

# 10 THE FICTION OF THE JURISTIC PERSON: REASSESSING PERSONHOOD IN RELATION TO PEOPLE

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When we reflect on the role of the company in modern society, its pervasiveness in every element of our existence as human beings is conspicuous. It is evident in the food that we consume, the water we drink, clothes we wear, pharmaceuticals we depend on and jobs that provide us with the income that enables us to acquire these resources to sustain life (O'Connell 2010, 202). It is particularly striking that these functions are accomplished by an entity that has neither body nor soul nor will (Dewey 1926, 655). That said, a company is not merely the aggregate of a group of people; it has, by definition, a personality of its own that is recognised by the law.

What then is the nature of the juristic person that is a company, and what are the implications of this for natural persons (of flesh and blood)? The law may posit a technical answer to this question, namely that a company is an association of natural persons authorised by the state, in terms of its charter or memorandum of incorporation, to undertake a specified business and in doing so be empowered to act as a natural person. Pennington (1931, 36) defines a company's being as 'an artificial being existing only in contemplation of law', as an entity that has properties conferred upon it by 'the charter of its creation'. The most important properties, according to Pennington, are those of immortality and individuality.

Pennington's definition is particularly useful as it extends beyond a description of the functioning of a company into the purpose of its recognition as a legal person, namely the immortal ownership of property. This on its

own may still not provide clarity as to the relationship between the juristic person of a company and natural persons, but it implores us to interrogate the normative underpinnings of the concept of the company. In this chapter I propose to do this by considering the historical development of the recognition of the juristic person, specifically within the context of imperialism and colonialism. I will argue that the juristic person occupies a place in the zone of existence while simultaneously maintaining some natural persons in the Fanonian 'zone of non-being' (Fanon 1967, 82). And I will anchor this conceptual exploration in the context of South Africa, not only because of the relevance to the country of the colonial elements of the company in the form of the Dutch East India Company (DEIC), but also because of the contemporary implications of the South African Constitution (Republic of South Africa 1996b) for the relationship between natural and juristic persons in this society.

In undertaking this exploration I am not suggesting that the concept of a company (or commercial juristic persons) is homogeneous or without exception. Nor am I attempting to demonstrate a genetic linear growth from early imperial enterprises such as the DEIC to the modern company, such as those incorporated in South Africa today. There is, however, a significant normative underpinning within their conceptual similarity of design and purpose which this chapter seeks to expose. Colonial oppression has been described as systemic. The modern company, as a constituent institution, remains an apparatus for control over land. Furthermore, this control is ideologically racialised and manifests itself in the poverty of those relegated to the zone of non-being.

What is significant about such a contention is that it may lead us to a more honest engagement with the elastic and mystifying nature of the company, in turn facilitating a more deliberate engagement with the power dynamics that a company enables – and the concomitant accountability of the natural persons behind the company. This may prompt us to reassess the suitability of the current discourse on the human rights obligations of the company (which remain controversial), to the extent that this discourse entrenches the power dynamics that enable this juristic person to violate human rights for the benefit of natural persons who are veiled from accountability's gaze. A more apt approach to concerns about the ways in which the company violates natural persons may be to reassess the legitimacy of the current form of an institution that facilitates such violations with relative

impunity. That is, this may compel us to interrogate the cause rather than the symptom of the company's deleterious power over natural persons.

### **UNPACKING THE NATURE AND PURPOSE OF JURISTIC PERSONALITY**

According to Judith Katzew (2011), the idea of the company was initially designed to provide for the consolidation of capital from various sources to support the entrepreneurial ventures of individuals or groups of individuals. In the context of the joint-stock or share-based company, this means separate ownership (of those who invested in the company, thereby bearing the risk of losing that investment in exchange for the potential growth of the investment) and control (of those whose investment was not at stake, but who stood to gain from the beneficitation of the company that would be achieved through their effective management of resources) (Katzew 2011, 694). The incentive of the shareholders to invest was presumably the limitation of risk to the extent of the initial investment (notwithstanding what liabilities might be engendered by those charged with growing the investment) and the additional potential for its growth (Katzew 2011, 694).

The notion that 'the business of business is business' has been credited to economist Milton Friedman and justifies the proposition that the purpose of a company is to maximise profits (Friedman 1962, 112). This had the effect of delegitimising activities of the corporation outside of making money, or related to spending that was not specifically geared towards making more money. The shareholder value doctrine (advocating for the primacy of shareholder interests) has become conventional wisdom and dictates the approach taken by corporations in several jurisdictions. It exonerates the company from obligations other than the making of profit, as the interests of the juristic person are presented as exclusively profit maximisation (Denning 2013). The furtherance of these interests has been widely regarded as being subject only to the rules of the game – the game being the operation of the free market and the prohibition of deliberate acts designed to circumvent its functioning (Baird and Henderson 2008). The fiction of the company has therefore provided a vehicle for the avoidance of liability of the investors and the entrepreneurs that it seeks to invite with the prospect of gain relative to diluted risk (Bilchitz 2008, 754).

