

POST MORTEM PROTECTION OF PERSONALITY RIGHTS IN THE TECHNOLOGICAL SOCIETY

A TUTELA POST MORTEM DOS DIREITOS DE PERSONALIDADE NA SOCIEDADE TECNOLÓGICA

PROTECCIÓN POST MORTEM DE LOS DERECHOS DE LA PERSONALIDAD EN LA SOCIEDAD TECNOLÓGICA



<https://doi.org/10.56238/sevened2026.008-115>

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ABSTRACT

This article is based on the following research question: to what extent is the post mortem protection of personality rights affected in a technological society? To address this question, the article is divided into two parts. The first presents an overview of *Post mortem* protection in Brazil, and the second explores the controversies surrounding such protection in a technological society. The methodological approach is deductive, and the research techniques employed are exploratory and bibliographic.

Keywords: *Post mortem* Protection. Personality Rights. Technological Society.

RESUMO

Este artigo parte da seguinte pergunta problema: em que medida a tutela post mortem dos direitos de personalidade resta impactada na sociedade tecnológica, para tanto, ele é dividido em duas partes, a primeira oferta um panorama da tutela *Post mortem* no Brasil e a segunda que se debruça as controvérsias dessa tutela na sociedade tecnológica. O método de abordagem é o dedutivo e as técnicas de pesquisa são a exploratória e bibliográfica.

Palavras-chave: Tutela *Post mortem*. Direitos de Personalidade. Sociedade Tecnológica.

RESUMEN

Este artículo parte de la siguiente pregunta de investigación: ¿en qué medida se ve afectada la protección post mortem de los derechos de la personalidad en la sociedad tecnológica? Para ello, se divide en dos partes: la primera ofrece una visión general de la protección *Post mortem* en Brasil y la segunda aborda las controversias en torno a esta protección en la sociedad tecnológica. El método de enfoque es deductivo y las técnicas de investigación son exploratorias y bibliográficas.

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Palabras clave: Protección *Post mortem*. Derechos de la Personalidad. Sociedad Tecnológica.

1 INTRODUCTION

Technology acts as a driving force for change, creating interconnected networks that transcend geographical and cultural boundaries. The convergence of smart devices, artificial intelligence, big data, and instant connectivity reshapes the way we relate to the world and to each other. In the face of this dynamic panorama, the technological society is not only a reflection of scientific progress, but an entity in constant transformation, influencing and being influenced by the expectations, values and challenges of a globalized community.

On the other hand, the issue of *post-mortem* protection of personality rights has always presented theoretical and practical controversies in Civil Law, despite its express provision in the Civil Code of 2002.

Thus, this article has the following problem question: to what extent is the *post-mortem* protection of personality rights impacted in the technological society? To this end, it seeks to offer a first-time overview of the *post-mortem* protection of personality rights in the Brazilian legal system, and in a second moment to focus specifically on the challenges of this protection in contemporary society, going through the phenomena of *deepfake* and digital inheritance.

The method of approach is deductive, that is, a reasoning that starts from general principles or broad premises to reach specific conclusions, and the research techniques are exploratory and bibliographic.

2 THE POST-MORTEM PROTECTION OF PERSONALITY RIGHTS IN THE BRAZILIAN LEGAL SYSTEM

Personality rights began to be highlighted in private law with the codifications of the twentieth century, such as the Italian Code of 1942 and the Portuguese Civil Code of 1966, however, parallel to this, there was an expansive development of personality rights in Public Law (ANDRADE, 2012).

For no other reason, within the scope of Brazilian law, the 1988 Constitution contemplates in its article 5, item X, different personality rights, such as intimacy, private life, image, among others, ensuring their inviolability, in addition, in its article 1, item III, in turn, establishes the dignity of the human person among the foundations of the Republic (ANDRADE, 2012).

In the scope of private law, the Brazilian Civil Code of 2002 included in its general part an entire chapter to deal with personality rights, evidencing the importance that the legal system attributes to the protection of the human person (DONEDA, 2005).

