# *Post-Mortem* Data Protection and Succession in Digital Assets under Spanish Law

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## Abstract

This contribution analyses a hot topic across Europe: the issue of *post-mortem* data protection and succession in digital assets focusing on Spanish Law. Their protection through the instruments provided by the Spanish Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights and the Catalonian Law 10/2017, of 27 June, on digital wills and amending the Second and Fourth Books of the Catalonian Civil Code are good samples of the interaction amongst data protection, contract law and inheritance law in this field, and will be the object of our study.

**Keywords:** *post- mortem* data protection, contract law, inheritance law, digital assets, digital content, digital will, digital inheritance.

## 1 Introduction

Over the last few years, from a general perspective, the issue of *post-mortem* data protection and succession in digital assets has become topical under Spanish law[2]. In this regard, the concrete purpose of this chapter is to contribute to this recent debate referred, as announced, to the *post-mortem* protection of the deceased's data and the inheritance of digital content or digital assets[3], protected as personality or as property elements

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[2] There are a series of previous contributions in which I have dealt with the topic. See Otero Crespo (2019), pp. 89-133; Otero Crespo (2020), pp. 1- 10; Otero Crespo (2021), pp. 367- 378.

[3] In this context, 'digital content' does not always have the meaning established in Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Article 2 of Directive (EU) 2019/770 states that 'For the purposes of this Directive, the following definitions apply: (1) 'digital content' means data which are produced and supplied in digital form'. On the other hand, the concept of 'digital assets' has been embraced by the American Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA, 2015). According to this instrument, Section 2. Definitions '(10) 'Digital asset' means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record'. This Act governs access to a person's online accounts when the account owner dies or loses the ability to manage the accounts. Furthermore, it extends the power of the fiduciary to manage not only the tangible property but also digital assets (See

respectively. On this matter, as a preliminary question, it is required to differentiate between the personal and the patrimonial aspects of succession, even though the two are sometimes intertwined and difficult to dissect in the digital environment. For the former, the idea of the digital trace or fingerprint, connected to the protection of the digital identity, means that the personal data of the deceased must be protected *post-mortem*; for the latter, the notion of inheritance, the succession *mortis causa* in the digital assets[4].

To achieve the abovementioned aim, a series of general issues will be outlined, which are destined to take into greater prominence in a *sui generis* field in which there is a clear intersection amongst inheritance law, data protection law and contract law.

The starting point is that it is an undeniable reality that people are making intensive use of the Internet, both from a professional and personal perspectives. Focusing on the second of these, the personal sphere, it seems obvious to point out that any average digital citizen of the 21st century uses e-mail accounts and instant messaging applications for communication; social networks to publish ideas, photographs or share other content; stores documents, videos or snapshots in the cloud; acquires goods and contracts services in digital media; and even opens a bank account or stores an online balance to make certain payments. Although the behaviours described have in common the fact that they are options facilitated by the development of the Internet, the truth is that they give us a good example of the heterogeneity of actions that can be adopted as Internet users and whose repercussions can and often go beyond the end of the physical existence of its 'owner'[5]. And this statement is based on the fact that, on the one hand, the digital fingerprint, typically made up of non-patrimonial contents, transcends the physical existence of the individuals, and on the other hand, the activity of the individuals may have created a 'digital' or 'virtual estate', so called in contrast to the traditional 'analogue estate'[6]. Thus arises the category of what the American doctrine has baptized as 'digital assets' (or also, 'digital estate'), that is, elements, goods, or digital assets[7], which in our Spanish literature has been denominated as 'herencia digital' or 'herencia virtual'[8].

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https://www.uniformlaws.org/viewdocument/final-act-with-comments-40?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=librarydocuments. Accessed 1 April 2023).

[4] Cámara Lapuente (2020 a), pp. 57-58.

[5] In many cases there is not an issue related to ownership as licenses of use are applicable.

[6] Navas Navarro (2020), pp. 60- 61.

[7] From a general perspective, it comprises any information or file of digital nature stored locally or online. See Santos Morón (2018), p. 416.

[8] Authors have distinguished between 'herencia analógica' (analogue estate) and 'herencia digital' (digital estate). However, it should be noted that this division is artificial when dealing with inheritance law as the so-called 'digital estate' must follow the general succession law rules. In this regard, Article 659 of the Spanish Civil Code states that 'An estate comprises all properties, rights and obligations pertaining to a

As can be inferred from the foregoing, in a broad sense, the category of 'digital assets' or 'digital content' is complex and, consequently, difficult to conceptualize and systematize[9]. It would include email accounts, web pages, blogs, social network accounts, documents, videos, or photos stored in the cloud, etc., in essence what we have just referred to as digital contents of a typically non-patrimonial nature, which value is normally sentimental and lacks clear economic content for the deceased and for those who survive him. Also included in this non-closed catalogue would be other items with a clear economic value, such as music, movies, books or, in a more obvious way, the balance available in certain payment applications or cryptocurrencies, as well as redeemable points obtained in loyalty programs[10].

