

On the contextual fabrication of persons and things: legal techniques and the human being's status after death*

Sobre a fabricação contextual de pessoas e coisas: as técnicas jurídicas e o estatuto do ser humano após a morte

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ABSTRACT

This paper discusses the fabrication of persons and things through legal techniques, taking as reference a study of Brazilian court rulings involving human beings after death. Analysis of these decisions reveals that any categorization of an entity as a person or thing depends on contingent distinctions made in particular situations, which in turn implies that law is in fact a powerful ontological device creating the world to which it refers. The contextuality of the person/thing distinction, partly associated with the complex topography of legal branches and specialities, allows different degrees of personification and reification to be identified, along with the possibility of fabricating persons and things by combining specific attributes from different entities.

Key words: Law, Legal techniques, Dead human beings, Persons and things

RESUMO

A partir do exame de decisões de tribunais estaduais brasileiros envolvendo a consideração jurídica do ser humano após a morte, este artigo procura identificar diferentes formas pelas quais as técnicas jurídicas constituem e distinguem pessoas e coisas. A análise dos julgamentos evidencia que a categorização de um ente como pessoa ou coisa depende de distinções contingentes efetuadas no exame de situações particulares, o que implica reconhecer o direito como um poderoso operador ontológico que efetivamente constrói o mundo ao qual suas disposições se

referem. Em parte associado à complexa topografia de ramos e especialidades do direito, o caráter contextual da distinção entre pessoas e coisas permite identificar nas decisões judiciais diferentes graus de personificação e reificação, assim como a possibilidade de constituição de pessoas e coisas pela articulação de atributos de entes distintos.

Palavras-chave Direito, Técnicas jurídicas, Mortos, Pessoas e coisas

The exploration of how law elaborates personhood in different social universes is nothing new to anthropology. However the analytic focus usually given to modes of constructing the person implicitly tends to reaffirm the foundational principle par excellence of western legal systems: a naturalized and hence apparently unproblematic boundary between persons and things. Yet a better comprehension of the ways in which law constitutes the world to which its provisions apply - particularly in terms of legal techniques of personification (and reification) - would seem to require that we avoid taking this boundary as a natural premise, an assumption which immediately restricts the analysis to the search for particular expressions of a distinction whose existence and implications remain unquestioned (cf. Pottage 2004).

Setting out from this alternative approach, my aim is to explore some of the forms in which persons and things are constituted and distinguished in legal considerations of the human being after death, taking as our reference point the judgments of Brazilian state courts. The rulings analyzed here show that, in the context of legal proceedings, persons and things are neither stable nor mutually exclusive categories. The categorization of an entity as a person or thing depends on a contingent distinction mobilized in the examination of particular situations, reflecting both the existing legislation and values derived from the social experience of those judging, sedimented in legal doctrine and jurisprudence in the form of specialized techniques. While the integrity of the living human organism, with its apparently self-evident boundaries, is capable of sustaining the symbolic assimilation between the individual body and the person as a subject during life (Strathern 2005:116), death renders this equation ambiguous and provokes the emergence of other assemblages. As we shall see, the disjunction between body and agency enables legal techniques to establish different degrees of reification of the corpse and/or its parts, as well as the fabrication of persons through the conjunction of attributes belonging to distinct entities, animate and inanimate alike. These variations force us to recognize that "law quite literally *makes* the difference"; in other words, "techniques of personification and reification are constitutive rather than declaratory of the ontology upon which they are based" (Pottage 2004:5 and 9).

The role of legal techniques in the fabrication of persons and things has been analyzed in particular in relation to the legislative impacts of the development of biotechnology (and vice-versa). A range of recent works, adopting a variety of analytic approaches, have explored processes of personification and reification associated with organ and tissue transplants, new assisted reproduction techniques and the patenting of genetic material, among other areas of contemporary scientific research (see, for example, Pottage & Mundy 2004, Strathern 2005, Pottage 2007). Though, there is a significant difference between the legal controversies generated

by the definition of the status of objects and relations linked with the development of biotechnology and the judicial decisions that inform the analysis proposed in this article. The former case involves the legal regulation of emerging realities whose configuration is recognized by the agents themselves as indissociable from their legal representation. By contrast, the agents involved in the verdicts examined here, though just as firmly engaged in processes of ontological fabrication, refer their activity to a tradition (specifically a legal corpus) and tend to represent their considerations as an attempt to reconcile the universe of legal categories with the essential attributes of a world conceived as pre-existent to them.

The research examined 22 appeal rulings (*acórdãos*):¹ eleven from the São Paulo Court of Justice, eight from the Rio de Janeiro Court of Justice and the remaining three from the Rio Grande do Sul, Minas Gerais and Maranhão Courts of Justice. My analysis of these rulings - which, following the classification of the legal universe itself involve private and public, civil and criminal questions, as well as their subdivisions - focuses on two aspects: a) the way in which the object in dispute, the arguments of the parties and the final decision are formally constructed; and b) how these legal techniques constitute and differentiate persons and things.²

I initially consider cases relating to the unauthorized exhumation of mortal remains by the administration of the cemetery where they had been buried, followed by their loss or their removal to the 'collective tomb' (or ossuary). Next I turn to cases involving the crimes of disrespecting and unlawfully removing corpses. Finally I examine - in a preliminary and tentative form, since I had access to just one ruling of the kind - the question of recognizing post-mortem personality rights.

As an example of the first type of situation, I describe in some detail a ruling from the 1st Civil Law Court of the São Paulo Court of Justice, occurring in January 2007.³ The trial involved a lawsuit for material damages and emotional distress⁴ caused by the exhumation and loss of the mortal remains of the plaintiff's mother by the Presidente Prudente municipal council without prior notification or consent. The trial court verdict ruled in favour of the claim (in relation to the emotional distress caused; nothing more was said about material damages) and sentenced the municipality to pay R\$3,600 in damages. The municipality appealed, claiming that it had published a notice in a local newspaper calling for re-registration of graves without any subsequent manifestation from the interested party. Believing the grave abandoned, the council had proceeded to exhume the mortal remains. The appeal court's decision, based on a document of just three pages from the reporting judge, upheld the original ruling.