Structurally, the Civil Code of 2002 dealt with personality rights in 11 articles, so that articles 11³ and 12 deal with the nature and protection of these rights, the others contemplate personality rights in kind, such as: the right to psychophysical integrity (articles 13 to 15), the right to name and pseudonym (articles 16 to 19), the right to image (art. 20) and the right to privacy (art. 21).

With regard to the ownership of personality rights, it is observed that the Civil Code of 2002 in its article 20, sole paragraph, contemplates the possibility of protection of these rights in the case of a deceased person (ANDRADE, 2013), conceiving that: "In the case of a dead or absent person, the spouse, the ascendants or the descendants".

It is clear that according to article 6 of the Civil Code, it asserts that the existence of the natural person ends with death and consequently the civil personality as well, allowing the person to be the subject of rights, however, it does not mean that personality rights cannot endure in legal relationships (BELTRÃO, 2015).

In this sense, in the lessons of Pontes de Miranda, death consists of a natural human legal fact, in the strict sense, as it arises from a natural and ordinary fact, since it is a common occurrence, generating effects in the civil order and manifesting itself in legal relationships, in order to extinguish or modify them (MENEZES, 2023).

Therefore, considering that death is a legal fact and that personality ends with death, the doctrine seeks to explain the post-mortem protection of personality rights, with at least six theories, the first of which is that of the new law, which argues that personality is extinguished with death and from this arises a new right of family members to demand respect for the rest and memory of the deceased; the second theory, called the theory of the transmission of personality rights, contemplates that with the advent of death, there is a transmission of the protection of honor, which is not to be confused with the transmission of the deceased's own honor; the third theory is that of the memory of the deceased, which ensures that memory is an autonomous legal asset that extends after death and needs to be protected (MENEZES; CHACON, 2020).

The fourth theory consists of the theory of the prolongation of personality, denying that personality is extinguished at death and prolonging it until after death; the fifth theory is that of post-mortem guardianship as a general legal duty, which argues that said guardianship is a general legal duty that must be fulfilled by all, that is, any person, whether family or not, can defend the honor of the deceased; finally, the sixth theory conceives that with death the

³ "In article 11, it is verified that personality rights are attributed the characteristics of non-transferability and non-renounceability, in addition to the impossibility of voluntary limitation of their exercise", in: DONEDA, Danilo. The rights of personality in the Civil Code. **Journal of the Faculty of Law of Campos**, year VI, n. 6, p. 71-99, 2005, p. 71.

personality is extinguished, but its emanation is not extinguished (MENEZES; CHACON, 2020).

Among the theories discussed, it seems, based on the provisions of the Civil Code, the one that is most aligned with the Brazilian legal system and the one adopted in the present work is the theory of the transmission of the right of personality.

Within the scope of Brazilian jurisprudence, it is observed that the Superior Court of Justice sought not to effectively focus on any of the theories, in Special Appeal No. 268660/RJ, the 4th Panel of the STJ recognized the possibility of protection of the right to the image after the death of its holder, in order to obtain the right to compensation, oscillating between two theories, that of the transferability of personality, since it argues that the successor can protect the image of the deceased relative and of another is affiliated to the theory of new law, considering that because the image of the deceased person has economic effects beyond death, the successors, in their own right, can postulate in court (ANDRADE, 2013).

Thus, despite the doctrinal controversies, the post-mortem protection of personality rights in Brazilian law is already something consolidated and provided for in the Civil Code, which does not fail to imply discussions on the subject.

The controversies become even more present considering the peculiarities of contemporary society, called technological society, which results from the interaction between technology and pre-existing contexts (CASTELLS, 2008), being characterized by amplitude, depth and speed, causing transformation in entire systems, such as legal, social, economic, among others (SCHWAB, 2016).

