RIGHTS OF PERSONALITY AND CORPORATIONS: a contemporary review

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ABSTRACT

The article aims to show the principal aspects related to the rights of personality as a way to promote the study of the natural person to the first level of concern and identify in which measure the aforementioned rights apply to corporations as well. The controversy about the extension of the rights of personality to corporations is based in the general clause inserted in the article 52 of the (Brazilian) Civil Code of 2002 as for some legal scholars the referred article just enabled the application of the technique of personality protection to corporations and for others we must admit the extension of the rights of personality to corporate bodies, excluding those special rights of personality that can't be separated from human personality.

KEYWORDS: Rights of personality. Corporation. Moral damages.

DIREITOS DA PERSONALIDADE E PESSOA JURÍDICA:uma abordagem contemporânea

RESUMO

O artigo busca apontar os principais aspectos relacionados aos direitos da personalidade, como forma de promover o estudo da pessoa humana a primeiro plano e identificar em que medida os referidos direitos se aplicam às pessoas jurídicas. A controvérsia acerca da extensão dos direitos da personalidade às pessoas jurídicas decorre da própria cláusula geral contida no artigo 52 do

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Código Civil de 2002, já que, para alguns doutrinadores, limitou-se o referido dispositivo a permitir a aplicação da técnica da tutela da personalidade, enquanto que, para outros, admite-se a extensão dos direitos da personalidade às pessoas jurídicas, excetuando-se aqueles direitos especiais de personalidade que sejam inseparáveis da personalidade humana.

PALAVRAS-CHAVE: Direitos da personalidade. Pessoa jurídica. Dano moral.

I - Introduction

The appearance of man as a subject to rights and liabilities is recent, being valued therefore as fruit of a historical development[2]. Such process finds its apex in the present day reality, in special in what it concerns the national legal system, in which this tendency was reinforced with the coming of the Civil Code from 2002 – law 10.406/02

Henceforth, this work will point towards the main aspects relating to rights of personality, as a way of promoting the study of the natural person at a first, and above all, as a way of recognizing to what measure the referred rights apply to legal entities.

The controversy about the extensions of rights of personality to legal entities follows the general clause held within the article 52 of the Civil Code from 2002, according to which "the protection of rights of personality apply to legal entities where applicable".

Roughly, the limits of the expression "where applicable" are precisely what entail such discussion, once it establishes the debate, between doctrine and law operators, in search for an outline better constituted amongst safer basis.

Thus, it can be inferred that, while for some the device is limited to allowing the application of the technique of personality tutelage by loan[3]; others accept the extension of rights of personality to legal entities, with the exception of those special rights which derive inseparably from human personality[4]. However, before properly assessing the discussion it is necessary, in order to have a broader understanding of the topic, to address the characteristics and the tutelage of rights personality under the national legal system.

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[2] DIAS, Jaqueline Sarmento. *O Direito à imagem* Belo Horizonte: Del Rey, 2000, p. 13.

[3] TEPEDINO, Gustavo. "A pessoa jurídica e os direitos da personalidade" *in Temas de Direito Civil*. 3 ed. Rio de Janeiro: Renovar, 2004, p. 55.

[4] SOUSA, Rabindranath V. A. Capelo de. *O Direito Geral de Personalidade*. Coimbra: Coimbra Editora, 1995, p. 596; ALVES, Alexandre Ferreira de Assumpção. *A Pessoa Jurídica e os Direitos da Personalidade*. Rio de Janeiro: Renovar, 1998, p. 81

II- Rights of personality in the Brazilian legal system and its tutelage according to the civil code from 2002.

The rights of personality, absent from the Civil Code from 1916, were introduced in Brazil by force of theoretical constructions. Particularly, special laws and the Constitution itself performed crucial roles.

The Code from 2002, by adopting the normative point of view (if approached in isolation) and by following the steps of the Italian Civil Code, regulates some rights of personality. These are the rights to psychophysical integrity, to the name, to pseudonym, to image and to privacy.

It is important to consider that the guideline brought by the Code does not intend to be exhaustive; it aims solely at what can be called the fundamental principles of the rights of personality[5]. The doctrine, based on the Constitution understanding about the rights of inviolability of intimacy, privacy, honor, and personal image; points towards the list of article 5, heading, from the constitutional text, that contemplates the minimum, not preventing that other rights might be considered rights of personality and, therefore, as indicated on § 2, of article 5 from the Constitution[6]. Henceforth, articles 11 and 12 of the referred Code deal with the nature and tutelage of these rights while all further articles refer to rights of personality specifics.

Article 11 deals with the characteristics attributed to rights of personality. These are the non-transmissibility, the non-waiver and the impossibility of voluntary limitation of its exercise. Beyond these, the doctrine also recognized its imprescriptibility and its nature of being anabsolute right, therefore considered to be *erga omnes* – generating a liability by which all other persons must abstain themselves from injuring, or from representing any injure threat, to any of the rights of personality, in the terms of the legal system in force.

These characteristics are often announced as a way of differentiating the rights of personality from (other) subjective rights. Nevertheless this distinction is negligible, since the very condition of being of rights of personality makes them inapplicable to trading, diversely from patrimonial rights. Not surprisingly the social and cultural values and even local habits in constant mutation allow for certain flexibility in what it concerns some of the characteristics approached in the law.

Moreover, confirming the previous argument and broadening the list of characteristics elicited in the referred device, Alexandre de Assumpção Alves states that:

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[5] ALVES, José Carlos Moreira. *A parte geral do projeto do Código Civil.* Available at: http://www.cjf.gov.br/revista/numero9/artigo1.htm. Acessed in: August 12th, 2007.

[6] PEREIRA, Caio Mario da Silva (atual. Maria Celina Bodin de Moraes). *Instituições de Direito Civil.* vol. I. 21 ed. Rio de Janeiro: Forense, 2005, p. 241.