In the face of this heterogeneity, a common point emerges: the *mortis causa* transferability of these 'digital assets' (and even at an earlier point in time, their accessibility) is conditioned in most cases by the existence of a binding contractual relationship between the company that provides the product or service (e.g., Google, Facebook, Apple, Amazon, etc.) and the person who makes use of these services or acquires these products (who has adhered to conditions or terms that they are usually unaware of). And as it could not be otherwise, on many occasions these contracts or agreements of use (typically 'free of charge'[11]) prevent or limit access to the information stored in their systems, making it impossible or difficult to obtain effective knowledge of potential patrimonial contents that may integrate the estate of the deceased person (and even non-patrimonial contents)[12]. Closely connected with the problem of accessibility

person, unless they are extinguished as a result of his death'. See Fernández- Bravo Francés (2016), p. 54; Navas Navarro (2020), p. 60; Ginebra Molins (2020), p. 916; Solé Resina (2018), pp. 421- 422; Otero Crespo (2019), p. 103; Otero Crespo (2021), p. 375. However, it has been suggested that there might be nuances in the light of the peculiarities of certain digital goods and services, in order to the protection of other interests in addition to those of the deceased (secrecy of one's own and third parties' communications, the contours of the defence of the deceased's memory, intellectual property of third parties, etc.). See Cámara Lapuente (2019), p. 411.

[9] Otero Crespo (2019), p. 92 ff.

[10] According to Navas Navarro, up to nine different legal relationships related to the digital behaviour of the deceased can be considered as part of his or her estate: social networks ('redes sociales'), email accounts ('cuentas e- mail'), online game accounts ('cuentas para juegos online'), accounts to use contents online ('cuentas para usar contenido online'), cloud computing services ('servicios de almacenamiento de datos en la nube'), sharing economy platforms ('plataformas de la economía colaborativa'), forums, blogs and chats ('foros, blogs y chats'), online stores ('tiendas online'), and, online banking services or online payment systems ('banca online' and 'sistemas de pago virtuales'). For further details, Navas Navarro (2020) pp. 63- 65.

[11] In some cases, the service is apparently provided free of charge. However, there is always a consideration on the part of the user, which consists of the transfer of certain data to the internet service provider. See, e.g., Santos Morón (2018), p. 416.

[12] Under Spanish law these aspects may be studied in connection with the laws on the protection of consumers and users and the unfair terms regulations. In this regard, some of these contractual terms might

and the need to combine this with the protection of personality rights (typically the right to privacy or secrecy of communications) is, once these are known, their transferability. Its limitation or prohibition contractually established by service providers may clash with the traditional foundations of inheritance law, insofar as it would call into question the universality of the inheritance phenomenon or the very principles on which each system is based[13].

In short, what happens after the death of the person with these contents or digital patrimonial and non-patrimonial assets will be the subject of our study over the next pages. For this purpose, it should be born in mind that these digital assets, comprise both personal or non-patrimonial and patrimonial elements which, from the perspective of personal data protection legislation, could be considered 'personal data'[14]. However, as we shall see, their processing is excluded from the scope of application of the 2018 Spanish *ad hoc* data protection rule (Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights), without prejudice to the fact that persons linked to the deceased for family or *de facto* reasons, or their heirs, are allowed to request access to the data, their rectification or deletion, where appropriate, in accordance with the directions provided by the deceased (article 3). Furthermore, and connected to the inheritance law aspects, the Organic Law 3/2018 refers also to the 'Right to a digital will' (article 96). Additionally, the regional Catalonian legislator, prior to the Spanish, had passed a Law on digital wills in 2017 (Law 10/2017, of 27 June, on digital wills and amending the Second and Fourth Books of the Catalonian Civil Code).

## 2 The General Data Protection Regulation of 2016 and the Spanish Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights

be examined from the General Law for the Protection of Consumers and Users ('Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias') perspective and considered as unfair terms. For further details, Navas Navarro (2020), pp. 68 ff.

[13] One outstanding European example of this is the German Supreme Court's decision of 2018 (BGH 12.7.2018, Case III ZR 183/17) where the Court held that social network accounts, like most contractual positions, pass to the heirs (in the case, the parents of a 15- years old girl who has died as a result of a subway accident in Berlin, probably committing suicide). The BGH considered that the principle of universal succession must prevail. See Resta (2018), pp. 201- 204; Cámara Lapuente (2019), pp. 379- 381; Patti and Bartolini (2019), p. 1183.

[14] Navas Navarro (2020), pp. 66- 67.

As is well known, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter GDPR) assumed among its objectives to lay down rules on the protection of individuals with regard to the processing of personal data and rules on the free movement of such data. However, it excludes from its scope the protection of personal data of deceased persons, without prejudice to the possibility for Member States to lay down their own rules[15]. In the light of this wording, some Member States have chosen to establish rules encouraging the protection of the data of deceased persons. For example, legitimising the heirs or other subjects to exercise the data subject's rights upon death (Italy), or empowering the heirs to request the data controller to update the data in order to reflect the death of the data subject (France)[16].

In the case of Spain, the entry into force of the GDPR imposed the need to review and adapt Organic Law 15/1999, of 13 December, on the Protection of Personal Data. And the result of this work of revision and adaptation to European regulations is Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights (hereinafter OLPPDGDR).

As stated in its first article, the OLPPDGDR is intended to adapt the Spanish legal system to the GDPR, to complete its provisions, as well as to guarantee the digital rights of citizens, all in accordance with the provisions of article 18.4 of the Spanish Constitution[17]. As is the case with the European instrument, it does not generally focus on the data of deceased persons, excluding them - albeit with a nuance - from its scope (article 2. 2 c) OLPPDGDR) and with the exception of a couple of theoretically coordinated provisions, articles 3 and 96, which content and scope will be analysed in the next sections[18].

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[15] 'This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons' (Recital n. 27 GDPR). See also Recitals n. 158 and n. 160. It has been sustained that the margin of freedom inferred from Recital n. 27 GDPR is high, since national legislators may or not may apply data protection to deceased persons. And in the affirmative case, they can decide whether to establish their own specific legal regime or, on the contrary, to extend all or part of the rules of the general legal regime applicable to the data protection of living persons. See Minero Alejandre (2018), pp. 159- 160.