The legal system is entirely impacted, so that

the implications of the Knowledge Society in law can be systematically outlined as follows: (a) the new factual parameters for the application of the law already in place, requiring its readjustment; (b) the existence of facts that become legally relevant due to technical-scientific advances; (c) the need for legal decision-making in a scenario of uncertainty and risk, as well as; (d.) the elaboration of legal norms has gradually been conditioned to meet the interests of an innovation guided by the economy (LIMA; DA COSTA, 2019, p. 173).

Regarding the post-mortem screen of personality rights it is no different, it must be said, there are so many problems: the post-mortem protection of personality rights, people, the so-called digital inheritance and deep fakes, something that will be discussed in the next chapter.

3 THE CONTROVERSIES OF THE POST-MORTEM PROTECTION OF PERSONALITY RIGHTS IN THE TECHNOLOGICAL SOCIETY

Law in the technological society remains modified, due to the systemic impact of the Technological Society, thus, to the extent that law regulates social relations and these are influenced by innovation and technology, inevitably the parameters of regulation and judicial decisions change (PARDO, 2000).

In the post-mortem protection of personality rights it is no different, innovation and technology cross this context. Among so many phenomena, attention is paid to the posthumous projection of personal data, the conception of digital inheritance and artificial intelligence, which will be discussed below.

Personal data figure as the true projection of the human personality, if expanded beyond the life of the subject (RODODÁ, 2012), in this sense, the electronic body even after death continues to appear as a representation of the subject's personality in the virtual space (COLOMBO; GOULART, 2019).

Therefore, the protection of the personality of the deceased exercised by relatives necessarily involves the control of the personal data that sustain the digital body of the *deceased* (COLOMBO; GOULART, 2019).

It turns out that the General Law for the Protection of Personal Data is silent on the data of deceased people, having this gap that generates controversy. On this issue, it is worth paying attention to the French law that conceives that subjects in life may define general or particular directives on the storage, deletion and communication of their personal data after death. French law allows a specific person to be defined to enforce the will of the deceased and in the absence of such a person, the heirs can exercise the rights delimited by law, with some limitations, such as: a. possibility of accessing personal data for probate purposes or arising from family memories; b. making the request for closure of the digital account or c. opposing the continuation of personal data processing and demanding the updating of data (COLOMBO; GOULART, 2019).

There are those who argue that when the projection of the deceased's personal data has patrimonial content, it is necessary to speak of the so-called digital inheritance and when it comes to personal data without patrimonial content in posthumous protection of personal data (COLOMBO; GOULART, 2019), however, there is another part of the doctrine that considers that the Civil Code of 2002, in its article 1,857, paragraph 2, admits that the will has off-balance sheet content, thus, when talking about digital inheritance, it is actually speaking in a broad sense, having a patrimonial or off-balance sheet character, which seems to be the most correct position (TARTUCE, 2018).

In this sense, it is questioned whether the digital data of the deceased person can compose the inheritance to be transmitted to the successors, following the line of article 1791 of the Civil Code (TARTUCE, 2018). Thus, as the LGPD and the Civil Code are silent on this issue, there are bills on the subject in progress in the National Congress.

Of note are Bill No. 4,099-B, of 2012 and Bill No. 4,847/2012, the first, seeks to include a single paragraph in article 1,788 of the Civil Code to contemplate that the digital files of the author of the inheritance will be automatically transferred to the heirs (TARTUCE, 2018).

The second that is currently being processed together with a more recent one, Bill No. 7,742/2017, intends to include articles 1,797-A to 1,797-C in the Civil Code, conceiving that digital inheritance is all "intangible content of the deceased, everything that can be stored or accumulated in a virtual space, under the following conditions: I – passwords; II – social networks; III – Internet accounts; IV – any virtual and digital good and service owned by the deceased". It also deals with the possibility that if the deceased does not have the capacity to test on their digital assets, these will be transmitted to their legitimate heirs, who may: "a) – define the destination of the deceased's accounts; b) turn them into a memorial, leaving access restricted to confirmed friends and keeping only the main content or; c) delete all user data or; c) remove the account of the former user (TARTUCE, 2018)".