> The rights of personality have common bonds identified by the doctrine, constituting a singular category besides the classical division between personal and real rights. This featureis due to characteristics that are common to both, i.e.: they are absolute, necessary, and perpetual; non-pecuniary; non-transmissible; imprescriptible; unattachable; non-expropriable; unavailable and unrenounceable. Non-expropriation is a characteristic attributed to this rights by Fabio Maria de Mattia, whereas unavailability and unrenounceability where included by Adriano de Cupis, the other by Orlando Gomes.[7]

In addition, still in relation to art 11 of the Civil Code from 2002, it must be emphasized the reservation there presented ("exceptionally in cases provided by law…"). Since the possibility of limiting tutelage through ordinary legal acts is unacceptable[8].

Protection conferred to the rights of personality must be integral. In this case, art 12 responds to this necessity consecrating inhibitory tutelage and, in addition to that, civil responsibility. The former technique of tutelage follows from the insufficiency of traditional civil law institutions in promoting protection and tutelage to rights of personality.

Likewise, the single paragraph from art 12 in this Code refers to the legitimacy to require tutelage for the rights of personality of deceased persons. Hence, it is established the list of possible legitimate interested persons: the spouse, any relative in direct lineage without any distinction of degree, or collateral relatives up to the fourth degree. There had been an inexplicable omission of the deceased person's partner. It must be pointed out that, in what it concerns rights to image, the list of legitimate persons is less broad, excluding collateral relatives.

Initiating the section that deals with the rights of personality in species, articles 13 to 15 regard rights to psychophysical integrity. Therefore, conceptions that dissociate the human body from the mind are overcome, once both constitute aspects of the human condition.

Art 13 reveals a strong inspiration to Italian law, and is applicable to acts of disposal of renewables parts from the body, being nonetheless subjected to regulation. The device confirms the notion of intangibility of physical integrity, thus the rule that prohibits the disposal of one's own body when it generates a permanent reduction of the rights of personality or when it goes against common morality. The first legal exception is that which follows medical requirement, for instance the necessity of amputation of a part of the limbs due to mortification, which authorizes the disposal of own body by the

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[7]"os direitos da personalidade têm traços comuns identificados pela doutrina, constituindo uma categoria à parte da clássica divisão entre os direitos pessoais e reais. Deve-se esta feição a certas características que são comuns a todos eles, a saber: são absolutos; necessários e vitalícios; não pecuniários; intransmissíveis; imprescritíveis; impenhoráveis; inexpropriáveis; indisponíveis e irrenunciáveis. A inexpropriação é característica atribuída a estes direitos por Fabio Maria de Mattia, enquanto que a indisponibilidade e a irrenunciabilidade fora incluídas por Adriano de Cupis, as demais por Orlando Gomes" IN: ALVES, Alexandre Ferreira de Assumpção. *A Pessoa Jurídica e os Direitos da Personalidade*. Rio de Janeiro: Renovar, 1998, p. 65.

[8]DONEDA, Danilo, "Os direitos da personalidade no Código Civil" *in* TEPEDINO, Gustavo. *A Parte Geral do Novo Código Civil:* estudos na perspectiva civil-constitucional. 2 ed. Rio de Janeiro: Renovar, 2003, p. 47.

individual. The regenerable parts of the body – hair, nails, skin, blood, for instance – do not fit into this prohibition once they do not result in a permanent reduction of physical integrity, nor does the use of earrings or body piercings in the skin or tongue[9]. Let it be noted that blood donation is ruled by law 10.205 from March 2001.

The exception, to which the single paragraph of the aforementioned article refers, consists on the cases of paired organs donation, tissue donation, and the donation of parts of the body, as presented in art 9 of the law 9.434/97. Nevertheless, it is worth note that the legislator did not progress further as it could have been done. If on the one hand there is a permanent discrimination of physical integrity, on the other hand, the adequacy to an existential situation more consistent with the optimal development of an individual's personality remains to be pursued. The admission of aesthetical surgery is based on two aspects: a) the inexistence of permanent reduction of physical integrity; b) the inexistence of injury to common morality, i.e., in front of the increasing social acceptance of this performance.

Moreover, article 14 refers to the possibility of free disposal of own body after death. There are tough limits imposed by this device, once it only applies in cases where the disposal attends to scientific or altruistic ends, never to economic exploration: for example the donation of own corpse to medical universities or to scientific research institutions in fields related to health sciences[10]. It must be noted that cases of after death organ donation for transplantation are ruled by law 10.211/2001, which modified what was ruled by law 9.434/97 in this matter. Hence, donation depends on consent by the spouse, close relative or collateral relative up to second degree. Here the partner must also be taken into consideration.

The theme addressed in article 15 still arouses issues relating to medical ethics. The device treats the possibility of refusal to medical treatment, which becomes patient's prerogative when the treatment presents life risk. The consent, required by law, is that this will is freely and consciously manifested, without any vices, and after the acquisition of clear, objective and transparent information about the individual's state of health and about the treatment or surgery to which the individual can be submitted to. In sum, informed consent.

The legal object physical integrity represents a projection of the principle of dignity of the natural person upon the individual body, and, in the text itself, it can be verified within the rules that hinder the practices of torture, degrading or inhumane treatment, the application of cruel punishment, besides ensuring to convicted individuals respect to moral and physical integrity[11].

The legal right is ruled trough articles 16 to 19

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[9]BARRETO, Wanderlei de Paula. *Comentários ao Código Civil brasileiro*. vol. I. coord. Arruda Alvim e Thereza Alvim. Rio de Janeiro: Forense, 2005, p. 129.
[10]BARRETO, Wanderlei de Paula, op. cit., p. 134.
[11]GAMA, Guilherme Calmon Nogueira da. *A Nova Filiação*. Rio de Janeiro: Renovar, 2003, p. 166.

Article 16 encloses the recognition to the universal right to name, here comprehending the prename and surname (family name). According to Pietro Perlingieri,

> Each one has tutelage, be it for the defense of name, as expression of own personality, be it for the defense of surname, as member of a group: in the first hypothesis it is an individual right, personal and exclusive; in the second. The legal right is not individual, not an exclusive instrument oftutelage of the reasons of the individual and its personality: it is blended in the need for a tutelage of the own person, but as part of the family group and it is province of the totality of its components. In fact, tutelage of name can be also extended to whom, even when not wearing the contested or inappropriately used name, has meritorious interests based of family that must be protected.[12]

It is worth note that such right was already ruled by law 6.015/73 in articles 52 and 55, which mandate the civil registration of any person who has been born and, therefore, has acquired personality, hence attributing to this person a name and registering it[13].

