

MARIUSZ ZAŁUCKI

**POST-MORTAL STATUS
OF DIGITAL ASSETS
AND HUMAN RIGHTS**

**Bridging the Gap Between Succession,
Privacy and Personal Data Protection**

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PRELIMINARY REMARKS

We live in an age when almost every household has a computer, when almost all of us use smartphones, record videos and upload them to the “cloud”, when we process various digital content on a daily basis, send e-mails, use various on-line services, or just log on to various portals by creating accounts in advance. Our reality is very different from the one that existed at the time of drafting the current regulations creating the right of succession, now one of the fundamental human rights.¹ The various normative acts providing for a mechanism of legal succession of an individual in the event of his death, derived from constitutional and international regulations, usually enacted many years ago, rarely directly address the modern situation of a person living in the age of new technologies. The digital revolution, the invention of the Internet, the development of computer hardware or mobile phone technology have meant that a significant part of human life has moved into a digital, virtual world, where we leave behind some “digital footprint” all the time.² Today, some goods, and sometimes even a significant part of our possessions, are in digital form.³

We use the individual digital assets, which exist in digital form on the Internet, with the aid of various legal tools⁴ without giving much thought to the consequences of our death on the further fate of these assets. The

¹ Cf. Haideer Miranda Bonilla, ‘Algoritmos y Derechos Humanos’ (2021) 71 *Revista de la Facultad de Derecho de México* 705.

² Unal Tatar, Yasir Gokce and Brian Nussbaum, ‘Law versus Technology: Blockchain, GDPR, and Tough Tradeoffs’ (2020) 38 *Computer Law and Security Review* 1.

³ Karen Yeung, ‘Regulation by Blockchain: The Emerging Battle for Supremacy between the Code of Law and Code as Law’ (2019) 82 *Modern Law Review* 207.

⁴ Morteza Vesali Naseh, ‘Person and Personality in Cyber Space: A Legal Analysis of Virtual Identity’ (2016) 10 *Masaryk University Journal of Law and Technology* 1.

question of whether the general rules of *mortis causa* succession will apply, whether these assets will become the assets of our heirs or whether they will meet a different fate - is most often not taken into account in the activities related to their creation by the Internet user.⁵ Meanwhile, the applicable law is not clear on this point and regulations or practice vary from country to country. Since we use the Internet on a daily basis, despite entrusting the digital world with many of our secrets, processing a variety of data in it, having various digital goods stored on the Internet (in a manner appropriate for this medium), the legislation in force in many countries has not yet developed and introduced a specific and generally accepted legal regulation, which would put this area in order.⁶

The area in question, however, raises many doubts. We have all heard of various attempts to access the digital assets of deceased persons, whether it was a Facebook account, a virtual storage archive, a character in a computer game, a photo library or an e-mail inbox.⁷ In different legal systems, before different courts, and in different jurisdictions, the decisions of the authorities applying the law on this subject have varied, ranging from ordering Internet service providers to grant specific heirs appropriate access, through intermediate solutions, to refusals to browse and access the digital world of the deceased, citing not only the specific nature of such assets, but also, *inter alia*, the right to privacy of the deceased. The various rulings have given rise to conflicts between pecuniary and non-pecuniary rights. They have also given rise, continue to give rise and are likely to give rise to a number of controversies in the future. Questions about the *mortis causa* succession of such assets remain open, especially as there are many dissonances between the global Internet and the succession regulations still in the domain of national legislatures.

These are problems that need to be resolved, for which the appropriate starting plane - as one might think - is that of human rights and their protection. For it is there that the doctrine of unfettered private property, from which succession and its possible limitations derive, has evolved, and

⁵ In the law of succession, digital problems also affect other areas. Cf. Kyle B Gee, 'Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators', *The Marvin R. Pliskin Advanced Probate and Estate Planning Institute, Ohio State Bar Association* (2015) 1-30.

⁶ Joshua C Tate, 'Immortal Fame: Publicity Rights, Taxation, and the Power of Testation' (2009) 44 *Georgia Law Review* 3.

⁷ John Connor, 'Digital Life after Death: The Issue of Planning for a Person's Digital Assets after Death' (2011) 3 *Estate Planning and Community Property Law Journal* 301.

it is there that privacy, a good that allows the individual to seclude himself and create his own personal situation, to the exclusion of others along with mechanisms to protect his personal data, has also found wide recognition. It is precisely this level that has so far, on more than one occasion, been the basis for legislative changes, forcing individual states to introduce appropriate legal regulations so as to ensure an adequate standard of human rights protection in their countries, while also becoming an inspiration for other legal systems, thus leading - in many cases - to a spontaneous harmonisation of the law.⁸ Under the influence of acts regulating the protection of human rights, there has been, among other things, an evolution of private law over the years, from a formal ethic of civil liberty to a reliance on a substantive ethic of social responsibility.⁹

It should be recalled in this regard that human rights derive from the inherent dignity of the human person and are enjoyed by everyone regardless of, *inter alia*, race, gender, language, religion, political opinion, national and social origin or property. They cannot be relinquished, and they cannot be granted or taken away by the state. In doing so, human rights may be restricted, but only in strictly determined situations, defined primarily in fundamental laws and international human rights agreements. What is important - nowadays - is the universality of the principle that respect for human rights is not an internal affair of states. This has been demonstrated, among other things, by the human rights agreements adopted by the international community, which are, however, essentially regional in nature. However, this does not change the fact that the area of human rights and their protection is therefore a matter that is currently regulated at international and national (constitutional) level.¹⁰

The development of legal regulations in this area has been gradual and has led to the distinction of several generations of human rights, a distinction accepted by many today. The right of succession, like the right to privacy in the broadest sense, belongs to the first generation of human rights, which includes personal and political rights, also known as liberty

⁸ Cf. Ramona Delia Popescu, 'Constitutionalisation of Civil Law: The Right to Respect for Private Life and Human Dignity' (2013) 1 *Agora International Journal of Juridical Sciences* 150.

⁹ Cf. Jaime Alberto Arrubla Paucar, 'La constitucionalización del derecho privado' (2010) 5 *Nuevo Derecho* 245.

¹⁰ Claire Moon, 'What Remains? Human Rights After Death' in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology* (Springer Nature Switzerland 2020) 39 ff.

rights.¹¹ From the point of view of European states, the most important act in this respect is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.¹² Forty-six states of the Council of Europe are bound by the Convention, including all states of the European Union (although the EU itself has not yet acceded to the Convention¹³). The European Union, in turn, has an “internal” mechanism for the protection of human rights, the Charter of Fundamental Rights of the European Union. The General Regulation of the European Parliament and of the Council (EU) on the protection of personal data is also relevant within the scope of this issue.¹⁴

These acts - from the point of view of European states - set standards of protection in terms of fundamental human rights and civic duties, based on the common values of individual states and their constitutional traditions. They imply, among other things, the need to protect property and succession, as well as respect for private life and the protection of an individual's personal data. Against such a background, the aforementioned conflict of values between rights of a pecuniary nature and those of a non-pecuniary nature is already *prima facie* outlined, which cannot fail to be significant in the context of the post-mortal status of digital assets. A proper and proportionate resolution of this type of doubt¹⁵ may be decisive for the adoption of a position on the legal succession of content left by a person on the Internet (digital assets).

¹¹ Cf. Laura Miraut Martín, ‘El sentido de las generaciones de derechos humanos’ (2022) 19 *Cadernos De Dereito Actual* 431, 431–446.

¹² William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 3 ff.

¹³ Cf. Opinion of the European Court of Justice of 18 December 2014, 2/13: “The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms”.

¹⁴ Cf. Chaminda Hewage, Yogachandran Rahulamathavan and Deepthi Ratnayake, *Data Protection in a Post-Pandemic Society* (Springer 2023) *passim*.

¹⁵ Resolving conflicting values in the area of human rights is nothing new, although new challenges arise from time to time. Cf., e.g.: Antonio Tirso Ester Sánchez, ‘El desafío de la Inteligencia Artificial a la vigencia de los derechos fundamentales’ (2023) 48 *Cuadernos Electronicos de Filosofia del Derecho* 111. See also: Juan Manuel Rodríguez Calero, ‘La delimitación de los derechos en el conflicto entre derechos fundamentales por el Tribunal Constitucional español’ (2001) 18 *Anales de la Facultad de Derecho* 253.

Such a conflict has already been the subject of scholarly debate in some countries, the results of which have in several cases so far led to the adoption of normative solutions to the problem discussed above. There are at least a few examples of different treatment of digital assets *mortis causa* by individual legislators, which can and should inspire further discussion and exploration of this area. A critical analysis of the views adopted by academia should make it possible to identify possible concepts and form the basis for comments on the optimal vision of a legal solution to the problem of post-mortal status of digital assets in the event of the death of a user. Supporting this analysis with examples from specific normative solutions and jurisprudence should make it possible to prepare an appropriate proposal *de lege ferenda*, which should have a universal, extraterritorial character, and thus - due to the subject matter of the considerations - be functionally applicable in individual jurisdictions. Such a task appears to be the primary objective of my work.

In legal science, despite many divergences on this issue, it is increasingly considered that digital assets left on the Internet after the death of its user may be subject to succession, which is supposed to justify the existence of a legislative solution dedicated to this matter. This claim will constitute the basic thesis of this book. This thesis will be accompanied by two main research hypotheses: whether the nature of digital assets left on the Internet after the death of their user supports the assumption that they are inheritable and whether the existing legislation adequately solves the problem of succession of such goods or whether other solutions need to be found.

In order to realise the above objective and to confirm the assumptions set out above, it will be necessary to first present the phenomenon of the use of digital assets by a natural person via the Internet and to indicate the possible separateness of these goods from traditional, one might say analogue objects, obviously in the context of succession. The phenomenon of this area, emerging scientific concepts regarding the treatment of digital assets as a separate category of goods or, finally, their potential heritable capacity, with reference to the ever-growing phenomenon of the death of Internet users leaving their digital assets there, will be the starting point for further reflections on the post-mortal status of digital assets.

I will then present the current legal foundations of succession and explain the possible ways of dealing with various types of property over which a person has authority. I will analyse, in particular, the right of succession

and its implications in the legal systems of selected countries, taking into account constitutional law and international law regulations shaping the contemporary human rights system, not forgetting European Union law. I will explain, among other things, how the right of succession should be understood, what the principle of succession of rights of a pecuniary nature is and what this may mean in the context of a potential succession of digital assets.

I will then consider possible restrictions on the right of succession and their justification, particularly in the context of rights of a personal nature and their relation to the protection of the individual's privacy as a counterbalance to the pecuniary and essentially hereditary nature of various assets. I will consider, *inter alia*, whether individual privacy, the protection of personal data or the secrecy of correspondence may argue for interference with the right of succession. I will look at these areas starting from constitutional law and international law, taking into account the recent European Union acquis, which is the standard for the international protection of human rights in this context. On the initial assumption of the hereditary nature of digital assets, I will consider whether there are sufficiently compelling arguments for any element of the right to privacy and the right to the protection of personal data interfering with the right of succession to argue for the exclusion of a given asset from the principle of succession of rights of a pecuniary nature.¹⁶ I will also attempt to assess the practice emerging against this background by looking at specific terms-of-use provisions stemming from contracts concluded with Internet service providers.

Having established the theoretical underpinnings of the post-mortal status of digital assets and confronting them with the practice of Internet service providers, it will be time to review the statutory solutions of selected countries regarding the post-mortal status of digital assets. I will reflect on the concepts emerging in individual countries, especially in those that have already grappled with the problem discussed in this book. I will present the legislative trends and the views of the jurisprudence and doctrine on the legal status of digital assets. I will also try to show how these views have influenced the shaping of statutory solutions in particular countries. I will discuss the traditional approach, the modern approach, as well as possible

¹⁶ There is no doubt that personal data protection issues, in particular, have been gaining in importance recently, and this is beginning to radiate into succession law issues as well. Cf. Laura Miraut Martín, 'New Realities, New Rights. Some Reflections on the Need to Safeguard Personal Data' in Laura Miraut Martín and Mariusz Załucki (eds), *Artificial Intelligence and Human Rights* (Dykinson 2021) 43–66.

development paths. I will take as a starting point those legal systems in which cases concerning the succession of digital assets have already been decided, presenting also milestones of case law in this area. All this will allow conclusions to be drawn as to the current trend of the settlement of the post-mortal status of digital assets in the various legal systems.

Accepting the direction of the development of legislation in this field, I will therefore present in turn selected normative solutions of some countries concerning the *mortis causa* status of digital assets, starting with their genesis and regulatory attempts, and ending with an exploration of the existing case law and its evaluation. It is at this point that I will consider whether there is indeed - assuming the hereditary nature of such assets - a need for a separate legal regulation in this area.

Such findings will make it possible to confront the nature of digital assets with previous arrangements concerning succession and its possible limitations (privacy, protection of personal data). The effect of such confrontation will be an attempt to defend the thesis on the hereditary character of assets in question and therefore, at the same time, the thesis on the need for a normative solution creating rules for handling such assets *mortis causa*.

Finally, recognising the many uncertainties of the matter, I will propose how the issue of the post-mortal status of digital assets should be resolved. After assessing the existing solutions, analysing trends, I will outline an optimal vision of how to solve this problem, indicating its most important elements. This will be the basis for designing a group of legal provisions of a universal nature, which could allow for solving the problem of the post-mortal status of digital assets in individual legislations interested in regulating this area.

The book will therefore have five chapters preceded by this introduction. It will conclude with a synthetic summary and recommendations as to how the legislator should deal with the regulation of the post-mortem status of digital assets after the death of their user. This arrangement, presented above, will clarify the status of digital assets and their legal and succession context based on the background of interference with the succession of other human rights.

In this book, I will explore the literature on the subject, legislation and case law of several selected countries. While presenting the matter of digital assets, it is impossible to omit the law of the United States of America,

where most of the popular websites offering Internet services are based, and where a number of cases of this kind have already been settled, and various legal solutions have been proposed. I will also look at solutions known in Germany, where one of the most famous court cases in the world concerning the area discussed in this book - posthumous access to Facebook services - originated. I will also explore the legislation of some other individual European countries, to mention France, Spain, Portugal or Italy in particular, as these are the regimes that have been changing the law in the area discussed in this book in recent years. I will also reach out, in a complementary manner, to other systems, including Austria, Switzerland, Romania, Canada, the United Kingdom or selected Latin American countries, so that the area of my scientific inquiry can see the global scale of the phenomenon of digital assets. Since it is not possible to analyse all legal systems in one book, my focus is aimed at those legal systems that usually serve as a paradigm for changes. This is why I do not analyse the legislation of all European countries. I have also made a number of references to Polish law, which is close to me. However, the starting point will be constitutional law, international law and European law governing the right of succession, the right to privacy and the right to personal data protection.

The work is, therefore, a comparative legal study directed towards those legal systems that constitute specific canons of modern private law. I believe that embedding it as broadly as possible in the doctrine, jurisprudence and legislation of individual states will ensure that the main objective of clarifying and outlining the optimal post-mortal status of digital assets is adequately achieved.

The abovementioned methods allowed me to obtain research material which made it possible to formulate theoretical and legal conclusions relating to the private law regulations governing the post-mortal status of digital assets, to evaluate the practice against the background of these regulations in the light of the tendencies prevailing in the legal science and to draft *de lege ferenda* conclusions relating to it in the face of current and future challenges.

* * *

This book has been written in several places around the world. Outside the walls of the Andrzej Frycz Modrzewski Krakow University in Poland, I carried out a number of related analyses during my research at several centres abroad, notably the University of Las Palmas de Gran Canaria, the University of Barcelona, Rutgers – the State University of New Jersey, the University of

Saskatchewan and the University of Pitesti. To all those who have bravely tolerated my presence, I would like to express my sincere thanks. However, it is impossible to mention you all here.

I would also like to thank the reviewers and the publisher, whose work made it possible to compensate for at least some of my shortcomings. I hope this is not our last collaboration.

I am aware that the prospect of combining succession law with a background in human rights and their protection would certainly not have been possible without a series of conversations over the last ten years with Prof. Laura Miraut Martín. This is a great honour for me. Abrazos estimada Profesora!

In turn, I am constantly amazed at how my immediate family puts up with me. This is because the time when I am working academically is the time when they do not get in my way. Once again, thank you!, and... let it stay that way!

Kraków-Murcia

June 1, 2024

CHAPTER 1. DIGITAL ASSETS AS A NEW PHENOMENON REQUIRING MORTIS CAUSA REGULATION

1. INTRODUCTION

Today's reality, in which the Internet plays an important role, is significantly different from that known in the days without broadband access. The worldwide interconnection system between computers, over the years of its development, has changed humanity's approach to many activities of daily life.¹⁷ The Internet community, itself creating this network of connections, continues to struggle with the various challenges of this area.¹⁸ Human communication, however, has never been so simple and yet at the same time complicated, at least from the point of view of current regulations.¹⁹ For what once seemed to be only a subject of small-scale coverage, today overcomes national borders, legal systems and jurisdictional bodies while creating new and extremely interesting challenges.²⁰

Undoubtedly, today's reality is such that part of human life has moved from the analogue world to the digital world.²¹ We rarely use traditional cameras, e.g., because we usually take photographs with our smartphones and at the same time we do not develop photographs in the traditional way,

¹⁷ Cf. Hannes Werthner and others, *Perspectives on Digital Humanism* (Springer 2021), passim.

¹⁸ Lawrence Lessig, *Code and Other Laws Of Cyberspace*, (Basic Books 1999) 3 ff.

¹⁹ Tatar, Gokce and Nussbaum (n 2) 1 ff.

²⁰ Alison Blondeau, *L'émergence de la blockchain dans les relations contractuelles: Vers une nouvelle forme de confiance algorithmique?* (HAL open science 2021) 53 ff.

²¹ Cf. Woodrow Barfield, 'Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars' (2006) 39 Akron Law Review 649.

but save them in the cloud, sometimes creating digital albums.²² The same is true of music, we buy CDs or DVDs less and less, and we also access music via online services, where we create our virtual collections.²³ We communicate with the world through various types of instant messaging, not to mention the widely and extensively used social networks. We no longer write letters but send e-mails.²⁴ A large part of our life activity also involves computer games, which we of course also play on-line.²⁵ Thus, providers of all kinds of products and services have moved into the world of the Internet, becoming Internet service providers, offering them via the Internet.²⁶ In order to use most of these services, it is first necessary to register virtually, thus creating an appropriate virtual account. For many on-line services, universal accounts such as those provided by *Google*, *Microsoft* or *Meta* (formerly *Facebook*) are sufficient.²⁷ It is therefore impossible to say that life and the needs associated with it are the same today as they were without the Internet or when Internet was still in its infancy. Today, therefore, our daily activities leave a “digital footprint”.²⁸ We create, acquire, obtain the right to use or access digital goods or content, use digital services for various purposes, often also pursuing our economic interests in this way.

This kind of Internet activity, as I have already suggested, raises all sorts of legal issues, usually, however, somewhat different from the traditional ones. It is because of the Internet, among other things, that we are considering the problem of distance contracts and their legal consequences,²⁹ it is because of the Internet that the right to information and its consequences have been given a new face,³⁰ and it is also because of this medium that documents,

²² Joshua AT Fairfield, ‘Virtual Property’ (2005) 85 Boston University Law Review 1047, 1055 ff.

²³ Joseph Mentrek, ‘Estate Planning in a Digital World’ (2009) 19 Ohio Probate Law Journal 195.

²⁴ Edina Harbinja, ‘Legal Nature of E-Mails: A Comparative Perspective’ (2016) 14 Duke Law & Technology Review 227.

²⁵ Paweł Księżak and Sylwia Wojtczak, *Toward a Conceptual Network for the Private Law of Artificial Intelligence* (Springer 2023), passim.

²⁶ Alexander Savelyev, ‘Contract Law 2.0: “Smart. Contracts as the Beginning of the End of Classic Contract Law’ (2017) 26 Information and Communications Technology Law 116, 116 ff.

²⁷ Cf. however: Augustin Carr, ‘Facebook Everywhere’ (2014) 7/8 Fastcompany.com 56, 56–92.

²⁸ Sandi S Varnado, ‘Your Digital Footprint Left behind at Death: An Illustration of Technology Leaving the Law Behind’ (2014) 74 Louisiana Law Review 719, 720–795.

²⁹ TJ de Graaf, ‘From Old to New: From Internet to Smart Contracts and from People to Smart Contracts’ (2019) 35 Computer Law and Security Review 1.

³⁰ Thomad MJ Mollers, ‘European Directives on Civil Law The German Approach: Towards the Re-Codification and New Foundation of Civil Law Principles’ (2002) 10 European Review of Private Law 777.

which we now call electronic, have been widely introduced and we are considering their legal nature. Finally, it is also thanks to the Internet that new quality and new opportunities have been given to service providers and the public has seen services such as e-mail, web hosting, file servers or clouds that are the modern archives.³¹ Thanks to Internet service providers, part of traditional, analogue life has moved on-line. This has happened, one would think, irrevocably.³²

Our on-line presence has various consequences. As we know, it is traditional to say, everything usually start. with the creation of an appropriate Internet account to enable the use of Internet services.³³ The latter, i.e. Internet services, involve the delivery of games, films, music files, computer programs and other products over the Internet, as well as enable the registration of Internet domains, hosting, access to e-mail accounts, the development and maintenance of websites, database applications, virtual shops, advertising or marketing on the Internet etc.³⁴ The Internet can also support communication between people through social media.³⁵ It is a medium accessible to anyone wishing to connect to any constituent network, provided, of course, that a suitable in-house infrastructure enables this. Today, therefore, there is no longer any doubt that services such as those offered by *Linkedin*, *Facebook* (now *Meta*) or *Twitter* (now *X*) have become part of our everyday life, and those using them can be found in almost every household.³⁶

Social networking sites are on-line meeting places for people seeking new friendships, where participants exchange all kinds of information based on their individual profiles using a special interface.³⁷ They make it possible to present oneself and one's network of contacts with other

³¹ Batoul Betty Merhi, *L'émergence de l'identité numérique: l'influence de la révolution numérique sur l'environnement juridique* (École Doctorale de Droit de la Sorbonne 2022) 10 ff.

³² Janja Hojnik, 'Technology Neutral EU Law: Digital Goods within the Traditional Goods / Services Distinction' (2017) 25 *International Journal of Law and Information Technology* 63.

³³ Mariusz Fras, 'Succession of Digital Goods. A Comparative Legal Study' (2021) 47 *Review of European and Comparative Law* 67.

³⁴ Alp Toygar, CE Tapie Rohm Jr and Jake Zhu, 'A New Asset Type: Digital Assets' (2013) 22 *Journal of International Technology and Information Management* 113.

³⁵ Aleksandra Gebicka and Andreas Heinemann, 'Social Media & Competition Law' (2014) 37 *World Competition* 149.

³⁶ M Esperança Ginebra Molins, 'Voluntades digitales en caso de muerte' (2020) 12 *Cuadernos de Derecho Transnacional* 908.

³⁷ Matthew Slaughter, 'The Barriers of Facebook's Terms of Service Agreement: Hardships Placed on Fiduciaries Access to Digital Assets' (2015) 24 *Information and Communications Technology Law* 183, 183 ff; Mohammad Owais Farooqui, Bhavna Sharma and Dhawal

people to a wide range of Internet users.³⁸ A common feature of all social networks is the possibility of creating a user account and his profile, which contains personal data. Each registered person can search for friends and acquaintances, creating a list of them, send messages and use the forum. There are many types and functions of social networks, including business, communication, information, cognitive, entertainment and advertising.³⁹ There are also social networks related to the labour market.⁴⁰ The turn of the twentieth and twenty-first centuries, is a time of showing the world what a superpower the Internet is, precisely thanks to such sites.

The use of social networking sites, as with other on-line services, is now commonplace. As of April 2024, there were 5.44 billion internet users worldwide, which amounted to 67.1 per cent of the global population. Of this total, 5.07 billion, or 62.6 per cent of the world's population, were social media users.⁴¹ Each of these users leaves a unique “digital footprint”, regardless of how much time they spend on-line or what sites they visit. With every new mouse click, on-line purchase, video broadcast or social media post, we leave behind more and more data that can impact various aspects of our lives, as well as those of our loved ones.⁴²

The legal status of this type of “digital footprint”, as well as its contents, is debatable.⁴³ There are basically no legal regulations in the various countries

Gupta, ‘Inheritance of Digital Assets: Analyzing the Concept of Digital Inheritance on Social Media Platforms’ (2022) 16 *Novum Jus* 413, 413 ff.

³⁸ Anna C Bocar and Gina G Jocson, ‘Understanding the Challenges of Social Media Users: Management Students’ Perspectives in Two Asian Countries’ (2022) 1 *Journal of Business, Communication & Technology* 24.

³⁹ Halyna Bryikhanova and others, ‘Social Media as a New Communication Platform in the Context of the Information Eco Strategy’ (2021) 13 *Journal of Information Technology Management* 128.

⁴⁰ Mahmut Özer and Matjaž Perc, ‘Impact of Social Networks on the Labor Market Inequalities and School-to-Work Transitions’ (2021) 11 *Journal of Higher Education* 38.

⁴¹ Cf. the statistics available on-line: <https://www.statista.com/statistics/617136/digital-population-worldwide/>, [last accessed: 30 May 2024].

⁴² Cf. Jonathan J Darrow and Gerald R Ferrera, ‘Who Owns a Decedent’s e-Mails: Inheritable Probate Assets or Property of the Network?’ (2005) 10 *Legislation and Public Policy* 281, 290 ff; Damien McCallig, ‘Facebook After Death: An Evolving Policy in a Social Network’ (2013) 22 *International Journal of Law and Information Technology* 107, 107 ff; Alexandra Indra Seifert, ‘Das digitale Erbe im Spannungsfeld von Persönlichkeitsrechten, Fernmeldegeheimnis und Datenschutz in Deutschland’ (2019) 27 *European Review of Private Law* 1169, 1169–1180; Tamara Kneese, ‘Networked Heirlooms: The Affective and Financial Logics of Digital Estate Planning’ (2019) 33 *Cultural Studies* 297, 297–324.

⁴³ Ram Govind Singh, Ananya Shrivastava and Sushmita Ruj, ‘A Digital Asset Inheritance Model to Convey Online Persona Posthumously’ (2022) 21 *International Journal of Information*

that clarify this status.⁴⁴ And those that do exist may be questionable to many, if only because they are national in nature, while the Internet is a space that knows no borders. What we encounter on the Internet, the trace we leave there, is a phenomenon that has not yet been uniformly defined.⁴⁵

Of course, in legal sciences, various attempts have been made to change this for some time now.⁴⁶ Opinions on the legal status of this type of Internet activity are being expressed more and more frequently and boldly by individual discussants.⁴⁷ These opinions are varied, often also pointing to some associations or similarities with the analogue world, which is primarily the result of the fact that the Internet has not developed a convincingly different conceptual and normative infrastructure that could have an autonomous character. Nor does it seem possible or desirable, especially as part of human life (and perhaps even most of it) still takes place as before. The legal system should therefore react to such phenomena as the Internet, describe these phenomena, create a conceptual apparatus appropriate to such phenomena and accommodate new arrangements among the existing ones.

Bringing the right order to the Internet is obviously a challenge for many, including legal sciences. Stable and predictable regulation is, after

Security 983; M Esperança Ginebra Molins, 'Voluntades digitales: disposiciones mortis causa' in Esther Arroyo Amayuelas and Sergio Cámara Lapuente (eds), *En derecho privado en el nuevo paradigma digital*, vol X (Colegio Notarial de Cataluña-Marcial Pons 2017) 209–235.

⁴⁴ Mariusz Załucki, 'Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies' in F da Silva Veiga, P de Brito and ZL Pierdoná (eds), *Future Law, Vol. II* (Instituto Iberoamericano de Estudos Jurídicos-Universidade Lusófona do Porto 2021) 671–684.

⁴⁵ Nuno Sousa e Silva, 'Digital Inheritance: Does It Require a Different Approach?' in Rita Lobo Xavier, Nuno Sousa e Silva and Mart. Rosas (eds), *Estate, Succession and Autonomy. New assets and new trends* (Universidade Católica Portuguesa 2024) 74–83.

⁴⁶ Cf., e.g.: Rebecca G Cummings, 'The Case Against Access to Decedents' E-Mail : Password Protection as an Exercise of the Right to Destroy' (2014) 15 Minnesota Journal of Law, Science & Technology 898, 898–948; David Koppel, 'From the File Cabinet to Cloudacre: Resolving the Post-Mortem Crisis of Digital Asset Disposition for the Fiduciary', *Kansas City Estate Planning Symposium* (2012) 1–34; Lilian Edwards and Edina Harbinja, "'What Happens to My Facebook Profile When I Die?'" Legal Issues Around Transmission of Digital Assets on Death' (2013) 5 CREATE Working Paper 2, passim; Natalie M Banta, 'Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' (2014) 83 Fordham Law Review 799, 799–854; Varnado (n 28) 719–775.

