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DIGITAL INHERITANCE IN THE LIGHT OF THE FUNDAMENTAL RIGHT TO DATA PROTECTION

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Abstract: Data constitute the new wealth in the context of the information society, composing a new kind of good: digital goods, which range from files - such as e-books, photos, videos and audios, to platform accounts, airline miles, among others. so many possibilities. There are still many technological issues in need of regulation, highlighting in this work the theme of the transmission of digital assets from a deceased person to his heirs, constituting the digital inheritance. Thus, this research seeks to understand the transmission of *post mortem* digital assets, in the context of the absence of legal provisions, observing the fundamental right to the protection of personal data and the particularities of each type of digital asset. To achieve this objective, a survey was carried out based on the indirect documentation technique and the deductive method. Finally, despite bills against the law, the feasibility of applying the understanding set out in this work is already seen in court decisions.
Keywords: Inheritance law, digital inheritance, digital assets, digital data, fundamental right to data protection.

INTRODUCTION

The emergence and improvement of the digital world, due to the various technological resources created in recent decades, has impacted all spheres of human life, mainly through a dynamic flow of new information that is propagated at every moment.

When it comes to information, it is important to consider the study by Manuel Castells, which indicates an intense transformation that society has undergone due to the technological mechanisms that have improved the dissemination of information, called by Castells the Information Technology Revolution. From this transformation, society would become informational, due to the importance of information for productivity and power (CASTELLS, 2009, p. 46).

The greatest impact of new technologies was not only due to their emergence, but to the space they made possible to exist. In this respect, cyberspace is central to the current technological revolution, which constitutes a "communication space opened by the worldwide interconnection of computers and computer memories", according to Pierre Lévy (1999 p. 92). Furthermore, according to Lévy, the general digitization of information would make it possible for cyberspace to become the main channel of communication and support for humanity's memory from the beginning of the 21st century (1999, p. 93), a context in which society already lives. In this sense, all spheres of society are being embraced by the phenomenon of digitization, which means "going digital", such as the economy, education, politics, interpersonal communications, among others. Still, Lévy had already written that one of the important functions of cyberspace is data transfer, which allows a quick movement of information between physically distant devices. (LÉVY, 1999, p. 94).

Not only is the data transfer speed high, but the ease of production is as well. All interactions that a person performs in the digital environment make data available, either through the simple use of a device, or by saving programs and applications (ALMEIDA, 2019, p. 35), which can be collected and processed to improve the user interface, but they can also bring problems related to privacy, mainly in view of the great exposure of private life in the digital environment. From this point of view, it is essential to discuss data protection and the mechanisms to implement it. In Brazil, the General Personal Data Protection Law - LGPD - (BRASIL, 2018) was approved in 2018, which also provides for the creation of the National Data Protection Authority (ANPD), in article 55-A, to deal with the

theme of data protection and application of the LGPD, monitoring and applying sanctions if necessary.

Thus, dealing with digital heritage involves resolving the tension between two constitutionally foreseen rights: the right to inheritance, provided for in article 5, XXX, and the right to the protection of personal data, provided for in article 5, LXXIX, which was inserted by the Constitutional Amendment (EC) No. 115, of February 10, 2022.

To solve the problem, it is proposed to divide digital assets into patrimonial (endowed with economic value) and existential (deprived of economic value, with a predominance of sentimental and private character), which will determine the correct destination. Although there are judicial decisions that take this distinction into account, there are bills pending in the Federal Chamber that completely disregard these two groups and even legitimize the alteration of existential digital assets of a deceased person by his heirs, which evidently violates the fundamental right to data protection.

Thus, this work seeks to investigate the characteristics of this recent institute, with attention to constitutional provisions, and the possibility of insertion in the Brazilian legal system to mitigate the tensions involved and bring legal certainty to the issue.

MATERIAL AND METHODS

As known, "scientific methods are the safest ways invented by man to control the movement of things that surround a fact and assemble forms of adequate understanding of phenomena" (BARROS; LEHFELD, 2007, p. 67).

Thus, so that the objectives of this text could be achieved, the deductive method was used, that is, the research started from general concepts involving digital goods to arrive at the particular analysis of the institute of digital inheritance and its consequences (LAKATOS; MARCONI, 2011, p. 256).

In addition, this is a predominantly theoretical research, supported by indirect documentation, notably doctrinal (which is embodied in the bibliographic review of relevant topics: Digital Law, Succession Law, digital inheritance, fundamental right to data protection and data digital), as well as legislation and jurisprudence.

RESULT AND DISCUSSION

DIGITAL GOODS AND TRANSMISSIBILITY TO HEIRS

Initially, it is important to inform that, according to Clóvis Bevilaqua (2003, p. 155), good is what has a utility, not necessarily economic. In turn, a digital asset can be defined as something that is owned in digital media, which can be stored on an electronic device or in other places belonging to the person, or even through a contract - such as the cloud (SHERRY, 2012, p.194). Under this bias, digital goods can be categorized into two groups: those with economic value and those devoid of it.