Our first point of interest is discovering how - that is, through which operations - this outcome was produced. The first step of the process leading to the court's decision on the municipal council's appeal, as recorded in the ruling in question, is the evaluation of its conduct *within the context of the trial itself*. To some extent, the question of what the municipality did or did not actually do is irrelevant: what matters is that it 'failed to prove' in the court records either its compliance with 'due legal process' in taking possession of the grave, or indeed supply evidence of its publication of a notice.

The self-contained and self-referential character of legal trials has been highlighted by various authors.⁵ For the purposes of the present analysis, though, it is the second step of the argument developed by the reporting judge that interests me. By establishing, in and through the trial, that the municipal council failed to give adequate notice to the interested party (when it was legally bound to do so), the

decision removes from consideration any alleged abandonment of the grave by the person responsible and thus the council's tacit argument that the neglect evinced by the state of the mother's tomb did not justify the claim for damages for emotional distress. Hence the psychological harm suffered by the plaintiff emerges as self-evident: it is sufficient to *declare* emotional stress for it to exist. This is the conclusive step of the reporting judge's response, a section of which I reproduce below:

The emotional distress arises *in re ipsa*, since it is impossible to conceal⁶ the prejudicial effect on the plaintiff's moral patrimony caused by the unauthorized exhumation of the mortal remains of the claimant's mother and their disposal in an unknown location [...] (TJSP, Ruling no. 01203172/2007).

The Latin expression *in re ipsa*, which confers legitimacy to the statement by implicitly invoking a legal tradition recognized (and claimed) by Brazilian law,⁷ expresses the idea that a determined result is a necessary and inevitable consequence of a certain conduct, which dispenses with the need for its proof during the legal proceedings. In the ruling in question, the presumption that the emotional distress is an immediate outcome of the council's action is also backed by jurisprudence. The reporting judge reproduces the summaries of four judgments from the São Paulo and Rio de Janeiro Courts of Justice relating to similar cases, all awarding damages for emotional distress to the relatives of people buried in public cemeteries whose mortal remains had been lost. Only one of the summaries refers to existing legislation,⁸ a fact which is not mentioned or discussed by the reporting judge here. The decisions incorporated in the judge's report are valid in themselves: in other words, their very *quality* as rulings made prior to the present verdict makes them incontrovertible, just as the present verdict may form the basis for future rulings.

Situations like the one described above, involving the unauthorized exhumation and loss of mortal remains, or their unlawful removal to the cemetery's 'collective grave' or ossuary, appear to be fairly common judging by the number of trials of this kind that eventually reach the different state appeal courts. Whatever the specific circumstances, the decisions usually lead to damages being awarded to the plaintiff for emotional distress.

In various cases, the opposing party (as a rule the municipal council responsible for running the cemetery) contests, in its defence, the interest and diligence of the plaintiff in tending the deceased relative's grave: that is, they cast doubt on the authenticity of the emotional suffering allegedly felt by the claimant following the loss of the mortal remains of a relative whose grave had failed to receive any kind of care. This line of argument is systematically rejected by the appeal judges in the verdicts examined here. The bond between the mortal remains of a close relative and the 'moral integrity' of the family member suing for damages does not require any specific *behaviour* by the latter capable of demonstrating a concrete concern for the deceased. The bond existence is assumed and requires no actualization or verification.

The premise implicit in these judgments seems to be the naturalized - and thus necessary - bond between what I propose to call the 'materiality' of the mortal remains of a close relative and the 'interiority' of the family member suing for damages, here understood as his or her intimate constitution as a moral being, endowed with self-consciousness and intentionality and, for this very reason,

susceptible to the effects of another's actions. This is what allows the existence of emotional distress (in Portuguese: *dano moral*, 'moral injury') to be considered self-evident in all the verdicts. Put otherwise, in situations like the one described above, legal technique constructs a specific modality of person through the dissociation and (re)connection of the levels of 'materiality' and 'interiority' of distinct beings. The relative's claim for damages is awarded on the basis of the constitution and recognition of his or her moral 'interiority,' defined here via the 'materiality' of the dead relative, which is absorbed as part of the claimant's own moral substance - in the legal expression, his or her *patrimônio subjetivo* ('subjective patrimony'). This explains why no *concrete* expression of the emotional bond between the plaintiff and the dead relative is needed for the injury and damages to be accepted: the *sofrimento moral* ('moral suffering') is an immediate outcome of this specific form of fabricating the person.

It is not fortuitous, therefore, that one of the decisive elements of the verdict in favour of the plaintiff - both in the cases of lost mortal remains and those relating to their unauthorized transference to a collective grave - is the impossibility of identification resulting from these actions: in other words, the impossibility of *particularizing* the mortal remains, now mixed with those from other bodies in a collective ossuary. This situation dissolves the unequivocal conjunction between the interiority of the living person and the mortal remains of the dead relative, absorbed as part of the former's 'moral patrimony.' But while *personhood* is irremediably affected by the impossibility of individualizing the deceased's mortal remains,⁹ the undifferentiated skeletal remains deposited in a collective tomb still retain a generically *human* quality, such that the distress found to be caused is restricted to the plaintiff.

In some of the examined verdicts, however, the exceptionality of the circumstances described in the court records would appear to threaten the ontological boundary between the human and the non-human, as conceived by the judges. In these cases, the verdicts show a specific deployment of legal techniques - which precede and ground the examination of the claims made by the parties - to carefully reconstitute these frontiers. An example of this is a verdict reached by the Rio de Janeiro Court of Justice in February 2008,¹⁰ which arose from the exhumation of the mortal remains of the plaintiff's father by the Inhaúma cemetery administration. Mixed with the bones of others, the skeletal remains were not deposited in a collective tomb, as in the cases described above: instead, in circumstances that remain unexplained, they ended up being dumped at a landfill in Duque de Caxias municipality.