⁴⁷ Cf., e.g.: Angelo Magnani, 'L'eredità digitale' (2014) 5 Notariato 519, 519–532; Paweł Szulewski, 'Śmierć 2.0 – problematyka dóbr cyfrowych' in Jacek Gołaczyński and others (eds), *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane* (Uniwersytet Wrocławski 2015) 731–749; Riccardo Berti and Simone Zanetti, 'La trasmissione mortis causa del patrimonio e dell'identità digitale: strumenti giuridici, operativi e prospettive de iure condendo' (2016) 18 Law and Media Working Paper Series 1, 1 ff.

all, important for our security. The security in question can, of course, be understood in different ways, which is also the result of the evolution of its concept over the years. Nevertheless, an undoubtedly important element in this area is the “digital footprint” just mentioned, the information we leave behind when using the Internet.⁴⁸ By filling in forms, registering new accounts, adding entries, uploading photos or videos, we leave traces of ourselves. These create a clear picture of the interests of Internet users, which then makes it possible to develop, among other things, personalised advertising, resulting in a return of interests to further corners of the Internet.⁴⁹

The resulting content and its legal nature are also the subject of debate. Only few focus on the problem of deceased Internet users leaving content on the Internet. Meanwhile, today’s reality is that Internet users using on-line services die every day.⁵⁰ According to many analyses, the problem will grow over time and may eventually lead to a situation where the number of accounts of deceased users of a given social network exceeds the number of living users. This raises and will raise significant questions, not to mention legal issues, to say the least.⁵¹ Individual Internet service providers are aware of this problem and, in a way, are anticipating it by implementing their own policies, which, e.g., may lead to expiry of a given user’s account (which would expire along with all its contents) if it has not been used for a longer period of time, as stipulated in the terms-of-use.⁵² There are also other solutions which emerge in practice or which derive from legislation already adopted in this area.

However, in order to be able to assess this type of solution, in order to be able to propose a possible optimal path for dealing with content left by Internet users on the Internet, it is necessary to look at what the content left on the Internet by a deceased user is and what its legal nature is. Only this will make it possible to undertake further reflections on the search for

⁴⁸ Katharina Seidler, ‘Der digitale Nachlass – ein Zwischenstand’ (2020) 7 *Neue Zeitschrift für Familienrecht* 141; Víctor Bastante Granell, ‘Menor de edad y últimas voluntades digitales’ (2022) 9 *Revista de Derecho Civil* 51.

⁴⁹ Cf. Sergio Cámara Lapuente and Esther Arroyo i Amayuelas (eds), *El Derecho Privado En El Nuevo Paradigma Digital* (Marcial Pons 2020), passim.

⁵⁰ Carl J Öhman and David Watson, ‘Are the Dead Taking over Facebook? A Big Data Approach to the Future of Death Online’ (2019) 6 *Big Data & Society* 1.

⁵¹ Tina Davey, *Until Death Do Us Part. Post-Mortem Privacy Rights for the Ante-Mortem Person* (University of East Anglia 2020) 13 ff.

⁵² McCallig (n 42) 107 ff.

a solution to the problem of content left by a person on the Internet after death.

2. THE CONCEPT AND LEGAL NATURE OF DIGITAL ASSETS

Various terminologies are used to name the content that people leave behind on the Internet, especially in connection with their use of on-line accounts to access various on-line services. The simplest references speak of “digital content”, by which is meant data produced and delivered in digital form.⁵³ This content is then generally combined with a digital service, which is intended to enable, among other things, the production, processing, storage or access to data in digital form.⁵⁴ These definitions fit the Internet environment, where it is possible for the user to, inter alia, store and share data in the cloud, use applications, access various works, play on-line games or use portals where he can share and communicate with other users.⁵⁵

In practice, other terms are also sometimes used, especially in the context of content left on-line by the Internet user. If one looks at the various statements made on this subject, one can see a number of divergent and heterogeneous elements, referred to as “digital goods”,⁵⁶ “digital content”,⁵⁷ “digital assets”,⁵⁸ “digital services”, “digital products”, or whatever.⁵⁹ The conceptual scope of all these terms is not precise. In the current normative state of many countries, there is basically no definition of these terms

⁵³ Esperança Ginebra Molins (n 36) 908 ff.

⁵⁴ Paweł Sz wajdler, ‘Digital Assets and Inheritance Law: How to Create Fundamental Principles of Digital Succession System?’ (2023) 31 International Journal of Law and Information Technology 144.

⁵⁵ Singh, Shrivastava and Ruj (n 43) 983 ff.

⁵⁶ Edwards and Harbinja (n 46) 2.

⁵⁷ Romana Matanovac Vučković and Ivana Kanceljak, ‘Does the Right To Use Digital Content Affect Our Digital Inheritance?’ (2019) 3 Eu and Member States – Legal and Economic Issues 724, 724 ff. It has to be mentioned that *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 (on consumer rights)* uses the term “digital content” (Article 2.11) and provides that it means “data which are produced and supplied in digital form”.

⁵⁸ Natalie M Banta, ‘Minors and Digital Asset Succession’ (2019) 104 Iowa Law Review 1700, 1699 ff. The American *Uniform Fiduciary Access to Digital Assets Act* uses the term “digital assets” (Section 2.1) and explains that it means “an electronic record in which an individual has a right or interest”.

⁵⁹ Stephanie Herzog, ‘Der digitale Nachlass und das Erbrecht’ (2018) 6 Anwaltsblatt Online 471, 471–481; Marcel Kubis and others, *Der digitale Nachlass. Eine Untersuchung aus rechtlicher und technischer Sicht* (Fraunhofer SIT 2019) 28 ff; Magnani (n 47) 1281 ff; Matilde Marinioni, *Patrimonio digitale: analisi comparata dei profili successori* (Università degli Studi di Padova 2016) 9 ff.

(which, however, is not necessarily flawed), significant divergences in their meaning also occur in practice. The development of different technological instruments, the lack of uniformity of practice or identical legislative solutions in individual countries, dictates that any definition of these phenomena, which collectively for the purposes of this book may be called "digital assets"⁶⁰, should be approached with caution. Despite the fact that, in recent times, it is possible to speak of an increasing clarification of the meaning of all these concepts, it is nevertheless necessary to make the far-reaching reservation (out of an excess of caution) that all these phenomena - from the perspective of legal sciences - have not yet been properly studied and diagnosed. Moreover, there is, as one might think, a need for a flexible approach in this regard, so that the conceptual scope of the "digital footprint" of the human being on the Internet is resilient to innovations that may, and certainly will, arise in the future.⁶¹

These remarks already indicate that we are dealing with specific phenomena which escape the traditional conceptual apparatus, which must give rise to, and usually does give rise to, various doubts. The different conceptual scopes, and thus the different understandings of the various terms, cannot fail to make a difference in the context of trying to agree on whether these phenomena can be governed by rules familiar from succession law.⁶²

Several concepts have emerged worldwide as to how the law should treat such digital goods (or to put it another way: virtual objects). The most far-reaching concept advocates the application of property law to these objects (rather, however, by analogy).⁶³ In this case, the object of ownership would be reduced to the computer code stored on the server of the entity that owns the rights to the on-line service in question. There are also concepts focusing on contract law, indicating that the user of an Internet service is linked to the Internet service provider by a licence contract, which should set out the terms and conditions for the use of specific virtual objects. There are also ideas proposing the use of a deposit contract structure. The latter assumes that, in addition to the licence contract, the user and the Internet

⁶⁰ Edwards and Harbinja (n 46) 2 ff.

⁶¹ Merhi (n 31) 10 ff.

⁶² Cf. Aleksandr Aleksandrovich Kud, 'Substantiation of the Term "Digital Asset": Economic and Legal Aspects' (2019) 2 *International Journal of Education and Science* 33, 33–44.

⁶³ Cf., e.g.: Hans Rainer Künzle, 'Digitaler Nachlass nach schweizerischem Recht' (2015) 9 *Successio - Zeitschrift für Erbrecht* 39.

service provider are linked by a deposit agreement, where the user could store the virtual objects “belonging” to him. Other positions can of course also be encountered.⁶⁴

The legal nature of the account and the virtual objects (digital assets) accessible through it is therefore not a foregone conclusion. The statements of private law doctrine and jurisprudence to date are not clear. As I have indicated, there is, *inter alia*, a tendency to formulate the position that such an account and its associated content are of a property nature, especially if they serve to realise an individual’s pecuniary interest.⁶⁵ In the case of e-mail, social networking sites or virtual computer games, it seems that such a legal qualification can be discussed, especially since practice shows that some accounts bring their beneficiary significant pecuniary benefits.⁶⁶ For example, the *Facebook* account of any celebrity can be pointed out here. It is usually a significant carrier of economic values. This in turn must somewhat impinge on the optics with which the legal status of such an account will be viewed. If one assumes, not without some doubt, that a virtual account for the use of on-line services is of an economic nature, for which there are many reasons, the consequences of such a view may be far-reaching, especially when considering the post-mortem fate of such an object.⁶⁷

Looking at the nature of the various goods left on the Internet and confronting this observation with the traditional doctrinal division of goods into those that are of a pecuniary nature and those that are not,⁶⁸ and thus assessing digital goods according to the criterion of the typical interest they pursue,⁶⁹ one can see an area in the digital world that is difficult to demarcate. However, regardless of the way in which pecuniary and non-pecuniary rights are defined, the assumption that a person’s presence on the Internet and his use of the various benefits of the digital world is of a non-pecuniary nature

⁶⁴ These concepts are described in more detail in e.g.: Esperança Ginebra Molins (n 43) 210 ff.

⁶⁵ Cf. Angelika Fuchs, ‘What Happens to Your Social Media Account When You Die? The First German Judgments on Digital Legacy’ (2021) 22 ERA Forum 1.

⁶⁶ Załucki, ‘Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies’ (n 44) 671 ff.

⁶⁷ Mateusz Grochowski, ‘Inheritance of the Social Media Accounts in Poland’ (2019) 27 European Review of Private Law 1195.

⁶⁸ Michael Bryan, *Private Law in Theory and Practice* (Routledge-Cavendish 2007) 31 ff.

⁶⁹ Stephen Waddams, *Dimensions of Private Law. Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press 2003) *passim*.

does not seem justified.⁷⁰ The use of digital goods on the Internet - as to its function - is analogous to that in the traditional world. In the traditional world, where the object of human activity is the production of a good, a subjective right of some kind is generally linked to the status of this good, which gives a particular person a kind of monopoly over the handling of this good.⁷¹ This concerns both the power over this good and the possibility to perform a number of actions concerning it. This must also be the case in the digital world, where once a digital good has been created, it can be subject to actions appropriate to the digital world, including processing and storage.⁷² These goods, like analogue goods, can and usually do serve to realise the pecuniary (economic) interests of the user, regardless of whether the realisation of the interest is direct or indirect. They bring various benefits to their users, which is, among other things, one of the reasons for their use on a mass scale.

It may seem debatable to whom and according to what principles the authority over a given digital asset should be vested, which, after all, does not arise in a vacuum, but only as a result of acceptance by the Internet user of the rules of provision of Internet services offered by the Internet service provider.⁷³ From a theoretical point of view, this seems to be an important issue, not always precisely covered in the analyses conducted. However, the view can be defended that this is a secondary issue and that the mere provision of on-line tools does not affect the subsequent perception of the distinctiveness of the digital asset in question, which may consequently lead to the division of the bundle of rights vested in the digital asset in question. Indeed, many potential subjective rights may come into play, ranging from those of a copyright nature to those of a narrower or broader scope, not excluding full digital ownership either.⁷⁴ However, the whole area is highly complicated and depends on many factors, including the legal qualification of the legal relationship existing between the Internet service provider and the Internet user. In my opinion, however, it is not possible to exclude the

⁷⁰ Lennart Ante, Friedrich Philipp Wazinski and Aman Saggi, 'Digital Real Estate in the Metaverse: An Empirical Analysis of Retail Investor Motivations' (2023) 58 *Finance Research Letters* 104299.

⁷¹ Jose Luis Caramelo Gomes, *The Law of Real Property in the European Community. A Comparative Study* (2002) *passim*.

⁷² Cámara Lapuente and Arroyo i Amayuelas (n 49) *passim*.

⁷³ Slaughter (n 37) 188 ff.

⁷⁴ Heather Antoine, 'Digital Legacies: Who Owns Your Online Life After Death?' (2016) 33 *The Computer & Internet Lawyer* 15.

application of typically proprietary concepts as regards the digital assets used by the user on a daily basis via the Internet. A digital diary made on-line is still the diary of the person making it.⁷⁵

This approach, which is sometimes encountered in the practice of individual countries, is gaining popularity in countries which have not yet provided for any specific legal regulation concerning the legal succession of digital assets after the death of their user. Such a qualification, which treats digital assets in a manner analogous to traditional objects, may also determine the *post-mortem* status of digital asset. If one were to apply the succession mechanism directly to this category of goods, everything - at least *prima facie* - would seem obvious.⁷⁶ This obviousness, in the context of digital assets, however, quickly turns into a high degree of non-obviousness, as can be seen in practice in some attempts made to use digital assets after the death of the user.

Undoubtedly, the legal status of digital assets must be looked at with regard to the medium of the Internet. This, in turn, is currently one of the main means enabling individuals to exercise their right to freedom to receive and impart information or ideas. After all, it can be found as an essential tool to participate not only privately, but also in social activities or debates related to political issues and public interest. In addition, by virtue of their accessibility, as well as their capacity to store and disseminate large amounts of data, websites contribute significantly to improve the public's access to information and, more generally, to facilitate the communication of this information. The range of information that is accessible to users on the Internet is very wide, as is the range of its use and further processing. Many of the digital assets that we use through the Internet are also ultimately linked to this information.⁷⁷ The content that we make available, publish or create on individual sites is also related to it, which is usually done by the individual with a view to self-interest. Individuals - when comparing the benefits and costs of realising their own preferences - take into account expectations about other people's behaviour. In addition to economic effects, they are driven by the desire to achieve social and psychological goals such

⁷⁵ Nuria Martínez Martínez, 'Reflexiones en torno a la protección post mortem de los datos personales y la gestión de la transmisión mortis causa del patrimonio digital tras la aprobación de la LOPDGDD' (2019) 35 *Derecho Privado y Constitución* 169.

⁷⁶ Jens Beckert, 'The Longue Durée of Inheritance Law. Discourses and Institutional Development in France, Germany, and the United States since 1800' (2007) 48 *European Journal of Sociology* 79.

⁷⁷ Varnado (n 28) 719 ff.

as gaining prestige, respect, friendship, etc. Reducing economic interest to material benefits - as is the case with traditional goods - therefore seems to be a simplification that has been outdone in the economics of the digital world. Hence, the realisation of economic interest through digital assets of various kinds is also about realising one's own preferences to a satisfactory degree, as well as, e.g., avoiding condemnation or gaining recognition, which come from social networks. This, in turn, prejudices the pecuniary, economic dimension of digital assets associated with most typical on-line services.⁷⁸ Interestingly, however, it does not prejudice how they are dealt with in the event of the death of their existing subject.

In private law theory, the term "property" is quite often used to denote the total assets of an entity.⁷⁹ This area is often highly differentiated and property includes various rights representing the specific economic interest of the subject. Property, broadly understood, is subject to legal protection found in individual legal systems either at the constitutional level or in connection with international obligations as to human rights protection standards. It would seem difficult to assume that digital assets do not fall within the category of property. Since, according to the applicable standards, the scope of the notion of "property" is as broad as possible and highly dependent on the circumstances of a given case, the type of power that an Internet user has over digital assets certainly allows for the inclusion of this category of goods in "property". This may also be relevant for further considerations.

The matter is of course not closed and perhaps requires more in-depth consideration. It is all the more difficult to speak of a unified position because the area of digital assets, the "digital footprint" left by the human being on the Internet, is a diverse area.⁸⁰ Individual on-line services sometimes differ from each other to such an extent that it is not always unambiguous and possible to indicate without great difficulty that they are aimed at the pecuniary interest of the entitled person. However, where such a pecuniary interest can be discerned, it is, I believe, impossible to question the economic nature of

⁷⁸ Toygar, Rohm Jr and Zhu (n 34) 113 ff.

⁷⁹ It is important to note that this is a functional understanding of "property". Sometimes, to describe this category, the English language also uses the term "possessions". In continental European countries, the civil law system uses the term "property" to denote the broadest right to a thing, "the ownership". These categories should not be confused.

⁸⁰ Cf. Ana Catharina de Marinheiro Mota, *Sucessão de Bens Digitais: A Admissibilidade da Herança Digital* (Universidade de Coimbra 2022) passim.

digital assets.⁸¹ However, the distinctions must be taken into account in each case. Therefore, it seems that it can be accepted as a general rule that digital assets left by an Internet user on the Internet as a result of his use of typical on-line services, especially social networks, are such a “digital footprint” that has a pecuniary dimension as it serves the pecuniary interest of the user in question, being an element of the user’s property. Regardless of whether we are dealing with the content of a social network account or an e-mail, the user’s use of this type of the most popular on-line services today also realises a property interest for the user. This, in turn, has legal consequences of its own, both in terms of the legal status of digital assets and the possible ways of dealing with this type of content in the digital world.

3. THE PROBLEM OF THE POST-MORTAL STATUS OF DIGITAL ASSETS

The preliminary and general legal qualification of digital assets made above, as may be thought, is not without flaws and doubts, as already mentioned. This does not mean that the qualification of the law of digital assets must be decisive for solving the problem of the legal succession of these assets after the death of their user.⁸² However, the problem is gaining in importance and needs to be resolved.

The question of the legal status of digital assets after the death of their user is increasingly becoming the subject of various analyses that deal with, among other things, the issue of succession.⁸³ A related message comes from many sources: “succession in the digital age is probably more complicated than you might think”. At first glance, this position seems incomprehensible, but only after a deeper analysis of the problem does one usually accept its validity. Digital assets include a wide variety of different assets,⁸⁴ and their number is growing with the development of new technologies. This, in turn, means growing uncertainties, in several fields.⁸⁵

⁸¹ Matanovac Vučković and Kanceljak (n 57) 725 ff.

⁸² Farooqui, Sharma and Gupta (n 37) 419 ff.

⁸³ Cf. Iryna Davydova, Larysa Didenko and Viktoriya Tomina, ‘Legal Nature and Inheritance of Virtual Property in Ukraine and the World: Current Status, Problems, Prospects’ (2021) 10 *Ius Humani. Revista de Derecho* 1.

⁸⁴ Leigh Sagar, *The Digital Estate* (Sweet & Maxwell-Thomson Reuters 2018) 10 ff.

⁸⁵ Mart. Terletska, *The Succession of Digital Assets in the EU* (Tallin University of Technology 2022) 5 ff; Carmen Carrera García, *Testamento digital y datos de las personas fallecidas* (Universidad de León 2021) 8ff; Arka Prasad Roy, ‘Navigating the Legal Void: Digital Estate Planning in Indias Developing Legal System’ (2023) 11 *International Journal of Advanced*

While it is generally accepted that digital assets serve the economic interest of the individual,⁸⁶ it seems debatable whether, after the death of the user, existing succession mechanisms should be applied in this respect or whether some other solution is required. It is debated whether such assets can be traded at all *post mortem* “*auctoris*”.⁸⁷ Their connection to private law transactions is usually linked to the fact that a previous Internet user (during his lifetime) is bound to a given Internet platform by contract.⁸⁸ Today, all of the most popular digital platforms require the future user to accept the terms of service or user agreement in the process of creating an account.⁸⁹ And it is usually for this reason, although of course not the only one, that many tend to accept the position that the legal relationship can continue after the death of one of the parties. This is done, at least, by those who base their argumentation on mechanisms allowing the ascension of all the rights and obligations of the parties to the contract.

A somewhat different solution is based on the concept of fiduciary access to digital assets.⁹⁰ According to the prevailing standard, a fiduciary is a person who manages property for someone else. The death of the right holder in this respect does not imply a concomitant assumption of his rights and obligations. It will generally be the task of the fiduciary to balance the various interests and determine the fate of the digital asset in question. In this respect, however, various solutions are possible which, according to the tradition of continental law, should not always, or perhaps even rarely, be qualified under the norms of the law of succession.⁹¹

Research 513, 513–518; Justin Goldston and others, ‘Digital Inheritance in Web3: A Case Study of Soulbound Tokens and the Social Recovery Pallet within the Polkadot and Kusama Ecosystems’ (2023) 2301.11074 Cornell University arXiv 1, *passim*.

⁸⁶ Pavel Koukal, ‘Inheritability of Gaming Accounts of Massive Multiplayer Online Games (Central-European Perspective)’ in Rita Lobo Xavier, Nuno Sousa e Silva and Mart. Rosas (eds), *Estate, Succession and Autonomy. New assets and new trends* (Universidade Católica Portuguesa 2024) 54 ff.

⁸⁷ Mariusz Załucki, ‘Contractual Limitations in the Mortis Causa Legal Succession on the Example of the Facebook Contract. The German Facebook Case’ (2021) 13 *Istorie, Cultura, Cetatenie in Uniunea Europeana* 106.

⁸⁸ *ibid.*

⁸⁹ Edward A Morse, *Digital Assets in Decedents’ Estates: Overview and Analysis* (Nebraska State Bar Association 2022) 3 ff.

⁹⁰ Isabelle N Sehati, ‘Beyond the Grave: A Fiduciary’s Access to a Decedent’s Digital Assets’ (2021) 43 *Cardozo Law Review* 745.

⁹¹ Jill Choate Beier, *Planning for Digital Assets* (New York State Bar Association) 259 ff.

The problem discussed here is increasingly recognised by practitioners, who are also looking for various kinds of remedies in connection with the death of existing users of digital assets.⁹² For example, it can be pointed out that a number of on-line services are nowadays provided on a so-called subscription basis, i.e. temporary access to the services,⁹³ which, as a solution, was supposed to be one of the ways to get rid of the problem of the *post-mortem* status of digital assets. In theory, the end of the subscription meant the end of access to the service in question, and therefore the end of the problem. However, the issue does not appear to be that simple, especially when it comes to the fact of the creation of digital assets using subscribed on-line services. The question of the *post-mortem* status of these assets is still not clear and subscription does not seem to change anything. Insofar as there are grounds for assuming that digital assets, as an aggregate category of content left on the Internet by the user of an on-line service, are goods to which a pecuniary character can be attributed, they are potentially goods which appear to be inheritable.⁹⁴ The termination of a subscription is unlikely to change much in this respect; it cannot result in the termination of a property right unless there are specific legal grounds for doing so.

Accordingly, as one can imagine, Internet service providers recognising the problem⁹⁵ are looking for solutions that allow to operate with a little less restraint.⁹⁶ They are the first group of actors to see (or have seen for a long time) the potential threats to their business. It is from this source that inspiration for future legal solutions can sometimes be seen.⁹⁷ In fact, some projects have already seen the light of day; moreover, there are already legal systems that have very advanced legal solutions regarding the fate of *post-mortem* digital assets after the death of their user.⁹⁸ Unfortunately, due to the different lengths and latitudes of the various solutions, uniformity is difficult to achieve, and in fact is not yet possible, which also distorts the

⁹² Rich Martin, 'Estate Planning Guidance for the Protection of Digital Assets' (2017) 34 The Computer & Internet Lawyer 1.

⁹³ Sousa e Silva (n 45) 76–77.

⁹⁴ Edina Harbinja, *Digital Death, Digital Assets and Post-Mortem Privacy* (Edinburgh University Press 2023) 5 ff.

⁹⁵ Radim Polčák, 'The Legal Classification of ISPs' (2010) 3 Journal of Intellectual Property, Information Technology and E-Commerce Law 172.

⁹⁶ Slaughter (n 37) 183–204.

⁹⁷ Maylin Maffini and Cinthia Obladen de Almendra Freitas, 'A Herança Digital No Brasil E O Tratamento Das Criptomoedas E Bitcoins Como Bens Digitais' (2020) 19 *Prima Facie* 1.

⁹⁸ Gerry W Beyer and Kerri M Griffin, 'Estate Planning For Digital Assets' (2011) 7 *Estate Planning Studies* 1.

market. As various solutions are possible, depending on the parties, the issue is potentially open to endless disputes. In the meantime, the optimum solution, considering the various interest groups, taking into account the legal nature of digital assets, should be the subject of further research and exploration.

As a complement to the above, it may be pointed out, as it were, that the practice of trading shows that digital assets may exist independently, pursuing primarily the interest of the user.⁹⁹ However, after the death of the user it is sometimes reasonable to consider whether the asset can still fulfil an interest, to determine what the interest is and whose interest it is or could be. After all, it is possible to imagine digital assets which, after the death of the hitherto user, no longer have any justification for their continued existence in the market.¹⁰⁰ In this case intermediate solutions may be necessary, which would make the succession of digital assets dependent on other factors, including, e.g., the will of the user (*ante mortem*). The will of the user is an element that is still rarely taken into account when designing solutions of this kind.

As the case concerns a huge number of Internet users, at least some first simplified conclusions are necessary for further consideration. Thus, firstly, it can be confidently assessed that a person's being on the Internet is one way of pursuing his interest, including his pecuniary interest, which leaves a "digital footprint". This footprint, which seems to be the second generally undisputed observation, seems to exist also after the death of a human being, and in this respect, raises interesting issues. As this is potentially the property of a natural person, after death this property cannot exist in a vacuum, as it were, and thus the question of the legal succession associated with this property seems legitimate - although no longer for everyone. This in turn, as is well known, can and does have various facets, which should and will be the subject of further inquiries. This is, in fact, the end of the unanimous standpoint of the previous discussants. In order to take a position of one's own, it would seem necessary to first examine a number of factors, including the potential applicability of the succession rules to digital assets or an analysis of possible safeguards restricting or excluding the application of these rules.

⁹⁹ Hao Wang, Michael W Galligan and Jeffrey B Kolodny, 'Modern Inheritance Develops in China' (2013) 2013 New York Law Journal 2.

¹⁰⁰ Eva Vrtačič and Anamarija Šporčič, 'Digital Death in the Age of Narcissism' (2010) 7 ELOPE: English Language Overseas Perspectives and Enquiries 101.

CHAPTER 2. RIGHT OF SUCCESSION AND ITS DETERMINANTS AS A TYPICAL CONSEQUENCE OF AN INDIVIDUAL'S DEATH IN THE CONTEXT OF THE POST-MORTAL STATUS OF DIGITAL ASSETS

1. INTRODUCTION

At this point the question arises whether the traditional legal solutions existing in the world creating rules of succession, based on constitutional and international protection of property, taking into account the law of the European Union, may be relevant to the issue of legal succession of digital assets in the case of death of their user. There is no doubt that when a natural person dies, the fate of his property is linked first of all to the process called succession,¹⁰¹ a consequence of the public right of succession, which is a typical solution found in individual countries.¹⁰² If an individual dies, then, typically, his property assets are passed on to the legal successors designated by this very process.¹⁰³ Perhaps this is also the right way to deal with digital assets after the death of their user.

As is well known, the right to property and the right of succession are human rights within an international trend towards respect for the property

¹⁰¹ Julius Binder, *Bürgerliches Recht. Erbrecht* (Springer 1923) 7 ff; Marco Echeverría Esquivel and Mario Echeverría Acuña, *Derecho sucesoral* (Universidad Libre 2011) 10 ff; Roger Kerridge, Alastair Brierley and David Hughes Parry, *Parry and Kerridge: The Law of Succession* (Sweet & Maxwell 2016) 10 ff.

¹⁰² Hans Brox and Wolf-Dietrich Walker, *Erbrecht* (C H Beck 2024) passim.

¹⁰³ Philippe Malaurie and Claude Brenner, *Droit des successions et des libéralités* (LGDJ Lextenso 2018) 21 ff.

of individuals,¹⁰⁴ the protection of which, at various levels, shapes the contemporary level of legal security.¹⁰⁵ As it happens, this type of protection, despite its transnational needs, if only in connection with the exercise of property by the owner in multiple territories or on the Internet, still has - as a rule - a national or regional dimension.¹⁰⁶ The protection of human rights, which includes the protection of property and the related protection of succession, is in fact primarily the domain of national law,¹⁰⁷ despite its appearance under this name at the level of international conventions.¹⁰⁸ Indeed, the effectiveness of the application of national law in a given case may consequently give rise to the formulation of an appropriate complaint to the competent international body,¹⁰⁹ which will then declare a violation of certain international standards and order the state concerned to implement remedial measures. However, where the legislation in question guarantees and ensures the implementation of the international standard, it is the national law that is the basis for the relevant claims.¹¹⁰

Traditionally, the right to property, the right to a person's possessions, has been subject to protection of the kind, instruments that today can be considered appropriate precisely for the protection of human rights.¹¹¹ The same is true of the right of succession derived from the right of property.¹¹² As a result, modern legislation has developed mechanisms which are appropriate in this respect¹¹³ and which may potentially be applied to solve the problem of the legal status of digital assets in the event of the death of their user. For this reason, this section will present the concept of protection of property

¹⁰⁴ Knut Werner Lange, *Erbrecht* (C H Beck 2022) 19 ff.

¹⁰⁵ Albert H Oosterhoff and others, *Oosterhoff on Wills* (Thomson Reuters 2021) 338 ff.

¹⁰⁶ Sherri L Burr, *Wills and Trusts* (West Academic Publishing 2022) 1 ff.

¹⁰⁷ Filippo Viglione, 'The Influence of Fundamental Rights on the Law of Succession' (2018) 29 *European Business Law Review* 773.

¹⁰⁸ Kostyantyn I Bieliakov and others, 'Digital Rights in the Human Rights System' (2023) 10 *Journal for the International and European Law, Economics and Market Integration* 183.

¹⁰⁹ Francesco Vigan, 'Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court' (2017) 7 *European Criminal Law Review* 103.

¹¹⁰ Jan Zgliniski, 'Doing Too Little or Too Much? Private Law Before the European Court of Human Rights' (2018) 37 *Yearbook of European Law* 98.

¹¹¹ Francisca López Quetglas, 'El derecho a la propiedad privada como derecho fundamental (breve reflexión)' (2006) 49 *Anuario Jurídico y Económico Escorialense* 335.

¹¹² Cf. Aurelio Barrio Gallardo, 'Derecho a la herencia y sucesión forzosa en el art. 33 de la Constitución española' (2018) 4 *Conpedi Law Review* 139.

¹¹³ Kubis and others (n 59) 27 ff.

and protection of succession, evolving at the national and international level, also taking into account European Union law, which will make it possible to consider whether a paradigm can be sought in this area for the way digital assets are dealt with after their previous user dies. If this is the case, solutions creating a succession, or to be more precise, a public right of succession, should constitute the starting point for consideration of the creation of a mechanism solving the problem posed at the beginning of this book.