The *Salomon* case is the classic authority for the distinct legal personality of a juristic person (Salomon Case 1896). The characteristics of legal personality

are the ability to have an identity (and a name), own property in that name (which then forms part of a patrimonial estate), have standing before a court to sue and be sued, and have the entitlement to rights. With this descriptive account in mind, it is pertinent to consider some of the theories that seek to explain the nature of the company as a juristic person.

The origins of the modern corporation have been attributed to Roman law. The early fictional theory of juristic personality is credited to Pope Innocent IV (who was incidentally also a champion of the divine right to conquest, which will be visited later in this chapter), in the context of ecclesiastic corporate bodies being immune to criminal or civil sanction on account of having no body to be punished nor any will to be condemned (Dewey 1926, 655). It is from this that the theory of the corporation as an immortal fictional person is said to have arisen. The recognition of this fiction was later developed, as the concept of the nation state rose to prominence, into the theory that the state alone could grant recognition of personhood (Dewey 1926, 666–69). This came to be known as the concession theory, on the basis that the recognition of capacity of the juristic person was a concession by the state, as the presiding authority over social relations (Dewey 1926, 666–69). This, John Dewey argues, was done in an attempt to entrench power and simultaneously exercise that power to prevent the collective power of ecclesiastical and business groupings from encroaching on the power of the state (Dewey 1926, 667).

Alternatively, the will theory suggests an interpretation of a fictional person as nuancedly distinct from an artificial person. This employs the concession theory to hold that the juristic person is artificially constructed by, and given content through, legal recognition (Dewey 1926, 670–73). The will theory suggests that a fictional being comes into existence in the formation of a juristic person. The will theory presents the collective volitions of the members or shareholders (particularly the majority of them) as culminating in the distinct volition of the company (Dewey 1926, 670–73).

In a similar vein, the group personality theory relies on Frederic William Maitland's conception of the company as an aggregation of groups collecting to pursue specific interests which culminate in 'psychic organisms, possessing not fictitious but real psychic personality' (Dewey 1926, 670). An alternative take, borrowed from Friedrich Carl von Savigny's conception of the state, is that a company functions in a distributive rather than a collective manner.

This is particularly so in the context of the contestations for power within the various collectives that constitute the company, and which pursue contrary interests at times. As such, the company displays its own will and consists of various groupings, but is essentially psychically distinct from these groupings (Dewey 1926, 670). The problem with the elasticity of these theories is that, due simply to a legal construct, juristic personality conveniently facilitates the pursuit of individualist interests without the burden of concomitant liability (Dewey 1926, 668).

The representative theory centres on the separation of ownership and control (Deiser 1909a, 228–29), in terms of which collective ownership is represented in shareholding/stakeholding. The shareholders'/members' rights are indivisible and their individuality is irrelevant. They operate within a nexus of association. This theory requires acceptance either that rights are held by a non-existent (unreal) entity, or that the collection of rights loses the properties of each individual right and is aggregated into the will of the majority. This would have the effect of excluding minority or dissenting shareholders/stakeholders from the nexus of association. In terms of this theory, technically minorities should not be entitled to interfere with the will of the majority, but this is not the case as justiciable minority shareholders'/stakeholders' protections are granted in several jurisdictions (Deiser 1909a, 228–29). The representation theory proves contradictory, in that the legitimacy of juristic personality is founded in the representation of constituent rights-bearing individuals acting collectively; however, when acting in association, each individual necessarily loses individuality as rights attach to the share/stake.

A solution to this tension appears in the idea of collective holding of rights, contained in George Deiser's suggestion that property ownership can be either individual or collective (Deiser 1909a, 229–33). Therefore, the juristic person is symbolic and merely serves as an administrative device for collective property ownership. Interests in the property are not distinct, but exist for the purpose of common benefit. This recognises that the ultimate rights holders and beneficiaries of the juristic person are always natural persons. Rights existing only in the abstract and never engaging in the real world of natural persons have no content. As such, the rights attributed to the juristic person belong to the natural persons who constitute it, albeit in different capacities than would be the case if those rights were directly held (Deiser 1909a, 229–33).

The binary of juristic and natural persons originally departed from the premise that natural persons have inviolable rights by virtue of being human. However, this practical distinction was eroded over time, as juristic persons were granted rights by virtue of interpretation of what it meant to be persons for legal purposes endowed with the authority to act as a natural person would, to the extent possible (Dewey 1926, 669). The movement from the recognition of juristic persons as properly artificial entities, with no inherent rights, to persons in the equal sense as natural persons, has generated immortal persons (Chomsky 1999, 97). Furthermore, as the concept of distinct personality grew, specificity about purpose stated in the charter or memorandum of incorporation became less determinative (Chomsky 1999, 97).