Converted into waste, these mortal remains are not only deindividualized: they are simultaneously deprived of any distinguishable human quality, becoming (con)fused with an undifferentiated mixture of inert matter.¹¹ What is perceived in the trial as a factual and logical scandal, however, is not the potential transformation of persons into things - indeed, on this point, it could actually be questioned whether the (humanly) undesirable residues making up the waste even retain the condition of 'things,' insofar as the latter category supposes the existence of *units* that, precisely by being distinguishable from other such units, enable specific rights to be exercised, notably the right of ownership. By emphasizing that the landfill is the "location where domestic animals usually look for food," the sentence of the trial judge accentuates the profoundly disturbing prospect of the imminent conversion of *human mortal remains* into a *living non-human substance*.

Likewise the appeals court responsible for assessing the plea lodged by the local council focuses its attention not on the facts of the trial and the emotional distress felt by the plaintiff - taken to be incontrovertible by the judges - but on the re-establishment of an ontological boundary that appears to be seriously threatened

by the cemetery administration's negligence.¹² By using a peculiar legal technique, grounded not on positive law but on a subtle shift between mythic time and historical chronology, the argument contained in the reporting judge's verdict constructs a human nature as singular as it is immutable. In order to delineate the essential *continuity* of care of the dead, taken to be *specifically human*, the judge's report turns to the distant example of the 'monumental pyramids' built by the ancient Egyptians to "preserve the mortal remains of their loved ones." He then cites various passages from the Old Testament - that is, events that not only precede our reckoning of historical time, but are situated in the atemporal dimension of myth - to conclude that "burying the dead with dignity is something inherent to human nature and a right that has been with us since the times of the great patriarchs of Israel." While the first half of this sentence posits care for the dead as a natural and typically human concern, the second extracts from this condition an essential right to be recognized and protected by positive law. Having taken this step, the ruling can return to the facts of the trial and confirm the compensation awarded in the initial court decision.

But while the *existence* of the emotional distress is never questioned in trials relating to the unlawful removal of mortal remains, the judges nonetheless tend to assess the *intensity* of this distress when deciding its financial equivalent: that is, the value of the damages to be awarded. As well as the doctrine invoked by the appeals judge in question, which asserts that the amount of compensation should be sufficient to ensure its punitive character, but not so high as to constitute an excessive advantage to the party receiving the award, we can identify two more elements that are taken into consideration in the analyzed cases: the *contiguity* between the person claiming damages and the deceased, evaluated in terms of degree of kinship; and the *time interval* between the distress caused and claim for compensation.¹³ By way of illustration, I briefly cite two other verdicts from the Rio de Janeiro Court of Justice.

In the first case,¹⁴ the appeals judge questions the fact that the lawsuit had been filed by the deceased's mother and sister instead of his wife and children. This fact - or rather, a differential evaluation of kinship relations that, without basis in any specific legal provision, appears to privilege voluntarily constituted ties over connections given by consanguinity - leads him to question the good faith of the plaintiffs, who he suggests "filed the present lawsuit with the aim, in my view, [of] enriching themselves at the costs of what could be called a human error, and that this error had not been observed by the plaintiffs at the time of the transfer of the mortal remains of the son and brother, who was buried in a double grave."

In the second ruling,¹⁵ the court reduced the value of the damages awarded by the trial court judge, arguing that since eighteen months had passed between the occurrence of the injurious act and the filing of the claim for damages, "the emotional distress caused, *self-evidently*, was already mitigated" (original emphasis). This makes explicit the premise that the bond between the living and the dead, though never completely dissolved, tends to weaken over time, perhaps in parallel to the decline in the materiality of the corpse itself.

This latter case also contains other elements worthy of closer attention, since they allow us to identify a distinct mode of constructing persons and things through legal techniques. The facts leading to the court case were no different in general to those found in the verdicts discussed previously. The plaintiff's ex-spouse¹⁶ had been buried in São João Batista Cemetery, in Rio de Janeiro, run by the Santa Casa de Misericórdia. At the time of burial, no copy of the contract was provided nor any information on its duration or on other procedures adopted by the cemetery administration. Some time later, after visiting the grave and discovering it had been violated, the plaintiff learnt that the body had been exhumed and cremated, along

with others, at the end of the three-year lease on the tomb. As in the other cases, the trial court awarded damages for emotional distress and the contesting party lodged an appeal with the higher court.

The formal mechanism underlying the argument of the appeals judge remains much the same: an examination of the facts and allegations made by the parties, as presented in the course of the trial, and the assessment of them made in light of existing legislation (as well as previous interpretations of legal texts, which generally include elements from other domains), a procedure that enables and grounds the final ruling. After describing the events, the judge immediately rejects the first allegation made by the Santa Casa de Misericórdia, namely that the presented evidence failed to show "the consternation suffered by the plaintiff, [who] had contributed to the facts by being neglectful and failing to act." As in the previous cases, the verdict of the appeals judge assumes that "the [emotional] distress arises *in re ipsa*." The divergence occurs in the examination of the second allegation made by the defendant - the strict observance of the relevant legislation by the cemetery administration - although formally the procedure is much the same as the first step. In contrast to cases relating to public cemeteries, in this and other rulings made by the Rio de Janeiro Court of Justice involving private funeral services, the judge's evaluation of the facts is based on the Consumer Protection Code.¹⁷