2. THE RIGHT OF SUCCESSION AND ITS CONSTITUTIONAL DESIGN VS. DIGITAL ASSETS

When considering the legal status of digital assets after the death of the person who used them so far, the first - as it may be thought - area of scientific inquiry should therefore be the regulations constructing the system of succession of assets. They may determine a number of issues related to this area, including such issues as the freedom of acquisition of property,¹¹⁴ its preservation and disposal through *mortis causa* actions,¹¹⁵ the obligation to regulate by law a certain sphere of issues arising in connection with the death of an individual,¹¹⁶ the prohibition of arbitrary taking over of the property rights of deceased persons by the state or other entities,¹¹⁷ the obligation to take into account the will of the owner as a fundamental factor in determining to whom the objects constituting his estate are to be allocated in the event of his death¹¹⁸ or, finally, the freedom to dispose of one's property upon death.¹¹⁹

If it follows from the initial assumptions that digital assets constitute an element of a natural person's property and that they potentially have, or may have, a pecuniary character, further analysis of their fate in the event of the death of an Internet user should, in my opinion, be preceded by an explanation of what follows from the regulations construing succession and

¹¹⁴ Cf. Mark Glover, 'A Social Welfare Theory of Inheritance Regulation' (2018) 2018 Utah Law Review 411.

¹¹⁵ Kevin Noble Maillard, 'The Color of Testamentary Freedom' [2012] College of Law - Faculty Scholarship 77.

¹¹⁶ Shelly Kreitzer-Levy, 'The Mandatory Nature of Inheritance' (2008) 53 The American Journal of Jurisprudence 105.

¹¹⁷ Gerry W Beyer and Claire G Hargrove, 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution' (2007) 33 Ohio Northern University Law Review 865.

¹¹⁸ Nicolas Coumaros, *Le rôle de la volonté dans l'acte juridique* (Librarie du Recueil Sirey 1931) passim.

¹¹⁹ Julian Rivers and Roger Kerridge, 'The Construction of Wills' (2000) 116 Law Quarterly Review 287.

in what way, if any, these regulations may determine the fate of digital assets after the death of the person using them *ante-mortem*.

The state of affairs in this area today is that the regulations in force around the world that create the foundations for specific normative solutions in the area of succession are primarily constitutional regulations (of course, in countries with basic laws). It is the constitutions that provide the basis for ordinary regulations, *inter alia*, precisely in the area of succession.¹²⁰ Indeed, the individual constitutions provide for the protection of property and the consequent protection of succession, which is then translated into the regulation of succession laws. The latter, first and foremost due to constitutional regulations (but not only) contain in their content solutions consisting in a specific legal consequence provided for in the event of death of a person who was a subject of a specific category of rights (usually property rights). This leads to a general acceptance of succession, which is recognised in doctrine as the entry of the heir (or several heirs) into the legal situation of the deceased as a result of the death of an individual¹²¹, consisting in particular in the acquisition of property rights and obligations to which the deceased was subject. In other words, succession is the transfer of the rights and obligations of a deceased natural person to one or more persons (heirs).¹²² Through succession, the heir acquires all the rights and obligations forming part of the estate, thereby becoming the general legal successor of the deceased.¹²³ It may therefore be that succession is the appropriate legal institution to apply in the case of the *post-mortem* status of digital assets (after the death of their user).

Further considerations in this regard may be started by recalling that the oldest of the current European constitutions, the Constitution of the Kingdom of Norway of 1814, stated in § 107 that “the right to of allodial ownership, and of retaining the parental estate shall not be abolished”.¹²⁴ This means that the European tradition has long recognised the importance of

¹²⁰ Agnieszka Wedeł-Domaradzka, *Śmierć a prawa człowieka* (Wydawnictwo Naukowe GRADO 2010) 17 ff.

¹²¹ Józef Stanisław Piątoski and Bogudar Kordasiewicz, *Prawo spadkowe. Zarys wykładu* (Lexis Nexis 2011) *passim*.

¹²² Elise Bennet Histed and Ken Mackie, *Principles of Australian Succession Law* (3rd edn, Lexis Nexis 2022) 10 ff.

¹²³ Brox and Walker (n 102) 12 ff.

¹²⁴ *Constitution of the Kingdom of Norway* of 17 May 1814, available on-line: <<https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/>>, [last accessed: 30 May 2024].

regulations protecting property at the level of the basic law, both *inter vivos* and *mortis causa*. This thought has developed over the years, broadening the dimension and scope of the regulation, while increasingly emphasising the independent need to protect the right of succession as a right derived from property, in order to lead to today's state of affairs, in which a large number of European constitutions literally provide for the protection of succession. Such a guarantee of this right, expressed explicitly in the basic law, can be found, e.g., in the Bulgarian Constitution [art. 17 – “the right to property and inheritance shall be guaranteed and protected by law”¹²⁵], the Croatian Constitution [art. 48 sentence 4 – “the right of inheritance shall be guaranteed”¹²⁶], the Czech Charter of Fundamental Rights and Freedoms [art. 11(1) – “inheritance is guaranteed”¹²⁷], the Estonian Constitution [§ 32 – “succession of property is guaranteed”¹²⁸], the Spanish Constitution [art. 33 (1) – “the right to private property and to inheritance is recognised”¹²⁹], the German Basic Law [Art. 14 (1) – “property and the right of inheritance shall be guaranteed”¹³⁰], Romanian Constitution [Art. 42 – “the right to succession is guaranteed”¹³¹], Slovakian Constitution [Art. 20 (1) sentence 3 – “the right of inheritance is guaranteed”¹³²] or Hungarian Fundamental Law [Art. 13 – “everyone shall have the right to property and inheritance”¹³³]. Also, other constitutional acts, despite the fact that they do not use the term “succession” or “inheritance” in their texts¹³⁴, protect this right through the protection of

¹²⁵ *Constitution of Bulgaria* of 12 July 1991, available on-line: <<https://www.parliament.bg/en/const/>>, [last accessed: 30 May 2024].

¹²⁶ *Constitution of the Republic of Croatia* of 22 December 1990, available on-line: <<https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text/>>, [last accessed 30 May 2024].

¹²⁷ The *Charter of Fundamental Rights and Freedoms* of 16 December 1992 is a part of the constitutional order of the Czech Republic, available on-line: <<https://www.psp.cz/en/docs/laws/listina.html>>, [last accessed: 30 May 2024].

¹²⁸ *Constitution of the Republic of Estonia* of 28 June 1992, available on-line: <<https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide>>, [last accessed: 30 May 2024].

¹²⁹ *Constitution of Spain* of 27 December 1978, available on-line: <<https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>>, [last accessed: 30 May 2024].

¹³⁰ *Constitution of the Federal Republic of Germany* of 23 May 1949, available on-line: <https://www.gesetze-im-internet.de/englisch_gg/>, [last accessed: 30 May 2024].

¹³¹ *Constitution of Romania* of 21 November 1991, available on-line: <https://www.cdep.ro/pls/dic/site.page?den=act1_2>, [last accessed: 30 May 2024].

¹³² *Constitution of the Slovak Republic* of 1 September 1992, available on-line: <<https://www.prezident.sk/upload-files/46422.pdf>>, [last accessed: 30 May 2024].

¹³³ *The Fundamental Law of Hungary* of 25 April 2011, available on-line: <<https://www.parlament.hu/documents/125505/138409/Fundamental+law/>>, [last accessed: 30 May 2024].

¹³⁴ The two terms, in English, are actually used interchangeably to mean the same thing. For the purposes of this book, I am assuming that “inheritance” rather means an object understood

property (e.g. Article 72 of the Icelandic Constitution¹³⁵, Article 35 of the Russian Constitution¹³⁶, Article 42 of the Italian Constitution¹³⁷ or Article 26 of the Swiss Constitution¹³⁸).

The doctrine of the mentioned countries - to a large extent - stresses that the law of succession in constitutional terms should be understood as a guideline for the legislator in drafting the succession law of statutory rank. It is argued that the relevant legal norms regulating the law of succession should also take into account other values protected at the constitutional level, of which the protection of persons closest to the deceased appear to be of primary importance (although privacy in its broadest sense, e.g., is increasingly significant, as will be discussed later).¹³⁹ This protection, which is also provided for by individual fundamental laws, may in many respects influence the perception of the succession law. The protection of the family is expressed, e.g., in the Irish Constitution [Art. 41(1) – “the State recognises the family as (...) the basic social group (...) it shall ensure the protection of the family”¹⁴⁰], the Macedonian Constitution [Art. 40 – “the Republic provides particular care and protection for the family”¹⁴¹], the Portuguese Constitution [Art. 67 – “the family shall possess the right to protection by society and the state”¹⁴²], or Slovenian Constitution [Article 53 – “the

primarily as an “inheritance estate”. On the other hand, “succession” is a term denoting the right and mechanism of acquiring rights and obligations *mortis causa*. However, the translations used by individual legislators to translate their texts into English also differ in this respect. The same applies to the works of individual authors.

¹³⁵ *Constitution of the Republic of Iceland* of 17 June 1944, available on-line: <<http://www.government.is/constitution/>>, [last accessed: 30 May 2024].

¹³⁶ *Constitution of the Russian Federation* of 12 December 1993, available on-line: <<http://www.constitution.ru/en/>>, [last accessed: 30 May 2024].

¹³⁷ *Constitution of the Italian Republic* of 27 December 1947, available on-line: <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>, [last accessed: 30 May 2024].

¹³⁸ *Federal Constitution of the Swiss Confederation* of 18 April 1999, available on-line: <<https://www.fedlex.admin.ch/eli/cc/1999/404/en>>, [last accessed: 30 May 2024].

¹³⁹ Cf. Dieter Heinrich and Dieter Schwab (eds), *Familienerbrecht und Testierfreiheit im europäischen Vergleich* (Giesecking Verlag 2001) 1 ff, and the papers delivered at this congress.

¹⁴⁰ *Constitution of Ireland* of 1 July 1937, available on-line: <<http://www.constitution.ie/>>, [last accessed: 30 May 2024].

¹⁴¹ *Constitution of the Republic of North Macedonia* of 17 November 1991, available on-line: <https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nsp>, [last accessed: 30 May 2024].

¹⁴² *Constitution of the Portuguese Republic* of 2 April 1976, <http://app.parlamento.pt/>, [last accessed: 30 May 2024].

state shall protect the family, motherhood, fatherhood, children, and young people and shall create the necessary conditions for such protection”¹⁴³]. The boundary between the protection of the family and the protection of property (succession), on the other hand, is not always clear. In such a context, it is pointed out that the conflict between the protection of the succession and the protection of the family is inevitable. This is emphasised, e.g., by the German doctrine, where the authors note that, on the one hand, there is the freedom to dispose property upon death (constitutive of the constitutional understanding of succession law), which consists in allowing the testator, through the institutions of succession law, to decide, in principle, the fate of the inheritance estate after his death; on the other hand, it is emphasised that the testator’s relatives have a protected right to acquire the inheritance estate after him (on the basis of Article 14(1) in conjunction with Article 6(1) of the German Basic Law), manifested in the regulations of the ordinary law.¹⁴⁴ Indeed, Article 14(1) of the German Basic Law stipulates that the state shall ensure the protection of the right to property and the right of succession, the content and limits of which shall be determined by law. Article 6(1) of the German Basic Law, on the other hand, provides that marriage and the family are under the special protection of the state order. The rights derived from the content of these provisions are intended to be a balancing factor between the freedom to dispose property upon death and the heir’s right to inherit. Hence, in many cases - deriving from ordinary legislation - they restrict the testator’s freedom (e.g. by limiting the ability to dispose of the property completely freely¹⁴⁵). Thus, the freedom to dispose property upon death is to some extent in opposition to the right of the members of the immediate family to inherit, protected by the various legislations. It is argued that if a testator makes use of his testamentary freedom and disposes of his estate to third parties in the event of death, this action may entail risks for family members. This is also, in the context of considering the application of the succession mechanism to digital assets, to be borne in mind.¹⁴⁶

¹⁴³ *Constitution of the Republic of Slovenia* of 23 December 1991, available on-line: <<https://www.varuh-rs.si/en/about-us/legal-framework/the-constitution-of-the-republic-of-slovenia/>>, [last accessed: 30 May 2024].

¹⁴⁴ Kenneth GC Reid, Marius J De Waal and Reinhard Zimmermann (eds), *Comparative Succession Law. Testamentary Formalities* (Oxford University Press 2011), passim.

¹⁴⁵ Cf. Wolfgang Burandt, Dieter Rojahn and Franz-Georg Lauck, ‘Erbrecht Kommentar’ (C H Beck 2014) 657 ff.

¹⁴⁶ Cf. Seidler (n 48) 141 ff.

An interesting example related to the formation or evolution of constitutional regulations concerning succession in national legislations may be found in Polish law, which has undergone a certain metamorphosis in this respect over the years. It may be pointed out that in Poland, as well as in other countries, traditionally the right of succession was included in the broad notion of property, the constitutional protection of which has a long pedigree. Perhaps for this very reason, none of the Polish constitutions of the interwar period mentioned succession. There was, however, no doubt that the protection of property called in the constitutional texts not only “property” but also “ownership” included a guarantee of their succession.¹⁴⁷ In the current Constitution of 2 April 1997¹⁴⁸ the term “right of succession” appears in three provisions (Articles 21(1), 64(1), 64(2)). According to the first, the Republic of Poland protects property and the right of succession. According to the second, everyone has the right to ownership, other property rights and the right of succession. The third one stipulates that ownership, other property rights and the right of succession are subject to equal legal protection for everyone.¹⁴⁹

On the other hand, the tradition of Polish constitutionalism strongly emphasises the constitutional protection of the family, which has a far-reaching connection with the right of succession, manifesting itself, e.g., in the fact that the right of succession and possible freedoms granted to the testator resulting from it should be balanced by regulations aimed at protecting the persons closest to the deceased.¹⁵⁰ The status of the family is determined by several provisions of the Constitution. The starting point for this type of protection is the formulation (in the introduction to the Constitution) of the principle of subsidiarity, which strengthens the powers of communities of citizens, also determining the role of the family in society. Articles 18 and 71 of the Constitution are also of great importance. According to Article 18, marriage as a union between a man and a woman, family,

¹⁴⁷ Andrzej Mączyński, ‘Konstytucyjne prawo dziedziczenia’ in Wojciech Popiołek, Maciej Szpunar and Leszek Ogieńko (eds), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana* (Zakamycze 2005) 116; Andrzej Mączyński, ‘Prawo dziedziczenia i jego ochrona w świetle orzecznictwa Trybunału Konstytucyjnego’ in Marek Zubik (ed), *Minikommentarz dla Maksiprofesor. Księga jubileuszowa profesora Leszka Garlickiego* (Wydawnictwo Sejmowe 2017) 322 ff.

¹⁴⁸ *Constitution of the Republic of Poland* of 2 April 1997, available on-line: <<https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>, [last accessed: 30 May 2024].

¹⁴⁹ Mariusz Załucki, ‘Disinheritance Against The EU Regulation on Succession (No. 650/2012). Polish Law Perspective’ (2017) 4 *European Journal of Economics, Law and Politics* 16.

¹⁵⁰ *ibid.*

maternity and parenthood are under the protection and guardianship of the Republic of Poland. In turn, in the light of the first sentence of Article 71(1), the state must take into account the welfare of the family in its social and economic policies. This statement is not without influence on the content of the right of succession indicated in the provisions of Articles 21(1), 64(1) and 64(2) of the Constitution.¹⁵¹

Succession, therefore, at least *prima facie*, is not only a mechanism that must take into account only the circumstances of succession and the transfer of property rights and obligations to other persons, but also a mechanism that cannot be random and must take into account other conditions, including, inter alia, the family circumstances of the deceased. This cannot be ignored in the context of digital assets either, if this construction were to be applied to such assets.

Against this background, it is therefore necessary to consider how the constitutions determine the shape of the ordinary legislation in the area of succession law. In particular, it is a question of clarifying whether the scope of the testator's rights to dispose of his inheritance estate in the event of death can be deduced from the constitutional norms, as well as of determining whether detailed indications as to the principles of succession can be deduced from the provisions of the constitution, including inter alia the indication of the circle of persons to whom the estate should fall after the testator's death, which seems to be indispensable for a preliminary assessment of the suitability of digital assets to be included in this process (succession).

The German Federal Constitutional Court conducted some interesting deliberations in this context, deciding on the constitutionality of the provisions of the German Civil Code concerning the reserved portion of an inheritance, as they protect the rights of the persons closest to the deceased (to receive the benefits of the inheritance contrary to the will of the deceased expressed *ante-mortem*). The Constitutional Court has made a very interesting interpretation of the right of succession as regulated by the German Basic Law in Article 14(1).¹⁵² The court pointed out that although the right of succession must be guaranteed to citizens, it is largely at the disposal of the ordinary legislature in the light of this provision. Hence, in

¹⁵¹ *ibid.*

¹⁵² Judgement of 30 August 2000, 1 BvR 2464/97, (2000) 5 *Zeitschrift für Erbrecht und Vermögensnachfolge* 399.

view of the second sentence of this provision, from which it follows that the content and limits of the right of succession are determined by statute, the guarantee of the right of succession derives from private law and the constitutional right of succession does not in any case imply - in the event of the death of the testator - the right to transfer the possessed inventory unconditionally to third parties.

In this context, it should also be pointed out that the prevailing view in German legal sciences is that the right of succession (and thus also the freedom to dispose property upon death) is not absolute and can be restricted by law.¹⁵³ The starting point for the individual authors is the position of the German Federal Constitutional Court as expressed in another judgment, rendered on 19 April 2005.¹⁵⁴ In this decision, the Court, referring to the constitutional protection of succession formulated the constitutional concept of this right applicable under the German Basic Law, which, according to the Court, consists primarily of the protection of private property, the freedom to dispose property upon death, the right to leave assets to the testator, the right of the heirs to acquire these assets, the right of the next of kin (primarily the descendants) to participate in the inheritance, and finally the right to the so-called compulsory portion of the inheritance (related to the constitutional protection of the family), which, however, is not absolute. The views of the German Federal Constitutional Court therefore emphasise the strong connection between the right of succession and property, which is treated by all modern legislation in a special way. Although, according to the Constitutional Court, the function of the right of succession is, *inter alia*, that a person's private property remains in the hands of his next of kin after his death, which is to be guaranteed by the legal norms in force. As the Constitutional Court pointed out, Article 14(1) of the German Basic Law leaves it to the discretion of the legislature to define the scope and limits of the right of succession. This provision, by providing that the content and limits of the right of succession shall be determined by law, is at the same time the basis for the legislature to enact such a norm which limits this right. In this sphere of limitations, however, all other rights and freedoms of individuals under the provisions of the Constitution must be taken into account. Therefore, the role of the succession law will be, *inter alia*, to

¹⁵³ Cf. Peter Gotthardt, 'Zur Entziehung des Pflichtteils eines Abkömmlings wegen Führens eines ehrlosen oder unsittlichen Lebenswandels' (1987) 34 *Zeitschrift für das gesamte Familienrecht* 757.

¹⁵⁴ Judgement of 19 April 2005, 1 BvR 1644/00 and 1 BvR 188/03, (2005) 52 *Zeitschrift für das gesamte Familienrecht* 872.

correctly resolve the conflict between rights of an equivalent nature.¹⁵⁵ On the other hand, the fact that the right to property and the right of succession are inextricably linked does not mean that the constitutional guarantee of the right of succession includes unconditional *mortis causa* succession of the deceased property. The grounds for limiting the right of succession are therefore “tolerated”.¹⁵⁶

Similar views can be found in several other legislations. Anglo-Saxon countries, lead the way in propounding the theory that the testator’s disposition *mortis causa* may be permitted unlimited.¹⁵⁷ In this respect, the views of the doctrine seem to be moving in the direction of a reduction or removal of future restrictions on the testator’s disposition of property on death.¹⁵⁸ While historically the various legal systems have tried to find the right compromise between the freedom to dispose property upon death and the protection of the family, economic and social relations have changed in recent years to such an extent that the regulations of the 19th or 20th century (and after all the greatest codifications of private law date from that period) are not adequate to meet today’s needs.¹⁵⁹

In this light, it must be emphasised that there is currently a general trend worldwide towards the deformalisation of succession law, in particular of testamentary dispositions.¹⁶⁰ It is accepted, among other things, that it is not the form requirements but the reflection of the testator’s last will that is one of the main priorities of modern succession law.¹⁶¹ A recent trend

¹⁵⁵ In this respect, the Federal Constitutional Court recalled its earlier judgements of 24 February 1971, 1 BvR 435/68 (30 Entscheidungen der amtlichen Sammlung (BVerfGE) 173) and of 25 July 1979, 2 BvR 878/74 (BVerfGE 52, 131).

¹⁵⁶ Here, the Federal Constitutional Court referred to one of its earlier judgements of 22 June 1995, 2 BvR 552/91, (93 Entscheidungen der amtlichen Sammlung (BVerfGE) 165), where the difference in the restrictions on the right to property and the right of succession was pointed out (*die Möglichkeiten des Gesetzgebers zur Einschränkung des Erbrechts sind - weil sie an einen Vermögensübergang anknüpfen - weiter gehend als die zur Einschränkung des Eigentums*).

¹⁵⁷ Cf. Sjef Van Erp, ‘New Developments in Succession Law’ (2007) 11 Electronic Journal of Comparative Law 1; Walter Pintens, *Towards a Ius Commune in European Family and Succession Law?* (Intersentia 2012) 6 ff.

¹⁵⁸ Cf. Mariusz Załucki, *Wills Formalities Versus Testator’s Intention: Functional Model of Effective Testation for Informal Wills* (Nomos 2021) 40 ff.

¹⁵⁹ Cf. Richard Hedlund, ‘Introducing a Dispensing Power in English Succession Law’ (2019) 25 Trusts & Trustees 722.

¹⁶⁰ John H Langbein, ‘Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion’ (2017) 38 Adelaide Law Review 1.

¹⁶¹ Mariusz Załucki, ‘Solving the “Problem” of Wills Formalities in the Modern Post-Pandemic Society: Can the Endless Discussion Be Concluded?’ (2021) 87 Studia Iuridica 526.

in judicial decisions calls for liberalisation of the formal requirements for testamentary dispositions, so to speak, with a view to upholding the will of the testator even in situations where his disposition does not correspond to the forms provided for in the law, if his will can be accurately reproduced and there is no suspicion of its falsification.¹⁶² The potential possibility for the next of kin of the legal heirs to benefit from the succession is therefore severely limited in favour of the testator's freedom to dispose of property upon death, both in the area of freedom of choice of the eligible heir and the increasingly frequent possibility of essentially unlimited dispositions *mortis causa*.

Generally speaking, and referring to the views of many countries, it should be noted that, in general, the testator's relatives are mentioned in the law as potential heirs and that these are the persons who are constitutionally entitled to inherit. However, this is not an absolute right and both the will of the testator himself and the will of the legislature may deprive those entitled of this right. Moreover, there is a tendency for the right to succession to escalate with increasing closeness to the testator. The stronger the family relationship with the deceased, the greater the statutory entitlement. This fulfils constitutional assumptions, indicated, e.g., in Article 6(1) of the German constitution, related to the need to protect the family. However, these powers often give way to the will of the deceased expressed in the last will *ante-mortem*. It is the will of the deceased that seems to be of the greatest importance, both in the context of indicating to whom and whether certain goods are to be allocated in the event of death.¹⁶³

In the context of the above, as an interesting example one may point to the heritage of Polish law, where the constitutional understanding of the right of succession is primarily due to the views formulated by the Constitutional Tribunal, which has dealt with the provisions of Polish Constitution on several occasions.¹⁶⁴

The first decision of the Polish Constitutional Tribunal concerning the protection of succession on the basis of the 1997 Constitution is the

¹⁶² Jeffrey A Dorman, 'Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule' (2016) 30 Quinnipiac Probate Law Journal 36.

¹⁶³ Francois Du Toit, 'Testamentary Condonation in South Africa : A Pyrrhic Victory for Private Autonomy over Mandatory Formalism in the Law of Wills ?' in Alain-Laurent Verbeke and others (eds), *Confronting the Frontiers of Family and Succession Law. Liber Amicorum Walter Pintens* (Intersentia 2012) 159–180.

¹⁶⁴ Cf. Mączyński, 'Konstytucyjne prawo dziedziczenia' (n 147) 322 ff.

judgment of 25 February 1999.¹⁶⁵ In the opinion of the Tribunal, Article 64(1) of the Constitution provides the basis for the formulation of three norms concerning the protection of: 1) the right to ownership, 2) property rights other than ownership, 3) the right of succession. The issue of the right of succession should be linked to both ownership and other property rights. What deserves to be emphasised, according to the Tribunal, is the fact that the freedom of succession is guaranteed by Article 64 of the Constitution, which concerns ownership and other property rights. Similarly, the issue is covered in Article 21 of the Constitution, where ownership and succession are mentioned together. It is only together that these two concepts make up the supreme principle of the Constitution. This is because, in the sense of the Constitution, the right of succession is an intrinsic correlate of the right of ownership, its complement and the possibility of its continuation after the death of the person subject to this right. Such coincidence also occurs in Article 64 of the Constitution. It is also in this context that one should look for the designator of the term “right of succession” contained in Article 21(1) of the Constitution. Therefore, it is not only about the mere fact of succession on the basis of a will or a statute, taking place from the moment of the death of the deceased, but also about the obligation of the state authorities to protect all bond rights related to the succession, as well as the obligation to establish and secure appropriate procedures aimed at declaring the estate acquisition, protection of the acquirer or division of the estate. Moreover, as the Tribunal emphasised, the provision of Article 21(1) of the Constitution imposes a positive obligation to legislate in such a manner as to follow the testator’s will. The Tribunal also pointed out that an inherent correlate of the freedom of succession is the freedom to dispose of ownership and other property rights in the event of death.¹⁶⁶

An important and probably the most extensive analysis of the constitutional right of succession in Poland was made by the Constitutional Tribunal in the judgement of 31 January 2001.¹⁶⁷ Analysing the legal grounds for a possible adjudication in the case, the Tribunal extended its earlier thesis that Article 64(1) of the Constitution, read in the context of other provisions speaking about succession, constitutes the basis of a public subjective right, the content of which is the constitutionally guaranteed freedom to acquire

¹⁶⁵ K 23/98, (1999) 2 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 25.

¹⁶⁶ The recitals of the judgement are referred to by Krzysztof Kozłowski, ‘Prawo dziedziczenia w świetle postanowień Konstytucji RP – zarys instytucji’ (2017) 22 *Białostockie Studia Prawnicze* 59.

¹⁶⁷ P 4/99, (2001) 1 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 5.

property, to retain it and to dispose of it. Disposing of property includes, in particular, disposing of it (in whole or in part, by means of *inter vivos* and *mortis causa* transactions by the entitled person.¹⁶⁸ The enumeration in Article 64 of the Constitution not only of ownership, but also of other property rights and the right of succession is intended to emphasise the broad scope of the constitutional right guaranteed by this provision - by listing those elements of it which, in the opinion of the authors of the Constitution, deserve to be emphasised. The constitutional subjective right based on this provision is one of those, the realisation of which presupposes the existence of a statutory regulation, concerning not only its possible limitations, but also - or even primarily - its content. The juxtaposition of Article 64, on the one hand, and Article 21, on the other hand, justifies - in the opinion of the Tribunal - the conclusion that the Constitution excludes the possibility of depriving ownership, which is the most complete of all property rights, of its hereditary feature. On the other hand, property rights other than ownership may, but do not have to, be shaped as hereditary rights, i.e. not extinguished at the death of the natural person being the subject of a given right. This observation, in the context of the problem discussed in this work, should be remembered.

At the same time, the Tribunal emphasised that the phrase “right of succession” used in the aforementioned provisions of the Constitution has no equivalent in the provisions of the Civil Code. It is therefore an autonomous concept of constitutional law. The notion of succession against the background of the constitutional provisions juxtaposed above should be understood in a broader sense than that adopted in the Civil Code, where it denotes a specific manner of transfer of property rights and obligations vested in an individual until his death to another person. In particular, the use of the term in the constitution does not imply that the constitution prescribes the adoption in statutory provisions of the construction of a succession understood as the totality of property rights and obligations constituting the object of succession. Nor does the constitution comment on the mechanism for the ascension of the legal successors of a deceased individual to the rights and obligations to which he was entitled until his death. This is also a very important observation in the context of the issue of *post-mortem* status of digital assets.

¹⁶⁸ Cf. Joanna Szponar-Seroka, ‘Zasada ochrony własności w Konstytucji Rzeczypospolitej Polskiej’ (2017) 38 Przegląd Prawa Konstytucyjnego 67.