To find out if a digital asset will be transmitted to the heirs, it is first necessary to consider whether it is a heritage asset or not (which can also be called existential, affective or non-patrimonial). Patrimonial goods are those that have an economic endowment, while affective goods do not, having only an affective utility.

Therefore, considering the right to inheritance of the successors, the assets must be transmitted, in view of the continuity of economic activity. As for affective assets, they must not be transmitted because they do not have a patrimonial character and because they involve personal data, in line with the fundamental right to data protection.

From this perspective, for an existential digital good to be transmitted, a manifestation

of will left by the deceased is necessary, either in the will or in another means allowed by the Brazilian legal system. This way, access to a conversation on the phone of the *cujus* with another person, without their permission, for example, would violate not only the privacy of the deceased, but also that of the other party involved in the conversations.

Although Bruno Zampier (2021, p. 117) understands that there is a third category of digital goods, hybrid goods (patrimonial-existential), this would contribute to legal uncertainty about the transmission of digital goods, instead of bringing solutions, lacking practical utility. For this reason, it is argued that it is possible to transform the affective nature of a digital asset into a patrimonial one, when an economic utility is assessed. This can occur with only a portion of a digital good, remaining the other components with existential content.

It is noteworthy that this differentiation of digital goods helps to rule out violations of the fundamental right to data protection, inserted in the Constitution in February 2022, and the right to inheritance. However, along with this analysis, it is necessary to consider the particularities of each digital asset, which may contribute to the transmission to the heirs, or hinder it.

DIGITAL HERITAGE DATA PROTECTION

It is important to point out that, although article 6 of the Civil Code explicitly presents the end of the natural person with death, remnants of his personality remain, which can be protected by indirect injured parties (TARTUCE, 2021, p. 98). Among these remnants is the right to privacy. Moreover, according to Ney Rodrigo Lima (apud TARTUCE, 2021, p.99), "Brazilian doctrine is almost unanimous in stating that the principle of human dignity (art. 1, item III, of CF/88) is the pillar of protection for deceased persons".

In addition, the sole paragraph of article 20 provides for the protection of remnants of the personality of the deceased by family members, explicitly guaranteeing the legal protection of the disclosure of writings, the transmission of the word, or the publication, exhibition or use of the image *post mortem*:

From the legal point of view, since 2018, Brazil has had the General Data Protection Law (LGPD), which provides the guidelines that must be adopted in the use of data, in addition to providing for penalties that can be applied by the ANPD. Data protection laws that are already in force in different parts of the world or are still being developed demonstrate the concern with the development of mechanisms that improve security in the digital environment.

It is noteworthy that the LGPD provides, in its article 46, the need for the treatment agents to adopt security, technical and administrative measures capable of protecting personal data, from the product or service conception phase to its execution. This means that privacy must be observed in order to prevent problems with data leakage, not just when the problem has already materialized. This paradigm for viewing privacy is called Privacy by Design, or in Portuguese Privacy from Conception, in which data protection care lasts from production to the end of a product's useful life (BU; WANG; JIANG; LIANG; 2020, p. 2).

Furthermore, although the LGPD does not expressly provide for the protection of data of deceased persons, their data must be protected as they constitute remnants of their personality, covered. For this reason, based on the aforementioned legal provision for post mortem protection and the need to condition the use of data to the consent of the data subject, it is expected that the legislation explicitly provides for this protection. Until then, doctrinal interpretation can fill the legal

loophole.

DRAFT LAWS AND JUDICIAL DECISIONS

When analyzing some bills in progress in the Federal Chamber that aim to insert digital heritage in the legislation, it appears that many have divergent positions. For example, PL 410/2021 seeks, among other changes, to insert in the Marco Civil da Internet the responsibility of internet application providers to delete the accounts of dead Brazilian users immediately after proof of death; that is, the project does not consider the possibility of transmitting the deceased's patrimonial digital assets without the existence of a manifestation of will.

PL 3050/2020, which is being processed by committees and has 6 joined projects, aims to amend article 1,788 of the Civil Code with the insertion of the following sole paragraph: "Sole paragraph. All contents of patrimonial quality, accounts or digital files owned by the author of the inheritance will be transmitted to the heirs". This means that, according to the project, the transmission of digital assets must occur indiscriminately, ignoring the particularities of each case.

It must be noted that these projects predate EC 115, contributing to some proposals favoring the right to inheritance on the part of the deceased's relatives. This way, it is imperative that the projects in progress in the Legislative Houses regarding digital inheritance be analyzed and discussed under the prism of data protection.

