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Analysis of Legal Institutes Based on Legal Concepts: the case of digital inheritance*

Análise de Institutos do Direito a partir dos Conceitos Jurídicos: o caso da Herança Digital

Análisis de Institutos del Derecho a partir de los Conceptos Jurídicos: el caso de la herencia digital

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Abstract

Based on the historicity concerning the theme of legal concepts and under the theoretical model of constitutional civil methodology, the article is dedicated to the importance of legal concepts in the analysis of Law institutes. From a conceptual perspective and before elements of the general theory of Civil Law and Succession Law, digital inheritance is analyzed in an attempt to insert the theme into the appropriate legal category. Since it is verified that the environment where rights should be protected and problems related to digital inheritance should be solved is that of assets or of the personality rights, it is proposed, at the end, to reflect on the possibility of protecting the two natures of the digital inheritance – both patrimonial and existential – and the goods insert on it, beyond the classification currently used.

Keywords: *legal concept; digital assets; digital inheritance; hybrid category.*

Resumo

A partir da historicidade concernente à temática dos conceitos jurídicos e sob modelo teórico da metodologia civil constitucional, o artigo dedica-se à importância dos conceitos jurídicos na análise dos institutos do direito. A partir de uma perspectiva conceitual, e diante de elementos da teoria geral do direito civil e do direito das sucessões, analisa-se a herança digital na busca de inserir o tema na categoria jurídica adequada. Constata-se que o ambiente onde devem ser tutelados direitos e solucionados problemas relacionados à herança digital é o patrimonial e o dos direitos da personalidade. Propõe-se, ao final, reflexão sobre a possibilidade de tutelar as duas naturezas – patrimonial e existencial – para além da classificação atualmente utilizada.

Palavras-chave: conceito jurídico; bens digitais; herança digital; categoria híbrida.

Resumen

A partir de la historicidad relacionada con la temática de los conceptos jurídicos y bajo el modelo teórico de la metodología civil constitucional, el artículo se centra en la importancia de los conceptos jurídicos en el análisis de

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los institutos del derecho. Desde una perspectiva conceptual y considerando elementos de la teoría general del derecho civil y del derecho sucesorio, se analiza la herencia digital con el objetivo de situar el tema en la categoría jurídica adecuada. Se constata que el ámbito donde deben tutelarse los derechos y resolverse los problemas relacionados con la herencia digital es el patrimonial y el de los derechos de la personalidad. Finalmente, se propone una reflexión sobre la posibilidad de tutelar ambas naturalezas – patrimonial y existencial – más allá de la clasificación actualmente utilizada.

Palabras clave: *concepto jurídico; bienes digitales; herencia digital; categoría híbrida.*

1Introduction

This article proposes a reflection on the importance of legal concepts in the analysis of institutions that may be surrounded by a certain degree of uncertainty and, consequently, some difficulty regarding their understanding, protection, and proper regulation. This issue is directly linked to the emergence of new legal situations and the need to accommodate them within the legal system.

A practical example is what has come to be known as digital inheritance, which refers to the transmission of a person's digital assets resulting from the death of its holder.

As is well known, there exists an infinite amount of personal data stored on various platforms and social networks, in addition to an unlimited quantity of assets also stored in virtual environments, such as photographs, videos, messages—emails included.

The issue of the post-mortem transmission of a person’s digital estate arises from a controversy linked to the nature of the asset represented by the digitally stored file. This issue immediately gave rise to two doctrinal schools of thought, which diverge on the matter of the automatic transmission of such assets.

The absence of a specific law or legislative provision on the problem fuels the divergence. One school holds that the totality of the deceased’s assets may be transferred to their heirs, including the digital estate. The other maintains that transmission may occur, but not in its entirety as claimed by the former. This is because the author of the inheritance may hold digital—or even non-digital—assets that are expressions of their privacy and, in such cases, depend on the declaration of intent by the holder for transmission (Malheiros; Aguirre; Peixoto, 2018).

Assets that are expressions of personality rights—but whose economic dimension may be transferred, such as image rights—may also form part of the estate. This last group is where practical difficulties regarding hereditary transmission are more prominent. These are hybrid assets that reflect personality rights yet also carry economic content.

This article seeks to demonstrate that problems of interpretation and, thus, of handling legal institutions in the pursuit of suitable solutions for concrete cases are inextricably tied to legal concepts. The lack of greater precision in categorizing a given institution within the appropriate legal framework also contributes to difficulties in its understanding and application.