The name of the person represents one of the most important and most useful distinct traces in the individualization of the natural person in society. The name and other identifying signs of the natural person constitute the basic elements of association that persons can dispose of, for relationships in the most varied strata (societal, household, educational, and business, among others)[14].

Let it be registered that, under law 9.708 from 18/11/98 – which has given new text to art 58 of the law 6.015/73 -, the prename ceased to be immutable, what had already been verified in the jurisprudential theoretical construction that admitted its modification, be it by restoration, suppression or in relation to spelling errors[15], besides recognizing the state of possession of the name proper. Still in relation to this topic remains the issue of transsexualism and sex change surgery – which abides to the issue of the right to physical integrity. Resolution 1.482/97, from the Federal Council of Medicine establishes rules in respect to sex change surgery, determining obligation that the subject be submitted to psychic, medical and endocrinological evaluation, beside formal consent informed by the patient, so that

[12]“ cada um tem tutela, seja para a defesa do nome, como expressão da própria personalidade, seja para a defesa do sobrenome, como componente de um grupo: na primeira hipótese o direito é individual, pessoal e exclusivo; na segunda, o direito não é individual, não é instrumento exclusivo de tutela das razões do indivíduo e da sua personalidade: ele se funde na exigência de uma tutela da própria pessoa, mas como integrante do grupo familiar e é de competência de todos os seus componentes. De fato, a tutela do nome pode ser estendida também a quem, mesmo não usando o nome contestado ou indevidamente usado, tem um interesse fundado em razões familiares dignas de serem protegidas” IN: PERLINGIERI, Pietro. *Perfis de Direito Civil*: introdução ao Direito Civil – Constitucional. 2 ed. Rio de Janeiro: Renovar, 2002, p. 180.

[13]DONEDA, Danilo, op. cit., p. 51.

[14]BITTAR, Carlos Alberto. *Os direitos da personalidade*. 5 ed. Rio de Janeiro: Forense Universitária, 2001, p. 124.

[15]BARRETO, Wanderlei de Paula, op. cit., p. 144-145.

the surgery may be possible. Despite the polemics that surround the issue[16], it is certain that, with the alteration of the external an internal genital organs and the secondary gender traits following surgical intervention, there must be a rectification of the civil register of the individual in the fields referring to gender and prename, otherwise incurring in violation of countless constitutional principles and values, in special those related to the dignity of natural persons.

Protection towards name is extendable to pseudonym (as stated in article 19), once its pursuit is towards a true tutelage of the rights to personal identity. Presently, the idea that the pseudonym has the function of concealing the identity proper when exercising professional activity, artistic, scientific, political or literary does not prevail, since pseudonym also have the function of identification, as predominantly defended by the doctrine.

From reading articles 17 and 18 it is made clear that the legislator did not neglect the rights to information and freedom of speech, since it only vetoed the publication of extraneous names in cases where the individual is subject to public contempt or where the main scope is profiting. In what it concerns the prohibition of using a person's name in publication or representations that subject the individual to public contempt (article 17, from Civil Code of 2002), it must be noted that such protection is more generic than that originated in law 5.250/67 (Law of Press) and law 8.078/90 (Consumer's Defense Code also known as CDC). It attends to the assurance of rights to intimacy, privacy, image protection and honor of the individual in its various spheres, as in the examples of films with reference to personalities such as Olga Prestes, Airton Senna among others. In respect to what has been stated in article 18 from the Civil Code of 2002, a person's image is protected against commercial exploration and advertisement within the notion of image-attribute[17].

The right to image, under the prism of self-portrait and image-attribute, is addressed in article 20. Once again the legislator was not only concerned with rights to image, but also with rights to information, making a consideration judgment of the image of a person when it does not wound honor or when it pursuits profit.

> It must be noted that, even though the article makes reference to the disclosure of written texts and the propagation of the word, these must be understood only in relation to what they represent to the construction of the image of a person and not to other aspects of its personality, such as its privacy, for example.[18]

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[16] As observed by Santos Cifuentes, the right to identity includes sexual identity, which authorizes sex-change surgery and its transformation in order to be a concrete match between the body and the sexual identity. CIFUENTES, Santos. *Derechos personalísimos*. 2 ed. Buenos Aires: Ed. Astrea, 1995, p. 304.

[17] BARRETO, Wanderlei de Paula, op. cit., p. 158.

[18] "Deve-se notar que, apesar do artigo fazer referência à divulgação de escritos e à transmissão da palavra, estes devem ser entendidos somente em relação ao que representam para a construção da imagem de uma pessoa e não

The single paragraph of the referred article 20 indicates the list of legitimate individuals to require protection of image when it concerns deceased or absent person. Therefore, there is the spouse, ascendants or descendants. It must be nonetheless registered the improper and unreasonable omission in relation to the partner. According to Pietro Perlingieri, "the interest of these is not so much of a personal nature as it is of family nature, and it encounters justification in family solidarity and in the possible negative consequence that the illegitimate use of the image of the relative may motivate to itself and to the group to which it belongs"[19]. It is of fundamental importance to note the improper and unreasonable omission in relation to the partner. In the hypothesis provided by art 20, of the Civil Code of 2002, there are aspects of the privacy of the person that might come to be revealed to an indeterminate audience, making it general knowledge, as is the word, previously reserved. There is firstly the protection to private life and secondarily to honor, good reputation and respectability[20].