Dewey suggests that the aim of theories of juristic personality is to make sense of the recognition of an entity through which natural persons can act with limited liability for the consequences of their actions (Dewey 1926, 673). This is in the context of an individualistic age concerned primarily with the right to private property. The fiction is employed as a way of deflecting accountability of natural persons that would be of moral character, while the concession theory grants legitimacy to the fiction. Due to the elasticity of the concept of a fiction, the company is able to derive benefits for natural persons while simultaneously shielding them from reproach. In this way, 'persons' may come to represent any content that the law attributes to the concept, including being a 'right-and-duty bearing unit' as classically described by Maitland (Maitland 1905, 193; see also Dewey 1926, 673).

On the other hand, Deiser suggests that the theory of juristic personality exists to establish a conceptual foundation for understanding and solving corporate problems, and not 'to furnish the doctors of jurisprudence with a cadaver that might serve for dissecting purposes' (Deiser 1909a, 305). As such, the nature of juristic personality is important only to the extent that it determines the parameters of the rights and obligations of the juristic person. The fiction generated around collective activity and the recognition of legal personality creates the illusion of a robust concept in the law (Deiser 1909b, 308). This is however misleading, as the content of the fiction is dependent on the intricacies of the jurisdictions within which the fiction applies (Deiser 1909b, 308). The absence of acknowledgement of this fact results in the elasticity of the concept being used to mean what is beneficial for those who

employ the fiction at a given place and time. Ultimately “[p]erson” signifies what the law makes it signify’ (Dewey 1926, 655).

Reading Dewey’s and Deiser’s suggestions together, we may conclude that the relevance of the nature of juristic personality can be situated in the purpose that the construction enables. Fundamentally, whether the fictional theory, which the *Dadoo* case (Dadoo Case 1920) has shown to have taken precedence in our law in close association with the concession theory, or the collective rights theory is seen as the basis for the existence of a legal personality, a common thread can be drawn. This thread is the ownership of property for the end benefit of natural persons who are invested in the company, with no correlate risk in that property or in the activities associated therewith.

Not surprisingly, the converse of the limitation of liability of the natural persons who are invested in the juristic person is the displacement of liability that would ordinarily rest in those persons, were they to carry on business in their own name. This displaced liability is theoretically situated in the distinct juristic person. However, as this is a fictional person, the extent of its liability is limited against the assets it holds. The complexities of the interrelations between natural persons and any moral character of the potential impact of activities of the juristic person are, in essence, lost.

The *Salamon* case set the tone for recognition of instances where the distinction between the juristic person and the natural persons behind it could be disregarded, but this was limited to instances where the construct was employed to commit fraud. Consequently, there are very limited instances where the veil between the juristic person and its shareholders/members will be pierced. This is necessarily so, as we have established that limitation of liability is a fundament of the construct of the juristic person. The lack of accountability is exacerbated by the fact that a juristic person may comprise members or shareholders who are numerous and disparate in space and time, and may themselves be juristic persons. It becomes difficult to deconstruct the fragments of natural personality that constitute the juristic personality in order to secure accountability and limit harm (Deiser 1909a, 220). This may be conceded to as part of the objectives of the fiction, but must be recognised as problematic when it facilitates the subversion of duties that natural persons might have in relation to one another.

The theories of juristic personality do not provide very much content. Recognising the sustaining notion of the company as a ‘construct’ may not

provide universal content, but is useful in confronting the reality that corporate personality is what the law allows it to be, and as such the law is empowered, if not compelled, to dictate the parameters of action and the means of attaching accountability to such action. Meaningful accountability would see those natural persons who benefit from the juristic person being accountable for the detriment to others that may be caused by the existence and power granted to that juristic person.

In confronting the elasticity of the concept of the fiction or construct of the juristic person, which veils the natural persons that animate it, it is necessary to recognise that '[a] corporation cannot be for one purpose, so many men, for another purpose a person, and for another purpose a fiction' (Deiser 1908, 135). We may accept Deiser's conclusion that central to the nature of the juristic person is the matter of property (1909b, 305). As such, the proposition that juristic persons are conduits for collective property holding becomes compelling.

#### **SIMILARITY OF DESIGN AND PURPOSE: AN IDEOLOGICAL GOLDEN THREAD**

Venkat Rao argues that the company as a juristic person emerged from the mercantilist approach to economic power (Rao 2011). This pivoted on imperial expansion and control of landed property as the literal foundation of power. Conquest of South Africa is conventionally ascribed to the Dutch (Rao 2011), while in practice this was done through activities incidental to the commercial endeavours of the DEIC (Rao 2011). This demonstrates the inextricable symbiotic relationship between commercial and political expansion endeavours that has occurred locally and globally (Callinicos 2009, 136). Companies have justified the appropriation of land in the furtherance of commercial pursuits in contexts ranging from unapologetic and theologically motivated conquest, to variations on the theme of a crusade for democracy in territories where barriers to entry by companies into markets were perceived to exist (Chomsky 1999, 65–68).