With regard to jurisprudential decisions, there are already examples that adopt the distinction of digital goods according to economic content. Among them, there is a decision of the Court of Justice of São Paulo (TJSP), and the jurisprudential research was carried out at the TJSP, in the time frame from 01/01/2020 to 04/13/2023, with the entry "digital heritage".

As a result, 3 judgments were found, with the following decision chosen due to the discussion centered on whether or not to allow access to a digital account of the deceased:

> Obligation to do action and compensation for moral damages. Judgment of inadmissibility. Deletion of the profile of the author's daughter from the social network (Facebook) after her death. This issue is governed by the terms of use of the platform, to which the user adhered during her lifetime. Terms of service that do not suffer from any illegality or abuse in the analyzed points. Possibility for the user to choose to erase the data or to transform the profile into a "memorial", transferring its management to third parties or not. Impossibility, however, of maintaining regular access by family members through the deceased holder's username and password, as the platform is prohibited. User's very personal right, not transmitted by inheritance in the case of the records, since any patrimonial content arising from it is absent. Absence of unlawfulness in the conduct of the appellee giving rise to liability or indemnifiable moral damage - Maintenance of the sentence. Resource not provided. (SAO PAULO, 2021)

In this case, after her daughter's death, the plaintiff started to use her Facebook account, since she had her username and password, in order to remember facts of her life and interact with family members. It would be a kind of memorial page.

However, the account was suddenly deleted from the social network, which led the mother to file an action requiring compensation for moral damages against the company at the time called Facebook Serviços Online do Brasil LTDA.

In the 1st degree, the judgment dismissed the requests, and a civil appeal was filed in which the grant was denied. It must be noted that the initial condon presented in the rapporteur's vote is based on the Terms of Service and Community Standards of the

platform, which provides, among the duties of users, the abstention from "sharing password, giving access to your Facebook account to third parties or transfer your account to someone else (without our permission)" (FACEBOOK *apud* SÃO PAULO, 2021). Therefore, the terms of the platform prohibit access by third parties to the account of a deceased person. Based on this provision, which was accepted by the user when she created her account, the rapporteur voted to deny the provision.

Still, the same problem of legislative omission reported in this work was found in the rapporteur's report, following the excerpt (SÃO PAULO, 2021):

> [...] urges to state that there is no specific regulation on digital inheritance in the national legal system. Not even Law 12.965/2014 (Marco Civil da Internet) or the new General Data Production Law expressly addressed the issue.

Furthermore, differentiation of the nature of digital goods is also adopted in this decision (SÃO PAULO, 2021):

> In the scientific work "Internet and the death of the user: the necessary overcoming of the paradigm of digital inheritance", Livia Teixeira Leal draws an interesting distinction between patrimonial and existential legal situations on the Internet. The first is certainly endowed with economic valuation to be passed on to the respective heirs. The second, however, fits precisely in the case under examine, in which the logic of protection based on personality rights, such as privacy and identity, which are personal and non-transferable rights, prevails.

It is still part of Facebook's data policy, as a rule, the transformation of the deceased user's profile into a memorial as soon as he becomes aware of the death. Thus, in life, the user can choose the fate of his account: deletion or transformation into a memorial. In addition, users over 18 years of age can choose a legacy contact to use some tools in the account left as a memorial, without having access to the account, messages, friend requests and other information (FACEBOOK, 2022). In any situation, the platform does not provide access to a dead person's account to others.

Thus, while the legal gap remains, the understanding and foundations presented in this work can be used to solve problems related to digital inheritance. It is essential that legal certainty accompany the high speed with which new technologies, platforms and digital products are created.

CONCLUSION

Actions with the theme of digital heritage are already reaching the Judiciary, but there is no legal provision to guarantee uniformity and legal certainty.

In this sense, this text analyzes this innovative institute in the light of constitutional rights, mainly the right to data protection, due to its recent inclusion in the Constitution.

And as there is a tension between the rights to inheritance and the right to data protection, the distinction of digital assets into patrimonial and existential is essential for a correct destination *post mortem*.

While, the patrimonial assets are transmitted directly to the heirs and the existential assets depend on a manifestation of will left by the deceased in favor of the transmission, otherwise it cannot occur, under penalty of violating data protection.

The importance of protecting data and conditioning the collection and treatment at the will of the holder finds support, in the infraconstitutional scope, in the General Data Protection Law, which, despite providing for various precautions when processing data, does not refer to personal data. deceased people, which is a problem and is expected to be solved with the insertion of this theme.

Finally, there are already judicial decisions based on the understanding defended in this

work, which demonstrates the recognition of conformity with constitutional principles and the applicability to concrete cases.

This way, the existing omission is resolved, the situation is adapted to the fundamental right to data protection and it contributes to the development of Digital Law, which corresponds to the legal scope responsible for virtual relationships.

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