The right to privacy is referred to in article 21. The first acknowledgement towards this article is that it considers inviolable the privacy of the natural person alone. Besides, the issue has raised discussions due to the sudden increase of the potential for offenses to personality with the coming of new technologies, and due to the inadequacy of traditional legal instruments to fulfill this tutelage. Likewise, it fell to the Civil Code of 2002 to predict what judges will possibly adopt as measures of tutelage of privacy[21]. Wanderlei de Paula Barreto notes that article 21 brings a general clause in respect to the protection of private life, whilst the already mentioned article 12 contains a general clause in respect to the tutelage of all rights of personality[22]. The device refers to episodes such as unauthorized breach of confidentiality, removal of mailing secrecy, improper access to documents, home invasion, among others.

Another aspect to be analyzed here is the circumstance in which the tutelage of intimacy is not connected only to the individual proper, but also as a member of the family group. "Each individual has the right, in relation to close relatives, to prevent that facts and behaviors of existential nature, relative to the individual or its family broadly, be not disclosured"[23].

It is important to highlight that such precepts gain real signification when interpreted as an analytical specification of the general clause of tutelage of personality, provided by the Magna Carta in article 1, item III (that addresses human dignity as a fundamental value of the republic); article 3, item III (that adduces to substantial equality) and article 5, § 2 (that increases the list of fundamental rights).

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para outros aspectos de sua personalidade, como a sua privacidade, por exemplo"IN: DONEDA, Danilo, op. cit., p. 52.

[19]PERLINGIERI, Pietro, op. cit., p. 184.

[20]BARRETO, Wanderlei de Paula, op. cit., p. 170.

[21]DONEDA, Danilo, op. cit., p. 183.

[22]BARRETO, Wanderlei de Paula, op. cit., p. 214.

[23]PERLINGIERI, Pietro, op. cit., p. 183.

III – Discussion about the admissibility of the extension of personal rights to legal entities

Having addressed the general characteristics pertaining to the rights of personality and having specified its tutelage regarding the Civil Code of 2002, the central question of this work must be approached, consisting of the possibility of the extension of rights of personality to legal entities.

The first argument to the counterwork the admission of such an extension resides in the fact that legal entities are alien to any historical process responsible for the formation of the rights of personality. Therefore, even though legal entities are, within the models of traditional doctrine, subject to rights and able to gather around them legal situations, they possess fundaments that are largely diverse[24].

Besides that, those who defend the impossibility of such an extension affirm that the general clause contained within the art 52 of the Civil Code from 2002 points clearly that the core of the rights to personality reside in the tutelage of natural person's dignity. Having only allowed the extension of the technique of rights of personality for the protection of the legal entity, without, however, recognizing its rights of personality[25].

Another aspect elicited by this section of the doctrine resides in the idea that rights such as those referring to bank and industrial confidentiality, that clearly express the patrimonial interests of the legal entity[26], cannot be guaranteed with basis on the tutelage of natural persons rights, since the natural persons value is diverse to that of the subject of the legal entity.

In this sense, the title 286 of the Federal Justice Council was approved in the IV *Jornada de Direito Civil* with the following text: "the rights of personality are necessary rights and are essential to natural persons, deriving from their dignity; therefore legal entities are not entitled to those rights".

Lastly, adherents of this position state that making use of common sense is sufficient to realize that some rights of personality only fit to the natural person, such as is the right to psychophysical integrity.

Conversely, another section of the doctrine considers that it is possible to recognize the rights of personality in relation to legal entities. This section nevertheless presents common points with the

[24]DONEDA, Danilo, op.cit., p. 53.

[25] As Gustavo Tepedino asserts, "(...) realizes the mistake of imagining rights of personality and the compensation for moral damages as neutral categories, borrowed by the legal entity for its protection (seen as a maximization of its economic performance and profitability). The other way around, the interpreter must be aware of the diversity of principles and values that inspire natural persons and legal entities. " TEPEDINO, Gustavo. "A pessoa jurídica e os direitos da personalidade" *in Temas de Direito Civil*. Rio de Janeiro: Renovar, 1999, p. 499.

[26] "The injuries relating to legal entities, when not directly affecting the partners or shareholders, only affecting the development of economic activities, deserving, therefore, repairing techniques targeted and effective, not mistaking it, however with the legal interests translated in the human personality (...) " TEPEDINO, Gustavo. "A tutela da Personalidade no Ordenamento Civil-constitucional Brasileiro" *in Temas de Direito Civil*. 3 ed. Rio de Janeiro: Renovar, 2003, p. 55.

previous doctrine, once it considers that, in what it concerns rights of personality, rights that relate to traits that are inseparable from the human condition remain immediately excluded from the legal entity. Save the understanding that the existence of a broad notion of rights of personality of legal entities must be recognized, this theme will be further developed later in this text.

This line of thought sees legal entities (or collective persons, as preferred by foreign doctrine, notably the Portuguese school) as holders of personal values and motivations.

That being said, the rights of personality applicable to legal entities must be analyzed more in detail.

The first point to be focused on here resides in the right to name, to title and to figurative sign[27].

The right to name for legal entities possesses a peculiarity in relation to natural persons, once the legal entity may change its name freely, provided it follows the due legal procedure required[28].

The Constitution (article 5, XXIX) and the law 8.934/94, resort on the expression "corporate name" to designate the name through which the business person exercises its activity. The article 1, heading of the NA (Normative Act) 104/2007 of the NDTR (National Department of Trade Registration) advocates that a "corporate name" is that under which the business person and the business association exercise their activities and undertake their relevant duties.

In this particular, Alexandre Ferreira de Assumpção Alves clarifies that:

> so that there is a complete isonomy, the expression "corporate name" applied by the Constitution must embrace the legal identification of any association (of persons) dedicated to industry, to trade and to service, with or without profitable intents.[29]

There are two kinds of corporate names, the firm and the denomination[30]. Such statement finds support in the forethought provided by articles 1, single paragraph[31]; 2; and 3 of the NA previously referred.

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[27] It is necessary to mention the point of view espoused by Adriano de Cupis. According to this author, the firm "understood as a distinctive sign of the business or companyis not a personal mark because neither are persons." He adds that the firm - even though it may be envisioned a personal and extrapersonal means of designation, ie even in its subjective aspect, which allows its use for purposes of underwriting documents - "has a pronounced patrimonial value, a fact that also helps to explain their transferability. "And he concludes by stating that, "consequently, the right to the firm, even in view of the subjective aspect, cannot be regarded as essential and therefore can never be numbered among the rights of personality themselves."DE CUPIS, Adriano (trad. Afonso Celso Furtado Rezende). *Os Direitos da Personalidade*. Campinas: Romana Jurídica, 2004, p. 319-321.