According to the Tribunal, from the point of view of Articles 20 and 21 of the Constitution, the right of succession is first and foremost a guarantee for property to remain in private hands. From these provisions, together with Articles 64(1) and (2) of the Constitution, stems an order addressed to the legislator to cover by statutory regulation a certain sphere of issues arising in connection with the death of an individual. Succession is the perpetuation of the right to property in the institutional sense. It consists in the fact that a property right vested in an individual may not be extinguished upon his death, but should continue, which implies its transfer to another person or persons. The constitutional guarantee of the right of succession has primarily a negative meaning, i.e. it justifies the prohibition of arbitrary acquisition by the state or other entities of the property of deceased persons. In other words, the legislator does not have the possibility to introduce a disguised expropriation by depriving the assets of deceased persons of their private property status. The law of succession makes private property a permanent institution, indefinite in time, independent of the lifetime of the person to whom ownership rights are vested at any given moment. The transfer of ownership of a deceased person to the state or another public entity is not categorically excluded, but it can only occur when it is not possible to identify individuals whose legal succession to the deceased is more justified by the closeness of the relationship linking those individuals to the deceased. The link between the categories of property and succession in the light of the constitutional provisions discussed above justifies the obligation to take into account the will of the owner as the basic factor determining to whom the objects forming his estate are to be allocated in the event of his death. It is therefore incumbent on the legislator to provide individuals with appropriate legal instruments to enable them to regulate these matters. This aspect of property can be described as the freedom (liberty) to dispose it, bearing in mind, however, that the Constitution does not determine whether the will of the owner is to crystallise in the form of a last will or in the form of another type of legal transaction in the event of death.¹⁶⁹

In view of the fact that not all individuals are in a position to dispose of their property upon death and that, as life experience proves, not all do so, according to the Tribunal, the legislator should introduce a subordinate regulation to the succession based on the last will of the deceased and

¹⁶⁹ Cf. Sylwia Jarosz-Żukowska, 'Gwarancja ochrony własności i innych praw majątkowych, Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym' (Wydawnictwo Uniwersytetu Wrocławskiego 2014) 531 ff.

allowing for an unambiguous determination, in a specific case, of the circle of heirs. The Constitution itself, although it gives the legislator certain directives as to the regulation of the statutory succession, does not formulate strict and unambiguous norms allowing for the determination of the circle, the order of appointment to the succession and the amount of shares of the statutory heirs. However, it should be emphasised that the legislator's choice of a specific succession model should be consistent, i.e. the legislator may not create exceptional provisions that violate the principle of equality or other constitutional values. Therefore, the Constitution sets the framework within which the legislator, when regulating the issue of succession law, has a considerable scope of freedom. It should respect, first and foremost, the above-mentioned prohibition of "disguised" expropriation and the assumption of adjusting the succession order to the deceased's presumed will, which implies basing such regulation on a certain degree of typicality and rationality of the deceased's provisions. From this point of view, the inclusion of the deceased's closest relatives and spouse in the circle of legal heirs can be justified. However, it should be emphasised that while in the case of an effective expression of the last will by an individual, the legislator must create mechanisms allowing for its implementation, and only exceptionally and in particularly justified situations may it allow for its questioning, in the case of a statutory succession, the legislator itself shapes the circle of persons acquiring the inheritance property and may, on this occasion, also realise other - besides the "discovery" of the will of the deceased - constitutionally justified goals. Therefore, it is clear that the scope of interference with the right of succession is broader in this case, as the legislator not only protects the interests of the heirs appointed by the deceased person, but itself determines the grounds for their appointment to the succession.¹⁷⁰

An important view of the Polish Constitutional Tribunal arising from this judgment is also that Article 64(1) of the Constitution only guarantees the right of succession conceived in the abstract and not referred to the succession of a specific natural person. Thus, this provision ensures the mere possibility for anyone to become the legal successor of a deceased person, but, without prejudging the order of succession of a specific person, it does not guarantee anyone the acquisition of property rights by succession from a specific deceased. Moreover, it is clear that constitutional protection is afforded to the rights of persons who have acquired the status of heir after

¹⁷⁰ Cf. Anna Frankiewicz, 'Konstytucyjna regulacja własności w Rzeczypospolitej Polskiej' (2009) 3 *Studia Erasmiana Wratislaviensia* 178.

the death of a specific person. The Constitution protects the rights acquired through succession, without, however, prejudging who in a particular situation acquires those rights. Neither the guarantee of succession provided for in Articles 21 and 64 of the Constitution, nor the injunction based on Articles 18 and 71 of the Constitution to protect marriage, parenthood and the family, expresses unequivocal indications enabling the determination of the circle of persons to inherit by law.

Analysing the content of Article 64, paragraph 2 of the Constitution, the Tribunal emphasised that the principle of equal legal protection of ownership, other property rights and the right of succession for all, refers to the general principle of equality expressed in Article 32 of the Constitution. The historical context of the establishment of the Polish Constitution explains that the inclusion of the principle of equal protection in the provisions normalizing freedoms and rights of man and citizen is aimed at emphasizing the inadmissibility of differentiating the protection of property rights by regulations granting the state and public entities a privileged position in relation to natural persons and legal persons of private law. Instead, the differentiation in the regulation of the means and scope of protection of rights may be a consequence of the binding of public and, in particular, state entities to constitutional norms that do not apply to private persons. The injunction to ensure equal protection of the law, like the principle of equality expressed in Article 32, does not therefore imply full identity of the legal situation of public and private entities. The principle expressed in Article 64(2) of the Constitution also applies to relations between several persons inheriting from the same deceased person. In the regulation of succession matters, special assumptions are made with regard to the situation, frequent in practice, in which the same estate is inherited by several persons. In such a situation, each of them acquires the status of an heir inheriting a certain share of the inheritance alongside other persons, with the result that they acquire joint ownership of certain assets and become joint owners of other property rights. The formal aspect of the law of succession thus involves the acquisition of certain property rights hitherto enjoyed by the deceased person, while the material aspect involves a gain in property resulting from the value of the objects forming part of the succession.¹⁷¹

According to the Polish Constitutional Tribunal, the principle of equal protection of the right of succession does not imply equality of rights of heirs. Differentiation may result, e.g., from the duly expressed last will of

¹⁷¹ Cf. Szponar-Seroka (n 168) 68 ff.

the testator. The inequality of heirs may also result from other causes, in particular from the factual or legal impossibility of securing for them the same rights to all the objects making up the inheritance. The importance of the principle of equal protection of the right to the succession lies not only in the fact that the beneficiaries are afforded the same legal safeguards in a situation in which several persons are called to the succession, equal protection of the right also lies in the fact that they are entitled to obtain, on analogous conditions, a financial gain appropriate to their share in the succession and to the value of the succession property. However, the principle of equal protection of the right of succession is not absolute.

The problems of the constitutional right of succession were also considered by the Polish Constitutional Tribunal in other judgments.¹⁷² The analysis of these rulings makes it possible to identify several characteristic features, elements of the constitutional right of succession. At the same time, the views expressed in Poland seem to be an interesting inspiration for further considerations, especially that also against the background of other legal systems the content of the constitutional right of succession is shaped in a similar way.

The views of the Polish Constitutional Tribunal are also reflected in the position of the doctrine. It has been pointed out that the provisions of Articles 21 and 64 of the Constitution form the basis for the determination of mechanisms allowing for effective protection of broadly understood property, which should be included in acts of a lower rank.¹⁷³ As is often argued, on the basis of the above-mentioned provisions, all property is subject to state protection, both that which serves productive purposes and that which is intended to satisfy the personal needs of the owner and his family. The same is true of the right of succession, whereby, it should be emphasised, the rules of succession are to be regulated by ordinary laws. Hence, the above-mentioned provisions define the directions for the development of private law and mainly the regulation of succession law. In a similar vein,

¹⁷² See, e.g., the judgements of: 21 May 2001, SK 15/00, (2001) 4 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 85; 25 November 2003, K 37/02, (2003) 9 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 96; 3 April 2006, SK 46/05, (2006) 4 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 39; 29 May 2007, P 20/06, (2007) 6 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 52; 4 September 2007, P 19/07, (2007) 8 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 94; 9 November 2010, SK 10/08, (2010) 9 *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 99; 30 June 2021, SK 37/19, (2021) *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 54.

¹⁷³ Frankiewicz (n 170) 178 ff.

others argue, e.g., that the protection of succession is directly linked to the protection of private property of individuals. By protecting the right of succession, the state guarantees, among other things, that the testator will be able to freely dispose of his property in the event of death and that the heir will not incur excessive costs in obtaining property rights. Furthermore, the Constitution guarantees the protection of the succession rights of the persons closest to the deceased.¹⁷⁴ It is noted that the notion of succession against the background of the provisions of the Constitution should be understood in a broader sense than that adopted in the provisions of the Civil Code. The Constitution is a kind of norm that constitutes an order for the state bodies to create such legal regulations that would secure the succession of rights and obligations by way of succession.¹⁷⁵

Analogously, one can also understand, e.g., the solution contained in the Spanish Constitution,¹⁷⁶ where the first two paragraphs of the provision of Article 33 seem to be the most important in the discussed context.¹⁷⁷ According to the first, the right to private property and inheritance is recognised [Article 33(1)]. According to the second, on the other hand, the social function of these rights shall determine the limits of their content in accordance with the law [Article 33(2)].¹⁷⁸ As the doctrine argues, the dual aspect of the right to property is emphasised *ad nauseam* to mark its social conception, as opposed to treating it as an absolute or unlimited subjective right.¹⁷⁹ It is the legislator who is explicitly entrusted with the task of identifying and defining the general and objective contours of the right of property and inheritance in accordance with a social function, with a view to specifying or definitively shaping their legal configuration. This social function is the result of the articulation of property and inheritance with other interests and cannot be interpreted merely as an element accompanying the right of property or inheritance, which has important consequences.¹⁸⁰

¹⁷⁴ Cf. Mariusz Załucki, 'Przyszłość zachowku w prawie polskim' (2012) 21 Kwartalnik Prawa Prywatnego 529.

¹⁷⁵ Kozłowski (n 166) 65 ff.

¹⁷⁶ Juan Manuel and Rodríguez Calero, 'Algunas consideraciones sobre la determinación jurídico práctica de los derechos fundamentales en la Constitución Española' (1999) 16 Anales de la Facultad de Derecho. Universidad de La Laguna 413.

¹⁷⁷ Barrio Gallardo (n 112) 140 ff.

¹⁷⁸ López Quetglas (n 111) 338 ff.

¹⁷⁹ Francisco M García Costa, 'El derecho de propiedad en la Constitución española de 1978' (2007) 7 Criterio Jurídico 281.

¹⁸⁰ Barrio Gallardo (n 112) 141 ff.

Indeed, the essential content of the constitutional right of property and the related right of succession, according to, e.g., the Spanish Constitutional Court, is in each case marked by a list of powers or possibilities of action necessary for the right to be considered as belonging to the type described, without which it ceases to be a right of that type. Thus, the essential content of the right (property and, consequently, the right of succession) is exceeded or disregarded when the right is subject to restrictions that make it impracticable, make it more difficult than is reasonable or deprive it of the necessary protection.¹⁸¹ According to this conception, individual ownership is complete only if it can be transferred both *inter vivos* and *mortis causa*. After the owner's death, the law protects his property until it passes into new, private hands. From the wording of Article 33(1) of the Spanish Constitution, the important role and need for protection for the principle of private autonomy in the administration of the inheritance is derived - in this context. Such an assumption is to imply, *inter alia*, the requirement of a minimum of testamentary freedom within the succession system, the requirement to influence the will of the deceased on the fate of his estate after death.¹⁸²

In view of the aforementioned case law, as well as the opinions expressed in this regard in the doctrine of legal sciences, it is synthetically possible to attempt to identify the essential elements of which a constitutional right of succession consists, irrespective of individual legislative attempts to fine-tune it:

- 1) the freedom to acquire property, to retain it and to dispose of it upon death;
- 2) an order to cover by law a certain sphere of issues arising in connection with the death of an individual; in doing so, the legislator must shape the institution of succession in accordance with constitutional assumptions; the constitution is silent on the mechanism of succession of the legal successors of a deceased individual to the rights and obligations to which he was entitled until death;
- 3) the prohibition of arbitrary seizure by the state or other entities of the property rights of deceased persons; the property right of an

¹⁸¹ Judgement of 8 April 1981, 11/1981, available on-line: <<https://www.tribunalconstitucional.es/>>, [last accessed: 30 May 2024].

¹⁸² Barrio Gallardo (n 112) 142 ff.

individual must not be extinguished at the time of his death, but must continue, which presupposes its transfer to another person or persons; in other words, the legislator is not allowed to introduce a “disguised” expropriation by depriving the assets of deceased persons of their private property status;

- 4) the need to take into account the will of the owner as the primary factor determining who is to receive the assets making up his estate on his death; it is the will of the deceased, and not the succession rules laid down by the legislature, that should determine the fate of the assets making up the estate;
- 5) the freedom to dispose of one's property on death; excessive interference by the legislature or other public authorities with the sovereignty of the testator's last will constitutes an infringement of the right to succession;
- 6) an obligation to lay down rules that are subsidiary to the succession based on the will of the deceased and which make it possible to establish unequivocally, in a specific case, the circle of heirs; in so doing, the legislator has a broad discretion; the statutory rules should, however, refer to the presumed rationality of the testator and take account of a certain typicality of testamentary dispositions;
- 7) the imperative of equal treatment of heirs in similar legal situations; the legislator's choice of a particular succession model should be consistent, i.e. the legislator may not create exceptional rules which infringe the principle of equal protection of the right to succession; this does not, however, imply equal rights for heirs, as differentiation may result, for instance, from the duly expressed will of the testator;
- 8) the prohibition on depriving a category of persons of their capacity to inherit, that is to say, of the possibility of acquiring ownership and other property rights after the death of the person to whom they were entitled during his lifetime; the transfer of the property of a deceased person to the state or another public body is not categorically excluded but may come into play only if it is not possible to identify the natural persons whose legal succession to the deceased is more likely to be justified by the closeness of their relationship with the deceased;

- 9) protection of the rights of persons who have acquired the status of heir after the death of a particular person; the constitution protects rights acquired through succession;
- 10) order that legal regulations be shaped in such a way as to allow the heir - designated by the testator or, in the absence of such designation determined by the legislator - to definitively acquire the components of the succession estate.¹⁸³

In this light, there is no doubt that the notion of succession as it appears on the grounds of constitutional provisions, should be perceived in a broader sense than that adopted, for instance, in the provisions of the civil codes of individual states. Thus, it is not only about a specific manner of transferring property rights and obligations vested in an individual until his death to another person or persons. This right, in its constitutional formulation, must be regarded as a public subjective right and imply the freedom to acquire property, to retain it and to dispose of it both *mortis causa* (testator) and *inter vivos* (heir). It is not only the right of the heir to receive the inheritance, but also - and perhaps above all - the right of the deceased to dispose of his property on death.¹⁸⁴

Therefore, there is no doubt that the basic laws significantly shape the succession law regulation. The constitutional guidelines practically prejudge the hereditary nature of property rights, especially property in the broadest sense, as well as the need to shape succession law in such a way that the regulation of succession allows property to remain in private hands.¹⁸⁵

In this regard, there is a clear tendency in European legislation to protect the last will of the testator, by which the constitutional right of succession is to be understood primarily as the testator's right to dispose of his property in the event of death.¹⁸⁶ The protection of the testator's next of kin, on the other hand, does not consist in necessarily granting them an unconditional right to acquire the benefits of the deceased's estate. The succession law may therefore provide for such institutions, as well as a regulation which does not contain instruments for the protection of such

¹⁸³ Some of these views were "catalogued" by the Polish Constitutional Tribunal in the justification of its decision in P 20/06, (2007) 6 *Orzecznictwo Trybunału Konstytucyjnego* Zbiór Urzędowy 52.

¹⁸⁴ Cf. Kreiczer-Levy (n 116) 105 ff.

¹⁸⁵ Martijn W Hesselink, 'The Social and Economic Foundations of the Law of Succession' (1997) 2 *Stellenbosch Law Review* 162.

¹⁸⁶ Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 2006 *Ethics* 263.

persons. It is the role of private law to decide whether, under the given systemic conditions, the freedom of disposing property upon death should be found and to what extent (dimension).¹⁸⁷ At the same time, when shaping the order of succession, the ordinary legislator should take into account the interests of the testator's closest relatives by including them in the circle of legal heirs, without, however, prejudging their receipt of any benefits from the succession. These persons are merely among those potentially entitled to the inheritance, but there is no basis for creating on their part a subjective right to receive the benefits of the inheritance. On the other hand, the legislator may provide for a degree of protection for such persons in the form of the possibility to contest the last will of the testator so as to enable other constitutionally legitimate objectives to be attained, in particular the social protection of such persons.

Against the background of the constitutional provisions, digital assets, as an element of a natural person's property, can potentially be qualified as goods analogous to ownership (what has already been explained), which essentially means that they can be shaped as hereditary goods.¹⁸⁸ At the same time, the constitutional solutions do not comment on the mechanism of succession, although the law of succession suggests the need for digital assets to continue to remain in private hands after the death of their user. The arbitrary acquisition of assets by the state or other entities should not be allowed. On the other hand, it is legitimate to take into account the will of the deceased as the primary factor in determining to whom, and whether, his estate consisting of digital assets should be distributed upon his death.¹⁸⁹

If it is therefore assumed that the problem of the legal succession of digital assets in the event of death is to be solved through the application of the succession mechanism, the creation of specific rules should be borne in mind. The regulations of the constitutions of the individual states should be the starting point for further considerations.¹⁹⁰

As a model, as one may think, there is no obstacle from the constitutional regulations to the adoption of the thesis of the hereditary character of digital assets.¹⁹¹ Thus, in principle, at least at the constitutional

¹⁸⁷ Joseph Laufer, 'Flexible Restraints on Testamentary Freedom-a Report on Decedents' Family Maintenance Legislation' (1954) 79 *Harvard Law Review* 277.

¹⁸⁸ Maffini and Freitas (n 97) 16 ff.

¹⁸⁹ Kozłowski (n 166) 67 ff.

¹⁹⁰ Farooqui, Sharma and Gupta (n 37) 413–435.

¹⁹¹ Fras (n 33) 76 ff.

level, digital assets could potentially be subject to succession, which - it seems - should be decided by the legislator, taking into account the will of the previous “owner” – the user. It does not unequivocally follow from constitutional law that the digital sphere of issues arising in connection with the death of an individual should be subject to statutory regulation. However, when the view of the pecuniary nature of such assets prevails in a given legal system, it is impossible to escape the need to shape the *mortis causa* area of digital assets in the paradigm of property and the resulting consequences.¹⁹²

Looking at the current national law regulations concerning succession, it should be recalled that the acts currently regulating the issue of statutory succession in individual European countries are primarily the civil codes. They regulate what an inheritance is, as well as the circle of heirs, the rules and the order in which they are appointed. It is generally thought that this matter is specific to each national legal system and that European law should not interfere in national systems.¹⁹³ In turn, this view is often justified by the cultural and social differences or legal traditions of individual countries.¹⁹⁴ There are essentially three concepts for the transfer of succession property to the deceased's legal successors: 1) the concept of *le mort saisit le vif*, 2) the concept of *hereditas iacens*, 3) the concept of administration of the estate.¹⁹⁵ *Le mort saisit le vif* is a French phrase meaning “the dead seizes the living” According to this doctrine the heir is considered as having succeeded to the deceased from the instant of his death. *Hereditas iacens* is a Latin phrase meaning “lying” or “recumbent inheritance”, meaning an inheritance not covered despite the appointment of heirs. The system of administration of the estate, on the other hand, is one in which the administrator of the estate, to whom the estate devolves upon its opening, plays a primary role.¹⁹⁶ These differences are, however, irrelevant for the classification of a given asset as “heritable”, although there is of course no uniformity between the different legal systems, especially as regards the classification of certain assets as being included or not included in the estate.

¹⁹² Fernanda Moretón Sanz, ‘Redes sociales y voluntades digitales. «Historia digital» y clausulado de las disposiciones testamentarias: privacidad, protección al honor y datos personales’ (2019) 95 Revista Crítica de Derecho Inmobiliario 955.

¹⁹³ George A Pelletier Jr and Michael Roy Sonnenreich, ‘A Comparative Analysis of Civil Law Succession’ (1966) 11 Villanova Law Review 323.

¹⁹⁴ Cf. Pintens (n 157) 8–12, 24–34, 88–90.

¹⁹⁵ Mariusz Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (AFM Publishing House 2015) 129 ff.

¹⁹⁶ *ibid.*

Digital assets - as a potential object of succession - are viewed and dealt with differently in certain legal systems. This is due to a number of factors that are both specific to the subject matter and individual to the particular legal system. The potential qualification of a given asset as inheritable at the level of constitutional regulations, as this is the subject of the current analysis, does not automatically prejudge its succession or consideration of such a need by the legislator. This is determined by a number of factors, and a possible lack of statutory regulation of succession may consequently lead to a position of violation of the constitutional standard. Succession may also suffer limitations. This will be considered further.

3. THE IMPACT OF INTERNATIONAL CONVENTIONS ON THE PERCEPTION OF THE RIGHT OF SUCCESSION AND THE RESULTING CONSEQUENCES FOR DIGITAL ASSETS

In recent years, acts of international law oriented towards the idea of the protection of human rights have also, and perhaps above all, played an important role in shaping succession solutions. Undoubtedly, this is a field whose task is to defend in an individualised manner the rights of the human person - the individual, especially as it concerns moral rights of a fundamental nature belonging to every individual in his relationship with the state.¹⁹⁷ While human rights, for obvious reasons, are protected at the constitutional level, their essence, the place where their widest and most dynamic development is currently taking place, is at the international level and in the area of individual international systems oriented directly towards the protection of human rights.¹⁹⁸ For this reason, when considering what the fate of digital assets should be after the death of their user, it is impossible not to look at this problem through this prism.

It should be noted that, as in the case of constitutional regulations, in solutions typically oriented towards the protection of human rights, i.e. in regional conventions for the protection of human rights, “property” also appears as an object of protection. Observation of the development of the law in this area already allows for the observation that the term “property” in the context of human rights regulations is a term which - as in the case of constitutional regulations - should be understood in a functional manner,

¹⁹⁷ Kalikst Nagel, ‘Human rights and the law of human rights: a positive legal regulation of an ontic reality’ (2014) 3 *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza* 213.

¹⁹⁸ Nuno Ferreira, ‘Evaluating the “new Culture” of Human Rights in European Private Law’ (2008) 16 *European Review of Private Law* 657.

different from that encountered in private law.¹⁹⁹ It has an autonomous meaning, not limited to the ownership of things, independent of the individual formal classifications of national legislation.²⁰⁰ The regional systems of human rights protection define the object of property protection in different ways.²⁰¹ Their common feature, however, is the indication of a certain economic value of the object of protection or its specific designation.²⁰²

This kind of path has been followed, e.g., by the system of European protection of human rights, where, against the background of Article 1(1) of Additional Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms, according to which “*every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*”, it is considered that not only the ownership is protected under this provision, but also other property rights and interests of the subjects of the law which have a measurable pecuniary value.²⁰³

It should be recalled that the protection of property under the Convention and its scope are issues that have, in principle, given rise to much debate from the outset.²⁰⁴ The subject of the dispute was, inter alia, whether to consider including this right at all in the catalogue guaranteed by the Convention, so that it was only included in the additional protocol, which, however, was adopted even before the Convention entered into force (i.e. on 20 March 1952). Through its incorporation into the Convention, the content of this right has been determined by the jurisprudence of the European Commission of Human Rights and the European Court of Human

¹⁹⁹ Cf. Cezary Mik, ‘Prawo własności w europejskiej konwencji praw człowieka’ (1993) 5 Państwo i Prawo 25.

²⁰⁰ Cf. the judgment of the European Court of Human Rights of 8 November 2005, Kochko v. Ukraine, 63134/00.

²⁰¹ Cf. José E Alvarez, ‘The Human Right of Property’ (2018) 72 University of Miami Law Review 580; Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000); Gino J Naldi, ‘Limitation of Rights Under the African Charter on Human and Peoples’ Rights: The Contribution of the African Commission on Human and Peoples’ Rights’ (2001) 17 South African Journal on Human Rights 109.

²⁰² Stuart Wilson, *Human Rights and the Transformation of Property* (Juta and Co 2021) 18 ff.

²⁰³ Cf. judgment of the European Court of Human Rights of 13 December 2007, Gashi v. Croatia, 32457/05.

²⁰⁴ Cf. Ali Rıza Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate Publishing 2004) 124–125.

Rights, both of which have shaped its understanding relatively broadly²⁰⁵ - as one might think - not yet the last word. It is, moreover, in this case law that the use of the term “property” has been accepted to protect also objects other than objects associated with ownership, which are disposed of in a proprietary manner. Therefore, it is nowadays indicated that this also applies to intangible goods and therefore potentially also to digital assets.²⁰⁶

Against this background, it should be noted that the use of the term “property” in the context of international law protection in the area of intangible goods draws attention first of all to private law constructions, where the concept of subjective rights is usually invoked as the basis for the protection of individual goods in this area. However, there are also such legal systems where the object of protection of property rights is understood only materially (e.g. Polish law), and other frames of reference are used for the protection of intangible goods.²⁰⁷ However, the terminology used in this area is not consistent, which can be seen, e.g., in the European Convention on Human Rights and Fundamental Freedoms itself. By way of explanation, it should be pointed out that the Polish text of the Convention contains both the terms “property” and “ownership”, which, against the background of this act, are understood in principle in the same way. Hence, it is most often assumed that on the grounds of Article 1 of Additional Protocol No. 1 the term “ownership” means, in the light of the nomenclature used in Poland and in many other countries, the same as “property”, which in principle means that there is no theoretical problem of qualification of particular digital assets as such which can be protected on the indicated Convention basis (at least *prima facie*). Thus, it seems that also digital assets, the separation of which is based on the particular construction of an intangible good, which is different from other objects of legal relations, should be included among the rights of a proprietary nature (a type of property) referred to in Article 1 of Additional Protocol No. 1 to the Convention. Property in this area therefore includes not only tangible objects, but also, inter alia, digital assets. This raises questions as to how the concept of protection as a fundamental

²⁰⁵ Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (Intersentia 2014) passim.

²⁰⁶ Khrystyna Maikut and others, ‘Protection of the Right to Property in the Case Law of the European Court of Human Rights’ (2020) 9 *Revista Amazonia Investiga* 497.

²⁰⁷ Teresa Mróz, ‘Własność prywatna jako podstawa konstytucyjnej zasady wolności gospodarczej’ in Stanisław Bożyk (ed), *Prawo, parlament i egzekutywa we współczesnych systemach rządów. Księga poświęcona pamięci Profesora Jerzego Stembrowicza* (Wydawnictwo Temida 2009) 118-128.

right differs from the concept of traditional protection, based on a system of absolute subjective rights, and what role the Council of Europe bodies, in particular the European Court of Human Rights, can play in shaping the protection of digital assets in Europe.

I have the impression that intellectual property can serve as an example and a good paradigm here, if only because of the far-reaching analogy with regard to its immaterial form. It should be recalled that in modern times the development of intellectual property law, at the European level, has taken place mainly thanks to individual harmonisation acts, having its origin in the Paris Convention for the Protection of Industrial Property²⁰⁸ and the Berne Convention for the Protection of Literary and Artistic Works.²⁰⁹ In the last few decades, it is also, or perhaps above all, related to the legislation of the European Union and the momentous role of the European Court of Justice, as the body overseeing the legality and interpretation of acts of EU law. It is due to the jurisprudential competence of the European Court of Justice at the European level that many positions have been harmonised and divergences resolved on fundamental issues in this area, including the subject matter and scope of protection. Today, in spite of still far-reaching doubts appearing (such as those concerning the unitary European patent),²¹⁰ it can be safely stated that the system of intellectual property protection of the European Union is a highly developed regime, corresponding to modern trends in this field of law, taking care of the interests of creators, inventors and entrepreneurs.²¹¹

Against this background, it is therefore somewhat surprising that the development of law in this area in Europe (intellectual property law) has basically taken place without much influence from the European Convention on Human Rights and Fundamental Freedoms, in particular without the case law of the European Commission of Human Rights and the European Court of Human Rights. Over the years, individual cases concerning intellectual property assessed from the perspective of fundamental rights have not received the attention they deserved and, as a result, the role of

²⁰⁸ Paris Convention for the Protection of Industrial Property of 20 March 1883, as amended on 28 September 1979.

²⁰⁹ Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, as amended on 28 September 1979.

²¹⁰ Hans Morten Haugen, 'Patent Rights and Human Rights: Exploring Their Relationships' (2007) 10 *The Journal of World Intellectual Property* 97.

²¹¹ Szymon Rubisz, 'The European Patent with Unitary Effect. Opportunities and Limitations for Innovative Projects' (2022) 1 *Organization and Management* 113.

the European Convention on Human Rights and Fundamental Freedoms in shaping intellectual property rights at the European level can be assessed as insignificant. It should be noted that the bodies of the Council of Europe, i.e. the European Commission of Human Rights and the European Court of Human Rights, had their share in this process. Initially, they interpreted the provision of Article 1 of the Additional Protocol No. 1 to the Convention in a restrictive way and dismissed few complaints concerning intellectual property rights, without going into deeper theoretical analyses, which allowed for the development of law in this area without the influence of the Convention.²¹² Mention can be made, e.g., of the patent law rulings in *Smith Kline & French Laboratories v. the Netherlands*,²¹³ *Lenzing AG v. the United Kingdom*²¹⁴ or *British-American Tobacco Company Ltd v. the Netherlands*.²¹⁵ None of these have generated much theoretical interest in the issue of the importance of intellectual property in the context of fundamental rights.

However, this situation has recently started to change and recent years show not only a slightly increased activity of the European Court of Human Rights in the discussed matter (which is connected, as it can be believed, among other things, with the increasing role of this body in general²¹⁶), but also the perception by representatives of doctrine and jurisprudence of problems arising in connection with the protection of human rights and the existence of a system of intellectual property rights protection. In the various studies, it is increasingly possible to find references to fundamental rights, in particular to the right to property as justification for the validity of the legal protection of intellectual property.²¹⁷ Among other things, therefore, the emphasis by the organs of the Council of Europe (the European Commission of Human Rights and the European Court of Human Rights) that intellectual property is undeniably protected as such on the basis of Article 1 of Protocol

²¹² Laurence R Helfer, 'The New Innovation Frontier ? Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International Law Journal 1, 3 ff.

²¹³ Decision of the European Commission of Human Rights of 4 October 1990, *Smith Kline and French Laboratories Ltd. v. the Netherlands*, 12633/87.