[16] See Resta (2019), p. 97.

[17] Article 18 of the Spanish Constitution regulates a fundamental right on the right to intimacy and the inviolability of the home. Its paragraph 4 states that 'The law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights'.

[18] A (previous) version of this section 2 is published in Otero Crespo (2019), pp. 112 ff.

### *2. 1 Article 3 OLPPDGDR: the processing of the data of deceased persons*

Firstly, article 3 OLPPDGDR articulates a right of access and, where appropriate, of rectification or erasure of data in favour of 'persons related to the deceased for family or *de facto* reasons as well as their heirs'[19]. Paragraph 1 states that these persons (or groups of persons) may contact the controller or processor, unless the deceased has expressly prohibited it, or a law so provides. However, 'such prohibition shall not affect the right of the heirs to access the data relating to the deceased's estate'. The wording of the first paragraph raises several controversial issues.

(1) The Spanish legislator makes no mention of the extent or degree of the relationship (kinship or factual), so that the list of persons potentially entitled to proceed accordingly could be dangerously numerous. This amplitude seems to respond to the fact that such intervention is not based on the hereditary succession – legatees are not explicitly mentioned, as we will resume in our reflections on article 96 OLPPDGDR-[20], so that it is not personalised in those called to the inheritance, but on the need to protect the (virtual) *memoria defuncti*[21]. Additionally, the article does not arbitrate how to resolve potential conflicts in the event of the concurrence of several legitimated parties. The issue is not trivial, because these entitled parties may raise identical claims (e.g., rectification) or incompatible requests (e.g., two entitled parties request in a contradictory manner one the rectification and the other the erasure of data). In this point, the Spanish legislator has omitted or distanced itself from the order established in the early eighties by the Organic Law 1/1982 on Civil Protection of the right to honour, personal and family privacy and one's own image[22], so it seems that in the absence of such priority and agreement between

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[19] The regulation of data protection of deceased persons is considered to be one of the major novelties introduced by the new OLPPDGDR. See Plaza Penadés (2018), p. 1.

[20] In this regard, there is a clear lack of coherence or coordination between the two branches of law which are at stake: succession law and data protection law.

[21] Otero Crespo (2020), pp. 1- 2.

[22] Article 4 of the Organic Law 1/1982 (amended in 2010) states that: 'One. The exercise of civil actions for the civil protection of the honour, privacy or image of a deceased person shall be the responsibility of the person designated for this purpose in the will. The designation may fall on a legal entity.
Two. If there is no designation or if the designated person has died, the spouse, descendants, ascendants, and siblings of the person concerned who were alive at the time of his or her death shall be entitled to seek protection.
Three. In the absence of all of them, the exercise of the actions for protection shall be the responsibility of the Public Prosecutor's Office, which may act *ex officio* at the request of the interested party, provided that no more than eighty years have elapsed since the death of the person concerned. The same time limit shall be observed when the exercise of the aforementioned actions corresponds to a legal person designated in a will.
Four. In cases of unlawful interference with the rights of the victims of a crime as referred to in Article 7(8), the injured party or person harmed by the crime committed, whether or not they have brought a criminal or civil action in the preceding criminal proceedings, shall be entitled to exercise the actions for protection. The Public Prosecutor's Office shall also have standing in all cases. In the event of death, the

those who claim to have standing, it will have to be a third party (e.g., Courts, arbitrators, etc.) who settle the dispute. In the absence of a clear criterion, and always bearing in mind that we are dealing with cases in which there is no express designation of the deceased, we could advocate the analogical application of the rule established in paragraph 2 of article 4 Organic Law 1/1982, which contains a 'cascading list' of subjects entitled for the exercise of civil actions for the civil protection of the honour, privacy or image of a deceased person against offences committed after his or her death[23]. The underlying reason is that the philosophy of article 3 OLPPDGDR is to protect the digital fingerprint of the deceased, which might be understood as the transposition to the digital sphere of the protection of the *memoria defuncti* foreseen in the Organic Law 1/1982[24]. If this proposal is accepted, the spouse (or person linked by an analogous relationship of affectivity, applying article 3 of the Spanish Civil Code), descendants, ascendants and siblings of the deceased would be entitled to seek protection[25]. In this group of subjects, both family reasons (or *de facto*) and the condition of heirs may concur.

(2) Similarly, no light is shed on the exception concerning the express prohibition on the part of the deceased. In the absence of formal requirements, the question arises as to the validity of oral statements, which are certainly not advisable given the difficulty of proving them, or what would happen in the case of express statements recorded in documents that are contradictory in their content[26]. It seems necessary to wait for the implementation of the register provided for in the OLPPDGDR[27], although it is not expressly mentioned in this first paragraph, to find out whether this opposition must be instrumented in accordance with some kind of *ad solemnitatem* requirement (not necessary by law).

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provisions of the previous sections shall apply'. On the legal standing foreseen in this article 4, see Minero Alejandre (2018), p. 91 ff; Gutiérrez Santiago (2019), pp. 216 ff.; Ammerman Yebra (2021), pp. 174- 176.

[23] However, the protection granted in the area of *post-mortem* data protection does not concern defence actions against unlawful intrusions by third parties, but the availability of the deceased's personal data to the persons entitled to do so, including the right of access. See Cámara Lapuente (2020 a), p. 60.