Hence, although the suffering caused to the plaintiffs by the disposal of the mortal remains of a close relative is not necessarily ignored in these cases, the emotional distress is characterized - additionally or primarily - by the failure to supply a contracted service in adequate form, irrespective of its specific nature.¹⁸ Consequently the application of a very general legal technique - the determination and later categorization of the facts within the context of the trial - means that the focus subtly shifts from the bond between kin to the contract binding the person who rented the tomb for a determined period and the cemetery administrator responsible for providing the service. As in the situations examined above, here too the emphasis is on the plaintiff: the difference lies in the way in which she emerges from the application of the legal technique. In the previous cases, the person was construed as a *relation between the attributes of distinct entities* - the subjectivity (or 'moral interiority') of the plaintiff and the materiality of the mortal remains of his or her dead relative. But in those cases where the facts of the trial are judged on the basis of the Consumer Protection Code, the person, defined on the basis of the contractual relation with a third party, is characterized by the *indissociability between attributes exclusive to her*, located on two complementary levels: the person's inner subjectivity and her physical capacity to act in the outside world. Consequently the moral integrity of the person, her most inner and particular dimension, is judged to be affected through a concrete expression of her agency in the world - the contract. More specifically, the distress is caused by the disregard for her dignity shown by the contractual partner who fails to fulfil the contracted obligation. Neither the distress nor the unfulfilled obligation have any specific connection to the actual nature of the service or to the relation between the living and the dead. The cemetery administration's conduct is judged as a failure to comply with the legal duty to inform the client, obliging the supplier to pay damages.¹⁹

Although the trials most frequently involving the dead relate to the unlawful conduct of cemetery administrations, both public and private, a number of cases concern violations of graves by third parties or other conducts leading to criminal prosecution. The Brazilian Penal Code dates from 1940 and contains, as part of its wide-ranging classification of types of conduct identified as criminal, a specific

chapter on "offences against respect for the dead." Despite the innumerable amendments made to the code over its seventy-year period in force, this chapter remains as originally formulated. It should be noted that the law aims to protect an intangible and collective property, namely the 'respect' which the living are presumed to have for the dead, and not the dead directly, who are considered independent of their relation to the living. The code stipulates four types of crimes: prevention or disruption of a funeral ceremony (article 209); violation of a grave (article 210); destruction, unlawful removal or concealment of a corpse (article 211); and disrespecting a corpse or its ashes (article 212).

Since the definition of these crimes is summary - the law merely lists each type of offence and stipulates the corresponding penalty²⁰ - court rulings are heavily based on the opinions of legal scholars and, through these, a series of categorizations whose principles lie beyond written law.²¹ In the legal definition, although the protected property is *intangible and collective* ('respect for the dead'), the crime is perpetrated and recognized in the form of an action affecting the *materiality of individualized* mortal remains. However when we examine the verdicts relating to the offence of disrespecting a corpse, the act in itself, though recognized as violent - for example, the post-mortem dismemberment of the corpse - is not enough by itself to justify its classification under the cited offence. The argument developed by the legal practitioners focuses on the subjective intention of the agent, the outcome envisaged at the moment of the action. By concentrating on agents and on the connection between their action in the world and their inner state, legal technique produces a *person* constituted by the indissociability between 'inner' and 'outer' (intentionality and agency in the world), as contained in the examples cited above. Simultaneously, though, it also implies the constitution of the corpse as a *thing*, an entity that merely suffers the action of another. This legal move can be observed especially in those cases in which the trial fails to establish the defendant's specific intention to offend or disrespect.

The condition of being a thing involves gradations, though, depending on the context and mode in which particular facts are evaluated. As my first example, I turn to a ruling from the Rio Grande do Sul Court of Justice.²² In brief, the case related to an event occurring in the municipality of Santa Cruz do Sul: a 34-year old bricklayer killed his neighbour by clubbing him to death on the pavement in front of their homes. He stowed the body in the trunk of his car and drove to his parents' smallholding in the rural area of the municipality. There, assisted by his older brother, he placed the corpse in a hole and burnt it with petrol. The burial site was then covered with earth and straw.

The younger brother was arrested and charged with aggravated murder. Both brothers were also charged with committing the offences listed in articles 211 and 212 of the Penal Code, namely: destroying, stealing or concealing a corpse or part of it; and disrespecting a corpse or its ashes. The defence's appeal, the object of the ruling to which I refer, looked to contest the charge of disrespecting the corpse. Here my interest is in exploring how the reporting judge examined and assessed the facts, finding in favour of the defence.

Since the Penal Code is limited to stipulating crimes against 'respect for the dead,' the judge's first step was to define the semantic field covered by the expression 'to vilipend a corpse' (in Portuguese, *vilipêndio a cadáver*). For this the judge turns to expert opinion: the interpretation of reputed legal commentators. His decision draws on the works of three scholars in particular. We can observe the same form of categorization as in the passages cited above. The first step is to establish the general meaning of the term *vilipend*, which involves juxtaposing the verb with others whose meaning implicitly appears to be better known or less open to dispute: vilipend means to "vilify, insult, treat with disdain." This list of synonyms,

however, is still located at a generic and imprecise level: the interpretation is circular, insufficient for the examination of concrete cases.

The next step, therefore, is to define the kinds of actions corresponding to this category. The judge notes that vilipending "can be practiced through words, writing or gestures." But a further step is needed: what specific content do these different forms of expression require for the crime to be identified as such? In response, the judge lists a series of acts that, more than exemplify, effectively *constitute* the very category of which they are examples: "remove the corpse's clothing, spit on it, cut off a member (*in order to mock*), acts of necrophilia, the use of insulting words, offensive gestures, defiling the corpse" (original emphasis).

The different legal scholars cited by the judge reproduce the same expressions almost verbatim, meaning that it is primarily through this repetition that an initially vague perception based on common sense is transformed into a solid technical exegesis that can be invoked with authority in the judgment of a defendant's conduct. Consequently, in the case to which I refer here, the reporting judge was able to conclude that the "evidence in the court records does not register any kind of insult or vilification of the victim's corpse and the accusation does not indicate any circumstance of this kind." The defence's appeal was successful.