²¹⁴ Decision of the European Commission of Human Rights of 9 September 1998, *Lenzing AG v. the United Kingdom*, 38819/97.

²¹⁵ Judgment of the European Court of Human Rights of 20 November 1995, *British-American Tobacco Company Ltd v. The Netherlands*, 19589/92.

²¹⁶ Cf. Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 Human Rights Law Review 403.

²¹⁷ Cf. Christophe Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35 International Review of Intellectual Property and Competition Law 268.

1 to the European Convention on Human Rights and Fundamental Freedoms²¹⁸ is extremely important, as it creates, in a way, an additional regime of protection, but it also raises doubts, related not only to the need to protect individual intellectual property, but also to the determination of the limits of this protection. Due to the Europeanisation of the market, trends towards globalisation,²¹⁹ the model of protection of intellectual property must take into account the existence of human rights, such as the right to life, health, privacy, freedom of expression or conducting scientific research. The existing constructions, which have been known for many years, such as the system of patenting inventions (which after all dates back to the 15th century), therefore now need to be revised from the perspective of human rights protection standards. For today, the very question of whether to protect intellectual property is not a properly posed question and needs to be supplemented. Due to the development of society and the expansion of markets for intellectual objects, much more far-reaching controversies arise, the solution to which boils down to resolving the dilemma not whether to protect, but how to protect. An excellent example of this, by the way, is the discussion that has been going on for some time about the unitary European patent. That is where the European Convention on Human Rights and Fundamental Freedoms and the bodies that uphold its provisions come in, one would think. In such an arrangement, fundamental rights can serve as a kind of corrective to the protection of intellectual property, interfering with the legal protection of intellectual property when this protection is too far-reaching or misused.²²⁰ This also seems to be possible in connection with digital assets, the content we leave behind on the Internet.

In such a context, the attainment of convention protection by a particular good (digital asset) will, it may be thought, influence the decision to work on new solutions, among many other factors. Indeed, as history has shown, broad legal protection is important for the speed and magnitude of the phenomenon of the creation and dissemination of particular intangible goods in society. Therefore, it should be assumed that

²¹⁸ Cf., e.g., the decision of the European Commission of Human Rights of 11 January 1994, A.D. v. the Netherlands, 21962/93 and the judgments of the European Court of Human Rights: of 30 March 1989, Chappel v. the United Kingdom, 10461/83; of 11 January 2007, Anheuser-Bush Inc. v. Portugal, 73049/01; of 5 July 2005, Melnychuk v. Ukraine, 28743/03.

²¹⁹ Daniele Archibugi and Andrea Filippetti, 'The Globalisation of Intellectual Property Rights : Four Learned Lessons and Four Theses' (2010) 1 Global Policy 137.

²²⁰ Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 University of California Davis Law Review 971.

the Convention protection of digital assets may be one of the stimulants of economic development. Despite the fact that the vast majority of property protection standards have been harmonised at the European level, as practice shows, the Convention guidelines may become the basis for legal protection of the interest of digital assets stakeholders and play a significant role in this area. It seems that this theme is also recognised by the Council of Europe bodies themselves, which in their jurisprudence (European Court of Human Rights) usurp the right not only to monitor compliance with the Convention provisions, but also to set standards for property protection in Europe for the future.²²¹ In this respect, however, the role of the European Court on Human Right can be read not only as an advocate of broad property protection, but also as a watchdog to ensure that the rights attached to property are not abused. It is, however, only future practice that will show what path the European Court on Human Rights will take, which in the context of digital assets will have to determine this. There are, however, more arguments in favour of a gatekeeper's mission, as one might think - the Convention might then begin to play a similar role for digital assets as antitrust law, except that in this case the succession of digital assets would be constrained by other human rights, and the Court's role would be to resolve the resulting conflict of values in the light of the Convention principles.

Since it can be assumed that digital assets are protected as an element of property, this raises the question of possible solutions related to succession. The protection of the succession of goods which are subject to *inter vivos* Convention protection is not in doubt. Therefore, if one accepts this widely accepted interpretation, the obvious must be raised: that the Convention protection of succession is part of the protection of property vested in the natural person. For these reasons, the existence in domestic law of a legal provision depriving a person of the right to succession, for reasons other than those indicated in Article 1 of Protocol No. 1, would necessarily constitute a violation of that norm. On the other hand, the admissibility of interference in the sphere of this right (property) is determined - in the light of the jurisprudence of the European Court of Human Rights - not only by the reason for which it is undertaken, but also by the manner in which it is shaped by the legislator. At the same time, the Convention does not regulate precisely what the limitations in question may consist in, as well as what is to be understood by succession (or the right of succession).

²²¹ This is, *inter alia*, the tenor of the judgement of the European Court of Human Rights in *Anheuser-Busch Inc. v. Portugal* of 11 January 2007.

Undoubtedly, however, this provision imposes an obligation on the national legislator to act in good faith in order to achieve the object and purpose of the Convention in accordance with its letter and spirit. In particular, the state has a negative obligation to refrain from interfering with the peaceful enjoyment of property and, if interference is permitted, it has the burden of proving that the interference has taken place in compliance with the requirements of the Convention.²²² Theoretically, therefore, it is possible for the state to interfere in the *mortis causa* disposition of property. This must be done in accordance with the guidelines of the aforementioned provision, which, in the context of the *post-mortem* status of digital assets, cannot be without significance.

One of the first issues that will need to be resolved in the future in this connection is to indicate the possible scope of protection of digital assets through the prism of the Convention basis. It should be noted that the Convention aims precisely at the protection of human beings (individuals), which, despite their occurrence also in professional relations, should not conflict with the idea of protection of human rights and, as a consequence, may mean the willingness to include these goods in the provisions of the Convention. It should be noted in this connection, however, that certain rights of professional subjects, too, may be protected by the provisions of the Convention, and this also applies in particular to the right to property.²²³ It will also be the task of the Court to resolve possible conflicts in this area.

In general, the scope of protection of digital assets has not yet been addressed by the Council of Europe bodies. The path that the European Court of Human Rights will take in the future, should such a case come before it, is uncertain. While there should be no doubt that digital assets can be protected under the Convention, some doubt may arise in relation to other interests of individuals, both of a pecuniary and non-pecuniary nature. Among others, the legal-personal threads of digital assets may prove to be a challenge for the European Court of Human Rights. Indeed, while there has so far been a consensus in the doctrine that Article 1 of Additional Protocol No. 1 to the Convention will apply to the protection of property rights, this

²²² Mik (n 199) 29 ff.

²²³ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) 1 ff.

is not so certain when it comes to conflicts of interest with personal rights (e.g. the right to privacy) which appear at the opposite extreme.²²⁴

It follows from the comments made that digital assets are potentially subject to the protection provided by Article 1 of Additional Protocol No. 1 to the European Convention on Human Rights, making their content dependent on, *inter alia*, the jurisdiction of the European Court of Human Rights. This conception of legal protection is somewhat different from the traditional conception of protection concerning tangible property. It must take into account not only the interests of the owner, but must also take into account the interests of the holders of other Convention-protected goods against which digital assets may prove to be in competition. In this context, the role of the European Court of Human Rights in the future will be to value the conflicts of goods that may arise and to resolve them rationally. The Court needs to develop standards for this valuation and dispute resolution, which of course will not be an easy task as it constructs further foundations for a system of protection of digital assets independent of national legislation.

The protection of digital assets in a changing reality will therefore also be a challenge for the European Court of Human Rights. Cases concerning a new type of goods may inspire the Court and further the development of law in this field at the European level. Reconciling the various interests will be a daunting task, which may consequently be extremely significant and set new boundaries for the legal protection of digital assets. Whether the Court will follow this path, however, is difficult to predict for today.

In attempting to summarise the above, however, it must be borne in mind and emphasised once again that the concept of property as used in the second sentence of Article 1 of Protocol No. 1 to the Convention has been interpreted - both in the doctrine and in the case law of the Court - in an expansive manner. Such an interpretation allows the Convention concept of property to include other property rights in addition to ownership. This view was expressed, e.g., by the European Court of Human Rights already in its judgment of 23 February 1995, where it indicated that the concept of property contained in this provision has an autonomous meaning, not limited to ownership of things.²²⁵ Certain other rights and interests in property may therefore also be considered as “property rights” and consequently

²²⁴ JC Buitelaar, ‘Post-Mortem Privacy and Informational Self-Determination’ (2017) 19 *Ethics and Information Technology* 129.

²²⁵ Judgment of 23 February 1995, *Matos e Silva v. Portugal*, 15777/89.

“property” for the purposes of this article,²²⁶ which in my view must also apply to digital assets. This position is the result of observing the views of the doctrine, according to which the concept used in the second sentence of Article 1 of Protocol No. 1 to the Convention has an autonomous character, unequal to national concepts, especially those formulated by private law.

The right to property cannot be understood in the technical-legal sense of the term, but more broadly as corresponding to the term “property”. The scope of the latter term, on the other hand, is vague and highly dependent on the circumstances of specific cases. It is also important to note that the prevailing view is that the Convention protects the “property” and not the “right to property”. Property, according to Article 1 of Protocol No. 1 to the Convention, is to be “one’s own” and therefore already acquired.²²⁷ It is also undoubtedly the case that succession is protected by the Convention as part of the protection of property vested in an individual. The existence of a provision of law depriving a person of the right to succession, for reasons other than those indicated in Article 1 of Protocol No. 1, must constitute a violation of that norm. The admissibility of interference in the sphere of this right is determined, in the light of the case law of the European Court of Human Rights, not only by the reason for which it is undertaken, but also by the manner in which it is shaped by the legislator. At the same time, the Convention does not regulate precisely what the restrictions in question may consist of, nor what is to be understood by succession (or the right of succession).

In this light, however, when considering the question of succession of digital assets against the background of the Convention standards, it should be borne in mind that also against the background of the European Convention on Human Rights, the view is expressed that the legal protection of property and of rights, the essence of which brings them closer to the right to property in the strict sense (and thus to the right of succession), cannot be of an absolute nature, since the rights subject to such protection are not absolute, unlimited rights. Such limitations are permissible insofar as they are necessary for the protection of other values. According to Article 1 of Protocol No. 1 to the Convention, interference by the legislature is therefore permissible in certain cases, but must not be excessive. This means that, of the available measures of action, the one which is least onerous for the

²²⁶ Judgment of 16 September 1996, *Gasus Dosier und Fördertechnik GmbH v. The Netherlands*, 15375/89.

²²⁷ Judgment of 28 October 1987, *Inze v. Austria*, 8695/79.

subjects to whom they are to be applied, or which is not more onerous than necessary to achieve the objective pursued, must be chosen. According to the Court, interference with rights protected under Article 1 of Protocol No. 1 to the Convention cannot be considered lawful if the underlying decision is contrary to the applicable legislation. In turn, the requirement that the expropriation take place under the terms of the law implies the need for sufficiently precise rules and their availability to an appropriate extent.²²⁸

Following the position of the European Court of Human Rights as set out in the grounds of the judgment in *Marckx v. Belgium*,²²⁹ it may be considered that Article 1 of Protocol No. 1 to the Convention implies the protection of the right of everyone to the undisturbed enjoyment of his property, which should lead to the conclusion that the Convention protection established by Article 1 of Protocol No. 1 to the Convention extends to the freedom to dispose of one's own property in the event of death. On the other hand, no one may rely on this provision as a basis for a claim to acquire the estate of a deceased person.

Therefore, also in the context of the problems discussed in this work, it must be emphasised that the right of succession is protected by the Convention, although this is not directly apparent from the wording of the applicable legislation. This is evidenced by the views expressed by the doctrine and the case law, especially the European Court of Human Rights. Although there are no explicit guidelines as to the form of the law of succession, the individual legal systems must nevertheless provide for such a law. A regulation such as the one in force in the emerging Soviet Union between 1918 and 1922, where succession was abolished altogether,²³⁰ is therefore not possible anymore. However, a solution other than the transfer of the property in question to other persons is possible, in particular when the interests of the hitherto beneficiary of the property speak in favour of this.

Individual national legislatures bound by the Convention - in the light of the Convention rules - are in principle free to shape the mechanism of *mortis causa* succession,²³¹ which means that they in fact may also treat the scope and content of the freedom to dispose of property upon death freely, with the proviso that testamentary succession as a guarantee of property

²²⁸ Judgment of 8 July 1986, *Lithgow and Others v. UK*, 9006/80.

²²⁹ Judgment of 13 June 1979, *Marckx v. Belgium*, 6833/74.

²³⁰ Vladimir Gsovski, 'Soviet Law of Inheritance' (1947) 45 *Michigan Law Review* 291, 296–297.

²³¹ Glover (n 114) 411–456.

protection must be provided for in the legislation of the Convention state party.²³² In view of the fact that the Convention protects the property and not the right to acquire property in the future, it should be considered that it is primarily the last will of the testator and not the rights of his heirs that should be decisive for the construction of any rules in this regard.²³³

In the context of legal succession, the provision of Article 8 of the Convention should also be borne in mind. According to its wording, everyone has the right to respect for his private and family life, his home and his correspondence. No interference by a public authority with the exercise of this right shall be permitted except in cases provided for by law and necessary in a democratic society for reasons of national security, public safety or the economic well-being of the country, the protection of order and the prevention of crime, the protection of health and morals or the protection of the rights and freedoms of persons. As indicated, this provision expresses, inter alia, the principle of protection of privacy and the family. As pointed out by the European Court of Human Rights in its March 2010 judgment in *Kozak v. Poland*,²³⁴ the state, when deciding on the choice of measures to protect the family and guarantee, as required by Article 8 of the Convention, respect for family life, must necessarily take into account the development of society and changes in the way in which social issues, marital status and relationships are perceived, including the fact that there is not just one way or one way of choosing how to lead a family or private life. Striking a balance between the protection of the various goods guaranteed by the Convention is, by its very nature, a difficult and delicate task that may require the state to compromise conflicting views and interests perceived by the parties concerned in opposition to each other.

The concept of “private life” within the meaning of Article 8(1) is broad and cannot be exhaustively defined.²³⁵ It encompasses the physical and mental integrity of the human person. It implies not only the right to live according to one’s own wishes, without control by others, but also to some extent the right to establish and maintain relationships with

²³² Jonathan Glasson, ‘Inheritance: A Human Right?’ (2018) 24 *Trusts & Trustees* 659.

²³³ Gerrit Ponath, *Die Beschränkungen der Testierfreiheit durch das Testamentsrecht* (Zerb Verlag 2006) passim.

²³⁴ Judgment of 2 March 2010, *Kozak v. Poland*, 13102/02.

²³⁵ Huw Beverley-Smith, Ansgar Ohly and Agnes Lucs-Schloetter, *Privacy, Property and Personality. Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press 2005) 1 ff.

others. This is especially true in the emotional sphere - the development and realisation of one's own personality. The right to a private life provides a zone in which everyone can freely pursue the development and realisation of his or her personality. The right to respect for "correspondence" within the meaning of Article 8 of the Convention, on the other hand, aims to protect the confidentiality of communications in a wide variety of situations. The concept covers correspondence of a private or professional nature.²³⁶ The scope of protection of Article 8 of the Convention includes electronic messages (e-mails), or the use of the Internet²³⁷ data stored on computer servers,²³⁸ including hard drives²³⁹ or diskettes.²⁴⁰

The conditions under which a state part. to the Convention may interfere with the exercise of rights protected by Article 8 are set out in Article 8(2) of the Convention, namely that interference is possible in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Restrictions are allowed if they are "in accordance with the law" or "prescribed by law" and "necessary in a democratic society" for the protection of one of the aforementioned purposes.

What seems to be relevant in the context of *post-mortem* status of digital assets is the fact of privacy protection only as far as the living are concerned,²⁴¹ which will be analysed further.

Against such a background, it may be initially noted that the Convention regulations seem to prioritise the interest of the individual over the interest of the whole, which may potentially give rise to a potential conflict between succession and other individual goods protected by the Convention, which, especially against the background of the Convention regulations and not the constitutional ones, is exposed, if only in the case law of the European Court of Human Rights. This is primarily due to the generality of the

²³⁶ Judgment of 16 December 1992, *Niemietz v. Germany*, 13710/88.

²³⁷ Judgment of 3 April 2007, *Copland v. UK*, 62617/00.

²³⁸ Judgment of 16 October 2007, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 74336/01.

²³⁹ Judgment of 27 September 2005, *Petri Sallinen and Others v. Finland*, 50882/99.

²⁴⁰ Judgment of 22 May 2008, *Iliya Stefanov v. Bulgaria*, 73284/13.

²⁴¹ Cf. Pascal Peña Pérez, 'El derecho a la muerte digital y la protección post mortem de los datos personales: nuevas prerrogativas aplicables al ecosistema digital' (2021) 71 *Revista de la Facultad de Derecho de México* 733.

Convention solutions and the universal nature of the provisions contained in the Convention.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is, of course, not the only reference point for the problem of the legal succession of digital assets in the event of the death of their user. However, the standards emerging from it are of a universal nature. In fact, the same position as for the Strasbourg standard can be deduced from other regional legal instruments for the international protection of human rights. Article 14 of the African Charter on Human and Peoples' Rights of 27 June 1981²⁴² states that the right to property should be guaranteed. It can only be restricted in the public or general interest, but only under the provisions of the applicable laws.²⁴³ According to Article 21(1) of the American Convention on Human Rights of 22 November 1969²⁴⁴, everyone has the right to own and enjoy his property. However, the law may restrict possession and enjoyment in the public interest.²⁴⁵ On the other hand, according to Article 21(2) of this act, no one should be deprived of his property (expropriated) unless this is done with adequate compensation for public and other purposes indicated by the relevant laws.²⁴⁶ It follows from the wording of these provisions that the right to property is not an absolute right and may be restricted in the cases indicated in the relevant national legal system, provided, of course, that such restrictions do not violate the provisions of the aforementioned Convention provisions. It also includes the right of succession, the content of which is similar to that of this right under the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁴⁷

A similar standard exists at the level of the European Union, and the act that mentions the protection of property and succession is the Charter of

²⁴² African (BANJUL) Charter on Human and Peoples' Rights available on-line: <<http://www.africa-union.org/>>, [last accessed: 30 May 2024].

²⁴³ "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

²⁴⁴ American Convention on Human Rights. Pact of San Jose, available on-line: <<http://www.oas.org/>>, [last accessed: 30 May 2024].

²⁴⁵ "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society".

²⁴⁶ "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law".

²⁴⁷ Cf. Aniela-Flavia Țicău-Suditu, 'Human Rights and Inheritance Law: A Mirrored Perspective' (2021) 28 Lex ET Scientia International Journal 47.

Fundamental Rights of the European Union of 7 December 2000.²⁴⁸ Article 17(1) of this act states that every person has the right to own, use, dispose of and bequeath his lawfully acquired property. No one may be deprived of his property except in the public interest, in the cases and under the conditions provided by law, with fair compensation paid in due time. The use of property may be subject to statutory regulation if it is necessary in the general interest. This is a guideline which, in conjunction with Article 33(1) of the Charter providing for the legal and economic protection of the family (“the family shall enjoy legal, economic and social protection”) Article 24(1), first sentence, of the Charter (“children shall have the right to such protection and care as is necessary for their well-being”) and Article 7 of the Charter (“everyone has the right to respect for his or her private and family life, home and communications”), may constitute a determinant for national regulations relating to succession law.

It should also be noted that contemporary general attempts to formulate a catalogue of human rights in the scope discussed here are also the Universal Declaration of Human Rights of 10 December 1948²⁴⁹ and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.²⁵⁰ The first of these acts states in Article 17 that everyone, either alone or in association with others, has the right to own property. In turn, no one may be arbitrarily deprived of his property. And in the light of Article 16(3) of this Declaration, the family is the natural and fundamental cell of society and is entitled to protection from society and the state. In turn, the latter act provides in Article 10 that the family, as the basic cell of society, should be guaranteed the widest possible protection. Special (privileged) treatment should be given to, inter alia, minor children. A reading of Article 16 of the European Social Charter of 18 October 1961 leads to similar conclusions,²⁵¹ which provides for the legal and economic protection of the family.

Undoubtedly, therefore, legal protection of an international nature, oriented directly towards the protection of human rights through the systems of regional human rights conventions, is an appropriate point of reference for

²⁴⁸ *Charter of Fundamental Rights of the European Union*, available on-line: <https://eur-lex.europa.eu/eli/treaty/char_2012/oj>, [last accessed: 30 May 2024].

²⁴⁹ UN General Assembly Resolution 217 A(III).

²⁵⁰ *International Covenant on Economic, Social and Cultural Rights*, available on-line: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>>, [last accessed: 30 May 2024].

²⁵¹ *European Social Charter of 18 October 1961*, available on-line: <<https://www.coe.int/en/web/european-social-charter>>, [last accessed: 30 May 2024].

considering the fate of digital assets in the event of the death of an existing user. The standard that can be created against this background boils down to adopting the view that digital assets as a type of property are also subject to international protection, with all the consequences this entails, including the important role of the hitherto right holder expressed in the event of death. In fact, therefore, the relevant legal regulation on this issue should also have in mind the international standard, the violation of which may entail various negative consequences resulting from human rights violations. It is not the case, however, that the international human rights law imposes a certain way of dealing with property and, therefore, with digital assets in the event of the death of their user. Property rights, in principle, are subject to succession, which may, however, give way to other conflicting values. A succession mechanism other than inheritance also appears to be permissible.

4. SUCCESSION LAW, DIGITAL ASSETS AND EUROPEAN UNION LEGISLATION

An analysis of the determinants for the regulation of the legal fate of digital assets after the death of their user would not be complete, in the context of the law of European countries, if one did not take into account the legislation of the European Union (other than the abovementioned Charter of Fundamental Rights of the European Union). Functioning in the European Union is important in the area of ensuring legal uniformity by the state not only on the basis of the national legal order, but also against the background of the validity of EU law, which has often constituted and still constitutes a considerable challenge.²⁵²

It is true that in the European Union, the distinctiveness of legal systems in areas not entrusted to the European Union by its Member States is often emphasised, and one of the areas which seemed to confirm the need for distinctiveness in national law was succession law, however, the situation is not very clear at present.²⁵³ Indeed, until recently, succession law was an area which, in principle, was not concerned by European harmonisation - indeed, it was considered to be outside the competence of the European

²⁵² Fabrizio Cattagi and Horatia Muir Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar 2009) passim.

²⁵³ Laura-Dumitrana Rath-Boşca, Loredana Mirela Barmos and Ioana Andreea Stănescu, 'The Need to Harmonize the Laws of the European Union Regarding the Succession Law' (2016) 10 *Agora International Journal of Economical Sciences* 35.

Union.²⁵⁴ In recent years, however, this has changed, partly due to changing customs, partly due to fashion and partly due to the law.²⁵⁵ In fact, Europeans have begun to emigrate on a large scale, purchasing various goods from abroad, which, in the event of their death, has given rise to certain problems, particularly with regard to inconsistent national solutions in this area.²⁵⁶

The rise of the Internet and the services it provides or access to digital assets in this way have also significantly changed this landscape. Cross-border death as a phenomenon, i.e. death with assets left behind in several EU countries, is a problem that has started to fester.²⁵⁷ Different rules regarding the designation of the law applicable to the succession, different substantive law provisions, including a different circle of heirs and different rules for the protection of persons close to the deceased caused various difficulties.²⁵⁸ This has been recognised at the institutional level of the European Union,²⁵⁹ where succession law has suddenly become one of the elements of the reshaping of European private law in a harmonising spirit.²⁶⁰ In this way, “contrary evidence” confirmed the rule. Today, this process is still progressing.²⁶¹

More recently, however, with the entry into force and application of Regulation No. 650/2012 of 4 July 2012 of the European Parliament

²⁵⁴ Alain-Laurent Verbeke and Yves-Henri Leleu, ‘Harmonisation of the Law of Succession in Europe’ in AS Hartkamp and others (eds), *Towards a European Civil Code* (Kluwer Law International 2011).

²⁵⁵ Christian Von Bar, ‘Privatrecht europäisch denken’ (2014) 69 *Juristen Zeitung* 473.

²⁵⁶ Leone Niglia, *The Struggle for European Private Law. A Critique of Codification* (2015) 7 ff.

²⁵⁷ Yves-Henri Leleu, *La transmission de la succession en droit comparé* (Maklu 1996) 600 ff.

²⁵⁸ F Sonnenveldt, ‘Avoidance of Multiple Inheritance Taxation within Europe’ (2001) 2001 *EC Tax Review* 81, 81 ff; Caramelo Gomes (n 71) 3 ff; Heinrich Dörner and Paul Lagarde, *Étude de Droit Comparé Sur Les Règles de Conflits de Juridictions et de Conflits de Lois Relatives Aux Testaments et Successions Dans Les Etats Membres de l’Union Européenne* (Deutsches Notarinstitut 2002) 11 ff; Paul Lagarde, ‘Les principes de base du nouveau du règlement européen sur les successions’ (2012) 101 *Revue Critique de Droit International Privé* 691, 691–732.

²⁵⁹ Jürgen Basedow and Anatol Dutta, ‘Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation Of a European Certificate of Succession’ (2010) 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 524.

²⁶⁰ Paul Lagarde, ‘Présentation du règlement sur les successions’ in Georges Khairallah and Mariel Revillard (eds), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012* (2013) 5–16.

²⁶¹ Cf. Maksymilian Pazdan and Maciej Zachariasiewicz, ‘The EU Succession Regulation: Achievements, Ambiguities, and Challenges for the Future’ (2021) 17 *Journal of Private International Law* 74.

and of the Council of the EU on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,²⁶² the spirit of harmonisation has taken on a new face.²⁶³ In order to ensure a uniform interpretation of this act in all the states bound by the Regulation, the national courts have started a process of clarifying the doubts that arise in this respect as well.²⁶⁴ Also in this area, the divergence of national case law does not allow for satisfactory results. Despite the low popularity associated with the use of succession law instruments by the European public in practice, the reality of the cross-border application of the rules in this area seems to encourage further legal unification.²⁶⁵

It should be pointed out that Regulation No 650/2012 is the legal act which comprehensively regulates matters of international succession law in the European Union.²⁶⁶ According to Recital 9 of the preamble to the Regulation, as well as the wording of Article 3(1)(a) of the Regulation, it concerns all civil law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations as a result of death, whether by voluntary disposition upon death or by legal succession.²⁶⁷ According to the title of the Regulation itself, the area of jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession as well as the new European instrument to document the acquisition of succession rights (European Certificate of Succession)²⁶⁸ should be taken into account in this regard.

One of the main tasks of Regulation No 650/2012 is to determine the legal regime applicable to the legal relationship of succession to the deceased,

²⁶² Document 32012R0650, available on-line: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0650>>, [last accessed: 30 May 2024].

²⁶³ Mariusz Załucki, 'New Revolutionary European Regulation on Succession Matters – Key Issues and Doubts' (2016) 3 *Revista de Derecho Civil* 165.

²⁶⁴ Cf. Csongor István Nagy, 'EU Private International Law in Family and Succession Matters: The Hungarian Judicial Practice' (2021) 2 *Pécs Journal of International and European Law* 93.

²⁶⁵ Giovanna Debernardi, *Le règlement européen sur les successions et nouvelles perspectives pour les systèmes juridiques nationaux* (Université Côte d'Azur 2017) 28 ff.

²⁶⁶ M Esperança Ginebra Molins and J Tarabal Bosch, *El Reglamento (UE) 650/2012: su impacto en las sucesiones transfronterizas* (Marcial Pons 2016) passim.

²⁶⁷ Andrea Bonomi and Patrick Wautelet, *Le Droit Européen Des Successions. Commentaire Du Règlement N°650/2012 Du 4 Juillet 2012* (Bruylant 2016) 32 ff.

²⁶⁸ Knut Werner Lange, 'Das Europäisches Nachlasszeugnis' in Anatol Dutta and Sebastian Herrler (eds), *Die Europäische Erbrechtsverordnung* (CH Beck 2014) 161 ff.

referred to as the “succession statute”. The Regulation therefore includes rules which delimit the spheres of action of the different national systems in the legal relations of succession by determining which system should apply in a given succession case. The principle underlying the adoption of the Regulation is to prevent the fragmentation of the succession, and therefore the existence of multiple succession regimes, as a result of the parallel use of two or more connecting factors in a given case with a particular national succession regime. In this regard, the Regulation introduces the connecting factor of the testator’s habitual residence at the time of death as a set of rules whose purpose is to indicate the appropriate legal regime for the legal assessment of a particular succession.²⁶⁹ Article 21 of the Regulation states that the law applicable to the succession as a whole is the law of the state in which the deceased had his habitual residence at the time of death. The law applicable to the succession as a whole is the law of the state in which the deceased had his habitual residence at the time of his death. This law governs all matters of the succession, including, *inter alia*, the determination of the beneficiaries, their respective shares and any obligations which may have been imposed on them by the deceased, as well as the determination of other succession rights, including the succession rights of the surviving spouse or partner.²⁷⁰

In addition to the definition of the succession statute, the norms of the Regulation also indicate the jurisdiction of the courts in matters of succession [Articles 4-19 of Regulation No. 650/2012]. This refers to the jurisdiction of the courts of any of the Member States of the European Union bound by the Regulation. The Regulation uses the connecting factor of the habitual residence of the testator at the time of death. The EU legislator has assumed in this respect that the court having jurisdiction over the succession should, as a rule, apply its own law. The Regulation thus not only defines the succession statute (*ius*), but also identifies the courts of one of the States as having jurisdiction to hear the succession case (*forum*). The provisions of the Regulation are designed to ensure that the authority dealing with the succession applies its own law in most cases [Recital 27]. In such a situation, the concurrence of *ius* and *forum* is of considerable importance in practice, facilitating the settlement of specific cases. Also, therefore, the succession

²⁶⁹ Matteo A Pollaroli, ‘EU Regulation No. 650/2012 and Access to New Forms of Intergenerational Transfer of Wealth’ (2013) 1 *Ricerche Giuridiche* 405.