Philip Stern argues that the English East India Company (EEIC) and the DEIC (collectively EICs) were the originators of the modern multinational (Stern 2016, 428). His argument is premised on their legal personality and corporate structure (separating ownership in joint transferrable stock/shares and management control). Furthermore, he asserts that the EICs are



historical reference points for globalisation, capitalism and international trade law. Specifically, he sees these companies as the points at which medieval collective commercial endeavours turned to more intricate capitalist principles and practices (Stern 2016, 429).

Stern criticises comparisons between the EICs and the modern company on the basis that instances of juristic persons do not follow a pattern of linear development, but are rather generated from the peculiarities of social and political contexts (Stern 2016, 431–32). A second reason for his opposition to this analogy has been the sovereign dimensions of the EICs (Stern 2016, 433): both companies maintained armies and amassed territories, which fell ostensibly under their control. It may be contended, however, that variations in the configurations and exercise of power between the EICs and the modern company should not discount the purpose-made design of the control of land (and consequently labour) that applies in both cases.

Due to the anchoring of this chapter in South Africa, I will focus on the DEIC as a reference point. The philosophy of the jurist Hugo Grotius motivated the DEIC's stance in respect of both the entitlement to trade as well as that of conquest (Stern 2016, 436). Grotius specifically extended recognition of personhood to juristic persons when expounding on the right of persons to carry on war and assume dominium over conquered territories and peoples (Stern 2016, 437). He also influenced the proposition that the DEIC could legitimately be a sovereign and a subject simultaneously (Stern 2016, 438). This ideological context, Stern (2016, 444) notes, explains the mutually reinforcing character of the nation state and the company. The fact of both these institutions being juristic persons draws into focus the at times artificial distinction between public and private power (especially to the extent that the distinction is used to justify the absence of obligation to act in protection of the interests of disempowered natural persons).

The DEIC operated as a private company but was inherently a national enterprise (Geen 1946, 7). The Dutch government had substantial shareholding in it, and the steward of the early Dutch Republic was the chairman of the DEIC. Shareholding was limited to Dutch subjects, and small shareholders were encouraged. It was granted status as a legal person by a charter granted by the States General of Holland empowering the Council of XVII, which required a payment to the government over 21 years that was ostensibly reinvested into the operations of the DEIC. The Council of XVII was empowered

to conduct trade, amass colonial possessions, maintain an army and make treaties with foreign powers (Geen 1946, 7).

Colonial occupation of the Cape took place in 1652, led by Jan van Riebeeck who was the ship surgeon and commander of the DEIC mission to set up a refreshment station for Dutch ships bound for the East (Geen 1946, 8–9). In 1660 he was promoted to the rank of governor, swearing obedience to the governor general at Batavia, and used his authority as commander of the DEIC and governor to constitute a Council of Policy. This Council notably included a law officer (who established a high court of justice), senior merchants, a chief salesman, bookkeeper, treasurer and two military officers (Geen 1946, 8–9). In effect, the DEIC had established itself as a monopoly and sovereign over the Cape.

The DEIC exercised control over the Cape, and introduced and maintained a deliberate social order consisting of four main groups: DEIC servants (employees), free burghers (employees who had been relieved of service and contracted to hold land in exchange to sustain farming operations), slaves and the Khoi (Lucas 2004, 32). Of these groups, the employees and free burghers were mostly white, with the exception of some employees and manumitted slaves who were referred to as ‘free blacks’, some of whom originated from other Dutch colonies. The DEIC also shaped the emerging society through the creation of a culture of materialism (Lucas 2004, 28). Some of the more superficial similarities between the DEIC in the Cape and modern corporations include the purchase carried by corporate identity and its signage and attendant symbols, including a company logo carried on all manner of objects ranging from packages to dinner plates (Lucas 2004, 28). As the DEIC operations in the Cape grew more self-sufficient they expanded territorially. Wars were instigated with indigenous communities to remove perceived threats to DEIC control (Lucas 2004, 72).

Notwithstanding the attainment of political independence, liberated colonies tend to nonetheless retain the residual economic, legal, political and cultural institutions of the colonial era – the normative underpinnings of which often go without interrogation (Sibanda 2011, 495). This is evidenced in the South African case. The significance of the shift in relationship of the indigenous persons to the DEIC, as a company, may be argued to be both physical and ontological; they shifted from being independent free agents to becoming dependent utilities whose occupation of space was now dictated

by European settlers through the instrument of a company. Of further significance was the fact that the DEIC utilised this labour (without reward) on terms of its own making. Those terms, established by the DEIC, formed the foundation of mercantile law and labour relations in South Africa while overshadowing and reconstituting indigenous governance systems. To this effect the divine right of conquest utilised the law as an instrument for control (Ramose 2007, 313). This was the same law that was constitutive of and constituted by the company as a juristic person.