[28]ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 82.

[29]"para que haja uma total isonomia, a expressão 'nome de empresa' empregada pela Constituição deve abraçar a identificação legal de toda e qualquer associação de pessoas dedicadas à indústria, ao comércio ou à prestação de serviços, *com ou sem fins lucrativos"* IN: ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 83.

[30]COELHO, Fábio Ulhoa. *Curso de Direito Comercial*. vol I. 7 ed. São Paulo: Saraiva, 2003, pp. 177-178.

[31] That said device provides that "the business name includes the name and designation."

As rule, the doctrine signals the differences between firm and denomination with basis on two aspects. The first relates to the structure of the corporate name and the second to its function. Hence, in what it concerns the structure of the corporate name, Fábio Ulhoa Coelho clarifies that

> The firm is based necessarily in a civil name, be it the name of the individual business person itself, be it the name of a partner of the business association. […] the denomination, on its turn, can be based in any linguistic expression, be it or not the civil name of a partner of the business association.

In what it concerns function, it must be noted that the firm, besides being the name through which the business person exercises its activities, is also a signature. Conversely, the denomination does not work as a signature and, therefore, is not capable of obliging the legal entity. Since it consists of a fantasy name that might indicate the corporation or not.

In spite of such distinction, the canon adopted by the NA104/2007 to distinguish them relied on the societal types apt to constitute firm or denomination. Therefore, in its article 2 it qualifies as firm "the name used by the business person, by the association in which there is a partner with unlimited liability, and optionally by the limited partnership". While the article 3 prelects that "denomination is the name used by the cooperative and joint-stock company, and optionally by the associations limited by shares".

The corporate name must obey the principle of truth (article 4, NA104/2007), i.e. expressed distinctively in relation to firm and denomination, having in mind the each one's structure as previously established. Hence, the business person will not be able to "use, in case of firms, the patronymic name of a corporation it does not take part in. For denominations, it is prohibited the use of words that indicate false origin or that induces to error […]"[32].

Another relevant aspect consists in the existence of two differing approaches to the corporate name. The first considers it as a personal right, an object of property referring to goods of intangible nature. The other current, considers it a right proper to the person, inalienable and non-transmissible, as an authentic right of personality. Aside from its economic value, it cannot be considered though as a right of property[33].

Regarding the exclusive use of the name, it is perceived the search for the preservation of clients and loans, which constitute the fundamental interests of the business person and, in the case of customers, one of the attributes of the company. Hence, article 4 of the NA104.2007 also advocates for the observance of the principle of novelty.

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[32] ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 87.

[33] In this particular, Alexandre Alves Ferreira de Assumpção says that "within the Brazilian system the firm is insusceptible to cession or transfer, which proves to be the object of a personal right rather than a real one, unlike the fantasy element of the name (core of the name) that can be registered as a trademark, became part of the azienda immaterial the property. " ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 85.

Another question also linked to the tutelage of the corporate name lies in the scope of the protection conferred by registration, to be made in the boards of trade (law 8.934/94). This discussion stems from the existence of distinct predictions on the subject, more specifically, in article 8 from the Decree 75.572/75 (Paris Convention) and in articles 61 of the Decree 1.800/96 and 11 from the NA 104/2007 of the NDTR.

While the Decree 75.572/75 gives the corporate name protection internationally, national legislature circumscribes such protection within the jurisdiction of each Board of Trade, i.e., at the state level. In this case, in order to extend the tutelage to other federal units, it is necessary that the individual obtains a registration certificate in the original Board of Trade where the name is registered and then proceeds to register it within all other Boards of Trade in the country.

The Supreme Court has already ruled on the issue, stating that the scope of protection of the corporate name is both national and international. Accepting, thus, the provision contained in the article 8 of the Paris Convention, incorporated in our legal system trough by the previously mentioned Decree 75.572/75[34]. Thus, even though the Decree 1.800/96 is posterior to Decree 75.572/75, it does not superimpose the Paris Convention, once it deals with the state tutelage of the corporate name and this same tutelage cannot prevail over the referred Convention. The desideratum here is to avoid unfair competition.

It is enough to mention that an eventual usurpation of a corporate name by a third party may give rise to remonstrance in the Board of Trade.

The title of the property[35], in its turn, is indirectly protected by intellectual property law (article 2 of law 9.279/96, also referred to as IPL). Disrespect towards this law might lead to a nullification of the registration (articles 165 to 168 of the IPL) and even to prosecution, which will proceed only upon complaint (crime of unfair competition, as predicted in the article 195 of the item V and the article 199, both from the IPL).

The brand[36] - here seen as a means of manifestation of the creator, i.e., as a manifestation of their productive activity - is also worthy of protection and an object of property, since it is a movable good on intangible nature. In this particular, the collective brand is worth note, consisting in an innovation

[34]It should be noted the summary section of the RESP-SP 9142-0, whose rapporteur was Min Sálvio de Figueiredo: "[...] There is no confusion between trademark and trade name. The first, which registration is done with the INPI, is intended to identify products, goods and services. The trade name, in turn, identifies the company itself, being the filing of articles of incorporation in the Board of Trafe enough to legitimize it and protect it, nationally and internationally, [...] ". IN: ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 88.

[35] "It is title of property the name used by the entrepreneur in order to identify where it exerts its activity professionally before the clientele". ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 91.

[36] "Brands are distinctive signs that identify, directly or indirectly, products and services" COELHO, Fábio Ulhoa, op.cit., p. 141.

proposed by the IPL (article 123 item III). It consists of a hypothesis of co-ownership, which obligates "partners to agree beforehand on how to use and how to exercise their rights in common over the intangible property"[37].