²⁷⁰ Christoph A Kern and Daniela Glücker, ‘Das Neue Europäische Erbstatut Und Seine Aufnahme in Der Deutschen Literatur’ (2014) 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 294.

jurisdiction of the courts of a particular Member State after 17.08.2015 derives, in principle, from the provisions of the Regulation.²⁷¹ The court with jurisdiction according to the rule of the testator's last habitual residence should therefore indicate, on the basis of the law of that place, inter alia, who is appointed to the deceased's succession and on what terms.

Regulation 650/2012 is therefore in principle only a conflict-of-laws instrument, resolving conflicts as to the applicable law and the competent jurisdiction in a particular succession case. This does not mean, however, that it does not, or cannot, have an impact on the issue of the unification of the substantive law of succession of EU States. In fact, bearing in mind the above and the standard resulting from the Article 17(1), in connection with Articles 7, 24 and 33 of the Charter of Fundamental Rights of the EU, it must be unequivocally pointed out that, despite the lack of basis for the current work on the unification of the substantive law of succession, the area of digital property and its fate *mortis causa*, is also an issue which has the capacity to be considered at this level and could be resolved, for instance, by the Court of Justice of the European Union (if only through the procedure of preliminary questions).²⁷²

This is the case, e.g., in view of the fact that European Union law is governed by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (the Consumer Directive). It follows from the provisions of this directive, which have been implemented into the individual national legal orders, inter alia, that also contracts for the provision of digital content fall within the scope of the directive and that unfair contractual terms appearing therein are to be treated as non-binding, which can be appropriately referred to, inter alia, in the area of contracts with Internet service providers and contractual provisions concerning the termination (non-transferability) of internet accounts on which digital assets (goods) is stored. The role of EU Succession Regulation No 650/2012 in this respect would be that if an appropriate legal solution were to be found with

²⁷¹ Isidoro Antonio Calvo Vidal, 'El Reenvío En El Reglamento (UE) 650/2012, Sobre Sucesiones' (2015) 1 Millennium DIPr: Derecho Internacional Privado 17.

²⁷² PA. Lokin, 'Choice-of-Law Rules in the European Regulation on Succession. A Familiar System for the Netherlands?' (2015) 10 Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftrecht 75.

regard to the fate of digital assets *mortis causa* in one member state, the protection standard could spread more widely (to other countries) through a spontaneous or institutional harmonisation of the law necessitated by the application of the provisions of the Regulation and national law.

Indeed, a consequence of the practical application of Regulation 650/2012 which has not been widely noticed - as it can be assumed - is the application in the individual legal systems of foreign substantive law solutions which could not be applied against the background of the previous connection between the succession case and the death of an individual (connecting factor of nationality). The more frequent application of foreign law than hitherto forces a broader interest in this law on the part of the various authorities in a particular country, with the result that certain solutions are inspired and perhaps ultimately adopted (what might be termed spontaneous harmonisation). This is very interesting, especially when one considers that the most frequently applied foreign law in succession cases by national courts is the law of those countries where European citizens spend the “autumn of their lives”, without giving up their citizenship or their property in their home country, but having their centre of life (habitual residence) in countries with better climatic characteristics. Hence, the foreign law often used in succession cases is, e.g., Spanish law, where a number of Europeans are increasingly willing to spend the “autumn of their lives”.²⁷³ This is also an avenue for Spanish legislators to inspire others and for national legislators in other EU countries to spontaneously, if not institutionally, harmonise this area of law.

Furthermore, there is another area in EU law and thus in the EU states that is important, seemingly outside the scope of consideration of the fate of digital goods in the event of the death of their user. Indeed, when pointing to the issue of fundamental legal solutions existing at the level of the European Union, and of possible relevance to the issue of the creation of the legal situation of digital assets *mortis causa*, it is impossible not to mention Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in relation to the processing of personal data and on the free movement of such data

²⁷³ As of January 2023, the Spanish-born population accounted for nearly 42 million nationwide. The foreign-born population was more than 6 million. That's about 15 percent of the total population. The trend is upward in this regard. See the report: National and foreign population figures in Spain 2006-2023, published by Statista Research Department, November 3, 2023, available on-line: <<https://www.statista.com/statistics/445638/population-of-spain-by-nationality/>>, [last accessed: 30 May 2024].

and repealing Directive 95/46/EC (General Data Protection Regulation). It is a piece of legislation that regulates the protection of personal data across the European Union, and its main objective is to standardise and unify the rules on the protection of such data across all EU countries. According to the Regulation, personal data is “information about an identified or identifiable natural person”, and the solutions arising from the Regulation are intended to, inter alia, protect individuals in relation to the processing of personal data, which is one of the fundamental rights under the Charter of Fundamental Rights [Article 8(1)] and is also important in relation to human functioning in the so-called digital world.

Personal data under the GDPR includes any information about an identified or identifiable natural person, and an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the natural person. Potentially, therefore, this is also an area of regulation that encroaches on the digital world, where we process a range of data, if only to use a variety of digital goods. So, too, the GDPR may leave its mark on the area of the *mortis causa* succession of digital goods, if only through the existing data processing mechanism and its connection to the right to privacy. From the content of the GDPR, however, only the protection of personal data of the living persons emerges as a principle. Indeed, according to Recital 27 of the GDPR preamble, the regulation does not apply to personal data of deceased persons. Member States may, however, legislate for the processing of personal data of deceased persons, which should be relevant for further considerations and which has already taken place in some EU countries - to be discussed further.

It should also not be overlooked that as of 17 February 2024, the Digital Services Act - Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the Digital Single Market for Services and amending Directive 2000/31/EC - became applicable in the European Union. Although this piece of legislation is potentially aimed at a different space, it is important to recognise the desire of EU bodies to protect fundamental rights in the context of so-called indirect services.

As can be seen, the area of European Union law is also not irrelevant to the *mortis causa* fate of digital assets. The traditional approach, which

in principle provides for the succession of property, which in some cases is limited by national law, does not seem to be justified in this regard. It appears that public law solutions, ranging from the conflict-of-laws act to fundamental rights to personal data protection solutions, which at first glance should have no connection, radiate onto typically private law regulations. However, digital assets escape traditional concepts, so that their use, including the use *mortis causa*, must, or perhaps only can, be non-traditional. It will certainly be associated with a number of possible limitations, which will result, among other things, from the respect for privacy and family life of the Internet user.

5. CONCLUSIONS ON THE MECHANISM OF SUCCESSION AND DIGITAL ASSETS

From the above it follows that digital assets potentially fall within the categories of objects to which the various legislators may apply the succession mechanism. The legal nature of digital assets makes it possible to classify them as one of the categories of property, which in turn must be relevant in the context of legal regulations providing for the succession of property after a deceased natural person. It is not the case, however, that constitutional or international regulations determine some unambiguous way of dealing with property, and therefore also with digital assets in the event of the death of their user. Property rights are, in principle, subject to succession, which may, however, give way to other conflicting values. A succession mechanism other than inheritance would also seem to be permissible.

Undoubtedly, the legal protection of this category of goods has its roots in constitutional and international law provisions protecting the right to property understood as the broadest right functionally vested in a given good (ownership). At the same time, it does not follow from the existing regulations at these levels that anyone must be granted an unconditional right to acquire a digital asset as a right from the deceased's estate. A law regulating the legal succession of such goods may therefore take a different path in this respect. Against the background of the constitutional and international law provisions discussed above, digital assets, as an element of a natural person's property, can potentially be qualified as goods at least analogous to property. In principle it means that digital assets can be shaped as inherited goods. The indicated paradigm, however, does not address the mechanism of succession, suggesting only the need for digital assets to continue to remain in private hands. It seems reasonable to take into account the last will of the deceased as the main factor in determining to whom and whether the

objects making up his estate consisting of digital assets are to be allocated in the event of his death, which, of course, in the case of digital assets, at least until now, seems to have been complicated.

In general, the scope of the protection of digital assets has so far not been the subject of broader interest by bodies that could shape binding law in this area, such as the European Court of Human Rights, European Court of Justice or the constitutional courts of individual states. Insofar as this will happen in the future, the path these bodies may take is uncertain, especially as significant doubts may arise in relation to the personal aspects of digital assets.

CHAPTER 3. THE RIGHT TO PRIVACY, THE RIGHT TO PERSONAL DATA PROTECTION AND SOME OTHER TYPICAL SAFEGUARDS WHICH MAY INTERFERE WITH THE RIGHT OF SUCCESSION IN THE CONTEXT OF THE POST-MORTAL STATUS OF DIGITAL ASSETS

1. INTRODUCTION

The “digital footprint” is all the information that people send on-line, whether in the shape of forms, e-mails, posts, comments, photos or videos that they publish.²⁷⁴ It’s also the collection of information provided by the browsers and applications (including IP address, language, location, IT system and more).²⁷⁵ Traces of us are also left by the movements we make on the web (time of login, logout), cookies of the sites we visit and much more. Our on-line activities and the “digital footprint” we leave behind are a valuable source of knowledge about us, our private and professional lives.²⁷⁶ For this reason, privacy, the right of the individual to live his own life, arranged according to his own will, with all outside interference kept to a minimum, is also important on the Internet.²⁷⁷ Already in ancient times, the sphere of domestic and public life was separated, which over the centuries

²⁷⁴ Cf. Merhi (n 31) 13 ff.

²⁷⁵ Cf. David Lee Baumer, Julia Brande Earp and JC Poindexter, ‘Internet Privacy Law: A Comparison between the United States and the European Union’ (2004) 23 Computers and Security 400, 401 ff.

²⁷⁶ Tatar, Gokce and Nussbaum (n 2) 1 ff.

²⁷⁷ Rebecca Wexler, ‘Privacy As Privilege: The Stored Communications Act and Internet Evidence’ (2021) 134 Harvard Law Review 2722.

led to the concept of the right to be alone by T. Cooley²⁷⁸ and formulated later - the right to privacy, when in 1890 S.D. Warren and L.D. Brandeis in the Harvard Law Review defined its limits.²⁷⁹ While it is true that the right to privacy as a distinct jurisprudential construct conceptually had yet to emerge, which was done through positive law instruments protecting only certain aspects of privacy,²⁸⁰ the importance of the right to privacy was recognised as early as the nineteenth century when the process of giving it its proper meaning and understanding has began. Over one hundred years later, the law of privacy is still developing as technological advancements continue to erode traditional concepts of privacy.²⁸¹

The right to privacy, over the years, has developed in various ways. Of interest in this context have been, among others, the views of R. Gavison, who reduced the right to privacy to the issue of a person's accessibility to others: to what extent we are known to others, to what extent others have physical access to us, and to what extent we are subject to interest from others.²⁸² Privacy is, in other words, limited accessibility. In doing so, the author mentions three elements of privacy: *secrecy*, i.e. what information others have about the individual, *anonymity*, i.e. interest in the individual by others, *solitude*, i.e. the issue of physical access to the individual.²⁸³ While in the analogue world, privacy has generally not been explicitly linked to succession, this area, it seems, can complement traditional conceptions that exclude succession when there is a primarily personal connection between an object and the person of the deceased.²⁸⁴

²⁷⁸ Thomas McIntyre Cooley, *A Treatise on the Law of Torts* (Callaghan) 29 ff.

²⁷⁹ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193, 193 ff.

²⁸⁰ Cf. Leon R Yankwich, 'Right of Privacy: Its Development, Scope and Limitations' (1952) 27 Notre Dame Law Review 499; Ali Alibeigi, Abu Bakar Munir and Ershadul Karim, 'Right to Privacy, a Complicated Concept to Review' (2019) 20 Library Philosophy and Practice e-journal 1, 1 ff; Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 Human Rights Law Review 441, 441–458.

²⁸¹ Abdus Samad Khan and others, 'The Right to Privacy, Its Progress & Decline: A Critical Review' (2022) 8 Journal of Business and Social Review in Emerging Economies 331.

²⁸² Cf. Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 Yale Law Journal 421, 421–471.

²⁸³ *ibid* 433 ff.

²⁸⁴ Mariusz Załucki, 'The Developing Problems of Succession of Digital Wealth on the Grounds of Eugen Chelaru's Concept of Personality Rights' (2023) 15 *Istorie, Cultura, Cetatenie in Uniunea Europeana* 103, 105 ff.

It should be recalled that the right to privacy, like the right of succession, ranks as a first-generation human right.²⁸⁵ The sphere of privacy of life as a distinct legal good is now protected in most modern legal systems.²⁸⁶ Indeed, according to many, there is - variously defined - a sphere of human life that is not subject to control by the state and others. The issue of privacy is related to the self-interest of the individual, his well-being and the actions taken by him to protect this value. It is a space of free movement, a domain of autonomous activity that is free from the control of other actors.²⁸⁷ In normative terms, this space implies the empowerment of the individual to shape the private sphere of life so that it is free from interference and inaccessible to others.²⁸⁸

In the literature on the subject, we can notice a multiplicity of terms referring to this issue: the personal sphere of a person, the legal personal sphere, the sphere of intimacy or the area of secrecy, etc.²⁸⁹ The idea of the law concerning the protection of the sphere of private life has changed according to the state, the legal system, the concepts reported in science or cultural-religious changes.²⁹⁰ This leads to the conclusion that no single universal system of privacy protection has been developed.²⁹¹

The most characteristic and essential element of the right to privacy is the right to seclusion.²⁹² It can be defined as the right of an individual to shape his own private sphere of life so that it is free from interference and inaccessible to others. This sphere is subject to protection because the right

²⁸⁵ Anna Banaszewska, 'Prawo do prywatności we współczesnym świecie' (2013) 13 Białostockie Studia Prawnicze 127.

²⁸⁶ Diggelmann and Cleis (n 280) 441–458.

²⁸⁷ Cf. Lee A Bygrave, *Data Privacy Law: An International Perspective* (Oxford University Press 2014) 117–144.

²⁸⁸ Marcos Alejandro Celis Quintal, 'La protección de la intimidad como derecho fundamental de los mexicanos' in David Cienfuegos Salgado and María Carmen Macías Vázquez (eds), *Estudios en homenaje a Marcia Muñoz de Alba Medrano. Protección de la persona y derechos fundamentales*. (Universidad Nacional Autónoma de México 2006) 71–108.

²⁸⁹ Jacques Velu, *Le droit au respect de la vie privée* (Presses Universitaires de Namur 1974) 7 ff; José Martínez de Pisón, 'El derecho a la intimidad: de la configuración inicial a los últimos desarrollos en la jurisprudencia constitucional' (2013) 32 Anuario de filosofía del Derecho 409, 409–430.

²⁹⁰ Laura Miraut Martín, *La formulación jurídica del libre desarrollo de la personalidad* (Dykinson 2023) 9 ff.

²⁹¹ Jonathan WZ Lim and Vrizlynn LL Thing, 'Toward a Universal and Sustainable Privacy Protection Framework' (2023) 4 Digital Government: Research and Practice 1.

²⁹² Cf. Stig Strömholm, *Right of Privacy and Rights of the Personality* (P H Norsiedt & Süners förlag 1967) 23 ff.

is granted to each person to have exclusive control over those spheres of life which do not pertain to others, and in which independence from the curiosity of others conditions the development and proper functioning of the individual.²⁹³

The category of privacy can also be applied to the sphere of an individual's family life.²⁹⁴ The protection of this sphere is based on the prohibition of arbitrary interference with the family and the right to legal protection against such interference. Privacy also encompasses all facts and data about a person's most personal qualities, i.e. sexual life, health or past. Another component of private life is respect for correspondence, which nowadays can take very different forms (traditional letters, e-mails, text messages and others). The right to respect for correspondence implies the right to keep secret the content of a communication sent to a designated addressee if this is the will of the sender.²⁹⁵

The issue of personal data protection also finds an appropriate place in this area.²⁹⁶ It concerns, *inter alia*, the principle of freedom of the individual from disclosure of information concerning his person, the competence of public authorities to obtain, collect and make available information on citizens, the right of every citizen to access official documents and data files concerning him, the right to demand rectification of information contained there, and the right to demand erasure of it. In this context, if only in relation to human activity in the digital world, one also sees the so-called right to be forgotten, allowing personal data to be deleted from databases created by any entity holding them.²⁹⁷

To date, the law and legal publications, particularly in European countries, have tended to speak of individual spheres of privacy protected by law: personal rights. And even when individual private spheres were referred

²⁹³ Cf. Vincent Gautrais, 'Le défi de la protection de la vie privée face aux besoins de circulation de l'information personnelle' (2004) 9 *Lex Electronica* 1.

²⁹⁴ Cf. Heliona Miço, 'The Right to Private and Family Life and the Need for Protection against the Digital Environment' (2023) 7 *European Journal of Economics, Law and Social Sciences* 71.

²⁹⁵ Cf. H Tomás Gómez-Arostegui, 'Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations' (2005) 35 *California Western International Law Journal* 153.

²⁹⁶ Cf. Lorenzo Dalla Corte, 'Scoping Personal Data: Towards a Nuanced Interpretation of the Material Scope of EU Data Protection Law' (2019) 10 *European Journal of Law and Technology* 1.

²⁹⁷ Samuel W Royston, 'The Right To Be Forgotten: Comparing U.S. and European Approaches' (2016) 48 *St. Mary's Law Journal* 253.

to and protected, such as the secrecy of correspondence or the inviolability of the dwelling,²⁹⁸ this did not result in any restrictions preventing the legislator at any time, at his will, from entering this sphere and regulating these matters in a different, more restrictive manner for the citizen. However, it can be argued that this situation has changed. Today's concepts of the protection of privacy in its broadest sense lead to a rather clear separation of the private sphere, which may also be of significance for the legal solutions adopted by the legislator.²⁹⁹

Therefore, all these above areas, which make up today's understanding of privacy, seem to play an important role in the context of the digital world and the "digital footprint" left there by humans, leading to a certain authority over digital assets.³⁰⁰ Hence, it is appropriate to look at concepts of privacy and to consider its possible impact on succession, obviously in the context of the applicability of this institution to address the *post-mortem* status of digital assets. Therefore, having established the relevance of digital assets for succession, it is important to consider whether another, more desirable route to address the problem of the status of digital assets after the death of their user might emerge from solutions concerning the right to privacy, understood relatively broadly and including the protection of personal data. As a first step, it will therefore be important to identify the legal basis for the protection of privacy, starting with the basic laws, passing through international and European law, all the way to contractual regulations, which also play an important role in digital relations.

2. THE RIGHT TO PRIVACY AND THE RIGHT TO PERSONAL DATA PROTECTION IN CONSTITUTIONAL REGULATIONS AND THE CONTEXT OF THE POST-MORTAL USE OF DIGITAL ASSETS

When considering the legal status of digital assets after the death of the previous user of these goods, legal solutions protecting privacy are

²⁹⁸ Isabelle Gravelais, *La protection juridictionnelle de l'inviolabilité du domicile* (Université de Bourgogne 2013) 22 ff.

²⁹⁹ Oluwatosin Reis and others, 'Privacy Law Challenges in the Digital Age: A Global Review of Legislation and Enforcement' (2024) 6 *International Journal of Applied Research in Social Sciences* 73.

³⁰⁰ Michael Birnhack and Tal Morse, 'Digital Remains: Property or Privacy?' (2022) 30 *International Journal of Law and Information Technology* 280, 280–301; Uta Kohl, 'What Post-Mortem Privacy May Teach Us About' (2022) 47 *Computer Law & Security Review: The International Journal of Technology Law and Practice* 1.

therefore an important stage of scientific inquiry. The close connection between a given digital asset and the person of the deceased user of the asset in question, which may be the result of the application of the concept of privacy in practice, may in fact determine the exclusion (in a given case) of succession.³⁰¹ Hence, for further consideration, it is necessary to establish what the current paradigm of the right to privacy is and its possible impact on the fate of digital assets after the death of their user.

In today's world, privacy, or more precisely the right to privacy, is recognised at the level of constitutional regulations, from which the legislators in ordinary laws must draw inspiration.³⁰² This right is either interpreted differently or is derived from other constitutional regulations, especially those concerning human dignity.³⁰³ It is not at all the rule that the right to privacy is explicitly referred to in individual constitutions. There may be many reasons for this, such as the time in which the contents of specific constitutions were drafted. Nevertheless, as of today, the state of constitutional law in this area is such that the right to privacy is a constitutionally recognisable right and its content is usually derived from the views expressed in constitutional and universal jurisprudence. Some constitutions also explicitly refer to the right to the protection of personal data, which is a kind of novelty of this area, a development of the concept of privacy, with increasing importance especially in the digital world.³⁰⁴

For example, direct reference to the right to privacy can be found today in the constitutions of Portugal [Article 26(1)], Spain [Article 18(1-4)] or Poland [Article 47].³⁰⁵ The Portuguese constitution mentions that “everyone is accorded the rights to protect the privacy of their personal and family life”,³⁰⁶ the Spanish constitution speaks of “guarantying privacy”,³⁰⁷ while, e.g., the Polish constitution contains a provision according to which “everyone shall have the right to legal protection of his private and family life,

³⁰¹ Lange (n 104) *passim*.

³⁰² Pisón (n 289) 409–430.

³⁰³ Luciano Floridi, ‘On Human Dignity as a Foundation for the Right to Privacy’ (2016) 29 *Philosophy and Technology* 307.

³⁰⁴ Ana Dharmo and Iris Dharmo, ‘Right to Privacy and Constitution : An In-Depth Analysis’ (2024) 11 *Interdisciplinary Journal of Research and Development* 190.

³⁰⁵ Cf., e.g.: Ángela Moreno Bobadilla, ‘El derecho a la intimidad en España’ (2016) 12 *Ars Boni et Aequi* 33.

³⁰⁶ Paulo Mota Pinto, *Direitos de personalidade e direitos fundamentais* (GestLegal 2018) *passim*.

³⁰⁷ José Antonio Soler Martínez, ‘Protección constitucional de la intimidad y de los datos de carácter personal frente a las nuevas tecnologías’ (2022) 11 *Anuario de Derecho Canónico* 93.

of his honour and good reputation and to make decisions about his personal life”.³⁰⁸ In addition, the Spanish Constitution contains an interesting Article 18(4), according to which, “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”.³⁰⁹

In France, provisions of the Constitution make no direct reference to the right to privacy.³¹⁰ However, the affirmation of the existence of this right at the constitutional level in this country has taken place³¹¹ if only in case law. The French Constitutional Council has ruled that the right to privacy derives from Article 2 of the Declaration of the Rights of Man and Citizen,³¹² and is therefore considered a constitutional right under French law. According to this provision, “the aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance to oppression”.³¹³

German Basic Law does not include the term “right to privacy”. Germany, however, has a very rich track record in this regard, part. on the provisions of the Article 1(1) of the Basic Law (inviolable human dignity) and Article 2(1) of the Basic Law (right to free development of personality).³¹⁴

Similarly, the Italian Constitution does not expressly refer to a right to privacy or data protection.³¹⁵ However, building on Article 14 (inviolability of domicile) and Article 15 (confidentiality of correspondence) relevant standards have been developed. According to the Article 14 of the Italian

³⁰⁸ Joanna Uliasz, *Konstytucyjna ochrona prywatności w świetle standardów międzynarodowych* (Wydawnictwo Uniwersytetu Rzeszowskiego 2018) 10 ff.

³⁰⁹ Mart. Otero Crespo, ‘Post-Mortem Data Protection and Succession in Digital Assets Under Spanish Law’ in Francisco António Carneiro Pacheco de Andrade, Pedro Miguel Fernandes Freitas and Joana Rita de Sousa Covelo de Abreu (eds), *Legal Developments on Cybersecurity and Related Fields* (Springer International Publishing 2024) 167–186.

³¹⁰ Pierre Kayser, *La protection de la vie privée par le droit* (Economica 1995) 11 ff.

³¹¹ Schallum Pierre, ‘La Vie Privée à l’heure Du Big Data et La «minimisation Des Données»’ *Alternatives Economiques* (26 March 2023) 1.

³¹² Cf. decision of 25 February 2010, 2010-604 DC, (2010) 52 Journal officiel “Lois et Décrets” 3, where it is stated that: “the liberty proclaimed by this article implies respect for private life”, available on-line: <https://www.conseil-constitutionnel.fr/decision/2010/2010604DC.htm>, [last accessed: 30 May 2024].

³¹³ Alain Bernard, ‘La protection de l’intimité par le droit privé’ (1995) 1995 Le for intérieur 153.

³¹⁴ Cf. Erik Tuchtfield, ‘Das Recht auf Schutz der Privatsphäre im Cyberspace’ (2018) 5 Studentische Zeitschrift für Rechtswissenschaft Heidelberg -Wissenschaft Online 389.

³¹⁵ Cf. Susanna Sandulli, *Circolazione dei dati personali e tutela della dignità della persona* (Università degli Studi Roma Tre 2019) 3 ff.

Constitution, “personal domicile shall be is inviolable. It shall not be subject to inspections, searches or seizures, save in cases and in the manner set forth by law and in accordance with guarantees prescribed for safeguarding personal liberty. Checks and inspections for reasons of public health and safety or for economic and taxation purposes shall be regulated by specific law”. In turn, according to Article 15, “freedom and confidentiality of correspondence and of every other form of communication is inviolable. Restrictions thereto may be imposed only by a measure for which reasons must be stated issued by a judicial authority in accordance with guarantees set forth by law”. Based on these regulations, both the Italian Constitutional Court³¹⁶ and the Italian Supreme Court of Cassation³¹⁷ have regularly defined the privacy as a fundamental human right. In the Italian law the area of personal data protection, among others, what is of some importance to the post-mortal status of digital assets,³¹⁸ as will be discussed later.

This matter is also regulated by the laws of Latin American countries. However, this area in each Latin American country is regulated differently, and there is no harmonisation of standards in the region.³¹⁹ It can only be pointed out that most countries are currently developing data protection laws or even sometimes adapting to the European General Data Protection Regulation, but there are still differences and challenges in terms of the development and harmonisation of standards in the region.³²⁰

It should be recalled, however, that the first significant conceptions of privacy, including those that emerged at the constitutional level, were primarily solutions arising from the federal jurisprudence of the Supreme Court of the United States of America. In the American system privacy was first and foremost a subject of protection against infringements by the authorities long before the recognition of a constitutional right to privacy.³²¹

³¹⁶ Judgement of 26 February 1994, 81/1993, available on-line: <<https://www.cortecostituzionale.it>>, [last accessed: 30 May 2024].

³¹⁷ Decision of 27 May 1975, 2129/1975, available on-line: <<https://www.cortecostituzionale.it>>, [last accessed: 30 May 2024].

³¹⁸ Cf. Francesca Bartolini and Francesco Paolo Patti, ‘Digital Inheritance and Post Mortem Data Protection: The Italian Reform’ (2019) 27 *European Review of Private Law* 1181, 1182 ff.

³¹⁹ Cf. Jorge Luis Ordellin Font and Salette Oro Boff, ‘La disposición post mortem de los bienes digitales: especial referencia a su regulación en América Latina’ (2019) 83 *Derecho PUCP* 29.

³²⁰ Antonio Anselmo Martino, ‘Asecho del derecho a la privacidad en América Latina’ (2012) 1 *Revista Internacional de Protección de Datos Personales* 1.

³²¹ Douglas J Sylvester and Sharon Lohr, ‘The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice’ (2005) 83 *Denver Law Review* 147; Vernon

The Federal *Bill of Rights* enacted in 1789 in the form of amendments to the Constitution of the United States of America, did not contain a clause on this right, but some of its provisions referred to certain aspects of it. From an analysis of the case law of the Supreme Court of the United States of America, it is clear that, at least since that time, there has been a gradual process of further expansion and extension of the concept of the right to privacy.³²² This has given rise to theoretical concepts, including the aforementioned views of T. Cooley, or S.D. Warren and L. D. Brandeis, enunciated at the end of the 19th century. In its jurisprudence, the Supreme Court of the United States of America, moreover, very often refers to these concepts and emphasises that the right to privacy is first and foremost right to leave the human being alone (undisturbed).³²³

Despite the development of the right to privacy in the United States of America, it must be emphasised again that the Constitution of the United States of America does not contain a literal right to privacy. However, individual aspects of the right to privacy have been found by Supreme Court justices in the aforementioned amendments to the Constitution: First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. In this regard, it is worth mentioning in particular the Fourth Amendment guaranteeing the inviolability of the person, dwelling and documents against unreasonable searches and seizures, unauthorised intrusions into the sphere of physical separateness of the person, the Ninth Amendment, from which it follows that the enumeration in the Constitution of certain rights does not imply to deny or disparage other rights retained by the people, thus opening the way to a broad interpretation of privacy, or the Fourteenth Amendment, one passage of which reads: “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.³²⁴

Valentine Palmer, ‘Three Milestones in the History of Privacy in the United States’ (2011) 26 *Tulane European and Civil Law Forum* 67.

³²² Cf. Baumer, Earp and Poindexter (n 275) 400 ff.

³²³ Martin Eiermann, ‘The Process of Legal Institutionalization : How Privacy Jurisprudence Turned towards the US Constitution and the American State’ (2024) 49 *Law & Social Inquiry* 537.

³²⁴ William M Beaney, ‘The Right to Privacy and American Law’ (1965) 31 *Law and Contemporary Problems* 253.