### **COLONIALISM AND THE COMPANY'S PARTICIPATION IN ZONES OF BEING**

This reflection on the DEIC and the beginning of colonial occupation of South Africa warrants the reassessment, prompted by Anibal Quijano, of the perception of history as a sequence of events where slavery and serfdom are presented as pre-capital occurrences (Quijano 2000, 550). Power relations set up by Europeans in the course of their conquest of the Global South, as seen in South Africa, were centrally based on racial classification and perceptions of European superiority. Central to this project were the ideas that modernity and progress were linear and in the sole preserve of Europeans (Quijano 2000, 552–53). Processes such as modernisation, corporatisation and globalisation have been championed in the name of development, and have served to both legitimate themselves and to put themselves beyond question (Tully 2008, 478). This circular logic pervaded colonial institutions, including companies used as instruments in various colonial contexts. Slavery was a deliberate commodification of human labour and was utilised to produce goods for consumption by the world market in the service of capitalism. Race was used as a social classification of the world's population and justified conquest, displacement and subjugation. The European Enlightenment brought with it conceptions of the identity of the European as central and superior, while others were essentialised into homogenised, inferior identities (Quijano 2000, 550–51).

The approach adopted by the DEIC in the Cape demonstrates that racial classification was strategic in facilitating the domination that justified exploitation. According to the Eurocentric conception of being, the body was the object of reason (Quijano 2000, 555). The distinction between body and reason (stemming from soul) enabled the theorisation of racial hierarchy.

Furthermore it allowed for the viewing of the bodies classified as certain races as mere objects, and thus inherently inferior to reasoned subjects.

Frantz Fanon refers to the recognition of the Hegelian 'I and other' that animated the conception of the Eurocentric (and patriarchal) conception of the human self (Fanon 1967, 82). He suggests that there is no black other, as the other, albeit distinct from the self, is still human. He thus presents blackness as existing in the zone of non-being, below the 'other' (Gordon 2007, 11). People in the zone of being are recognised socially as human beings and thus reap the fruits of humanity, including rights and access to resources (Gordon 2007, 8). The sub-human or non-human exists in a zone of contested humanity or negation (Fanon 1967, 82). The zone of non-being is characterised by violence and inconsequentiality; it is a zone where social practices and convention normalise arbitrary death and the non-human status of those who exist in this zone (Gordon 2007, 11). For the black person, any attempt to alter this condition is necessarily an act of violence. Gordon (2007, 11) explains that this is because change necessitates visibility, which is violent when that visibility is of an existence that is supposedly illegitimate.

To this effect Ramón Grosfoguel (2016, 10) propounds that racism is 'a global hierarchy of superiority and inferiority along the line of the human that have been politically, culturally and economically produced and reproduced for centuries by the institutions of the "capitalist/patriarchal western-centric/Christian-centric modern/colonial world-system"'. As such, racism, according to Grosfoguel's definition, is primarily but not necessarily reliant on race as a signifier. Therefore race is relevant to understanding the relationship between juristic persons and natural persons, especially in a context where some of the first companies (such as the DEIC) would relegate persons to the zone of non-being on the basis of race, as a justification for their dispossession and exploitation.

Race as a focal point is justified on the basis of the understanding of race as the dividing line between the zones of being and non-being (Grosfoguel 2016, 11). It assumes that relations such as class, sexual orientation and gender operate as factors within the zones, and therefore manifest as forms of oppression that are experienced differently in the zone of being than in the zone of non-being. According to Grosfoguel's taxonomy, therefore, racism is a structural, hierarchy-related recognition of humanity. The racist violence of dispossession within colonialism, which would be unjustifiable if exercised

against human beings, is justified as it involves the dispossession of objects (Grosfoguel 2016, 14). In this way the company as a juristic person occupies the zone of being, while possessing the property of those that occupy the zone of non-being, as well their efforts. This is enabled by virtue of the company being recognised as a juristic person in the conceptualisation of natural persons who inhabitant of the zone of being.

### **THE MODERN COMPANY: (POST)-COLONIAL SOUTH AFRICA AND THE CONSTITUTION**

In South Africa, the common law definitions of natural and juristic persons prevail for the purposes of the contemporary Companies Act (No. 71 of 2008), as the terms are not specifically defined there or in other South African legislation. Section 7 of the Companies Act does, however, make specific reference to the purpose of promoting the rights set out in the Bill of Rights that forms chapter 2 of the Constitution of the Republic of South Africa (Republic of South Africa 1996b) in the application of company law. While this may suggest an inclination towards a respect for human rights that would break from the conception of a company as being an instrument for exploitation, as outlined above, further examination suggests that a commitment to rights may be more an inclination towards the preservation of privilege and subjugation.