Through a philosophical analysis of legal concepts, this article aims to show that the solutions to the difficulties faced by legal practitioners in various fields—including digital inheritance—are found within this domain.

To that end, the text is structured into three parts. The first is dedicated to a philosophical analysis of legal concepts, as previously mentioned, followed by a presentation of how these concepts can aid legal practice through the engagement with new topics and institutions, such as digital inheritance, with its corresponding definitions and issues. Finally, it analyzes the assets that comprise the digital estate and demonstrates the need to address the complexity of the system, not to reduce it, but to confront it. The idea is to construct new interpretative possibilities, providing the legal practitioner with the correct use of legal concepts and categories to promote better understanding and facilitate the pursuit of appropriate solutions for demands that may arise in general—and specifically—regarding digital inheritance, from the moment succession is opened, whether related to access, management, or the actual transmission of the decedent's digital estate.

The civil-constitutional methodology was chosen for this work due to its relevance to the historicity and functionality of the institutions presented. This methodology assigns a promotional function to the structures of legal models, enabling the achievement of social goals that cannot be reached through other forms of social control. As advocated by Norberto Bobbio's doctrine, the integration of the promotional function with the protective-repressive function forces a shift in the conception of law from a form of social control to a form of control and social direction (Bobbio, 2007, p. 209).

2 The Importance of Legal Concepts from a Philosophical Perspective

In the field of the historicity of law and its contingencies, there exists a category whose elaboration is particularly challenging: legal concepts.

The very reflection on historicity entered the legal domain more as a form of history—something concluded, in the past—than as an unfinished cultural experience shaping a renewed legal science.

The Historical School of Law (19th century) revealed the historicity of law as a manifestation of the people's spirit, "a new fundamental experience of historicism" (Wieacker, 2004, p. 407). Thinkers such as Savigny, Puchta, Beseler, Ihering, and Gierke, as well as Marx—through his studies on the alienation of man in a commodity society—sought the identity of legal consciousness with a historical and social character. It was Puchta, a disciple of Savigny, who, with a clear vision oriented toward social issues, reflected on the authorship of legal creation. He conceived a theory of legal sources that emphasized a system in which the

jurist is authorized to create legal norms from concepts, thus founding Conceptual Jurisprudence.

The strongest criticism of this School came from Ihering through Interest Jurisprudence, which viewed the method of deducing norms and legal decisions from concepts as inverted. For Interest Jurisprudence, norms, decisions, and also social valuation must be the starting point for the induction through which the system and concepts are produced (Wieacker, 2004, p. 457). Following German historicism came the scientific positivism of the early 19th century with the codification of common law and also legalist positivism, which had great influence in Italy, Switzerland, and South America.

In the 20th century, the Vienna Circle, a key figure in the philosophy of language, had a direct impact on law, as did the Frankfurt School, which projected itself broadly. Its ideas and thoughts managed to unite social questions with concerns directed at individual personality, thereby discussing Marxism and psychoanalysis, as well as reflections on contemporary reason and technique. Given its broad scope, Frankfurtian thought came to be known as the Critical Theory School.

Another school with major repercussions on language—and consequently on legal discourse—was the aforementioned Vienna Circle. It reflected the vibrant thinking of the mid-20th century, capable of breaking paradigms in a society—indeed, a city—resistant to the era's changes in arts, sciences, and behavior. One of its greatest figures was the philosopher Ludwig Wittgenstein, a harsh critic of metaphysics in the early phase of his thought, as represented in the *Tractatus Logico-Philosophicus*. There, Wittgenstein sought to establish the status and foundations of logic, critiquing traditional philosophy through a philosophical activity aimed at steering philosophy away from paths that lead only to confusion and contradiction. The *Tractatus* strips the mysticism from traditional metaphysical themes—God, the subject, the world as a totality—to assert that the revelation of the essential structure of propositions (logic) reveals the essential structure of the world (Wittgenstein, 2022, p. 103).