[24] On legal standing, Cámara Lapuente seems to disagree with the similarities between the Organic Law 1/1982 and the OLPPDGDR (and even article 18 of the Law 41/2002, of 14 November, regulating patient autonomy and rights and obligations regarding clinical information and documentation). For instance, the legal interests protected are very different in the three laws: in the Organic Law 1/1982, the broad legal standing is justified in the defence against violations of the right to privacy, honour or image of the deceased; in the access to the clinical history, contents that can be accessed are very restricted and there must be some justification related to health risks; and finally, accessing the social network accounts of the deceased has nothing to do with the previous laws. See Cámara Lapuente (2019), pp. 424 -425.

[25] In the absence of all of these, see Article 4 paragraph 3 of the Organic Law 1/1982 above.

[26] The express prohibition can be included in a will.

[27] In early 2023, this Register has not been set up yet.

(3) But undoubtedly, the part of the provision that most attracts our attention is the last clause of the first paragraph: 'Such prohibition shall not affect the right of the heirs to access the data of the deceased's assets'[28]. This wording has several drawbacks. Thus, in the first place, although the legislator's intention is laudable, in that it seems to recognise the dichotomy between content - or data - of an extra-patrimonial nature and those of patrimonial significance, it is no less so that it will be very difficult to know *a priori* whether there is patrimonial content behind the deceased person's data. It would be easier if there is a will, or a manifestation externalised in another way by the deceased in which this information is revealed. If this does not exist, it seems unlikely that it would be known by those entitled under the OLPPDGDR. As a logical derivation, it cannot be ruled out either that these patrimonial contents end up disappearing or becoming very difficult to trace or identify, especially if one of the entitled parties requests the erasure of the digital fingerprint and the provider proceeds to complete the request. We could even be faced with a case of liability of the provider *vis-à-vis* the heirs -and even legatees when the asset or right that is bequeathed is linked to the deceased' digital assets. This would happen if, for example, they comply with the will issued by one of the entitled parties (not the specific heirs – nor legatees) by cancelling the data, and it subsequently becomes known that among those data there were some revealing information on patrimonial content, access to which would no longer be possible[29].

Secondly, and no less relevant, the will of the deceased prohibiting access could lack *post-mortem* effectiveness. Once again, the wording of the provision would allow access to the heirs simply by arguing the existence of potential contents (or data) with patrimonial transcendence. The rule does not require even the slightest indication of proof to render inoperative any provision of the deceased vetoing access to his or her data.

Moreover, the wording of the remaining paragraphs of article 3 OLPPDGDR is not exempt from criticism either. In this regard, paragraph 2 provides that 'the persons or institutions that the deceased had expressly designated for this purpose may also request, in accordance with the instructions received, access to the deceased's personal data and, where appropriate, their rectification or erasure'. The provisions contained in the previous paragraph are replicated with respect to the rights of access, rectification, or erasure,

[28] Again, legatees are out of the picture.
[29] A different case may occur if the heir does not exercise the action for petition for inheritance, which is subject to the limitation period of 30 years *ex* art. 1963 of the Spanish Civil Code, within a reasonable period after the death of the deceased and the assets are lost (the doctrine of unfair delay might be applicable).

always following the mandate of the *de cuius*. However, no reference is made to the right of the heirs to access the data of the deceased's estate. Even so, we understand that this right remains untouched, as it would make no sense to allow it in the cases of the first paragraph and not in those of the second.

The last clause of the paragraph adds that 'a Royal Decree will establish the requirements and conditions for accrediting the validity and effectiveness of these mandates and instructions and, where appropriate, the registration of the same'. As noted above, in this case there is a reference to a future regulation in charge of regulating these 'mandates and instructions'.

Finally, the provision closes with two references to the death of minors or persons with disabilities. Thus, 'In the event of the death of minors, these powers may also be exercised by their legal representatives or, within the framework of their competences, by the Public Prosecutor's Office, which may act *ex officio* or at the request of any interested natural or legal person'. It seems that in the case of minors, we cannot ignore the fact that in most cases they will be minors of a certain age, since the terms of access to goods and services require minimum ages. Theoretically, such minors, depending on their degree of maturity, could have expressed their will *post-mortem*[30], but it seems that it will be usual for the powers before the service providers to be exercised by their legal representatives or by the Public Prosecutor's Office, acting *ex officio* or at the request of any interested party[31].

In the case of the death of persons with disabilities, these powers may also be exercised, 'in addition to those mentioned in the previous paragraph, by those who have been designated for the exercise of support functions, if such powers are understood to be included in the support measures provided by the designated person'. At the time of passing out the OLPPDGDR, the Spanish legislator was updated on this point, following the path set by the Draft Bill for the reform of the Spanish Civil Code on disability, through which the aim was to achieve the necessary adaptation of Spanish law to the requirements of the UN Convention on the matter. This Draft Bill has given way to the Law 8/2021, of 2 June, which reforms civil and procedural legislation to support people with disabilities in the exercise of their legal capacity. If the new regulation tends to recognise the widest range of faculties, including the right to grant a will in the proper

[30] Under the application of the rules contained in the Spanish Civil Code, minors, from the age of fourteen, may make a will, except for a holographic will (See articles 663 and 688 of the Spanish Civil Code).
[31] See Bastante Granell (2022), pp. 118 ff.

sense, it seems coherent that the person could exercise this right to express his or her digital will by him or herself. The intervention of the foreseen support person thus seems to us to be residual[32].

Lastly, the systematic organisation of the provision is not free from criticism. From our point of view, it would have been more appropriate to provide, firstly, for the autonomy of will and, secondly, to insert the rule applicable in the alternative (in the absence of instructions, the list of persons entitled to act *vis-à-vis* service providers).