The Constitution itself has been contested as being a product of unconvincing consent, given the nature of the compromise secured by the Convention for a Democratic South Africa negotiated settlement (More 2011, 170). James Tully argues that this is the nature of legal consent, as it is produced gradually through a shift from sanction for non-compliance to buy-in by habit and rules that appear natural in social, political and economic life (Tully 2008, 472). Mabogo More (2011, 178) posits that the Constitution reaffirms the entitlement of the bearers of the fruits of the divine right of conquest. This is because of its resort to the language of South Africa belonging to all those who live in it, without tangible regard to the violence of displacement that gave birth to the country; it therefore assists in perpetuating a convenient historical amnesia. More argues further that the latest transfer of political power, resulting from compromises secured in the negotiated settlement, has maintained economic power in the hands of white people and secured the original project of white supremacy. This occurrence is not unique

to South Africa, as the situation of economic and military power outside the control of the sovereign states in the former colonies has made their political power appear tokenistic (Tully 2008, 477).

If this line of reasoning is adopted, then it is not surprising that Section 8 (2) and Section 8 (4) of the Constitution, respectively, provide '[a] provision of the Bill of Rights [that] binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right' and that 'a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person' (Republic of South Africa 1996a). This begs the question: what entitles a juristic person to rights generally regarded as 'human rights'? (Interestingly, the only right in the Bill of Rights qualified as 'human' is dignity.)

Adopting the collective theory of juristic personality, it may be argued that the collective rights of the individuals that constitute a juristic person converge into the rights of the juristic person. This is, however, problematic on several accounts. The first is that it assumes that there would not be competing interests and rights of those within the juristic person, and that the exercise of a right to a specific end would be possible. Even if it did amount to a convergence of rights, this would be problematic as it would amount to the persons whose rights the juristic person is drawing from effectively receiving a duplicate set of rights in addition to their own right that contributes to the collective right (and effectively is no longer equal to others who do not possess the same). As I have noted, this is avoided by the argument that the juristic person is an entity distinct from its constituent natural persons. However, that takes us in circular fashion back to the question of why a juristic person would be entitled to rights.

Perhaps a more pertinent question would be what the purpose of conferral of rights on juristic persons is. There we may conjecture that the answer, in terms of More's (2011) reasoning about the Constitution being a compromise document, would be that the entitlement to property rights would secure the property of the juristic person amongst other rights, such as the right to privacy (which would secure the non-transparency of the juristic person) and the right to free speech (which would secure the right of the juristic person to influence policy). An example of this would be the financing of election campaigns (Brown 2015, 161).

In this way, securing the property rights of the juristic person secures rights in land that entrench white control of most of the land in South Africa. This statement must be situated historically. We may depart from the point of the Natives' Land Act (No. 27 of 1913). This Act facilitated legal displacement of the country's black inhabitants, and thereby established a 'captive labour force' and set the tone for formal apartheid (More 2011, 179). It is relevant to note that this Act was repealed only in 1991. The Natives' Land Act prohibited natives (classed as all black peoples including 'Africans', 'Coloureds' and 'Indians') from owning or buying land anywhere except in native reserves. Factually, even in these spaces title was generally granted in terms of long leases by the municipality.

Fanon describes colonialism as the combination of the conquest of territory and the oppression of people (Fanon 1967, 81–83). The politics of liberation was therefore necessarily a politics of land restitution (Fanon 1967, 82). Land is quite literally the foundation of life. It is material in the sense that it is the source of shelter and food, but it is also representative of dignity in the sense of the right to life and to agency (More 2011, 179). Colonialism created conditions for the majority of the colonised to be condemned to poverty and consequently death (More 2011, 179).

Lost land and lost sovereignty (in the form of displacement and deprivation of freedom) for masses of indigenous peoples are a legacy of colonialism (More 2011, 179). The distinction between freedom and liberty is important to note for the purposes of understanding the manner in which the company is utilised to continue subordinating persons and restricting them to the zone of non-being (More 2011, 175). Although potentially free of constraints and physical bondage, liberated persons are not free to determine what a meaningful existence would amount to. Instead, for survival and literally for the entitlement to occupy space, someone else's space, people must sell their labour on terms over which they have little or no power (Ramose 2007, 319).

The matter of survival of those who occupy the zone of non-being requires further scrutiny. Poverty is a function of the structure of economic relations and not a natural and inevitable phenomenon (O'Connell 2010, 205). What has been described as epistemic fundamentalism dressed in the garb of universality and neutrality perpetuates the thinking that solutions to problems will be found by addressing the symptoms rather than the cause of systemic inadequacies (Ndlovu and Makoni 2014, 505). The reality of the zero-sum

nature of the current economic system, which incorporates basic goods and services and forces them onto a global scale, make it natural, if not necessary, that some are deprived while others enjoy excess (O'Connell 2010, 204).