An examination of another case, this time judged by the Maranhão Court of Justice,²³ allows us to explore this topic a little further. At a factual level, there is no similarity between the two situations: while the first case involves murder, this second case concerns the managing partner of a cemetery that proceeded to exhume mortal remains following non-payment of instalments relating to lease of the tombs. For our present purposes there is no need to describe the other details of the trial. Suffice to note that here too the appeal court judge responsible for examining the case turns to legal doctrine to find in favour of the defendant. Below I reproduce a section from her decision which provides a clearer illustration of the importance given to the *subjective disposition* of the defendant - the determination of which can obviously only be conjectural and speculative - in deciding whether an action constitutes a crime against the 'respect for the dead.'

[The] procedure executed by the defendant makes clear that his purpose in exhuming the mortal remains, in the case of defaults on payment, was to enforce the clauses of the contract rather than offend the feeling of piety for the dead, which would constitute the offence set out in article 210 of the Penal Code [violation of a grave], which only applies when the agent's conduct embodies the subjective element of intent, that is, the deliberate and conscious wish to violate or desecrate graves or mortal remains (TJMA, Habeas Corpus 16318/2000).

Considering the importance assumed by the voices of legal scholars in the above two cases, as well as the nature of their arguments, it can be suggested, perhaps, that the interpretation of the articles of the Penal Code dealing with crimes against 'respect for the dead' allow - and maybe even demand, given that the legal protection concerns an intangible value, and that the types of offence that express its violation are stipulated in a generic and imprecise form - the introduction of classificatory parameters from outside the legal universe, deriving from the commentators and their own social experience. In this way, disrespect and insult are conceived in legal doctrine - and consequently in jurisprudence - to be the result of a conscious subjective disposition: an accidental offence is no offence at all.

What are the effects of this move in terms of processes of personification and reification? It can be seen that the focus is entirely on the agent of the crime: the process concentrates on establishing *a posteriori* his or her intentions prior to and during the action (a step conceived as unproblematic in the context of the trial), which means that legal technique constitutes the defendant as a person possessing an intentionality that is manifested concretely in his or her agency in the world. But the accent falls emphatically on the inner level: it is the will that first and foremost defines the person. Correlatively, we can note the reification of the object of the action, that is, the corpse lacking will and agency. Although it is admitted in the trials that a special kind of thing is involved, the argument pursued by the judges indicates that the corpse's value is a question to be decided among the living: an action affecting the corpse is not enough to constitute the crime of disrespecting the dead. To reach this decision, legal technique looks to place in perspective the internal and subjective level of the intentionality of the alleged author of the crime and the dispositions equally internal to the collectivity (the feeling of respect for the dead), objectified in the Penal Code. This results in an accentuation of the discontinuity between the living and the dead, based on the distribution of *exclusive* qualities: each pole is defined by the absence or fading of the attribute crucial to the constitution of the opposite pole.

However the ontological boundary between persons and things drawn by legal technique is neither stable, nor necessarily coincides with the distinction between the living and the dead. Depending on the context, the deceased may be considered even more pronouncedly thing-like. Or, inversely, the attribution to the human being of an interiority that subsists after death may radically dissolve the boundary between the living and the dead and, at the same time, redefine the distinction between persons and things based on other attributes.

This constitution of the dead human being as a thing becomes even clearer in trials relating to the violation of graves and the removal of parts of the corpse - especially gold dental work - for later commercialization. In the two rulings of this kind that I was able to access in full, both from the São Paulo Court of Justice,²⁴ the defendants were initially accused of the crimes of violating a grave and theft (articles 210 and 155 of the Penal Code, respectively). In both cases, the defence's appeals contesting the charge of theft, the penalty for which varies between two and eight years imprisonment, were successful. The legal debate on the correct classification of the facts simultaneously defines the ontological status of the corpse. In both appeals, the verdict depends on two steps: the preliminary definition of what constitutes theft, followed by the comparison between this definition and the details of the trial.

Reading the Penal Code, the definition of theft seems unproblematic: theft is a crime against property, which presupposes injury to the patrimony or property of a *person* - in Brazilian law, either a *pessoa física* (a physical person: an individual) or a *pessoa jurídica* (legal person: a company or entity) -- in order to be defined as such. But while the definition seems precise, its application is controversial: can the corpse be the object of such a crime? Beginning with a vague reference to the tradition of Roman law through the use of Latin expressions enshrined in the legal universe, the judges turn to more recent legal doctrine to establish that:

[The] corpse cannot be a material object of theft, as a general rule, nor its parts, since it does not constitute patrimony in the economic sense, it does not belong to a third party. It should not be said that it belongs to the family, that it is something that forms part of the

patrimony of the deceased's heirs and that the latter would thus be the victims of the crime of theft. It would be risible to consider this hypothesis. Were this the case, the corpse would always have to be included in an inventory of assets (TJSP, Appeal 53.500-3/1987 — *Revista dos Tribunais* 619/291).

Hence neither legal doctrine nor the court records consider the possibility of defining the theft of a dental prosthesis as an act perpetrated against the *person of the deceased* him or herself, whose legal representation could be provided by a family member. This hypothesis would imply not only the legal assimilation of inanimate human bodies and living persons, it would also engender the difficult problem of recognizing property rights over parts of the human body, even where this involves the subject's rights over his or her own body. In a move that evokes the notion of 'fabrication by default' formulated by Strathern (2005:116), these questions are deliberately avoided by attributing to the corpse - in an uncontroversial form in this context - the status of a thing.²⁵ But while legal technique constitutes the corpse as a thing, it also attributes it with the status of a special type of thing. It amounts to a *res extra commercium*: in other words, it cannot be someone's property and thereby be introduced into the flow of economic transactions. As a result of this move, which skilfully continues to avoid the more troublesome implications of converting a person into a thing, it becomes impossible for the corpse to become the *object* of theft.