It can be seen that both bills attribute to the heirs of the *deceased* the decision about the fate of the digital inheritance, however, these are essential and very personal rights of the deceased that cannot be automatically transferred to the heirs, and must be extinguished with death (TARTUCE, 2018).

It should be noted that in an opinion prepared by the Institute of Lawyers of Brazil (IAB), Professor Pablo Malheiros Frota expressed himself unfavorable to the legislative proposals, listing that (TARTUCE, 2018, p. 875):

- a) the two bills authorize the entire digital collection of the deceased to be automatically transmitted to the heirs, violating the fundamental rights to freedom and privacy, notably in cases where the digital asset is a projection of privacy and there has been no express declaration of will or conclusive behavior of its owner, authorizing any heir or third party to access and manage it; b) third parties who interacted with the deceased during life will also have their privacy exposed to the heirs; c) it is necessary to respect the personal, interpersonal and social efficacy of private life, which concretizes the positive freedom of each one to decide the course of his or her life, "without undue external interference from the community, private or the State, in which this freedom is intersubjectively linked to the community, the State and the individual"; d) the bills intend to transmute the property right regime from the Law of Things to personality rights, since the personality right of the deceased is transformed into a patrimonial asset, since the intimacy and image of the deceased person serve as a source of economic wealth; e) family members or third parties should only have the right to manage the digital collection if there is an express declaration by the deceased,

by public or private instrument, including in fields intended for such purposes in the electronic environments themselves, without the need for witnesses, or if there is conclusive behavior in this regard; f) if such statement or behavior is not present, or is affected by a problem related to its validity or effectiveness; all digital collection that is an expression of personality must not be altered, seen or shared by anyone; g) intangible assets that project the privacy of the deceased should not and should not be accessed by the heirs or by third parties, in the absence of a manifestation of will by the author of the inheritance.

In this way, the proposals are not in line with the dignity of the human person and the very personal rights of the deceased, and there should be a legislative proposition that proportionally balances the interests of the heirs with the personality rights of the deceased that are extinguished with death.

Another controversy about the *post-mortem protection* of personality rights consists of the impact of artificial intelligence in this field. It is explained.

Artificial Intelligence (AI) takes place in the innovation and technological process of contemporary society, being a branch of computer science that proposes to develop devices that seek to simulate some of human capabilities, such as making decisions and solving problems (SARLET, 2021).

Thus,

Artificial intelligence (AI) proposes to handle devices that simulate the human ability to reason, perceive, make decisions and solve problems, in short, the ability to be intelligent. It should be noted that the basic element for a characterization of artificial intelligence is found in the learning dimension and, therefore, is situated in the formation of taxonomic profiles that, in other words, are based on a first stage in the production of large analyses from large databases, orienting themselves at the present time more and more towards granulation (GUIMARÃES, 2023, p. 331).

In this scenario, the impact of artificial intelligence on personality rights in general is observed, thus, artificial intelligence (AI) starts to be used in profiling and monitoring the behaviors of individuals (SARLET, 2021), but, in addition, there is the phenomenon of *deepfakes*.

Deepfake consists of the technique through artificial intelligence that builds the fusion of moving images, generating new content with a high degree of reliability (AFFONSO, 2021), in this scenario,

Whatever the technological means adopted to create a false image, two characteristic traits can already be pointed out, namely, the use of advanced computational techniques, commonly artificial intelligence, as well as the high degree of reality that makes it almost impossible to detect fraud, which is especially dangerous in current times. marked by the "attention economy" (AFFONSO, 2021, p. 263).

The risk of deepfake ranges from its use to generate disinformation and impact the democratic process, to its criminal use through advertising. In this line, attention is paid to the violation of the personality rights of deceased people with the use of digital reconstruction, that is, through an image bank of the deceased person, their image is recreated for current times (AFFONSO, 2021).