The limitations of regarding the world as (post-)colonial are evident when one examines the remaining institutions that operate on and perpetuate power relations that closely resemble those evident under colonial rule. Morgan Ndlovu and Eric Makoni refer to the emergence of the idea of coloniality as an understanding of the ways in which colonialisms have continued to exist, notwithstanding the dismantling of the overt political and judicial administrations of colonial governments (2013, 47–48). Coloniality, as the more nefarious and subtler operation of Western modernity and development, maintains the zones of being and non-being (Mignolo 2009, 39). The role of structures and institutions in perpetuating colonial power dynamics does not always capture our attention to the extent that its potential consequences should compel us to recognise.

The idea that juristic persons in their current form are essential for development, and create employment, plays into notions of the trickle-down effect that have somehow not been deterred by evidence of increasing inequality and the absence of broad-based redistribution of wealth globally, and in South Africa in particular (Ndlovu and Makoni 2014, 506). Morgan Ndlovu and Eric Makoni draw attention to the way in which trickle-down thinking that idealises international investment and job creation simply perpetuates inequalities, as indigenous people generally operate as cheap labour dependent on others who own the means of production (Ndlovu and Makoni 2014, 511). To this end, globalisation is not an objective and organic process but rather a construct informed by a specific underpinning ideology (O'Connell 2010, 204).

Ndlovu, reflecting on the Marikana massacre that took place in August 2012, when 34 human beings employed as miners were killed in the course of demanding a living wage, questions whether state actors can fathom an economic system different to that which enabled the conditions that facilitated the massacre (Ndlovu 2013, 56). He notes that for as long as exploitation continues, resistance to it make the occurrence of violent suppression inevitable. Part of the project of coloniality is the undermining of the rationality of the perspective of the oppressed, in the context of a reference point that is positioned as neutral but is nonetheless Eurocentric. The conditions



that prevail for the majority of black South Africans occupying the zone of non-being are violent and inhumane (Ndlovu 2013, 56–57). Most sectors of the economy remain dominated by white people (in the form of ownership or control) and black people are relegated to being cheap labour. Perhaps the most disturbing aspect of this dynamic is the purported neutrality with which poverty is viewed. The conduct of the state that facilitates and perpetuates inequality cannot be dismissed without, again, turning our attention to the historical context that informs the very formation of states in (post-)colonial countries. We are reminded that juristic persons with commercial interests were at the helm of the dissection of Africa into nation states at the 1884 Berlin Conference (Ndlovu 2013, 57).

#### **LIMITATIONS OF HUMAN RIGHTS: SERVING THE ZONE OF BEING**

The South African Constitution is heralded as the solution to the ills of injustice and inequality; however, its abstract ideals are not reconciled with the concrete experiences of poverty (Modiri 2015, 224–5). The ways in which the law produces the subjects it seeks to protect, and the necessity of the adoption of that victim subjectivity in order to benefit from such protection, are co-constitutive (Brown 2000, 231). Those who do not have the means to enforce their rights must appeal to the benevolence of others to act on their behalf, or alternatively be satisfied with remaining in the zone of non-existence. The net effect is an attempt to mitigate the effects of poverty rather than to eradicate its causes or even envision a society where poverty is intolerable.

Joel Malesela Modiri exposes a contradiction in the recourse to rights as a remedy to end poverty (Modiri 2015, 255). Fundamentally, using these rights to secure the institutions and systems that generate poverty contradicts the effect of appeals to rights to create carve outs (specific instances in which transgressions are deemed unacceptable and for which symptomatic relief is provided) in respect of deviant conduct; these appeals are attempts to mitigate the harmful effects of institutions, rather than ways to call into question the legitimacy of those very institutions and of the power they have to cause harm. Appeals to these rights also frame harm as sensational instances that offend conceptions of what is permissible, but do not require accountability of actors in the scheme of social power dynamics and the ways in which

dynamics of subordination and control are maintained (Modiri 2015, 255). To this effect, Sanele Sibanda questions whether the liberal democratic constitutional paradigm is conducive to bringing about the structural change that is necessary to free impoverished people from the status of dependent non-beings (Sibanda 2011, 497). Rights, in their current context, require an appeal to power without questioning the legitimacy of that power.

Tshepo Madlingozi also refers to the Marikana massacre of miners who were essentially contesting their location in the zone of non-being, where they were expected to accept the terms of an existence as objects to be acted upon, or as mere functionaries in a system (Madlingozi 2016, 138–39). He argues that colonial apartheid creates an ontology of being where being white, equated to being human, is greater than being black, which is equated to being sub-human (Madlingozi 2016, 124). He argues that the transition to a constitutional democracy represented merely a transition in phases of coloniality and not liberation in the sense of restored ontological and material humanity (Madlingozi 2016, 129). Liberation is understood in terms of restored dignity and land, as well as agency over that land, including the conditions of subsistence on that land (Madlingozi 2016, 135). To this end he argues that human rights discourse extends the discourse of determination of who is human and who is not, and the pursuit of the recognition of human rights translates into the aspiration towards being white and Western, as a prerequisite for existence in the zone of being.