However, the averred non-commerciality of human mortal remains is situational rather than absolute. The rulings themselves are concerned with distinguishing the situations under analysis from those in which a corpse can legally constitute the property of third parties, a case in which it becomes a 'common thing' able to be stolen. According to the legal doctrine cited by the judges, this applies, for example, to archaeological findings or cases where a corpse has been donated to a museum or scientific institute for study or display. Under these conditions, the unauthorized removal of a corpse or its parts constitutes a crime against property that can be classified as theft. In other words, the legal relation of ownership equalizes the things capable of comprising someone's property and thus removes from the human corpse the specificity that in other situations continues to differentiate it from other objects. In the cases mentioned above, meanwhile, the recourse to the notion of *res extra commercium* enables the obvious intention of the defendants to sell the gold dental prostheses extracted from the corpses to be considered irrelevant to the classification of these actions as theft. In other words, by employing the notion of property, legal technique establishes varying degrees of reification of human substance.

Conversely, other situations can be encountered in which the dead human being is still conceived to possess interiority, will and honour, although the manifestation of this will necessarily precedes death, meaning that the defence of the dead person's honour and memory must be concretely undertaken by third parties. Different rulings analyzed in this study mention the desires manifested by the deceased while alive, a topic that poses no real problems from the viewpoint of legal practice, since civil law covers in detail elements such as the testament and other dispositions to be carried out after the death of the person in question, establishing the conditions for their execution or legal representation. Yet it is important to note that the recognition of the dispositions established (in life) by the dead person also forms the step leading to the extinction of this now bodiless personality. The will, as an attribute constitutive of the person, is manifested posthumously in an imperative form, but just once and forever.

Other possibilities open up, though, when we turn to the legal considerations surrounding the so-called rights of the personality, understood as those rights inherent to the person and his or her dignity, set out in article 5 of the 1988 Federal Constitution and covered in a separate chapter of the 2002 Civil Code (articles 11 to 21). The affirmation of the rights of honour, image and intimacy, among others, immediately poses a new question: does this legal provision extend to the dead too? Can the dead be recognized to maintain personality rights, given that the legislation defines these rights as both unrenounceable and *non-transferable*?²⁶

At first sight, the recent debate in legal scholarship on the question of post-mortem personality rights allows us to distinguish two general positions (at least) that, by legally setting out the inability of the deceased to manifest him or herself directly, express different modes of fabricating persons and things. The first position, perhaps the most common, claims that the personality ceases at death: even if the contrary were recognizable, the practical effects of this recognition would be null due to the "extinction of any legal capacity" (Amaral 2000:221), that is, the effective impossibility of the deceased manifesting his or her will. From this perspective, personhood is founded on the indissociability between (subjective) interiority and (material) agency. Consequently legal personality can only correspond to the living human person, possessing an interiority to be legally protected, but also the condition for concretely exercising the rights that emanate from this interiority. In other words, legal personality is taken to be unable to exist without 'legal capacity;' biological existence and legal existence must coincide.

The second approach to this issue argues that article 12 of the new Civil Code,²⁷ which addresses the protection of personality rights, recognizes their continuation after death. Here the impossibility of a dead person directly claiming legal protection of his or her rights is not deemed to be an obstacle, since the legal text itself identifies the spouse or close kin as legitimate representatives of the dead person in legal proceedings. Also according to this view, article 20 of the Civil Code, which concerns the protection of the person's image, also implies recognition of the rights of the deceased (see, for example, Tartuce 2005). In more general terms, the entities composing the legal universe are understood not to depend on, nor necessarily correspond to, the projection of something outside of this universe - and this is what enables legal technique to produce a maximum gradient of personification. Recognition of the person dispenses not only with the materiality of the body, but also an inner faculty capable of becoming actualized in the world: it is enough for the person to exist in the context of the process.²⁸

In this approach, the legal definition of a *thing* is also altered. According to an understanding that has become firmly established among legal scholars, 'human creativity' is defined as an *extrapatrimonial property*, whose ownership cannot be transferred to another subject - as Strathern (2005:154) observes, the opposite would imply admitting property rights over people. However the exteriorization of the generative capacity of the intellect in an invention or a work of art can unproblematically constitute a *material and owned (patrimonial) thing* (cf. Gediel 2000). Based on this specification made by legal technique, the *person* is seen to contain -or to manifest as - elements with different degrees of alienability. The *properties of the personality* form the inalienable nucleus of the person and cannot be disposed of, even at the will of the person him or herself. The person's core is thus the limit not only of the market but also of his or her own will: inalienable and indisposable, it is distinguished from the manifestation of its own faculties in the world in the form of *things* with a patrimonial value, which can indeed figure in economic transactions and are appropriable by other subjects without implying a diminution of the creative capacity from which they originate.

The examples explored in this essay reveal that legal technique does not work, as sometimes presumed, by matching a set of legal categories with entities whose ontological status is stable and independent of the court proceedings. On the contrary, the appeal rulings analyzed here demonstrate the contextual constitution of the entities populating the trials as persons and/or things through a contingent distribution of distinct attributes that either postulates an identity between the person (as a legal subject) and the *human being*, or distances itself from natural law, constituting persons and things without necessarily affirming any correspondence with qualities taken as innate or natural.²⁹ The coexistence of these distinct perspectives leads firstly to recognizing law as a powerful ontological device that effectively constructs the world to which its provisions refer. But while this is a necessary step to a better understanding of the processes of personification and reification found in the legal universe, the discussion has also shown the importance of analyzing the strong segmentation existing within this universe. Even the analysis of a small sample of court rulings shows that it is not enough to speak of the division between persons and things made by modern western law, ignoring the complex topography of the different branches of law and their institutional expressions. As Hermitte observes, each of these instances works with the objects that it apprehends in its own way, not only without searching for coherence with the other instances but, on the contrary, following a logic of increasing autonomization whose consequences might include, for example, the constitution of 'hybrid objects,' intermediary categories between things and persons (Hermitte 1998:18 and 24).