Finally, in this section intended to clarify the role of concepts in law, the Danish legal-philosophical school of positivist nature, also known as the Copenhagen School and representative of Scandinavian realism, is noteworthy—particularly for Alf Ross. He was influenced by the philosophical critique of language, evident in Vienna and also in Cambridge, where a realistic reconstruction of legal concepts was promoted in pursuit of empirical understanding (Ross, 2007, p. 9). The idea was that the true scientific path to legal analysis and understanding must rely on a firm grasp of scientifically valid types of propositions. Ross raised the question of the nature of law, the answer to which lies in linguistics. Ross argued that linguistic expression is a conscious organization of language in actual use, spoken or written (Ross, 2007, p. 29). Expression and meaning are distinct. The meaning may be expressive—when it reflects the experience that caused it—or representative—indicating a

state of affairs. An expressive meaning manifests a drive to communicate the fact to another person. A representative meaning is called an assertion, which may be abstracted from the expression and its associated experiential context and be verified as true or false. Some expressions may contain both expressive and representative meanings. Expressive meaning does not represent but rather expresses an experience—like a cry of pain. In this case, the meaning cannot be separated from the experience. Ross concludes that the linguistic expressions used in legal rules, due to their logical nature, do not have representative meaning but are intended to exert influence. Hence, they are called directive expressions:

We also, therefore, express ourselves as if something had come into existence between the conditioning fact (legal fact) and the conditioned legal consequence. This something is a claim, a subjective right which, like an intermediary agent or causal link, causes an effect or provides the basis for a legal consequence. We cannot entirely deny that for us this terminology is associated with the somewhat undefined notion that a subjective right is an incorporeal power, a kind of internal and invisible dominion over the object of the subjective right—a power that only materializes in the exercise of force (judgment and enforcement), whereby the actual and apparent use and enjoyment of the subjective right occurs without being confused with this materialization (Ross, 2004, p. 31).

In legal doctrine, the linguistic expressions used, even when referring to current law, are assertive propositions not of law, but about law. In the text titled *Tû-Tû*, where Ross attempts to show that legal discourse operates with meaningless words manipulated technically and serving only to present the law, he delivers a sharp critique of the senses attributed to legal discourse, helping to eliminate ideologies that distort reality in favor of "hidden and unconfessable" interests, as Alaôr Café Alves states in the preface (Ross, 2004, p. 9). Ross contends that legal thought must conceptualize norms within a systematic order, offering a clearer version of law through logical formulas that link conditioning facts to legal consequences. When a given word is inserted between these facts and consequences, it does not necessarily convey meaning or semantic reference—it merely serves as a presentation instrument. This is, in a way, what happens with the term “digital inheritance,” as will be explored further. Ross’s example, presented here in a condensed form, is illuminating: when it is stated that a person who bought something may receive its delivery, assigning a concept to this situation could involve any word. “Ownership” was chosen, but any other word could replace it. The legal fact and consequence—or both—remain valid regardless of the presentation instrument, which may be the word “ownership” or any other (Ross, 2004, p. 47).

In a text where he notes that legal concepts are created with a specific purpose in mind, José Rodrigo Rodriguez identifies them as instruments for the exercise of power. He uses as an example the legal concept of “parmesan cheese,” a concept whose sole aim is to grant the State the power to inspect and control the production and commercialization of that

food item, as well as to ensure that consumers acquire the product for which they paid (Rodriguez, 2007, p. 53).

Legal concepts thus serve both the State, in the exercise of power, and society, as a reference. This is how the State also levies taxes on the product in question, adjudicates conflicts arising from various legal situations, all under the same vocabulary that functions as legal communication. However, for such communication to occur, a certain stability in the meaning of words is necessary—rules that are part of a system determine how words are used in context. And it is this system that defines how words are used, allowing communication and understanding of their meaning. The rules that guide word usage must be accepted and applied, or the practitioner will neither understand nor be understood in the legal discourse (Rodriguez, 2007, p. 55).

Rather a description than a critique, this part of the work intends only to demonstrate the importance given to legal concepts across various historical schools. The precision of words—rarely achieved even in the "communication at stake," as José Rodrigo Rodriguez puts it—and their alignment with legal categories bestow greater certainty upon legal discourse, ease problem-solving, and avoid misuse of legal institutions.

Using the concept of digital inheritance as a starting point, this work seeks to show how fruitful the correct use of legal categories can be for the law.

General theories of various legal branches and institutions, common in Brazilian legislation—such as the general part of the Civil Code or the general theory of contracts within the same body—are inspired by the German *Pandektenwissenschaft*, more precisely by Conceptual Jurisprudence. More than a legislative technique, this reflects the logical-legal rationality, a locus where law reaches its most expressive form through the formulation of abstract concepts and categories for application (Lôbo, 2024, p. 20).

Accordingly, a more precise understanding of the legal situations involved in digital inheritance—and, consequently, a more effective and definitive solution to potential conflicts—results from the interpreter's search for the most appropriate category and pertinent concept, in an effort to eliminate systematic interpretive difficulties. Hermeneutic unity, so vital to civil-constitutional law, with the Constitution as the pinnacle shaping the elaboration and application of civil legislation, is challenged by the complexity of the legal system due to the plurality of legal sources.