A case involving the theme of reconstruction was the recent commercial released in July 2023 by Volkswagen, on the occasion the singer Maria Rita is next to her mother, Elis Regina, who died in 1982 and was recreated by artificial intelligence, singing together the song by composer Belchior, entitled "Like our parents" (FIGUEIRA; RENZETTI FILHO; DE LUCA, 2023). Thus, several ethical and legal discussions arose about the commercial, among which was the fact of the contradiction of linking the image of Elis Regina and the music of Belchior, who were openly against the military dictatorship, to an advertising campaign by a company that supported the regime (CONAR, 2023).

In fact, based on the Brazilian Civil Code, considering that the daughter and the other heirs participated in the advertising campaign, there is manifest authorization by the heirs in the use of the image of the singer Elis Regina, which removes possible legal obstacles in the matter (FIGUEIRA; RENZETTI FILHO; DE LUCA, 2023).

However, the case fell on the National Council for Advertising Self-Regulation through Representation No. 134/23, due to consumer complaints that raised three points: a. the ethical use of AI in the reproduction of an image of a deceased person; b. whether it would be up to the heirs to authorize such a practice and c. the lack of information to the public about the use of AI in the creation of the scene (CONAR, 2023).

It so happens that the 7th Chamber of Conar considered items a and b unfounded, as the use of the image would have been with the consent of the heirs, under the terms of the Civil Code and as for item c, it decided to archive the representation, considering the lack of regulation on the subject (CONAR, 2023).

It should be noted that in Brazil, Bill No. 759/2023 is being processed, which deals with the use of Artificial Intelligence in Brazil, being an intimate project that does not scrutinize this use, declining the details of the subject to the Union, which should create a National Policy on Artificial Intelligence, under the terms of article 5 of the aforementioned project.

It is important that, considering the peculiarities of the theme, it is important that, with regard to the *post-mortem protection* of personality rights and the use of Artificial Intelligence, the legislation considers "(i) the provision expressed in the contract during life and authorization of the family, (ii) the purpose of the recreation of the image and (iii) the adequacy

of the image created post-mortem to the image-attribute constructed in life by the person" (AFFONSO, 2021, p, 269).

Therefore, the challenges of *post-mortem tutelage* in the technological society are not limited to the phenomenon of *deepfake* and digital inheritance, the present article sought, however, to bring these two phenomena as examples to demonstrate the transformative character of technology in the social environment and the need to make the hermeneutic effort to protect and promote personality rights and the dignity of the human person.

4 FINAL CONSIDERATIONS

This article sought to answer the following problem question: to what extent the *post-mortem* protection of personality rights remains impacted in the technological society, reaching the conclusion that the very legitimacy of the heirs in protecting personality rights must be reread based on the dignity of the human person of the deceased, considering categories such as consent in life for certain activities and interactions with technology and the context itself social of the deceased.

The *post-mortem* protection of personality rights in a technological society represents a complex and multifaceted challenge that requires careful consideration of the intersections between law, ethics and rapid technological transformations. This article has highlighted the need to adapt existing laws to address emerging issues related to the preservation and management of personality rights after death in a digital context. The increasing ubiquity of digital technologies and social media amplifies concerns about privacy, misuse of information, and the preservation of posthumous identity.

In this scenario, it is imperative that legislators, jurists, and society as a whole promote in-depth discussions to develop legal frameworks that are sensitive to the specific challenges posed by the digital age. Ensuring that personality rights continue to be respected after death not only preserves individual dignity but also protects the memory of the deceased and provides comfort to loved ones.

In addition, the implementation of ethical and transparent technological solutions is crucial to balance individual and collective interests in this context. Reflection on the post-mortem protection of personality rights in the technological society not only promotes legal development, but also contributes to the construction of an ethical framework that respects the integrity of individuals even after their departure, thus shaping a more just and compassionate environment for future generations.

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