Another right of personality to be recognized to legal entities is the right to the image. Let it be noted that here it is preferred to talk of image protection rather than honor[38]. There is, therefore, a distinction in the treatment of this question in the criminal and civil fields, - once the latter makes the differentiation between subjective and objective honor, recognizing protection to the legal entity only in relation to objective honor – in the civil field there is the tutelage of a concept, an abstract non-visual image, of the entity before the world of business and the consumers themselves. Here it must be recognized tough that image damages are also connected to moral damages, once publications or words threatening to the image will have repercussions on the reputation of the injured person.

In this sense, the right to confidentiality must also be analyzed, once it falls on the legal grounds that regulate the reservation that should be kept in relation to trade and industrial activities.

It is fortuitous to mention that commercial confidentiality also covers commercial books (refers to its content and finds prediction in article 17 of the Commercial Code), banking (banking secrecy is provided in article 38 of the Law 4.595/64) and the duty to secrecy of managers of joint stock companies (article 155, heading and § § of Law 6.404/76).

Regarding industrial confidentiality, the object of legal protection are creations derived from technological research, insusceptible to registration for specific protection within the scope of brands. Interesting aspect is the fact that the secrecy surrounding the *know how*[39] will only be subject to protection by the IPL if the contract of technology transfer is registered at the INPI, which, as a rule, is not the case, since it is more interesting to run risks than to forego the profits generated by virtue of the transfer of the production process.

Finally, there is the moral right of the inventor, which includes rights of intellectual order. Such intellectual rights are commonly divided into copyright (which includes rights of artistic, literary and scientific property) and industrial property rights (including patents, utility models and industrial design).

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[37]ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 97.

[38]SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 599.

[39]Alexandre Ferreira de Assumpção Alves differs the knowhow of the contract of know how. According to the author, know how are "secret knowledge or technological processes and documents, held by a person whose result of its application will promote the manufacture of a product to be used on an industrial scale. These secrets are originally ultra personal and are the known only to its owner. "On the other hand "The know how contract comes with the revelation of these secrets to a third party by the person who dominates the technological process. This legal transaction is bilateral, of personal intuition and onerous, requiring the transferor to disclose to the transferee the entire production process (although the partial transfer is common), provide technical assistance and ensure the novelty of the product. In contrast, the transferee is required to absorb the knowledge transferred, not revealing them without authorization, besides paying a fee freely fixed between the parties (royalty)." ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 107.

Generally, it is assumed that the legal entity holds the copyright only in case of gratuitous disposal or purchase. A diverse situation occurs with respect to industrial property rights, more specifically, regarding the ownership of the patent, once the article 6, heading and § 2 of the IPL, besides assuring it to the author of the invention or utility model, it also acknowledges it with respect to whom the law, the contract of employment or contract for services determines[40]. In relation to this second hypothesis it should be noted that, along the lines of article 88, § 1 of the IPL, remuneration for the work of the researcher / inventor is limited to the salary as agreed, unless the contract expressly states otherwise. If there is such a prediction, the researcher may have a share in the economic gains resulting from the exploitation of the patent, upon negotiation with the person or company's internal provision.

It should be noted that

> the privilege granted to the inventor is temporary (20 years, after which the patent falls into the public domain), but during the term of the exclusive exploration period there may be the extinction of the same: act of renunciation by the holder (which may not affect rights third party), for failure to pay the annual fee due to the INPI for the protection given to the inventor by the state or by expiry (this will be decreed ex officio or upon request of any interested legitimate party if, after 2 years of the grant of the first license, the owner of the invention has not begun its exploitation.[41]

However, the extinction of the patent does not affect the moral rights of the inventor by virtue of the characteristics of the non-waiver and indispensability.

IV - The general right of personality and the tutelage of legal entities

Recently, it began to be discussed, especially in the core of the German doctrine, the possibility of recognizing the existence of general rights of personality also in relation to legal entities (or collective),

[40]Segundo Alexandre Ferreira de Assumpção Alves, a aquisição pela pessoa jurídica do direito sobre a invenção pode ser originária, quando ficar configurada a ocorrência de uma das hipóteses seguintes: "1ª) a existência de um contrato de trabalho cuja execução ocorra no Brasil e tenha por objeto a pesquisa ou a atividade inventiva (art.88,*caput*, 1ª parte); 2ª) a existência de um contrato de prestação de serviços em que a natureza destes sejam atividades de pesquisa ou inventivas (art.88, *caput*, parte final) e; 3ª) quando na vigência de um contrato de trabalho houver a criação de bem patenteável, obtido através da contribuição pessoal do empregado e de recursos, dados, meios, materiais, instalações ou equipamentos do empregador, ressalvada expressa disposição em contrário (art.91, *caput*)". ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 111.

[41]"o privilégio concedido ao inventor é temporário (20 anos, após os quais a patente cai em domínio público), mas durante a vigência do período de exploração exclusiva pode haver a extinção do mesmo: por ato de renúncia do titular (que não pode prejudicar direitos de terceiros); por falta de pagamento da retribuição anual devida ao I.N.P.I. pela proteção dada ao inventor pelo Estado, ou pela caducidade (esta será decretada de ofício ou a requerimento de qualquer legítimo interessado se, decorridos 2 anos da concessão da primeira licença, não tiver sido iniciada a sua exploração pelo titular da invenção" IN: ALVES, Alexandre Ferreira de Assumpção, op.cit., pp. 115-116.

namely admitting a law that " unfolds in multiple legal powers and faculties, e.g., in consonance with the broad spectrum of goods of human personality which constitutes its legal object"[42].

Rabindranath V. A. Capelo de Sousa points out the existence of three different theories on the theme. On the one hand, there are the authors who are inclined not to accept the idea of a general right of personality of legal entities, with the consequent recognition of "natural titles of personality" to the same. On the other hand, there are the authors that recognize the existence of a general right of personality to legal entities, delimited by their statutory and legal functions of much smaller extent than that of natural persons. This position rests on the non-equation of legal entities to natural persons for purposes of personal rights and, according to Rabindranath V. A. Capelo de Sousa, is the prevailing current. Lastly, there are still authors who claim that the legal entities are endowed with a "real personality", analogous to that of natural persons and equipped with individuality, with self-worth, dignity and particularities and, therefore, with a broad general right of personality[43].