### *2.2 Article 96 OLPPDGDR: the normative enshrinement of the 'right to a digital will'*

Apart from the regulation on the personal data of deceased persons, article 96 OLPPDGDR -entitled 'Right to a digital will'-, is found in another section, referring to the Guarantee of Digital Rights (Title X)[33]. This is not a right in the technical sense, and its virtuality is reduced to its merely pedagogical function[34], insofar as a legal instrument recognises the possibility for subjects to decide on the destiny of digital content. Not only does the legislator err in considering it as a 'right', but they are also mistaken in their use of the term 'digital will', which is totally non-technical[35].

What the provision enshrines is a right of access, not to the personal data for which its counterpart, article 3 OLPPDGDR, is responsible, but to the content managed by the providers of information society services. This right can be exercised because it has been provided for by the party causing the breach, by means of a positive choice or, failing that, by the rules established in a supplementary capacity. Furthermore, it establishes which actions could be carried out by the entitled parties on the social networks or equivalent services and how the possible mandates and instructions would be materially

[32] On 3 September, Law 8/2021 reforming civil and procedural legislation to support people with disabilities entered into force. See García Rubio (2021), *passim*.

[33] The Spanish literature has been critical on the regulation of the guarantees of digital rights in Organic Law 3/2018, considering that a more intense and calm reflection would have been necessary. See Piñar Mañas (2019), pp. 1 and 8-11. The author also states that a specific regulation of fundamental rights in the digital society would be more appropriate than a Title of a Law. It should be remembered that this regulation on the digital will was incorporated into the text of the Organic Law by way of an amendment presented in Congress during the processing of its Draft.

[34] E.g., Otero Crespo (2021), pp. 373-374; Cerrillo i Martínez (2021) p. 4331.

[35] Otero Crespo (2021), pp. 369 ff. However, other authors are less critical and value positively the regulation of the right to a digital will, considering that it establishes a series of 'clear and precise rules of conduct for cases that until now lacked them, despite the defects observed in the parliamentary processing of the Law' -author's own translation- (González García (2018), p. 5).

and formally implemented and what the coexistence regime would be between this rule and possible provisions passed by Spanish Autonomous Communities[36].

(I) The right of access to contents

The first paragraph of article 96 OLPPDGDR establishes that all access to content managed by information society service providers about deceased persons shall be governed by the following rules.

Firstly, 'persons related to the deceased by family or *de facto* reasons, as well as their heirs, may contact the information society service providers in order to access said content and give them the instructions they deem appropriate regarding its use, destination or deletion'. However, 'As an exception, the aforementioned persons may not access the content of the deceased, nor request its modification or deletion, when the deceased person has expressly prohibited it or when so established by law. This prohibition shall not affect the right of the heirs to access the contents that may form part of the estate'.

Without prejudice to the criticisms made of certain paragraphs of article 3, which are identical in article 96 OLPPDGDR, the general rule will be that of access to digital content by 'third parties' – legatees are not expressly mentioned again, and some of them might have a direct interest if the legacy left in the will is related to the 'digital inheritance'[37]- unless there is explicit opposition from the deceased. To a certain extent, the expected rule is reversed, with the right of access by relatives, related persons and heirs prevailing over the right to protection of the privacy of the person and those with whom he or she has communicated digitally. The justification could be found, albeit with nuances, in the doctrine of the Spanish Data Protection Agency ('Agencia Española de Protección de Datos', hereinafter AEPD) referring to Organic Law 15/1999, of 13 of December, on the Protection of Personal Data. In this sense, regarding the right of access to data (not content) of deceased persons, the AEPD has - on many occasions- recognised the right of access by relatives, in order to protect the memory of the deceased. In this

[36] The Spanish Constitution establishes a division of regulatory powers between the State and the Autonomous Communities ('Comunidades Autónomas'). In general terms, this means that, depending on the legal sphere, we can find Autonomous Community and State regulations. This distribution of competences in the Spanish Constitution is contained in articles 148 and 149. In addition, we must pay attention to the assumption of competences articulated in the different Statutes of Autonomy ('Estatutos de Autonomía').

[37] It has been sustained that the legatees should be considered included as well. See Navas Navarro (2020), p. 77. However, the exclusion might be related to the position of the heir, who is the person replacing the deceased on a universal basis.

sense, 'it would be possible for the heirs to have access to the data of the deceased provided that they are directly related to their own status as heirs (for example, access to the data necessary to know the estate or the state of certain assets of the inheritance). However, the access to information to which we refer could not be understood as related to the right of access enshrined in the legislation on the protection of personal data, but would be derived from the right of all heirs to know the estate and the state of the same, as well as to carry out the necessary actions for its determination and defence, given that the heir succeeds the deceased in all his rights and obligations as a consequence of his death, as determined in articles 651, 659 and 661 of the Civil Code'[38]. It would therefore be a right of access linked to the field of succession, but not to that established by the legislation on personal data, showing the clear disconnection between the recent regulations on the protection of personal data and the fundamentals of succession law.

In any case, we consider - and have defended[39]- that an unlimited right of access could never be granted, as it may collide with other fundamental rights, such as the right to privacy, not only of the deceased person - extinguished with the end of the personality - but also of other subjects, potentially together with the right to secrecy of communications[40]. As a result of the concurrence of these rights, it is very difficult to know to what extent it is proportionate to provide a generalised right of access. The right option would be the costliest one: a case-by-case assessment in which a tailor-made solution would be found. Respect for these fundamental rights would be weighed against safeguarding the heirs' (and even legatees) right to know whether there are assets that can be included in the estate, a fact that is also of interest to potential creditors or to the tax authorities. However, if we examine again this power that the law grants to the heirs, their right to know the contents that may be included in the estate, it seems that the letter of the law sweeps aside any respect for other rights of a fundamental nature.