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Notes

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1 An *acórdão* is a judicial decision reached in a higher (appeal) court. As established in Brazil's Civil Trial Law (articles 458 and 563), this ruling is composed of four essential elements: a *summary*, a *report*, a *motivation* (or *ground*) and a *decision*. The *summary* provides a résumé of the ruling, summarizing the essential aspects of the case. The *report* describes the facts of the trial and the law being discussed by the parties. The *motivation* or *ground*, which derives from the analysis

made by the judges on the factual and legal questions set forth in the report, forms the bases for the decision by the judicial authority. The *decision*, the final part of the ruling, sets out the conclusion reached from the report and the motivation, that is, the court's final decision.

2 The majority of the rulings (15) were made in the period from 2005 to 2008. However three of the consulted judgments took place in the years 1986 and 1987 (prior to the current Constitution) and another three in 2000 and 2001 (after the current Constitution but prior to the new Civil Code).

3 Court Records for Civil Appeal no. 259.073.5/5-00, Ruling no. 01203172. Available at: <http://www.tj.sp.gov.br/consulta/Acordaos.aspx>. Consulted on 28/01/2008.

4 TN: In Portuguese: *danos materiais* and *danos morais*, literally 'material harm' and 'moral harm.'

5 See, for example, Hermitte (1998) and Latour (2004a and 2004b).

6 TN: The phrase used by the reporting judge here is *sendo inescandível*: literally, 'it being inconcealable.'

7 On the incorporation of the Roman legal tradition by Brazilian law, see Abreu (2008).

8 Namely article 159 of the Civil Code of 1916: "Someone who through their action or deliberate omission, negligence, or imprudence, violates the rights of or causes harm to another, is obliged to compensate for the injury. Ascertainment of guilt and assessment of responsibility are regulated by the provisions of this Code, articles 1.518 to 1.532 and 1.537 to 1.553."

9 On this point we can note a similarity with the mid-90s debate cited by Strathern (2005:117) on European legislation relating to biotechnology. According to the author, one of the arguments raised during the period backed the possibility of patenting human body parts, so long as they could no longer be linked to specific individuals.

10 Civil Appeal 2007.001.57339. Judgment made by the 13th Civil Chamber of the Rio de Janeiro Court of Justice on 13 February 2008. Available at www.tj.rj.gov.br. Consulted on 17/05/2008.

11 The identification of the remains of the plaintiff's father only became possible after the recovery of a pacemaker, a non-human part of the body, identifiable by a serial number imprinted by the manufacturer.

12 We can also note the judges' perception of an improper conjunction between humanity and animality in another ruling, where it was deemed to be admissible only in the universe of fiction (in passing it is worth noting the frequent allusions to literature and/or cinema in the remarks of the judges, as well as in legal scholarship, where they comprise a specific technique of argumentation). Here I reproduce a brief passage from the decision of the reporting judge, accepted unanimously: "The body of the plaintiff's mother was buried in a *locale that seems more like an animal cemetery*, with bones scattered everywhere, densely overgrown and displaying a complete lack of hygiene, more reminiscent of a *horror film*" (my italics). Civil Appeal no. 2006.001.63792. Ruling made by the 13th Civil Chamber of the Rio de Janeiro Court of Justice on 14 March 2007. Available at www.tj.rj.gov.br. Consulted on 17/05/2008.

13 The assessment of emotional distress raises a wide range of questions - spanning from the plaintiffs' legal standing and the nature of the indemnifiable losses to the adequate financial compensation for the injury suffered - and distinct legal paths depending on the political-juridical context and the specific case under trial. On this point see, for example, the different criteria used for compensating relatives of people who 'disappeared' during periods of political repression in Brazil, Argentina and Chile (Mezarobba 2008) and the disputes involved in the damages paid to relatives of victims of the 9/11 attacks on the World Trade Center and Pentagon in the United States (Zelizer 2005).

14 Civil Appeal 2008.001.05163. Ruling by the 6th Civil Chamber of the Rio de Janeiro State Court of Justice on 2 April 2008. Available at www.tj.rj.gov.br.

Consulted on 17/05/2008.

[15](#) Civil Appeal 2007.001.54575. Ruling by the 16th Civil Chamber of the Rio de Janeiro State Court of Justice on 11 March 2008. Available at www.tj.rj.gov.br. Consulted on 19/03/2008.

[16](#) The expression 'ex-spouse' is used in the appeal ruling to describe the bond between the plaintiff and the deceased. It remains unclear whether the qualification 'ex' refers to the husband's death or whether the couple had already separated prior to this event.

[17](#) The Consumer Protection Code (Law no. 8.078/90) applies indifferently to public and private agents. In the appeal rulings examined here, however, there seems to be a certain reluctance on the part of the courts to cite the CPC when one of the parties is a public agent. In most cases the judges opt to frame the facts legally on the basis of the Constitution (article 37, § 6: "Public legal entities and private legal entities rendering public services shall be liable for damages that any of their agents, acting as such, cause to third parties, ensuring the right of recourse against the liable agent in cases of malice or fault") and/or on the Civil Code (article 43: "Public legal entities are civilly responsible for the actions of their agents who in this capacity cause harm to the third parties, subject to recourse against those causing the injury, if guilt or malice on their part is established").

[18](#) The Consumer Protection Code stipulates that unsatisfactory provision of a service renders the provider liable for compensation to the consumer not only for material losses, but also emotional distress (cf. article 6, VI; article 14 and articles 20 to 25). In legal doctrine and jurisprudence alike, emotional distress has been recognized as an inevitable outcome of the frustration of the consumer's expectations.

[19](#) Articles 6 and 14 of the Consumer Protection Code, respectively. Only in one of the examined rulings was there a concern to demonstrate the applicability of the CPC to the facts of the case. In the other rulings, it was deemed sufficient to declare the legal framing of the case as the unsatisfactory provision of a service, without explicit mention of legal doctrine or jurisprudence.