The autonomy or recognisability of the constitutional right to privacy in US law is primarily associated with the federal Supreme Court's decision in *Griswold v. Connecticut* in 1965,³²⁵ where for the first time it was unequivocally recognised that a particular statutory solution violated the "constitutional right to privacy".³²⁶ Therefore, the right to privacy in the United States of America became one of the central institutions in the American *common law* system. The development of jurisprudence in this area has meant that the content of this right is now relatively rich, and in addition to the aforementioned leaving the individual alone (undisturbed), its content includes, among other things, the protection of personal data (appearing in the US law under the name informational privacy).³²⁷ The constitutional right to privacy in US law therefore also includes the right of an individual to protect information concerning him from unwarranted disclosure. This also includes the right to limit access to the person, the right of the individual to protection of his autonomy, the right to protection of individuality and dignity or the right to protection of intimacy, which must also be relevant to the issues discussed in this book.³²⁸

However, it should be pointed out that, according to many, at least in the early days of the right to privacy, its concept in the United States of America meant that these rights terminate at the time of death. Nor did personal privacy rights of the dead exist. Federal courts have found that when a statute uses the term "person", it refers to "a living human being" and does not provide a basis for a posthumous claim for violation of the statute or right at issue.³²⁹ However, against the backdrop of social phenomena, including the widespread use of the Internet, it has been noted that posthumous privacy

³²⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³²⁶ Cf. Ernest Katin, 'Griswold v. Connecticut: The Justices and Connecticut's Uncommonly Silly Law' (1967) 42 *Notre Dame Law Review* 680, 680–706.

³²⁷ Cf. Larry J Pittman, 'The Elusive Constitutional Right to Informational Privacy' (2018) 19 *Nevada Law Journal* 135, 137 ff.

³²⁸ Cf. Bryce Clayton Newell and others, 'Regulating the Data Market: The Material Scope of US Consumer Data Privacy Laws' (2024) 45 *University of Pennsylvania Journal of International Law* 1; Shirin Elahi, 'Privacy and Consent in the Digital Era' (2009) 14 *Information Security Technical Report* 113; Alexander Roßnagel and others, 'Neue Konzepte für den Grundrechtsschutz in der digitalen Welt' in Alexander Roßnagel and Michael Friedewald (eds), *Die Zukunft von Privatheit und Selbstbestimmung: Analysen und Empfehlungen zum Schutz der Grundrechte in der digitalen Welt* (Springer 2022) 3–48.

³²⁹ See *Guyton v. Phillips*, 606 F.2d 248, 250 (9th Cir. 1979) (finding a deceased person could not bring an action under the Civil Rights Act); see also *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979) ("[A decedent] is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived").

must be reshaped to adapt to the digital age.³³⁰ This is certainly an area where the last word has not yet been said, especially as the system has developed the concept of “publicity rights” to ensure the property interests of public figures, essentially meaning commercial publicity rights, which have traditionally been located in the area of non-property rights.³³¹ The protection of the “right of publicity”, which exists at the state level, is a legal protection based on property constructions, which usually allows not only *inter vivos* but also *mortis causa* trading.³³² In fact, it is accepted that this right can be effectively separated from the person identifying it and its protection extended also to the period after the death of the right holder.³³³

Therefore, the view expressed sometimes about the understanding of privacy as an element of property rights must also be noted in these reflections. It is a model of privacy re-anchored in natural property rights (beginning with self-ownership).³³⁴ The notion of proprietarian privacy is unabashedly based on a holistic reading of the US Constitution.³³⁵ That model of privacy was invoked by Justice John Paul Stevens. In *Moore v. East Cleveland* (1977),³³⁶ in which the court struck down a zoning law that prohibited a woman from living with two grandsons who were not brothers, Justice Stevens, in a concurring opinion, said that the test to be applied was “whether East Cleveland’s housing ordinance is a permissible restriction on (Mrs. Moore’s) right to use her property as she sees fit.” The property rights standard makes distinguishing privacy violations from non-violations a matter of principle.³³⁷ Such an approach must mean that

³³⁰ Natalie M Banta, ‘Death and Privacy in the Digital Age’ (2016) 94 North Carolina Law Review 927.

³³¹ Cristina Fernandez, ‘The Right of Publicity on the Internet’ (1998) 8 Marquette Sports Law Review 290.

³³² Aubrie Hicks, ‘The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of Experience Hendrix v. HendrixLicensing.Com’ (2012) 36 Seattle University Law Review 275.

³³³ Dustin Marlan, ‘Unmasking the Right of Publicity’ (2020) 71 Hastings Law Journal 419.

³³⁴ Edina Harbinja, ‘Post-Mortem Privacy 2.0: Theory, Law, and Technology’ (2017) 31 International Review of Law, Computers and Technology 26.

³³⁵ Norberto Nuno Gomes de Andrade, ‘Striking a Balance between Property and Personality. The Case of the Avatars’ (2009) 3 Journal of Virtual World Research 3.

³³⁶ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

³³⁷ Sheldon L Richman, ‘Dissolving the Inkblot: Privacy as Property Right’ [1993] Cato Institute Policy Report, available on-line: <<https://www.cato.org/policy-report/january/february-1993/dissolving-inkblot-privacy-property-right>>, [last accessed: 30 May 2024].

the will of the “owner” must be considered, what may play a significant role in the discussion about the post-mortal status of digital assets.

For obvious reasons, the concept of the right to privacy, which had grown up on the American continent, began to gain acceptance on the European continent as well. Indeed, in parallel, doctrine of the right to privacy has emerged in some European national legal systems, which is particularly characteristic of German law.

In Germany, since the entry into force of the Basic Law of 23 May 1949, the law lists the fundamental rights of man and citizen, indicating in Article 1(1) the inviolable dignity of man and in Article 2(1) the right to the free development of personality. According to Article 2(1) of the Basic Law, every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. Consequently, this provision recognised a right whose point of reference is the person and which encompasses goods such as life, health, physical and mental safety, personal freedom, honour, privacy, name, image, family life, marital relations, economic freedom.³³⁸

The German institution of a general right of personhood (*Persönlichkeit*) is twofold in nature.³³⁹ On the one hand, it encompasses not only the right to privacy understood as the right to be left alone (right to be let alone), but also it is treated as a right to self-determination (free will), an essential element of human personality and dignity that deserves protection.³⁴⁰ This right ensures that everyone has the right to decide freely what information concerning him will be publicly disclosed; the right to decide with regard to the dissemination of his image, oral or written statements, or the disclosure of details of his private life. German law, which is, incidentally, characteristic of continental European legislation, emphasises the strong connection between privacy and human dignity, and the protection of dignity plays a momentous role in shaping the axiological basis of the legal order in this country.³⁴¹

³³⁸ Cf. Jürgen Taeger, Boris Reibach and Gregor Scheja, *Datenschutzrecht* (Universität Oldenburg 2022) 7 ff.

³³⁹ Mario Martini, ‘Das allgemeine Persönlichkeitsrecht im Spiegel der jüngeren Rechtsprechung des Bundes- verfassungsgerichts’ (2009) 41 *Juristische Arbeitsblätter* 839.

³⁴⁰ Christoph Enders, ‘The Right to Have Rights: The Concept of Human Dignity in German Basic Law’ (2010) 2 *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 1.

³⁴¹ Edward J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ (1997) 1997 *Utah Law Review* 963.

However, the concept of a general right of personhood, which gave impetus to the consideration of the right to privacy, also known as protection against indiscretions, appeared earlier than the German constitution, already in the 19th century. The real development of this concept, however, is linked to the defeat of the Reich in the second world war and the emphasis on the essence and role of human dignity against this background. Privacy in this legislative circle can therefore be regarded as a derivative of human dignity, although, as the case law of the German Federal Constitutional Court shows and as the views of the doctrine indicate, the basis for the operation of the right to privacy should also be sought in the wording of Article 10 of the German Basic Law on secrecy of communication and Article 13 of the German Basic Law guaranteeing the protection of the dwelling. Article 1(1) of the German Basic Law is therefore a kind of super standard in relation to other constitutional regulations, including for the right to privacy.³⁴²

Article 10 of the German Basic Law is worth looking at. According to its paragraph 1, the privacy of correspondence, posts and telecommunications shall be inviolable. According to Article 10(2) of this act, on the other hand, restrictions of this secrecy can only be made by law. If the restrictions serve the protection of the free democratic constitutional order or the preservation of the existence or security of the federation or one of its federal states, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.³⁴³

The relevance of this provision, in the context of the protection of privacy and the digital content issue at stake, is also significant. This is underlined by the emphasis in the case law of the German Federal Constitutional Court on the existence and importance of the inviolable, personal sphere of the human being in order to guarantee the protection of the individual against excessive and always susceptible to expansion intrusions by state authorities into the sphere of privacy.

The claim that the German general right of personality must be regarded as a constitutionally guaranteed fundamental right first resounded in a 1954 decision of the German Federal Court of Justice, where “protection against indiscretion” was mentioned, which was subsequently confirmed in

³⁴² Cf. Martini (n 339) 839 ff.

³⁴³ Cf. Johann Neethling, ‘Personality Rights : A Comparative Overview Overview’ (2005) 38 Comparative and International Law Journal of Southern Africa 210, 213 ff.

the case law of the German Federal Constitutional Court. In a 1957 case, the Court, on the basis of Article 2(1) of the German Basic Law, recognised the existence of not only a general right of personality, but also singled out one of its components, i.e. freedom of action. It defined this as the right of the individual to do what he wishes, to engage in such categories of activity as are necessary to shape his own person. This freedom is not to be absolute, it may be restricted, but only if there is a need for security measures to protect society.³⁴⁴

In a subsequent decision of the German Federal Constitutional Court in 1969, it was stated that the fundamental constitutional right guarantees every citizen the innermost sphere of personal freedom, within which the individual can freely shape his life, with the result that the public authority is deprived of the possibility of any interference in this sphere of human activity. Intimacy is to be an inviolable, absolutely protected sphere. It is the individual who is in control of his personal information, in particular as regards access to and control of the dissemination of his personal data.³⁴⁵ This has led to the development of the right to information, to which is also linked the right to an image, which to some extent corresponds to the American concept of the right to publicity.

Another judgment of the German Federal Constitutional Court from 1983³⁴⁶ on the census is seen as a milestone in the history of privacy protection. From the general right to the protection and development of one's personality rooted in the catalogue of fundamental rights of the German Basic Law, the Constitutional Court - under the conditions of automatic data processing in 1983 - also derived the fundamental right to the protection of personal data [Article 2(1) - the general right to the development of one's personality, and Article 1(1) - respect for human dignity]. The Constitutional Court linked this "new" right to the right to privacy. According to the Constitutional Court, in the context of modern data processing, the free development of one's personality therefore requires that the individual be protected against the unlimited collection, storage, use and sharing of their personal data. The right to "informational self-determination" is not, however, guaranteed without limitation. It does not afford the individual

³⁴⁴ (1957) 6 Entscheidungen der amtlichen Sammlung (BVerfGE) 32.

³⁴⁵ (1969) 27 Entscheidungen der amtlichen Sammlung (BVerfGE) 1.

³⁴⁶ Judgement of 15 December 1983, 1 BvR 209/8, available on-line: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html>, [last accessed: 30 May 2024].

absolute or unlimited control over “their” personal data; rather, the individual develops their personality within the social community, and is dependent on communication with others. Qualifying data as sensitive is not solely dependent on whether the relevant data concerns intimate matters. Rather, knowledge of the relevant context in which the data will be used is necessary to determine its significance for the right of personality: whether a restriction of the right to informational self-determination is permissible can only be assessed once it is clear for what purposes the relevant information has been demanded and what possibilities exist with regard to using and linking the data obtained.³⁴⁷

With this in mind, it is essential to note and underline the importance of an individual’s will for the creation of legal solutions that can potentially interfere with that will may also be inferred from the views of German law, of course in the context of assets over which the individual exercises relevant authority.

Case law has played, and continues to play, the most significant role in the context of shaping the boundaries of the right to privacy in Germany. This can be seen, e.g., in the considerations of the German Federal Court of Justice confronting the world-famous case before this court concerning the succession of a Facebook account, which will be presented in more detail a little further on. At this point, it will suffice to point out that this court considered, among other things, the interdependence of the right of succession and the right to privacy as well as possible conflicts on this basis, including solutions aimed at protecting personal data. Leaving aside the facts of the case, this German Federal Court of Justice noted that under German law, legal assets with strictly personal content, irrespective of their pecuniary value (and therefore also those of a private nature), can pass to heirs, as is supposed to follow from §2047(2) and §2373(sentence 2) of the German Civil Code (documents with highly personal content are inheritable). The succession of strictly personal contents, on the other hand, does not, in the court’s opinion, infringe on the testator’s posthumous personal rights, which derives from the fundamental civil right concerning the inviolability of human dignity and its contents.³⁴⁸ The interest of the heirs, combined with

³⁴⁷ Cf. Justification of the view of Constitutional Court, available on-line: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html>, [last accessed: 30 May 2024].

³⁴⁸ Judgement of 12 July 2018, III ZR 183/17, available on-line: <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&xpos=0&anz=1>>, [last accessed: 30 May 2024].

the need to protect goods of a personal nature belonging to the deceased, would seem to speak in favour of limiting the interest of the deceased, particularly where there is no relevant will.

Interesting considerations were also made by this court in the area of a potential other conflict: the rights of third-part. communication partners of the deceased and the rights of the heirs. Referring to the fundamental right to respect for private and family life and communication, it emphasised the need to consider the reasonable expectations of data subjects based on their relationship with the controller, including consideration of whether the data subject has a reasonable expectation that data processing may take place for the purpose for which someone is requesting access. In the realities of the case, also in this area, it has been established that the interests of the testator's communication partners do not outweigh the legitimate legal interests of the heirs.³⁴⁹

There is therefore a connection between succession and privacy and its various varieties, according to German legislation,³⁵⁰ which in a specific case may mean the continuation of legal relationships initiated by the deceased. Especially in a digital environment with massive amounts of data processing, this must be of importance.

In surveying the legislation worldwide in this area, it should be mentioned that also in France, e.g., jurisprudence has had a significant impact on the development of privacy and the development of legal instruments for its protection. Indeed, France is also considered In this country initially, as in Germany, privacy was derived from the general right of personality (*droit de la personnalité*), which originally comprised, among other things, precisely the right to privacy, the right to honour and the right to reputation.³⁵¹ The paradigm of the French concept in this area derives - as is often pointed out - from the concept of *vie privée murée* (private life behind walls),³⁵² although the first law referring to this right dates back as far as 1868 [the Press Law]

³⁴⁹ *ibid.*

³⁵⁰ Hannes Rosler, 'Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law' (2008) 26 Berkeley Journal of International Law 153, 168 ff.

³⁵¹ Cf. Jean-Michel Bruguière and Bérengère Gleize, *Droits de la personnalité* (Ellipses Édition 2015) 5 ff.

³⁵² Cf. Krzysztof Motyka, 'La vie privée murée, le droit à l'image i początki ochrony prywatności we Francji' in Dorota Strus and Anna Duk-Majewska (eds), *Administracja. Samorząd. Prawo. Księga jubileuszowa funkcjonowania Instytutu Administracji, Samorządu i Prawa Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach* (Oficyna Wydawnicza ASPRA-JR 2014) 93 ff.

and was cited in the famous work by S.D. Warren and L. D. Brandeis. The provision of Article 11 of this law criminalised the publication of any fact concerning private life.

In order to protect privacy, French courts, over the years, have invoked the general tort formula in their judgments. However, the French legislature considered the above solution insufficient. As a result, a new provision to the French Civil Code was introduced, according to which everyone is entitled to protection of the sphere of private life [Article 9 of the French Civil Code]. Protection for “the intimacy of private life” is strengthened by the article’s second paragraph, which provides in addition that a court can make an interlocutory order directing whatever steps may be necessary to put a stop to violations of this right.³⁵³ In the absence of a precise legal definition of “private life”, the concept has been clarified by the courts, which have held that a person’s private life includes his love life, friendships, family circumstances, leisure activities, political opinions, trade union or religious affiliation and state of health.³⁵⁴ In general, the right to privacy entitles anyone, irrespective of rank, birth, wealth, present or future office, to oppose the dissemination of his picture - an attribute of personality - without the express permission of the person concerned.³⁵⁵

The French conception of the existence of freedom of expression is enshrined in article 11 of the Declaration of the Rights of Man and of the Citizen. This act is part of the corpus of French constitutional law. The value to society of information is focused on public figures. However, a just balance needs to be found between what can be publicized, in deference to the principles of freedom of expression and of information, and what must be safeguarded from excessive public curiosity, so as to avoid infringing the individual’s right to privacy, as a part of the right of personality.³⁵⁶

Despite the lack of an explicit verbalisation of this right in the French Constitution, it is accepted that private life - in French terms - is an extension of the individual’s personality, which must give the possibility to control the

³⁵³ Helen Trouille, ‘Private Life and Public Image: Privacy Legislation in France’ (2020) 49 *International and Comparative Law Quarterly* 199.

³⁵⁴ Elisabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image: An Amiguous Concept Protecting the Human Persona’ (1998) 18 *Loyola of Los Angeles Entertainment Law Review* 511.

³⁵⁵ Cf. Judgment of the French Court of Cassation of 13 April 1988, JCP 1989 II 21320.

³⁵⁶ Cf. Motyka (n 352) 93–102.

use that the person makes of the various attributes of himself.³⁵⁷ Protection is therefore of an inverted nature in this respect. There is freedom of expression limited by the rights of others, and one such right that interferes with the freedom of third parties is the right to privacy. This right, it should be recalled, at the constitutional level in France is to be derived from Article 2 of the Declaration of the Rights of Man and of the Citizen.³⁵⁸

In French law, the issue post-mortal status of digital assets also touches on the protection of personal data. For its part, French legislation³⁵⁹ also approaches the issue from the perspective of the protection of personal data, although, in the absence of instructions left by the deceased or any mention to the contrary therein, it provides that the heirs may act to the extent necessary to organize and manage the succession.³⁶⁰ Therefore, also against the background of French law, the possibility of succession of digital assets could result in an infringement of the deceased's right to privacy, and important areas of it are linked to, *inter alia*, data protection issues.

The right to privacy also plays an important role in Central and Eastern European countries, as has been noted especially in the post-transition period. For example, in Poland, where the right to privacy is regulated in the Constitution, the constitutional regulation defines two distinct situations. Article 47 of the Polish Constitution reads: "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life".³⁶¹ This provision implies, firstly, the right of the individual to the "legal protection" of the spheres of his life indicated in the first part of the provision (private and family life). This sphere is not further defined; it can partly be defined by contrasting it with the sphere of the individual's "non-private" - that is, "public", including the individual's "political" or "social" life - that is, the sphere in which his active engagement in various interactions with others takes place. The aforementioned sphere of "political life" encompasses

³⁵⁷ Bruguière and Gleize (n 351) 5 ff.

³⁵⁸ Kayser (n 310) 12 ff.

³⁵⁹ First through the Law no. 2016-1321 of 7 October 2016 pour une République numérique, and subsequently through Ordinance no. 2018-1125 of 12 December 2018, amending Law no. 78-17 of 6 January 1978, relative à l'informatique, aux fichiers et aux libertés.

³⁶⁰ Cf. Articles 84-86, with particular reference to Article 85(II) of the Law no. 78-17 of 6 January 1978 relative à l'informatique, aux fichiers et aux libertés, as amended in accordance with the Ordinance of 12 December 2018.

³⁶¹ Ewa Michalkiewicz and Ewa Milczarek, 'Prawo do prywatności w dobie Internetu' (2015) 6 *Prawo Mediów Elektronicznych* 53, 55 ff.

situations of action of the individual essentially as a “citizen”, i.e. as part of a sovereign nation. The sphere of “social life”, on the other hand, which also includes e.g. “professional life” or “economic life”, encompasses all further relations with fellow residents of the country, during which they remain anonymous to each other, usually unknown, not bound by any special ties of a personal nature. Transfers within the circle of family or friends or close acquaintances remain in the sphere of private life; very similar transfers with a group of other people do not. The existence of one or the other situation is thus in fact decided by the individual, but both situations involve the “right to privacy”. Secondly, the situation of “deciding” by the individual - and only by the individual - on the matters defined in the second part of the provision, i.e. all those occurring as manifestations of “personal life”. Naturally, the two situations overlap and are rather two aspects of a certain homogeneous situation.³⁶²

“Legal protection” under Article 47 of the Polish Constitution means in principle protection through laws or through international agreements ratified with the consent of the law.³⁶³ In doing so, the right to privacy is not absolute and may be subject to limitations. Statutory manifestations of the protection of privacy include, inter alia, the provisions on the protection of personal goods contained in the wording of Articles 23 and 24 of the Polish Civil Code. The processing of personal data, on the other hand, is regulated at the level of an act (the Personal Data Protection Act 2018),³⁶⁴ which, however, does not apply to the processing of data of deceased persons.³⁶⁵

This problem has also found constitutional roots in, e.g., Romania, where personal rights are protected at the constitutional level.³⁶⁶ The

³⁶² According to Paweł Sarnecki, ‘Komentarz do art. 47’ in Lech Garlicki and Marek Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Wolters Kluwer 2016) 248 ff.

³⁶³ Cf. Marzena Szablowska, ‘Ochrona prywatności w krajowych oraz w międzynarodowych systemach prawnych (zagadnienia wybrane)’ (2006) 20 *Zeszyty Naukowe Ostrołęckiego Towarzystwa Naukowego* 181; Jakub Rżucido, ‘Prawo do prywatności i ochrona danych osobowych’ in Mariusz Jabłoński (ed), *Prawnym, Realizacja i ochrona konstytucyjnych praw i wolności jednostki w polskim porządku* (Wydawnictwo Uniwersytetu Wrocławskiego 2008) 153–176; Joanna Uliasz, ‘Prawna ochrona prywatności oraz wolności dzieci w Internecie’ (2020) 28 *Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza* 285.

³⁶⁴ Kinga Machowicz, ‘Prawo do prywatności w kontekście ochrony danych osobowych’ (2018) 29 *Studia Bobolanum* 167.

³⁶⁵ Marcin Rojszczak, *Ochrona prywatności w cyberprzestrzeni ochrona prywatności w cyberprzestrzeni z uwzględnieniem zagrożeń wynikających z nowych technik przetwarzania informacji* (Wolters Kluwer 2019) 128 ff.

³⁶⁶ Cf. Laura Magdalena Trocan, ‘The Evolution of Human Rights in Romania’ (2010) 1 *Days of Law* 1.

Romanian Constitution regulates the following rights: the right of persons to life, to physical and mental integrity, as well as the prohibition of torture and any inhuman or degrading punishment or treatment [Article 22]; individual freedom [Article 23]; intimate, family and private life [Article 26]; inviolability of one's home [Article 27]; secrecy of correspondence [Article 28]; freedom of conscience [Article 29]; freedom of expression (which includes freedom of the press) [Article 30]; and the right to a healthy environment [Article 35].³⁶⁷ However, the national protection of personal rights in Romania is not limited to their inclusion in the Constitution.³⁶⁸ The new Romanian Civil Code recognises the civil rights and freedoms of individuals under Article 26.³⁶⁹ Civil law in Romania guarantees and protects personal non-property and property rights, regardless of whether they belong to natural or legal persons.

At this point, it is worth devoting a few words to Romanian law. In Romania, according to the doctrine, personality rights occupy the central position within the personal non-patrimonial rights that belong to the natural persons.³⁷⁰ The classification of personal rights takes into account, the moment when personal rights protect values which are indissolubly related to the natural person's humanity: during his life or after the human being's death.³⁷¹ This means that, despite the wide doubts raised in the doctrine of civil law in Europe over the years, the concept of the existence of personality rights after the death of a natural person seems possible in the law there, which may be of interesting relevance for today's reflections on the theoretical basis of personality rights. This is because there is a conviction found in many legal systems, that these rights are intrinsically linked to the subject and therefore can only function until the subject's death.³⁷² Some scholars seem to question this idea, which, against the background of today's considerations about the *post-mortem* effects of leaving digital traces, may

³⁶⁷ Popescu (n 8) 150–156.

³⁶⁸ Ramona Duminičă, 'The Legal Protection of the Personality Right in the Romanian Civil Legislation' (2019) 24 *Studia Prawnicze. Rozprawy i Materiały* 61.

³⁶⁹ Cf. Flavius-Antoniou Baiaș, Eugen Chelaru and Ioan Macovei, *Noul Cod Civil. Comentariu Pe Articole* (CH Beck 2014).

³⁷⁰ Eugen Chelaru, 'The Personality Rights. The European Regulation and the Romanian One' (2013) 12 *Legal and Administrative Studies* 5.

³⁷¹ *ibid.*

³⁷² Jacek Mazurkiewicz, *Non omnis moriar: ochrona dóbr osobistych zmarłego w prawie polskim* (Wydawnictwo Uniwersytetu Wrocławskiego 2010) *passim*.

add to the argument in favour of a position against the automatic succession of this kind of property.

In this respect, in Romanian law, e.g., it is pointed out that, from the point of view of the protection of personality rights, the right to protection of the data with personal character is important. In Romania it is regulated by Article 77 of the new Civil Code³⁷³, according to which: “Any processing of the data with personal character, by automatic or non-automatic means, it can be made only in the cases and under the conditions provided by the special law”. The processing of the data with personal character can injure the right to intimate life, to family and private life and that is why this activity can only be developed in the cases and under the conditions stated by law.³⁷⁴ This idea seems to be extremely universal, if only because today it is the basis for many of the legislative solutions in individual countries in the area of digital wealth.

In this regard Romanian scholars mention that the law at which the new Romanian Civil Code refers is the Romanian Law No. 677/2001 on the protection of the data with personal character.³⁷⁵ The goal of this regulation is stated within art. 1 paragraph 1 and it consists in the “guarantee and protect the individual’s fundamental rights and freedoms, especially the right to personal, family and private life, with regard to the processing of personal data”.³⁷⁶ According to art. 3 paragraph 1a) of the Law No. 677/2001, the data with personal character are “any information referring to an identified or identifiable person; an identifiable person is a person that can be identified, directly or indirectly, particularly with reference to an identification number or to one or more specific factors of his physical, physiological, psychological, economic, cultural or social identity.”³⁷⁷ It is this type of legislation that can and generally does have a bearing on the exercise of personality rights.

These are undoubtedly valuable observations, which in later years formed the basis for solutions to the issues raised, among other things, in the area of post-mortal status of digital wealth of some foreign countries, as will be discussed later. In fact, when looking for solutions for digital assets, some

³⁷³ Chelaru (n 370) 15 ff.

³⁷⁴ *ibid.*

³⁷⁵ Law No. 677/2001 of 21 November 2001 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data.

³⁷⁶ Chelaru (n 370) 15 ff.

³⁷⁷ *ibid.*

legislators referred to the provisions on personal data protection, basing certain solutions on this very matter.

The Romanian example seems to be interesting in this respect, as it sees non-obvious links between succession and the right to privacy. These delicate links, as it turns out, may be the basis of a whole set of norms regulating the legal situation of digital assets after the death of their user. Undoubtedly, it follows at least from constitutional regulations on the protection of privacy, which then permeate various legislative solutions of ordinary legislation, that restrictions on the exercise of constitutional freedoms and rights are possible. These limitations, in states with a constitutional tradition, may be laid down by law, especially when this is necessary for the protection of the freedoms and rights of others, while these limitations may not affect the essence of the rights being limited.³⁷⁸

What seems even more interesting against the above background is, e.g., the fact that the Constitution of Spain, strictly read, did not recognise a separate fundamental right to data protection apart from the right to privacy. Such a distinction only emerges from the jurisprudence of the Spanish Constitutional Court, which has determined that the subject matter of this right is not only privacy, but also personal data.³⁷⁹ According to the Spanish Constitutional Court, it includes public personal data, which due to the fact that they may be accessed by anyone, does not imply that they are outside the control of the affected party, because such protection is granted by the personal data legal framework. Therefore also, the fact that such data are personal data, does not mean that such protection refers only to the intimate or private life of a person, on the contrary, the data protected refers to any data which identifies or allows for the identification of a person and may be used to generate an ideological, racial, sexual, financial or any other type of profile, or which may be used for any other purpose that in certain circumstances may pose a threat to that person.³⁸⁰

The Spanish Constitutional Court has delimited the content of the data protection right³⁸¹ by stating that it “consists in a power of disposal and control of personal data which entitles the person to decide which

³⁷⁸ Cf. Camelia Mihăilă, ‘New Concept of Personality Rights in Romanian and French Law’ (2019) 2 *Open Journal for Legal Studies* 11.

³⁷⁹ Cf. Soler Martínez (n 307) 93 ff.

³⁸⁰ Decision of 30 November 2000, STC 292/2000.

³⁸¹ Juan Manuel Fernández López, ‘El derecho fundamental a la protección de los datos personales. Obligaciones que derivan para el personal sanitario’ (2003) 11 *Derecho y salud* 37.

information he will provide to a third party, either the state or a private individual, or which data may that third parties gather, and also to the right of such individual to know who holds his personal data and for what purpose, being entitled to oppose himself to such possession or use. These disposal and control powers over personal data are part of the contents of the fundamental right to data protection which from a legal point of view they include the faculty to consent in the gathering, obtaining and access to personal data, their subsequent storage and treatment, and its potential use or uses, either by the State or by a private individual, as well. And this right to consent the disclosure and treatment, by data processing techniques or otherwise, of personal data, requires as an essential counterpart on one hand that it must be known at all times who is effectively holding such personal data and for what purpose such data is being used, and on the other, the faculty of refusing such storage or treatment.”³⁸²

Similarly, the right to privacy and the right to personal data are being singled out in Latin American countries, where, although there is no uniform solution, the solutions discussed here are beginning to be seen in an increasingly broader context, including in their nature as limiting other rights and freedoms.³⁸³

Therefore, as can be seen, the constitutional standard for the protection of privacy is not uniform, although it can definitely be emphasised that privacy as a right of the individual enjoys legal protection also at this level, with all its consequences.³⁸⁴ The ordinary legislator must take the constitutional standard into account and design the provisions of ordinary laws around it. The current trend that can be identified in this respect is that of a broad protection of privacy combined with the need for a far-reaching protection of the processing of personal data as part of the individual's freedom to disclose information concerning him. This seems to be relevant to the possible resolution of the problem of how to deal with digital data, the goods left by a user in the digital world after that user's death. This will be discussed shortly.