[38] See Report 63/2016 ('Informe 63/2016') and Report 010601/2019 ('Informe 010601/2019') of the AEPD, p. 25.

[39] Otero Crespo (2019), p. 121.

[40] The secrecy of communications is a fundamental right also foreseen in Article 18 of the Spanish Constitution. In its paragraph 3 it is stated that 'Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary'. However, this right to secrecy of communications applies while the process of communication is taking place (See Spanish Supreme Court judgements, Criminal Chamber, 342/2013, of 17 April and 786/2015, of 4 December). Once the message has reached the receiver, we leave the scope of article 18.3 of the Spanish Constitution, without prejudice, where appropriate, to the right to privacy proclaimed in paragraph 1 of the same provision (See Supreme Court judgement, Criminal Chamber, 864/2015, of 10 December). Considering these restrictions, the right to secrecy of communications would be remotely put into question.

Moving forward in our criticisms of the provision, nothing is laid down about how the opposition/ prohibition of access is to be instrumented, and even less about who is responsible for proving its existence, leaving it to a future regulatory development to establish 'the requirements and conditions for accrediting the validity and effectiveness of the mandates and instructions and, where appropriate, the registration of the same' (art. 96.3 OLPPDGDR). In practice, over the last few years, most internet service providers have started to include clauses in their contracts or policies that allow users to declare their preferences for deciding the *post-mortem* destiny of their digital assets during their lifetime. However, the knowledge of these options offered by the service providers, as well as their effective use, can still be qualified as quite residual, especially if we take into consideration that such possibilities are due to modifications of the initially established terms of use, of which the user has only a chimerical knowledge.

Secondly, art. 96 OLPPDGDR legitimises 'the executor of the will and any person or institution that the deceased has expressly designated for this purpose may also request, in accordance with the instructions received, access to the contents in order to complying with such instructions'. For this to be the case, there must have already been an express action by the deceased during his or her lifetime, by establishing guidelines that will guide the actions of the executor or of the natural or legal person selected by himself or herself. The only disadvantage that could arise would be that of the previous disappearance of those expressly called upon to execute these digital wills, because the natural person has died or has lost the autonomy to do so, or the legal person has been extinguished. It would then be possible to consider the subrogation of the heirs in the absence of the previous ones. Furthermore, when a designated natural or legal person acts, it should be noted that this third party must refrain from executing wills that, although established by the deceased, may be harmful to the interests of the heir(s) or legatee(s). In this regard, it would be possible that a mandate to suppress the content affects the inherited estate. Therefore, this third party cannot execute wills that are contrary to the legal system[41].

Thirdly, and alike article 3 OLPPDGDR, the provision refers to cases of death of minors or disabled persons. For the first of these cases, the powers described in the previous paragraphs may also be exercised 'by their legal representatives or, within the

[41] See, with reference to the executor, Article 901 of the Spanish Civil Code ('The executors shall have all the powers expressly conferred on them by the testator and which are not contrary to the law').

framework of its powers, by the Public Prosecutor's Office, which may act *ex officio* or at the request of any interested natural or legal person'[42]. For the second, 'in the event of the death of persons with disabilities, these powers may also be exercised, in addition to those mentioned in the previous paragraph, by those who have been designated to exercise support functions if such powers are understood to be included in the support measures provided by the designated person'.

(II) The actions that the entitled persons may carry out on the social networks or equivalent services and the formal and material requirements that the instructions or directions of the deceased must comply with.

Paragraph 2 of article 96 OLPPDGDR insists on the need to heed the instructions or directions of the deceased, and only in the absence of such instructions, 'the persons entitled in the previous section may decide on the maintenance or deletion of the personal profiles of deceased persons on social networks or equivalent services'. In these circumstances, 'the person responsible for the service who is notified, in accordance with the previous paragraph, of the request to delete the profile, must proceed without delay to do so', without establishing a maximum period for action or the need for reliable notification of such a fact. The question also arises as to what will happen in the event that the deceased has left contradictory instructions. Although paragraph 3 states that a Royal decree will establish the requirements and conditions for recognizing the validity and effectiveness of the mandates and instructions, as well as, where appropriate, their registration, the fact is that – as already stated- we are still left with this regulatory lacuna. This Royal decree should shed light on some controversial questions, easily imaginable in the event of disagreement: Should the will expressed and recorded in this possible register or the provisions of the will prevail? Or the option selected by the service provider? Or will the clauses established by the service provider be ineffective if the deceased has opted to express his will through this register or in the will?

(III) The coexistence between state and (potential) autonomous regulations

Article 96 OLPPDGDR ends with a rather ill-advisedly worded paragraph 4. In this sense, it specifies that 'the provisions of this article in relation to persons deceased in the Autonomous Communities with their own civil, foral or special law shall be governed

[42] Again, Bastante Granell (2022), pp. 118 ff.

by the provisions of the latter within their scope of application'. The legislator is wrong to identify the application of autonomous civil law with the fact of death in such territories. As is well known, as far as personal status is concerned, regional status ('vecindad civil') is the determining factor for the application of ordinary law or regional ('special or foral') civil law. This is governed by article 14 of the Spanish Civil Code, the place of death of the deceased being irrelevant. Therefore, it seems that the legislator should have referred to 'deceased persons with regional status in an autonomous community with its own civil law'. On the other hand, the regulatory capacity of the Autonomous Communities with their own law is indirectly recognised, although in the Catalonian case their competence to regulate certain aspects has been attacked, as discussed in the following section[43].