[20](#) Preventing or disrupting a funeral ceremony (article 209): detention from one month to a year, or a fine; Violation of a grave (article 210), and Destruction, theft or concealment of a corpse (article 211): imprisonment of one to three years and a fine; Disrespecting the corpse or its ashes (article 212): detention of one to three years and a fine. In concrete terms, the difference between imprisonment and detention functions primarily as a criterion for determining how sentences will be carried out. If imprisonment is stipulated, the sentence may be realized in a closed, semi-open or open regime. In the case of detention, however, closed regimes are seldom stipulated by the judge, save in exceptional circumstances.

[21](#) I did not encounter a single trial referring to preventing or disrupting a funeral ceremony, a category of crime that can be traced back to pre-Christian Roman law: on this topic, see the excellent analysis by Yan Thomas (2004). In the following considerations, therefore, I stick to the other crimes relating to the dead as defined by the Brazilian Penal Code.

[22](#) Criminal Appeal 70001.799.402. Ruling of the 1st Criminal Court of the Rio Grande do Sul Court of Justice on 21 February 2001. *Revista dos Tribunais* 794/674. Consulted online on 17/05/2008 (www.rt.com.br/JurisOnline).

[23](#) Habeas Corpus 16318/2000. Ruling by the Special Recess Court of the Maranhão Court of Justice on 9 January 2001. *Revista dos Tribunais* 790/656. Consulted online on 17/05/2008 (www.rt.com.br/JurisOnline).

[24](#) Respectively: Appeal 41.767-3, judged by the 3rd Criminal Court of the São Paulo Court of Justice on 10 March 1986 (*Revista dos Tribunais* 608/305, consulted online on 17/05/2008 - <http://www.rt.com.br/JurisOnline>); and Appeal 53.500-3, judged by the 1st Criminal Court of the São Paulo Court of Justice on 18 May 1987 (*Revista dos Tribunais* 619/291, consulted online on 17/05/2008 - <http://www.rt.com.br/JurisOnline>).

[25](#) The expression 'fabrication by default' describes an outcome which is produced

indirectly, by implication, when the law deliberately avoids dealing with (and deciding on) certain particularly problematic questions. One example examined by Strathern is the treatment given to human organs and tissues in British law. The emphasis on the establishment of legal mechanisms of prior consent for the removal and later use of these elements (which continue to be referred to, significantly, as body 'parts') makes it possible to avoid deciding whether organs and tissues, once separated from the human body, constitute (entire) 'things' and, consequently, whether they would be subject to the same legal regime as other things, particularly their inclusion in someone's economic property and thus their potential commercialization (Strathern 2005:16-18).

[26](#) I encountered just one ruling referring to these kinds of questions. This case involved the appeal presented to the Rio de Janeiro Court of Justice by the makers of the film *Luz del Fuego* - a semi-fictionalized biography of Dora Vivacqua, an actress and dancer who went by the stage name Luz del Fuego, famous in the 1950s for performing in scant clothing with her body wrapped around by a boa constrictor. The authors of the appeal requested the annulment of the sentence passed down by the trial court, which had banned exhibition of the film following a lawsuit filed by the actress's sister. The ruling, dating from 1986, was made prior to the current Federal Constitution and the new Civil Code. Nonetheless, the trial and appeal court judges based their rulings on the notion of 'personality rights,' the recognition of which is extended, in the (then) absence of a 'specific ruling' in Brazilian legislation, as a necessary outcome of the very "evolution of the science of law." As a result, the ban on the film was maintained on the grounds of recognizing the possibility of harm to the personality rights of a dead individual. But once recognized, these rights were immediately converted into a 'new right' belonging to third parties affected by the harmful action, namely the relatives of the victim. In sum, the injury is recognized, but not the post-mortem ownership of personality rights. Appeal 39.193/86 (declaratory embargo). Ruling by the 3rd Civil Court of the Rio de Janeiro Court of Justice on 17/12/1985 and 24/06/1986 (*Revista dos Tribunais* 619/175, consulted online on 17/05/2008 - <http://www.rt.com.br/JurisOnline>).

[27](#) Civil Code - Article 12. "Cessation of the threat or injury to the personality right may be demanded and compensation for losses and damages claimed, without prejudice to other sanctions established by law. Sole paragraph. Insofar as it concerns a deceased person, the surviving spouse or any direct relative or collateral relative to the fourth degree may legitimately demand the legal action set forth in this article."

[28](#) The emergence of entities like Abrame (Brazilian Association of Spiritist Judges) - whose membership, according to a report by the *Folha de São Paulo* newspaper, includes around seven hundred trial judges, appeals court judges and higher court judges - has also contributed to relativizing the boundary between life and death in terms of the legal recognition of the manifestation of will, since, from a spiritist point of view, for example, the materiality of the body is not a necessary condition for the existence of the *person* or for the exercise of his or her legal capacity. The report reproduces an excerpt from an interview with the auxiliary judge of the presidency of the National Council of Justice, Alexandre Azevedo, in which he asserts: "I don't see any difference between a declaration made by myself or yourself and a mediumistic declaration which has been psychographed by someone" (Galvão 2008).

[29](#) The tension between these two models can be observed in the legal framework itself. The notion of personhood developed in the Civil Code dispenses with the affirmation of an ontological correspondence between legal entities and those existing outside this universe. An example of this is the recognition of bodiless persons - *pessoas jurídicas*, 'legal persons,' that is companies and other legal entities - and, inversely, the consideration of the human body as a thing that can become the object of legal relations, limited only to its commercialization. The Federal Constitution, on the other hand, which in its preamble affirms legal

principles of absolute legitimacy, logically anterior and ethically superior to formal law and state action, forms part of a wider tendency in modern constitutionalism to revive legal approaches based on natural law, in opposition to the so-called legal positivism predominant until the mid-20th century (on this topic, see Vianna 1996).