The interchange of elements and relationships within the legal system, in turn, imparts a high degree of variability to events and situations, demanding and requiring hermeneutic unity as a form of rational control over this universe (Ferraz Júnior, 2003, p. 253).

3 Legal Concepts and Digital Inheritance

Much has been written about digital inheritance, a current and important topic that, like many other legal institutions, bears the strong impact of the so-called “information age.” Telematics, understood here in its lexical sense as the set of services provided through telecommunications networks (Houaiss, 2009, p. 1823), evolved in a superlative manner from the second half of the 20th century, now presenting a myriad of forms, a wide variety of strands, purposes, technologies, etc. Nevertheless, as if to find a simplifying element, it has become customary to conceive of this vast universe in terms of what is digital and what is analog. Thus, the adaptation or reception of law to this new reality does not necessarily follow such simplification.

It is essential to examine the concept attributed to digital inheritance and to extract from it, as precisely as possible, its meaning—defining its boundaries—as well as to attempt to reveal its legal nature and to which category the institution belongs. The absence of such delimitation may greatly hinder, for example, a comparative law study, from the perspective of the “term” or “legal particle” to be compared[1].

At first glance, and in accordance with the theoretical frameworks indicated in the first part of this text—especially those advocated by Alf Ross—can it be affirmed that the “presentation instrument” digital inheritance satisfies the systematic order that might clarify the legal framework in question? Thus, one may ask: does such a system provide the determining rules that give stability to the meaning of these words, of this expression? Rules that should guide its use, as José Rodrigo Rodriguez defends?

The response, as well as the very questions raised, point toward a line of reasoning to be developed from what has come to be known as digital inheritance. And the concept of digital inheritance cannot be disassociated from what has also come to be defined as “digital assets.” In fact, the way in which the concept of digital inheritance has developed has tied it intrinsically to digital assets, such that it has become impossible for one to exist conceptually without the other.

Civil law defines “asset” as any object subject to appropriation by a person, whether material or immaterial. Employing the generic term “thing” to refer to assets, the 2002 legislation no longer refers to assets outside of commerce—a category used by the 1916 Code to designate those whose disposition or negotiation is prohibited—a classification rendered unnecessary by their very nature: “for personal use,” for communal use, or even for non-use, in accordance with relevant values (Lôbo, 2024, p. 157).

Social transformations, especially after World War II, also led to a change in the

way assets are characterized. Formerly more linked to utility, economic value, externality, and susceptibility to appropriation, this characterization now focuses more on the realization of the human person, relativizing economic value in favor of estimative value, use value over exchange value, and individual appropriation in favor of collective use (Lôbo, 2024, p. 158).

The Brazilian Civil Code opted to use the term “thing” to address rights related to the appropriation of assets in Book III of the Special Part, such that legally, the expressions are similar. Paulo Lôbo warns, however, that asset or thing and the object of the right do not have the same meaning. According to the author, based on the doctrine of Pontes de Miranda, the object of the right is some good of life, such as liberty, honor, or the act of doing or not doing something, which do not necessarily constitute an asset or thing (Lôbo, 2024, p. 158).

In the Consumer Protection Code, the terms “asset” or “thing” were replaced with “product,” thereby expanding the conceptual duality.

The challenge for the legal system always seems to be the lack of words that can translate new legal phenomena, which may lead to hasty presentations and a clear misalignment with the legal category to which they should belong. This challenge does not imply that new words must necessarily be created to translate the meaning of new phenomena. Old words, either alone or joined to form a new expression, may solve the problem.

Beyond conceptual or even semantic debate, it is necessary to acknowledge that there have been changes in the relationship between assets and individuals.

Today, inheritance law is the legal field seeking a new concept to encompass hybrid digital assets and make them suitable for succession, allowing for the transmission of what has economic value while preventing the transmission of existential assets.

From shelves full of vinyl records and later Compact Discs—the famous CDs—to streaming[2]; from space to time as a criterion for division in the case of multiproperty; from letters, diaries, and other documents in drawers to cloud storage, there are numerous legal situations that civil law must confront, and many problems to be solved by civil law.

Conceptual issues arise as new demands are placed upon the law without the creation of new words to express or define them. As law is a complex system, difficulty is almost inevitable. Still, why not treat the new with old words? This is undoubtedly a possibility. Isolated words or words joined in an expression can adequately represent a new legal institution. However, that is not what commonly occurs—as in the case of “digital inheritance.” The term inheritance has a well-established meaning in law; the term digital does not. The imprecision of the expression is striking.