## 3 Law 10/2017, of 27 June, on digital wills and amending the Second and Fourth Books of the Catalan Civil Code

More than a year before the approval of Organic Law 3/2018, the Catalonian legislator undertook the first specific regulation in the Spanish legal sphere, with Law 10/2017, of 27 June, on digital wills and amending the Catalonian Civil Code (hereinafter CCCat)[44]. The Catalonian law maker was thus at the forefront of the Spanish State insofar as it crystallised an *ad hoc* regulation, admitting, even indirectly, that positive law was not in a position to provide a response to these new realities[45].

Through this Law, issued under the civil law competence of article 129 of the Catalonian Statute of Autonomy, Book II, relating to the person and the family, and Book IV, relating to inheritance, were amended. This also regulated digital wills in the event of death and 'supervening loss of capacity' and included a reference to minors/persons under guardianship.

Certain articles were the subject of an action of unconstitutionality ('recurso de inconstitucionalidad'), which was resolved through the Judgement of the Plenary of the

[43] Otero Crespo (2019), pp. 124- 125; Otero Crespo (2020), p. 8.

[44] Ginebra Molins (2020), pp. 919 ff.

[45] The Preliminary Draft of the Law in its Preamble stated that 'the current legislation on inheritance does not provide an answer to these questions' – author's own translation - (Ruda González (2017), pp. 227 - 230, in which the author reflects on the need or otherwise for the Catalonian regulation when it was still at the preliminary draft stage). However, it has also been considered a 'marketing law' or one that fulfils a pedagogical function (Ginebra Molins (2020), p. 916).

Constitutional Court 7/2019 of 17 January of 2019[46]. This ruling declared the unconstitutionality and nullity of a series of provisions, affecting articles 6, 8, 10, 11 and the first final provision of the Law 10/2017. In this regard, the Constitutional Court endorsed the theory of the invasion of powers already adopted by the Opinion of the Council of State of 21 September 2017[47].

In accordance with the regulation in force after the ruling of the Highest Constitutional interpreter, it is possible to manage the digital footprint for cases of death through clauses that are inserted in a will, in a codicil or in testamentary memoirs (with the option of using a document that can be registered in the electronic register of digital wills having been erased from the Catalonian legal system). Through the expression of these digital wills, the heir[48], the universal executor or the designated person would act before the digital service providers with whom the deceased had active accounts (article 411-10, paragraph 1 CCCat).

The content and scope of the assignment to be undertaken by any of these three 'executors' is limited to a series of options, the exercise of which may be all-encompassing or limited to a specific action. Namely: '(a) To notify digital service providers of his/her death; (b) To request digital service providers to cancel his/her active accounts; (c) To request digital service providers to execute the contractual clauses or to activate the policies established for cases of death of active account holders and, if applicable, to provide them with a copy of the digital files on their servers'.

Following the declaration of unconstitutionality of paragraph 3(b), which provided for the possibility of recording these digital wills in an *ad hoc* document to be entered in the Register created for this purpose, it seems that paragraph 4 of the provision has been left orphaned in terms of systematic interpretation. It provides that 'the document of digital wills may be amended and revoked at any time and has no effect if there are last will provisions'. It is evident that a document containing a digital will can be amended and revoked at any time. What does not make sense is the addition of 'and has no effect if there are last will provisions', because after the ruling of the Constitutional Court and the declaration of nullity of paragraph 3 (b), such wills must necessarily be expressed in wills, memoirs, or codicils, in other words, in last will instruments.

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[46] Decision available at https://www.boe.es/buscar/doc.php?id=BOE-A-2019-2033. Accessed 1 April 2023.
[47] 'Dictamen del Consejo de Estado de 21 de septiembre de 2017', available at https://www.boe.es/buscar/doc.php?id=CE-D-2017-725. Accessed 1April 2023.
[48] The Catalonian regulation also omits the reference to the legatee.

In the absence of the expression of such digital wills, 'the heir or the universal executor, if applicable, may execute the actions of letters a, b and c of paragraph 2 in accordance with the contracts that the deceased has entered into with the digital service providers or in accordance with the policies that these providers have in force'. In this sense, the Catalonian legislator does not incur in the vagueness of the Statal lawmaker in establishing who the potential applicants against the service providers are and at the same time shows respect for the terms of the contracts signed between such service providers and the deceased.

The regional legislator also expresses its views on access to the contents of digital accounts and documents. In this case, the default rule is that of non-access, unless the deceased has established otherwise in his or her digital wills. In any event, it provides for recourse to the courts for the corresponding judicial authorisation to be granted. We assume that such authorisations would be granted in cases in which, among others, there is suspicion of the existence of digital assets with patrimonial content or even, as has happened in the comparative sphere, when there are indications that behind this digital fingerprint there may be information that could shed light on the causes of death, for example, because there are suspicions of suicide or help those closest to the deceased to find out the last letters written by the person who dies in combat[49].

The article closes with a paragraph 7 in which it is specified that, unless the deceased has provided otherwise, the expenses that may arise from the execution of the digital wills shall be borne by the estate ('activo hereditario'). Consequently, and again in the absence of an express statement to the contrary, they form part of the liabilities as inheritance expenses, as they arise due to the death of the deceased and as an automatic reaction to the opening of succession.

Finally, the Catalonian legislator also allows the determination of digital wills in anticipation of a supervening loss of capacity. It does so in the area of 'preventive powers' in Book II of the CCCat relating to the person and the family. In line with the provisions on succession, the principal, when he or she has full capacity, can organise his or her digital wills in the event of a 'supervening loss of capacity'.