In the context of the company, this manifests as recourse to finding and enforcing human rights obligations of juristic persons in response to violations of the rights of natural persons. It involves balancing the rights of juristic persons against those of human beings in a context that purports to make use of an even scale – as opposed to re-imagining the acceptable parameters of activity or even legitimate purposes of juristic persons in society, having recognised the fictional and at best artificial nature of corporates. Recourse to rights to mitigate the plight of those relegated to the zone of non-being neglects the manner in which rights entrench the system that created the conditions for relegation into that zone in the first instance. That is, the paradoxical operation of rights is neglected (Brown 2000, 234).

Rights are premised on a liberal individualism. They formulate power as a zero-sum game that requires, at best, a balancing act that maintains political and social order. Wendy Brown cautions that '[w]e must take into account

what rights discourse does not avow about itself' (2000, 237–38). She argues that we must be critical of an approach that incrementally solves or mitigates problems with a view to a later solution to the extent that our energies and attentions are occupied with alleviating the symptoms of injustice, rather than addressing its causes. One of the paradoxes of rights that she identifies is that they regulate by circumscribing the category that they serve to protect and simultaneously dismantle. They are presented as protections that persons simply 'cannot not want', notwithstanding their limiting effect on systemic solutions (Brown 2000, 237–38). This paradox stems from the resolvability of the challenge to a system that, in seeking to modify the system, appeals to that very system to be more accommodating, thereby necessarily legitimating it (Brown 2000, 238).

It has been argued that oppression is contextual, and as such the remedy for it must address its context. Brown (2004, 460) asks: '[y]es the abuse must be stopped but by whom, with what techniques, with what unintended effects, and above all unfolding what possible futures?' Frustrations with human rights do not necessarily stem from a conceptual rejection of rights, but rather a rejection of the ways in which rights discourse is used to patronise those with lived experiences of poverty and injustice in the face of the rights-based protection of those institutions that perpetuate these experiences.

### **POSSIBILITIES OF THE FICTION/CONSTRUCT: POWER AND RESPONSIBILITY OF THE STATE TO GOVERN**

It is prudent, finally, to contemplate the fundamental question of what the source of power of one person over another is. Deiser submits that control is ultimately a function of the power of the strong over the weak, and that inevitably some persons are able to exert force over others and as such influence those others to act in accordance with their own will and for their own benefit (Deiser 1908, 135). While a detailed exposition and contestation of the operation of power is beyond the scope of this chapter, as are the implications of the juristic personality of the state itself, it may be argued that this authority to enforce power operates centrally at the state level. The classic social contract theory suggests that the state's authority to govern is derived from the consent of the governed (Deiser 1909a, 226–27). Theoretically, with this authority comes the expectation that the state will regulate relations between persons in a manner that is just, using the power and authority entrusted to it.

Natural persons have utilised the construct of the juristic person and the amorality of profit-seeking to exert control without personal accountability (Stephens 2002, 46). This has been exacerbated by the potentially nebulous control structures that the fiction enables, which at times make identification of the persons behind the fiction itself a nearly impossible task. This is evidenced by the manner in which persons have profited from the oppression enacted by companies in the form of dispossession, slavery and genocide (Stephens 2002, 46). The fiction of the juristic person has thus far been employed to effect the imposition of the interests of the strong over the person of the weak or weakened, including the interest of maintaining a relative position of strength. The fiction has operated, largely unquestioned, within a colonial frame of reference.

In order to extend decolonisation beyond the tokenistic into the tangible transformation of power relations, the reality and consequences of dispossession must be interrogated (Tuck and Yang 2012, 7). Therefore, the systemic nature of poverty and the manner in which the company operates as an instrument in this system are relevant. So too is the manner in which this construct has operated to obscure the racialised relations between natural persons and the dehumanising operation of coloniality. The golden thread of control of land is significant against the backdrop of the company's role in historical and continuing dispossession. The occupation by the juristic person of the zone of being, at the expense of persons consigned thereby to the zone of non-being, is central in this process of questioning. The manner in which the construct of the juristic person empowers the inequitable control of land and the generation of captive labour is central to this.

The contention that coloniality imposes an epistemological paradigm that proclaims itself inevitable and absolute may explain the lack of interrogation of the role that juristic personality plays in maintaining colonial relations of power. A hesitation about re-imagining this paradigm supports Ramose's argument that colonialism was not only genocidal but epistemicidal, in that indigenous epistemologies were discredited and replaced with a Eurocentric monopoly on reason (Ramose 2007, 313). This has extended to the purportedly neutral principles that have informed and animated institutions such as the company. The utility and desirability of the legal construct of the company as a juristic person can and must be interrogated by the state, which in theory confers upon the construct its very existence. In this process the

epistemic points of reference must be consciously situated when populating the construct of the company, bearing in mind the real consequences that the construct has had and continues to have on persons of flesh and blood.

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