It should be noted that the referred author is inclined to adopt the majoritarian conception. He claims that the legal capacity of legal entities is not of a general character - but of a specific nature, merely in function of the particular purposes for which each is bound - and therefore, with regard to personality rights, the goods related to physical, emotional, spiritual and animic personality become immediately excluded, i.e.,

> any special rights of personality or any goods contained in the general right of personality, that are inseparable from human personality, e.g., the right to life, the right to physical, spiritual and animic integrity, the right to freedom of physical movements, the right to sexual liberty, the rights over the corpse and on detachable organs or elements of it [...][44]

The author also states that in relation to other goods, particularly those pertaining to the social sphere, "as certain manifestations of freedom, identity, the good name, the reputation, the sphere of secrecy and initiative"[45], may set up similar interests to those of natural persons and thus be worthy of tutelage. Hence, special rights of personality expressly provided by law would belong to legal entities, as well as those rights that are necessary or convenient to the pursuit of their ends.

At this point he also deals with the author of the problematic involving the legal entities governed by public law. Under his analytical perspective,

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[42]SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 601.
[43]SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 600.
[44]"quaisquer direitos especiais de personalidade ou quaisquer bens integrantes do direito geral de personalidade, que sejam inseparáveis da personalidade humana, *v. g.*, o direito à vida, o direito à integridade corporal, espiritual e anímica, o direito à liberdade de movimentos físicos, o direito à liberdade sexual, os direitos sobre o cadáver e sobre órgãos ou elementos dele destacáveis [...]"SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 595
[45]SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 601.

> only to a much lesser extent than the private legal entities is the acquisition of contents properly adapted from the general rights of personality of natural persons admissible to public legal entities, rights that are inseparable from and that are consistent with the nature of public legal entities. Private legal entities are in a sense, a projection a substitute or continuation of individual human desires while in public bodies, public interests and purposes predominate.[46]

V - Legal Entity and Moral Damage

A theme that has also been the target of discussions and that derives from the very admissibility or opposition to the extension of rights of personality to legal entities, resides in the possibility of these to suffer moral damage.

On the topic Gustavo Tepedino states, that by discarding the equality of rights typically pertaining to natural persons; it is clear that it is not exactly the honor of the legal entity that is intended to be protected and, besides that, the tutelage of the image of that legal entity, a commonly mentioned attribute, has a different meaning other than that assigned to the image of the natural person.

Thus, the author aforementioned is inclined for the impossibility of the right to the compensation for moral damages to be granted to legal entities, since moral damage is inextricably linked to the measurement of the pain and suffering inherent to man (natural person). Whereas an eventual attack on a human being affects its dignity, injuring the individual psychologically and morally, in the case of a legal entity, this affects its ability to produce wealth, in the context of the economic activity which it develops legitimately.

However, the author points towards the necessity to distinguish those legal entities that aspire to profit and those that orient themselves by other purposes, since in the latter case,

> It cannot be considered [...] that the attacks suffered by the legal entity are ultimately expressed in the reduction of their profits being genuinely a sort of material damage. Considering then that these are nonprofit legal entities it would be possible to admit a configuration of institutional damage, here conceptualized as those which, unlike

[46]"só em muito menor medida do que quanto às pessoas colectivas privadas é admissível o reconhecimento às pessoas colectivas públicas de conteúdos devidamente adaptados do direito geral de personalidade das pessoas singulares, não inseparáveis destas e que se mostrem compatíveis com a natureza das pessoas colectivas públicas. É que, as pessoas colectivas privadas, são, de certo modo, uma projecção, um substituto ou uma continuação de vontades humanas individuais, enquanto nas pessoas colectivas públicas predominam fins e interesses públicos" SOUSA, Rabindranath V. A. Capelo de, op.cit., p. 603.

> moral or material damage, wound a legal entity in their credibility or reputation, off-balance-sheet, once informed by the guiding principles of private economic initiative.[47]

This positioning - underpinned by the measurement of pain and suffering, biological phenomena unique to men - is ordinarily consolidated in minority tendency[48].

Danilo Doneda though also considering that the protection of the interests of the legal entity through rights of personality is something that does not fit into the trajectory and function of such rights, refers to the fact that the Brazilian legal system recognizes hypotheses of protection of rights of personality of legal entities, especially in cases concerning the image and honor. In this sense he mentions, the vote of the Minister Ruy Rosado de Aguiar in which he presents a statement of reasons that separates objective and subjective honor[49]. Briefly, it can be said that this second current advocates that the extension of the technique of rights of personality for the tutelage of the legal entity allows the recognition of the appropriate protection, in particular in what it concerns the image and honor. One should, however, distinguish objective and subjective honor, restricting the possibilities of the offense only to legal entities, in relation to the first.

Furthermore, the author, despite his disagreement, alludes to the score sheet 227 of the Supreme Court which reflects the understanding of that court in the sense that "the legal entity may suffer moral damage". This formula plays an important role in the defense of competition and free enterprise, the legal entity is thus liable to suffer hardly estimable losses as a result of any harm to its image or honor. However, at this point, he notes that "the reference of this loss, however, is a set of factors in everything

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[47]"não se pode considerar [...] que os ataques sofridos pela pessoa jurídica acabam por se exprimir na redução de seus lucros, sendo espécie de dano genuinamente material. Cogitando-se, então, de pessoas jurídicas sem fins lucrativos poder-se-ia admitir a configuração de *danos institucionais*, aqui conceituados como aqueles que, diferentemente dos danos patrimoniais ou morais, atingem a pessoa jurídica em sua credibilidade ou reputação, sendo extrapatrimonias, posto informados pelos princípios norteadores da iniciativa econômica privada" IN: TEPEDINO, Gustavo. "A Tutela da Personalidade no Ordenamento Civil-constitucional Brasileiro" *in Temas de Direito Civil*. 3 ed. Rio de Janeiro: Renovar, 2003, p. 57.

[48]ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 121.