[49] One of the most media-acclaimed was that of Marine Justin Ellsworth, who died at the age of 20 in a bombing in Fallujah, Iraq, in November 2004. His father, John Ellsworth, launched a legal battle against Yahoo to gain access to his son's emails - as he was deployed on the front line, he was not entitled to an account as a Marine. Finally, despite the company's opposition on privacy grounds, the Oakland County Probate Court in Michigan in 2005 upheld his father's claims, forcing Yahoo to turn over the contents of Justin's email account to him. Yahoo complied with the decision by delivering the emails on CD (more than 10,000 pages) and indicating that it would also provide them in paper format.

### 4 The Spanish Digital Rights Charter

Together with the OLPPDGDR and the CCCat, a final reference should be made to the Digital Rights Charter, made public in July 2021[50]. The drafting of the Digital Rights Charter followed a participatory process, including contributions from experts in the digital rights field and advocacy associations, as well as from private citizens, together with input from the private sector, service providers, and the public sector with relevant competences in the matter[51]. In its Introductory remarks ('Consideraciones previas'), it is stated that 'The objective of the Charter is descriptive, prospective, and assertive. Descriptive of the digital contexts and scenarios that determine conflicts, sometimes unexpected, between the rights, values, and goods, but which require rethinking; this mere description helps to visualise and become aware of the impact and consequences of digital environments and spaces. Prospective by anticipating future scenarios that can already be predicted. Assertive in the sense of re-validating and legitimising the principles, techniques, and policies that, from the very culture of fundamental rights, should be applied in present and future digital environments and spaces.

The Charter is not normative in nature, but rather aims to recognise the very new challenges of application and interpretation that the adaptation of fundamental rights to the digital environment and spaces of today and the future will bring (…)'.

Besides its lack of normative character, the Digital Rights Charter is of utmost importance because it recognizes the so-called 'Right to digital inheritance'[52] under Spanish law ('Derechos de libertad' point VII).

According to its wording, '1. In accordance with the law governing the succession, the right to digital inheritance is recognised in respect of all assets and rights which, in the digital environment, were held by the deceased person.

2. It shall be for the legislature to determine the digital assets and rights of a digital nature that may be the subject of protection, preservation, and memory, as well as the

[50] See also the Portuguese Charter of Human Rights in the Digital Era, approved by Law 27/2021, of 17 May.

[51] Additionally, an Expert Group on Digital Rights was established, and two public consultations were carried out, receiving more than 250 contributions. See https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2021/20210713_rights-charter.aspx. Accessed 1 April 2023.

[52] See Cámara Lapuente (2020 b), pp. 5-6; Otero Crespo (2021), pp. 375- 376.

persons called upon, where appropriate, to perform such a function, in the absence of the deceased designation.

3. Legislation shall be encouraged to provide for those cases in which, in view of the rights of the deceased person or of third parties, and in particular the protection of their privacy and the secrecy of their communications, it is appropriate to extinguish the digital assets or to make it inaccessible outside the persons to whom it was distributed or to whom access was allowed, in cases where the deceased has not left an express destination'.

Performing a superficial analysis of the provision, the following remarks can be made. Firstly, paragraph 1 is just superfluous insofar as it adds nothing to the inheritance setup, be it analogue or digital; secondly, paragraph 2 contains flawed wording and content as it states that it would be left to the legislator to decide which assets of a digital nature would form part of the inheritance. This cannot be the case, precisely because of existing article 659 of the Spanish Civil Code, in which the legislature already specifies that the inheritance is made up of all assets, rights and obligations, even if it does not refer to those of a digital nature; thirdly and finally, paragraph 3 shows once again how the pseudo- legislator in matters of digital rights is unaware of basic issues of inheritance law. Thus, it is established that legislation should be encouraged to provide for cases in which, taking into account the rights of the deceased or third parties, and in particular the protection of their privacy and the secrecy of their communications, it is appropriate to extinguish the digital assets or to prevent its accessibility outside the persons to whom it was distributed or to whom it was made accessible. It seems strange that any prospective law can advocate for the destruction of digital assets which are part of the inheritance, irrespectively of the protection of fundamental rights such as privacy and, to a lesser extent, the secrecy of communications[53].

## 5 Conclusion

Over the last few years there has been a concern in the Spanish academia on the issue of *post-mortem* protection of personal data and the so-called digital inheritance. As shown, this topic has been subject of attention by the Spanish legislators, both at national

[53] See above footnote 40 and the relevant case law of the Spanish Supreme Court (Criminal Chamber) on the secrecy of communications.

and regional levels, passing the Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights (specific provisions) and the Law 10/2017, of 27 June, on digital wills and amending the Second and Fourth Books of the Catalonian Civil Code, and even of the 'pre-legislator', with the 'approval' of the Digital Rights Charter.

However, as detailed above, articles 3 and 96 of the OLPPDGDR are far from providing the solutions to the critical issues related to *post-mortem* data protection and succession in digital assets. In this sense, criticisms also extend to the Catalonian regulation.

To sum up, all of them seem not to establish the necessary connexion between succession law and data protection law as the legislators, bearing in mind the digital nature of the assets or goods at stake, seem to forget about basic elements pertaining to inheritance law. From our perspective, a reform on the topic is necessary, providing a coherent solution taking into consideration inheritance law and the protection of personal data (and even contract law –a third element which has been mostly excluded from our picture[54]).

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[54] It has been argued that the Spanish OLPPDGDR takes an important step forward in as it recognises that the will of the individual in the preservation of his or her identity and digital assets prevails over any contractual impositions. See Cámara Lapuente (2019), pp. 384- 385.

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