In a reference work on the subject, Everilda Brandão discusses the relationships of ownership and the new objects of appropriation, constructing and presenting an innovative problematization about the immaterial reality in which the idea of digital assets develops (Guilhermino, 2018). The idea most frequently disseminated in legal language is that digital is

everything that is not analog. Despite a range of studies on the historicity and evolution of the analog-digital duality—whose demonstration is not relevant to the main purpose of this text—the term “digital” ends up conveying a description of Modernity in technology.

Words such as depatrimonialization, dematerialization, sharing, and functionalization point to new forms of asset appropriation no longer exclusively linked to individual and exclusive property rights (Guilhermino, 2018, p. 65). Nevertheless, as already stated, law is a complex system fraught with difficulties and must be treated, analyzed, and interpreted as such. Therefore, one understands that it is not a simple task to use a word or expression that merely appears to be a simplifier of complexity when it truly is not.

To better understand the phenomenon—now known as digital inheritance—and given the challenge of overcoming the dichotomy between what is inheritable and what is not, when categorizing an asset as patrimonial or existential, a third path has emerged as a viable option: the right of access. This introduces a legal situation that envisions elements for exclusive appropriation, but with access as a non-individual owner (Guilhermino, 2018, p. 67).

4 The Construction of New Legal Concepts in Inheritance Law

Changes that have occurred in asset categories and property law have had a direct impact on inheritance law. The questions posed as premises for attempting a prospective analysis are: Have succession relationships changed? Has the concept of inheritance changed? Or have only the assets changed? Or, additionally, the modes of appropriation? Or, in the end, is the issue one of a conceptual nature?

These questions lead researchers to investigate the direction in which modern civil law is heading regarding digital inheritance.

And what about digital assets? How are they appropriated? Through ownership or via access? Into which category do these assets fall in relation to a person’s estate?

The classification most commonly presented in doctrine regarding digital assets is one that divides them into hybrid digital assets and existential digital assets, with the economic motive being what separates them. Digital assets, in truth, represent the object of the relationships projected in this new environment, which generate legal effects. For this reason, it is necessary to understand them and verify to what extent the current legal system—created under the lights of an analog universe—can meet the needs of digital relationships (Konder; Teixeira, 2024).

Whereas physical assets have always been binary—either patrimonial or existential—digital assets present themselves in a hybrid form, capable of being both

existential and patrimonial at the same time. This is the system's breaking point concerning digital inheritance, revealing a true need for a change in legislative methods.

Although computational language is binary, legal language need not be—as previously observed. The need for dialogue between law and other fields of knowledge has long been recognized, yet the idea that law cannot be reduced to this type of language is not new either. Categorizing legal institutions and new phenomena under proper legal categories allows for the possibility of a third path, regardless of the indicative criterion. Following the thought of Pietro Perlingieri, Carlos Konder discusses the reference of value and the normative treatment of an asset concerning the function it plays in a given subjective legal situation, choosing the functional profile as the most appropriate criterion for distinguishing digital assets:

A patrimonial legal situation is one that performs an economic function, capable of conversion into pecuniary value, concerning financial interests and aimed at profit. Therefore, its protection is directly linked to the realization of free enterprise and is founded on Article 170 of the Federal Constitution (Konder; Teixeira, 2024, p. 6).

Digital assets, then, would be existential—or have an existential function—to the extent that they are linked to personality rights. The fundamental issue is that, if not for the emergence of hybrid assets, there would be no demand for change in the system, which would remain comfortably stabilized in binary concepts, allowing everything to continue as it always has.

However, hybrid assets are a factual reality that must be encompassed by inheritance law and need to enter the legal world to produce necessary effects, both in terms of ownership during life and after the holder's death.

As a consequence, it becomes essential to develop a legal concept that encompasses the hybrid nature of digital assets. In this way, inheritance law will provide appropriate protection to these assets, whether or not they form part of the hereditary estate.

Since the emergence of the idea of digital inheritance, the institution has been studied and addressed within the realm of inheritance law. At least initially, it was not possible to develop a different rationale, given the certainty that the transmission of assets upon the holder's death is governed by succession law.

Thus, new institutions began to take shape, whether regarding inheritance or the mode of succession. More than ever, it is necessary to distinguish legal dimensions and their concepts, as it is through this hermeneutic operation that appropriate responses to social demands are achieved. Therefore, this is understood to be, above all, a conceptual issue.

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