[49]"When it comes to legal entity, the subject of the offense to the honor proposes an initial distinction: subjective honor, inherent to individual, which is in the psyche of each and may be offended by acts that reach their dignity, self-respect, self-esteem etc., causing pain, humiliation, shame; objective honor, external to the subject, which is the respect, admiration, appreciation, consideration what others dispense to the individual. Therefore it is said to be an injury an attack on subjective honor, to the dignity, whereas defamation is injury to the reputation that the victim enjoys in the context of the social where they live. The legal entity, creation of the legal order, has no ability to feel pain and emotion and is therefore deprived of the subjective honor and immune to injury. It may suffer, however, attack to the objective honor, since it enjoys a reputation with third parties and it is possible to be undermined by acts affecting its good name in the civil or commercial world where it operates. "STJ. RESP 60.033-2 (DJ 27.11.1995, p.40893).

different than they would be for the human person by reflecting on a complex of patrimonial relations aimed at profit and efficiency, and it is within this environment that it should be evaluated.[50]"

At last, the current headed by Alexandre Ferreira de Assumpção Alves urges that

> it is the duty of the State to protect the name and reputation of the legal entity, basing constitutional tutelage precisely in sections V and X of article 5, with the aim of preserving such entities, curbing the practice of irresponsible and grave acts which may cause moral damage, with or without reflections of patrimonial nature.[51]

This positioning is therefore based in the items V and X of the article 5 of the Magna Carta and is corroborated by the provision contained in article 6, item VI of the CDC, since the referred device ensures compensation for moral and patrimonial damages, be it individual, collective or diffuse. It must be kept in mind that article 2 of the aforementioned legal instrument considers it as a consumer "any person or entity who acquires or uses products or services as end."

Additionally, this conception seeks to safeguard the credibility and respectability of the legal entity through the notion that, "after the 1988 Constitution, the notion of moral damages is no longer restricted to *pretium doloris* covering also any attack on the person's name or image, natural or legal [...] "[52], i.e., the legal entity may propose _ responsibility lawsuit based in both material damage as well as in moral damage.

Reaffirming the latter conception, follows the summary now attached

> CIVIL LAW_ LEGAL ENTITY_ Checkbooks_ LOSS_ INAPPROPRIATE EMISSION_ MORAL DAMAGES_ REDRESS_ SUMMARY 227/STJ_
> 1 - The responsibility for the misplacement of checkbooks is of the bank that must compensate the legal entity account holder (docket 227/STJ) being unnecessary to prove concrete patrimonial reflection_ Precedents of the Third and Fourth Class_
> 2 - Special Feature known and, with the application of the law to the species partially provided, to restore the conviction for moral damages, however, limited in amount to $ 20,000.00.
> 3 - Preliminary article 535 of the CPC impaired.[53]

VI – Conclusions

[50]DONEDA, Danilo, op.cit., p. 55.
[51]"é dever do Estado proteger o nome e a reputação da pessoa jurídica, fulcrando a tutela constitucional precisamente nos incisos V e X do art. 5º, com o escopo de preservar tais entes, coibindo a prática de atos irresponsáveis e gravosos que podem provocar danos morais, com ou sem reflexos de índole patrimonial" IN: ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 123.
[52]TJRJ, 2ª CC, apel. nº 5.943/94. rel. Des. Sérgio Cavalieri Filho, in ADCOAS – Dano Moral, Jurisprudência *apud* ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 127.
[53]STJ, RESP 53.7713 / PB, Relator (a) Ministro FERNANDO GONÇALVES, Órgão julgador: T4 - QUARTA TURMA, DJ 05.09.2005, p. 414.

The provisions of the Civil Code of 2002, regarding the rights of personality, ultimately consecrated some positions already present, although sparsely in the law or jurisprudence and the doctrine.

Thus, in the words of Gustavo Tepedino in this respect the legislature has been "engineer of works carried out" for such rights "are protected in our legal culture since at least the political pact of October 1988."[54]

In fact the legislator has not gone beyond compiling the work done by Orlando Gomes in his Provisional Draft of the Civil Code dated from 1963, which, although praiseworthy, is an earlier stage of the tutelage of human personality by civil law.

Another aspect to be emphasized is the need to break with the typifying perspective and to seek subsidies in the Federal Constitution to interpret these precepts. This approach civil and constitutional is crucial in order to have an effective tutelage of the human person in its most varied aspects.

Additionally, in relation to the central theme of this study, it can be said that legal entities should be allowed as holders of personal values and motivations and thus it is imperative to recognize rights of personality in relation to them that conform to the individual purposes for which each is bound[55].

It is accurate to highlight the situation of the companies that do not register their constitutive acts, as they are stripped of a legal personality and, "therefore, cannot receive the tutelage of the law in regard to rights of personality. However, its irregularity does not exempt them from tax obligations nor deprive them of procedural capacity, both active and passive. "[56].

It is necessary to also address the question concerning the existence of a general right of personality also in relation to legal entities. Even if admitting this thesis, it should be recognized, as has been pointed out, that the legal capacity of legal entities is not general character, but specific in nature, and thus the goods inherent exclusively to individuals become immediately excluded.

At last, regarding the recognition of moral damages to legal entities, despite the understanding of part of the doctrine for the inadmissibility, one must attend to what articles 5, items V and X of the Constitution and 6, item VI of CDC, as well as the score sheet 227 of the Supreme Court provide. Thus, the unwavering conclusion that one reaches is that the legal entity can propose a responsibility lawsuit based in both material damage as well as in moral damage.

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[54]TEPEDINO, Gustavo, editorial da *Revista Trimestral de Direito Civil* nº 7. Rio de Janeiro: Editora Padma, jul.-set. 2001, pp. III-5.

[55]In this particular, the positioning previously espoused in this article is modified "Direitos da Personalidade e Código Civil de 2002: uma abordagem contemporânea" *inRevista dos Tribunais*, v.853, São Paulo: Revista dos Tribunais, novembro, 2006, pp. 69-70.

[56]ALVES, Alexandre Ferreira de Assumpção, op.cit., p. 131.

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