³⁸² Decision of 30 November 2000, STC 292/2000. Cf. Soler Martínez (n 307); Carmen Aguilar del Castillo, ‘La protección de datos entre el contenido constitucional y su contenido legal. pdf’ (2016) 2 *Labour and Law Issues* 29.

³⁸³ Martino (n 320) 2 ff.

³⁸⁴ Cf., inter alia, Katarzyna Dunaj, ‘EU Standards for Protecting the Right to Privacy in the Area of Cybersecurity’ (2023) 3 *International Law Quarterly* 15, 1–19.

3. INTERNATIONAL LAW STANDARDS ON THE RIGHT TO PRIVACY AND RIGHT TO PERSONAL DATA PROTECTION VS. POST-MORTAL USE OF DIGITAL ASSETS

Before commenting more broadly on the specific implications of broad privacy protection in the digital world, it is first necessary to reflect on international standards in this area. It may be recalled that in searching for the basis of the right to privacy in international law, it is customary and chronological to go back to the Universal Declaration of Human Rights of 10 December 1948, adopted by the General Assembly of the United Nations. Article 12 of this act stipulates that it is forbidden to interfere arbitrarily with anyone's private life, family life, home life, or correspondence, or to offend his honour or good name. Furthermore, every person is guaranteed the right to legal protection against such interference or derogation. And although the provisions of this act do not have the force of universal application, the right to privacy as so defined - as repeatedly pointed out in legal scholarship - has inspired the drafters of subsequent acts of international law.³⁸⁵

In this respect, attention should be drawn to the International Covenant on Civil and Political Rights of 19 December 1966, where the right to privacy also finds its place [Article 17 of the Covenant]. The formula used in this act is almost analogous to that of the Universal Declaration of Human Rights. It stipulated that no one shall be subjected to arbitrary or unlawful interference with his private life, family, home or correspondence, or to unlawful attacks on his or her honour and good name. Everyone was also guaranteed the right to legal protection against such interference and attacks.³⁸⁶

The cited provisions of universal human rights systems have strongly influenced the developers of regional systems. The right to privacy has found its place in almost every such system. International law in many cases determined the path followed by the national legislator.³⁸⁷

In European countries, attention should be drawn to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the aforementioned piece of legislation, attention is clearly drawn to Article 8, which explicitly states the right to privacy. It contains a broad formula

³⁸⁵ Cf. Kristian P Humble, 'Human Rights, International Law and the Right to Privacy' (2020) 23 *Journal of Internet Law* 14.

³⁸⁶ Cf. Alexandra Rengel, 'Privacy as an International Human Right and the Right to Obscurity in Cyberspace' (2014) 2 *Groningen Journal of International Law* 33.

³⁸⁷ Diggelmann and Cleis (n 280) 443 ff.

according to which everyone has the right to respect for his private and family life, his home and his correspondence.³⁸⁸ The regulation of Article 8 of the Convention creates a large area of specific freedoms of individual rights and negative and positive obligations of public authorities.³⁸⁹ It may also be pointed out that in the situations set out in Article 15 of the Convention, the obligation to apply the legal norms in question may be excluded. In addition, the relevant restrictions derive from Article 8(2) of the Convention. This may therefore only be done on the basis of provisions of statutory rank and when it is necessary in a democratic society for reasons of national security, public safety or the economic well-being of the country, the protection of order and the prevention of crime, the protection of health and morals or the protection of the rights and freedoms of others.³⁹⁰

The system of protection under the European Convention on Human Rights is fortified by guarantees for its implementation, among which the European Court of Human Rights has a leading role.³⁹¹ The case law of this Court makes it possible to identify the basic elements of the right to privacy. A detailed analysis of the activities of this body in this regard has already been made in the literature on several occasions. The jurisprudence of this Court is very rich, and the activity of the Court in this field started quite early, at the turn of the 1970s and 1980s. The addressees of the right to privacy are the states parties to the Convention. It is incumbent on them (and especially on their authorities) to guarantee this freedom.³⁹²

The right to privacy also has a high profile within the system operating in the European Union. One of the foundations of this system - as is well known - is the Charter of Fundamental Rights of the European Union.³⁹³ Article 7 of the Charter establishes that everyone has the right to respect

³⁸⁸ L Yu Fomina, 'Protection of the Right to Respect for Private and Family Life in European Court of Human Rights' (2016) 19 *European Research Studies* 97.

³⁸⁹ Gómez-Arostegui (n 295) 195 ff.

³⁹⁰ Cf. Loukis G Loucaides, *Essays on the Developing Law of Human Rights* (M Nijhoff Publishers) 83–107.

³⁹¹ Wilson (n 202).

³⁹² Fomina (n 388) 97–110.

³⁹³ Gloria González Fuster and Raphaël Gellert, 'The Fundamental Right of Data Protection in the European Union: In Search of an Uncharted Right' (2012) 26 *International Review of Law, Computers & Technology* 37.

for his private and family life, home and communications.³⁹⁴ The scope of this right thus corresponds to that set out in the European Convention on Human Rights. The essence of the Charter is that a person whose freedom or right has been violated can seek redress on the basis of the provisions of the Charter alone before both national and EU courts. The condition, however, is that the norm in question meets the criteria of direct effect and, above all, that it is sufficiently precise.³⁹⁵

The *acquis* developed under the European Convention on Human Rights and that of the member States is also part of the European Union's system, due to the content of Article 6(1) and (2) of the Treaty on European Union, which is intended to strengthen the fundamental rights system within the European Union.³⁹⁶

The same solutions in principle can be found in other regional systems protecting human rights. The American Convention on Human Rights, drawn up in San José on 22 November 1969, regulates the right to privacy in Article 11. This provision states that everyone has the right to respect for his honour and recognition of his dignity. Furthermore, no one shall be subjected to arbitrary or improper interference with his private life, family life, home turf, correspondence or unlawful attacks on his honour or reputation. Everyone is also granted the right to legal protection against such interference or attacks.³⁹⁷ In the African system, according to the African Charter on Human and Peoples' Rights, which entered into force on 21 October 1986, the right to privacy is not explicitly provided for, but it does contain provisions that make it possible to interpret this right. First and foremost, attention is drawn to Article 4, which stipulates the inviolability of the human person. Everyone is guaranteed the right to respect for his or her moral integrity. No one may be arbitrarily deprived of this right. In addition, the provisions of Articles 2, 5, 6, 9, and 322 are relevant to the

³⁹⁴ Cf. Maja Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) 20 *German Law Journal* 864.

³⁹⁵ Dunaj (n 384) 18 ff.

³⁹⁶ Cf. Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645.

³⁹⁷ Cf. Martin Hevia, 'Surrogacy, Privacy, and the American Convention on Human Rights' (2018) 5 *Journal of Law and the Biosciences* 375.

regulation in question.³⁹⁸ Also the regulations in force in the system created under the auspices of the League of Arab States, specifically the Declaration of Human Rights in Islam of 5 August 1990, in Article 18, affirms the right of everyone to privacy in the conduct of his personal affairs, in his own home, among family, with respect for property and personal relationships.³⁹⁹ The Arab Charter of Human Rights of 22 May 2004, on the other hand, in Article 21 of this states that no one shall be subjected to unlawful invasions of his privacy, family life, home mirrors and correspondence, and unlawful attacks on his honour and reputation.⁴⁰⁰

It can be seen from the above that the regulation of the right to privacy in the various human rights protection systems appears to be similar. This may indicate that their creators are based on a similar conception of human rights. Today, privacy as a category of legal protection is undoubtedly strengthening, individual legislators are confronted with this phenomenon and the resulting consequences.⁴⁰¹ National protection, which has its source in constitutional law and is usually carried out at the level of specific laws, must take into account international standards, which form the basis for specific legislative solutions.

As an example of a contemporary understanding of privacy, one can point to the views expressed by the European Court of Human Rights. The Court has often used the notion of private life in a very flexible way, using it almost as a “catch-all” clause, so that situations not covered by the concept of family life, but deserving the protection of Article 8, can benefit from it. Consequently, the first category of relationships covered by the concept could be defined as quasi-family relationships. The right to a private life is not limited to already existing relationships, but also extends to the possibility to “establish relations with the outside world”. By defining the broad boundaries of the concept of “private life”, the European Court of Human Rights confirms

³⁹⁸ Cf. Mujib Jimoh, ‘The Place of Digital Surveillance under the African Charter on Human and Peoples’ Rights and the African Human Rights System in the Era of Technology’ (2023) 1 African Journal of Legal Issues in Technology & Innovation 113.

³⁹⁹ Ms Mariam Sherwani, ‘The Right to Privacy under International Law and Islamic Law: A Comparative Legal Analysis’ (2018) 1 Kardan Journal of Social Sciences and Humanities 30.

⁴⁰⁰ Mervat Rishmawi, *The League of Arab States: Human Rights Standards and Mechanisms* (Cairo Institute For human Rights Studies 2015) 78 ff.

⁴⁰¹ Humble (n 385) 14 ff.

that there is a sphere of a person's interaction with others, even in a public context, that can be covered by the concept.⁴⁰²

It is also clear from the case law of the European Court of Human Rights that the purpose of the right to respect for correspondence is to protect the confidentiality of private communications. It is interpreted as guaranteeing the right to undisturbed and uncensored communication with others. The threshold for protection is high because there is no *de minimis* rule for permitted interference. The technological advances noted in the field of communication are regularly taken into account by the Court, which has adopted an evolutionary interpretation of the word correspondence. In addition to traditional paper letters, forms of communication such as telephone calls,⁴⁰³ messages sent by pager,⁴⁰⁴ electronic messages (e-mails) and information derived from controlling personal use of the Internet,⁴⁰⁵ or electronic data⁴⁰⁶ have also been recognised as correspondence under Article 8 of the European Convention on Human Rights.

An interesting factual situation, from the point of view of the issues discussed in this book, took place in *Copland v. the United Kingdom*. The claimant was a teaching assistant at a state school. During her employment, the claimant's phone and her e-mail and Internet connection were monitored by a supervisor. The UK Government argued that the purpose of this monitoring was to determine whether the claimant was misusing the school's facilities for private purposes. As far as the monitoring of internet use was concerned, this took the form of an analysis of the sites visited, the date and time of the visits and their duration. On the other hand, the monitoring of electronic correspondence took the form of an analysis of the recipients' e-mail addresses and the date and time they were sent. In the UK Government's view, however, there was no violation of the right to privacy in the case, as there was no monitoring of the content of the telephone calls or the content of the websites visited by the claimant. Only "automatically generated information" was subject to analysis, according to the government. The claimant disagreed that her conversations had not been overheard and her correspondence read, but pointed out that even accepting such findings, an interference with personal life and correspondence must be found. The

⁴⁰² Gómez-Arostegui (n 295) 195 ff; Fomina (n 388) 97–110.

⁴⁰³ Judgement of 6 September 1978, *Klass and Others v. Germany*, 5029/71.

⁴⁰⁴ Judgement of 22 October 2002, *Taylor-Sabori v. United Kingdom*, 47114/99.

⁴⁰⁵ Judgement of 3 April 2007, *Copland v. United Kingdom*, 62617/00.

⁴⁰⁶ Judgement of 16 October 2007, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 74336/01.

Court held that telephone calls from work were *prima facie* covered by the terms “private life” and “correspondence”. It also treated e-mails and Internet use in the same way. It emphasised that the claimant may have had a *reasonable expectation as to the privacy* of these. Having concluded that the collection and storage of the aforementioned data constituted a violation of Article 8 of the ECHR, the Court proceeded to examine whether this was done in accordance with the law, which implies that there must be a legal basis for the interference and due remedies against arbitrary interference. Such a legal regulation must, in the Court’s view, meet certain “qualitative” requirements, i.e. comply with the rule of law and be sufficiently precise. In this context, the Court did not agree with the UK Government that the general statutory mandate of the school to take all necessary and appropriate steps to ensure educational activities constituted a sufficient legal basis. Nor was there any other legal basis in domestic law at the time the interference occurred. The Court therefore unanimously found a violation of Article 8 of the European Convention on Human Rights.⁴⁰⁷

This case demonstrates that a person’s presence on the Internet and his use of tools specific to the digital world is covered by the protection of privacy, with all the consequences that this entails. It would seem to be permissible for national law to provide for some kind of limitation in this respect, which is of course the result of the wording of Article 8(2) of the European Convention on Human Rights. With the spread of the Internet, the right to privacy has therefore also evolved, with the need to extend its scope to the new environment - the World Wide Web.⁴⁰⁸

A perfect example of the loss of control over the information circulating on the Internet about oneself can be seen in the high-profile case of *Mario Costeja Gonzalez*, who filed a complaint with the Spanish data agency AEPD against *Google Spain*. The case concerned the fact that after entering his details on *Google*, a search result appeared which referred to a website of a newspaper on which information was published several years earlier and concerned the auction of his assets due to insolvency. These events took place quite a long time ago, the auction of assets due to insolvency did not ultimately take place, however, a trace of it remained on the Internet and, according to M.C. Gonzalez, it has negatively affected his good name, as well as his current business. Therefore, invoking his right to privacy in

⁴⁰⁷ Judgement of 3 April 2007, *Copland v. United Kingdom*, 62617/00.

⁴⁰⁸ Rolf Oppliger, ‘Privacy Protection and Anonymity Services for the World Wide Web (WWW)’ (2000) 16 *Future Generation Computer Systems* 379.

the broadest sense, as well as his right to the protection of personal data, the applicant requested that the information in question be permanently removed from the search engine so that it would no longer appear next to his name. Although the AEPD granted the request of Mario Costeja Gonzalez's application,⁴⁰⁹ but the Spanish court, hearing the case after an appeal by Google Spain, ultimately brought the dispute before the European Court of Justice.⁴¹⁰

The European Court of Justice, in response to the Spanish court's question for a preliminary ruling, interpreted certain provisions of the Directive 95/46/EC and also based its ruling on an analysis of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. The judgment of the European Court of Justice caused a real storm, if only because it has set a new direction in the interpretation of Internet and search engine regulations.⁴¹¹ The Court ruled⁴¹² that a data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.⁴¹³

⁴⁰⁹ Antonio González Quintana, 'El derecho al olvido frente al deber de recordar: el papel de los archivos y sus profesionales' (2021) 12 *Nuestra Historia: revista de Historia de la FIM* 53.

⁴¹⁰ Cf. Judgement of 13 May 2014, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12.

⁴¹¹ Cf. Julie Dupont-Lassalle, 'Beaucoup de bruit pour rien ? La précarité du «droit à l'oubli numérique» consacré par la Cour de justice de l'Union européenne dans l'affaire Google Spain' (2015) 104 *Revue trimestrielle des droits de l'homme* 987; Joaquin Muñoz, 'El llamado "derecho al olvido" y la responsabilidad de los buscadores - Comentario a la sentencia del TJUE de 13 de mayo 2014' (2014) 92 *Diario La ley* 9; Orla Lynskey, 'Control over Personal Data in a Digital Age: Google Spain v. AEPD and Mario Costeja Gonzalez' (2015) 78 *Modern Law Review* 522.

⁴¹² Judgement of 13 May 2014, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12.

⁴¹³ Yulia Razmetaeva, 'The Right to Be Forgotten in the European Perspective' (2020) 10 *TalTech Journal of European Studies* 58, 60 ff.

For this area, the protection of personal data has become important in recent years.⁴¹⁴ This is particularly evident in the European Union, where the Regulation (EU) 2016/679 (General Data Protection Regulation) has been adopted, as already mentioned. It can be additionally pointed out that the assumptions of this legal act are based on the position that the protection of natural persons in relation to the processing of personal data is one of the fundamental rights. Indeed, Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union state that everyone has the right to the protection of personal data concerning him.⁴¹⁵ For these reasons, the rules and regulations for the protection of individuals with regard to the processing of their personal data must not infringe their fundamental rights and freedoms, in particular the right to the protection of personal data. According to the views taken at EU level, on the other hand, the processing of personal data should be organised in such a way that it serves humanity. At the same time, the right to the protection of personal data is not an absolute right. It must be seen in the context of its social function and weighed against other fundamental rights in accordance with the principle of proportionality.⁴¹⁶ Undoubtedly, rapid technological progress and globalisation have brought new challenges to the protection of personal data,⁴¹⁷ as exemplified by, inter alia, the problem of leaving a “digital footprint” *post-mortem* on the Internet. Although the wording of the GDPR implies as a principle only the protection of personal data of the living persons,⁴¹⁸ as I have already mentioned, according to recital 27 of the preamble of the GDPR, member states of the EU may adopt legislation on the processing of personal data of deceased persons.⁴¹⁹

⁴¹⁴ Rolf H Weber, ‘The Right to Be Forgotten’ (2011) 2 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 120.

⁴¹⁵ Maria Tzanou, ‘Data Protection as a Fundamental Right next to Privacy? “Reconstructing” a Not so New Right’ (2013) 3 International Data Privacy Law Journal 88.

⁴¹⁶ Ervin Karamuç, ‘The Human Rights: The Legal Protection of Personal Data’ (2015) 4 Academic Journal of Interdisciplinary Studies 224.

⁴¹⁷ Cf. Laura Miraut Martín, ‘Novas Realidades, Novos Direitos. Algumas Reflexões sobre a Necessidade de Salvaguardar os Dados Pessoais’ in Eduardo Vera-Cruz Pinto and Marco Antonio Marques da Silva (eds), *Direito Digital, inteligência artificial e proteção de dados* (Quartier Latin do Brasil 2023) 271–298.

⁴¹⁸ Cf. Bart Custers and Gianclaudio Malgieri, ‘Priceless Data: Why the EU Fundamental Right to Data Protection Is at Odds with Trade in Personal Data’ (2022) 45 Computer Law & Security Review 1.

⁴¹⁹ As to the use of such data see, e.g.: Hiroshi Nakagawa and Akiko Orita, ‘Using Deceased People’s Personal Data’ (2022) 37 AI & Society 1.

Such provisions, in the context of the issue at hand, already exist in some EU countries, which must be signalled here. However, as can easily be seen, the area of leaving digital traces of human beings in the virtual world nowadays also reaches this normative context.

There is no doubt that the Internet is a diverse data processing environment, a tool that is now used in all aspects of daily life, a system that enables the exchange of information (data) between different devices connected to it. Social life on the Internet has become an extension of life itself in almost all its dimensions. The Internet is regarded as a community of users. It is assumed that there is a huge group of people on the other side who are willing to make contact and interact. This worldwide system of computer-to-computer connections is a space of IP addresses in which we share huge amounts of data, which are then transmitted instantaneously around the world, essentially ruling out the possibility of retaining control over it. For this reason, it is the area of regulation that creates this kind of protection (Internet data protection), which refers to the practices, safeguards and binding rules put in place for its existence. It is intended to ensure that the individual has control over the data and can decide whether to share some of it, who has access to it, for how long and for what reason. Surely, then, this is an important area for seeking inspiration as to how to regulate the problems of dealing with our assets in the digital world. For this reason, the hitherto seemingly unconnected spheres of property and privacy may nevertheless be related. A decision about our property goods must consider the sphere of privacy.⁴²⁰

It should also be mentioned that, as of 17 February 2024, the Digital Services Act - Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the digital single market for services and amending Directive 2000/31/EC - also became applicable in the European Union.⁴²¹ This regulation applies to so-called indirect services, including mere transmission, caching or hosting. It aims to contribute to the proper functioning of the internal market for indirect services by establishing harmonised rules for a secure, predictable and trusted online environment that facilitates innovation and in which fundamental rights are effectively protected. The Regulation strongly emphasises the need to

⁴²⁰ Ivan Stepanov, 'Introducing a Property Right over Data in the EU: The Data Producer's Right - an Evaluation' (2020) 34 *International Review of Law, Computers & Technology* 65.

⁴²¹ Aina Turillazzia and others, 'The Digital Services Act : An Analysis of Its Ethical, Legal, and Social Implications' (2023) 15 *Law, Innovation and Technology* 83.

protect the fundamental rights enshrined in the Charter of Fundamental Rights of European Union in the digital market. These include, in particular, freedom of expression and information, or consumer protection, which are at the heart of the protection of consumers of digital services. Thus, while the main objective to be pursued by the regulation is protection within the framework of the so-called intermediate services, the axiology underlying this legal act seems to be an interesting determinant also for problems that are not covered by the content of the regulation, including solutions concerning the fate of digital goods after the death of their user.⁴²² This should also be kept in mind when developing these legal solutions in the area discussed in this book.

In addition to the above, it may be noted that due to the rather general wording of international instruments in this area and the resulting lack of precision for the digital environment, some legislators have been tempted to create national regulations for the protection of human rights in the digital environment. An example of this is the Portuguese Charter of Human Rights in the Digital Age adopted on 17 May 2021.⁴²³ As the doctrine indicates, protection of personal data and cybersecurity naturally emerge as the main areas addressed in the content of the Charter. Within this scope, the Charter grants a global process of transforming the Internet into an instrument for the achievement of freedom, equality and social justice, with a view to social inclusion in a digital environment, as well as a space for the promotion, protection and free exercise of human rights.⁴²⁴ Perhaps in the future this act will become a model to be applied on a wider scale.

It follows, therefore, that also at international and European level, privacy is of vital importance and enters into correlations with solutions concerning *mortis causa* personality. The design of future legal solutions concerning the legal status of digital assets left on the Internet by their user after his death must bear this in mind. This is because, potentially, the succession mechanism may have to give way to a broader protection of privacy and the resulting protection of personal data or other safeguards

⁴²² *ibid.*

⁴²³ Law no. 27/2021.

⁴²⁴ Cf. Domingos Soares Farinho, 'The Portuguese Charter of Human Rights in the Digital Age: A Legal Appraisal' (2021) 13 *Revista Española de la Transparencia* 85; Nuno Sousa e Silva, 'Internet e Direitos Fundamentais: uma crescente interação' (2023) 35 *Revista de Direito e Estudos Sociais* 203.

protecting persons entering into various types of relationships with the deceased in the on-line environment.

4. CONTRACTUAL RESTRICTIONS ON THE POST-MORTAL TRADING OF DIGITAL ASSETS

Against the background of constitutional and international legal solutions related to the right to privacy, which seem to have the potential to influence and, e.g., limit succession solutions if only because the digital asset in question is closely linked to the person of the deceased or its broad disclosure interferes with the privacy of third parties, answers resulting from practice may turn out to be interesting. There is no doubt that Internet service providers have considered the issue of access to digital assets after the death of their users in their contractual regulations long before legislators became interested in these solutions.⁴²⁵ Therefore, while the right of succession and the right to privacy in this area may remain in a certain conflict, it is worth looking at some of the problems of practice before moving on to the presentation of individual statutory solutions concerning the question of what can be done with digital goods after the death of their user. This is because it is undeniable that digital content, particularly in social media and the associated human presence in the virtual world, is an area that has long given rise to significant practical problems concerning the *mortis causa* circulation. Despite the fact that such trading is not yet particularly popular worldwide (although it is growing) and that, in academic circles, actions concerning digital assets carried out upon death are still - to all appearances - an undiscovered area in many places, one of the fundamental problems that arise against this background is the issue of the user's ability to dispose of digitally produced data in the virtual world at the time of his death. This concerns both the disposal of a virtual account and of the digital assets associated with this account. There is no doubt that virtual reality has overtaken the legislators, if only because attempts are being made to dispose of this type of data as well as to assume the user's virtual rights and obligations *post-mortem*, despite the lack of any regulation in this area in many countries. Analyses carried out in this area show that the problem will grow, if only because in 2070, less than fifty years from now, there will be fewer living *Facebook* users than deceased ones.⁴²⁶

⁴²⁵ Cf. Dubravka Klasiček and Tomislav Nedić, 'The Power of Internet Service Providers (ISPs) over Digital Life – Civil Law Insight' in Iva Buljubašić and others (eds), *Conference Proceedings: European Realities – Power* (University of Osijek 2023) 217–240.

⁴²⁶ Öhman and Watson (n 50) 1–13.

Individual contracts with Internet service providers contain various provisions to the effect that an account created by the original user cannot be accessed by other persons. In this light, one wonders about the effectiveness of such contractual provisions in the context of the mandatory rules of succession law.⁴²⁷ Intuitively, it would seem that contractual provisions cannot be in conflict with mandatory rules of law. Whether this is the case in reality, however, and whether rights and obligations related to the use of various on-line information systems can therefore pass on to heirs, is a problem worth considering. However, as there are many different systems of this kind, the digital content of the most popular social network on the Internet, i.e. *Facebook*, shall serve as an example.⁴²⁸ This service had an approximately 3.05 billion active users as of the end of 2023, which makes it the biggest social network worldwide.⁴²⁹ It is estimated that over 8,000-10,000 *Facebook* users die every day. This is undoubtedly an important reference point for further consideration.

There is no question that, in many cases, the succession of the user's virtual rights and obligations, particularly those relating to content on social networks, may be hindered by the rules of the websites (terms of use) where the deceased used his digital assets (at least *prima facie*). Participation in individual on-line services is based on a contractual relationship. In order to use a particular service, the user must agree to the terms-of-use, which he does by concluding a click wrap agreement, without which the exploitation of virtual reality is not possible.⁴³⁰ In turn, the terms-of-use often prohibit the granting of access to the virtual account to other persons (and the content therein - digital assets), not to mention its trading, including its *mortis causa* trading. However, if one were to assume that digital assets have a pecuniary value and are a type of property (as I have previously pointed out), it would be impossible to conclude that contractual provisions can exclude the application of the legal act without its express wording to this extent.

⁴²⁷ Cf. Sergio Cámara Lapuente, 'La sucesión mortis causa en el patrimonio digital. Una aproximación' (2019) 84 *El notario del siglo XXI: revista del Colegio Notarial de Madrid* 377.

⁴²⁸ Cf. McCallig (n 42) 1-34.

⁴²⁹ S. Westreich, 'How Many Dead People Are on Facebook?', Medium.com of 21.09.2020, available on-line: <<https://medium.com/swlh/how-many-dead-people-are-on-facebook-aa296fea4676>>, [last accessed: 30 May 2024]. See also the Report: Facebook User and Growth Statistics to Know in 2024, available on-line: <<https://backlinko.com/facebook-users>>, [last accessed: 30 May 2024].

⁴³⁰ Heather Daiza, 'Wrap Contracts: How They Can Work Better for Businesses and Consumers' (2018) 54 *California Western Law Review* 14.

However, the possibility of transposing the concept of succession of all the deceased rights and obligations to digital assets on the grounds of privacy, protection of personal data or the resulting secrecy of correspondence is questionable. Resolving conflicting values can be quite a challenge. Profiles “tracked” by thousands and sometimes millions of Internet users can undoubtedly be a “catch-all” for heirs, ultimately they will have a significant economic value. On the other hand, some content appearing in the virtual world, often personal, should not necessarily fall into the wrong hands, including those of the heirs. However, the possibility of such content being inherited can hardly be ruled out straight away.⁴³¹

Different Internet service providers offer different solutions to the problem of a deceased person’s account and the content contained in that account. For example, *Facebook* allows the account to be given an “*in memoriam*” status, which transforms the account into a kind of memorial, a plaque commemorating the deceased.⁴³² It is clear from the terms-of-service that *Facebook* generally does not share account data with others. As can be read on the service, “we cannot share login details for an account with *in memoriam* status. Logging into another person’s account is always a violation of our policies”.⁴³³ Elsewhere on this site, however, it is indicated that “we can only process requests for access to the contents of a deceased person’s account from persons who are legitimate representatives of that person. Processing a request to access the contents of an account is a lengthy procedure and will require a court order”.⁴³⁴ Elsewhere on this website, it is in turn possible to obtain information that members of the deceased’s immediate family can, after appropriate kinship verification, also request the deletion of the *Facebook* account. “For special requests, we require confirmation that the author of the request is a member of the deceased person’s immediate family

⁴³¹ Kristina Sherry, ‘What Happens to Our Facebook Accounts When We Die ? Probate Versus Policy and the Fate of Social-Media Assets Postmortem’ (2012) 40 *Pepperdine Law Review* 185, 234 ff.

⁴³² Which also responds to problems arising from the practice where Facebook denied relatives of the deceased access to the account while the account was still “alive”. Cf. M. Moore, *Facebook Introduces ‘Memorial’ Pages to Prevent Alerts About Dead Members*, *The Telegraph* of 27 October 2009, available on-line: <<http://www.telegraph.co.uk/>>, [last accessed: 30 May 2024].

⁴³³ Terms-of-service available on-line: <<https://www.facebook.com/help/150486848354038>>, [last accessed: 30 May 2024].

⁴³⁴ Terms-of-service available on-line: <<https://www.facebook.com/help/contact/398036060275245>>, [last accessed: 30 May 2024].

or the executor of the deceased person's will" - states the information from the tab "Deactivating, deleting an account and giving it *in memoriam* status."⁴³⁵

Other Internet service provider that offers e-mail services - *Gmail* - stipulates that accessing a deceased person's mail in *Gmail* is permissible in some cases. "We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review".⁴³⁶ On the other hand, *MySpace*, e.g., a service that allows people to create their own galleries and music profiles, allows changes to a deceased person's account and the entitled persons are the next of kin. The profile can be deleted or retained as desired. The request must be accompanied by a death certificate and guidelines for the profile (delete, keep, delete only certain content).⁴³⁷ In contrast, the X service, which provides a microblogging service that has replaced *Twitter*, provides that "in the event of the death of a X user, we can work with a person authorised to act on behalf of the estate, or with a verified immediate family member of the deceased to have an account deactivated".⁴³⁸

Similar solutions are being proposed by other social networks, increasingly allowing the legal successors of the deceased to decide the future fate of the virtual account. One of the first portals to allow the safekeeping of passwords to various virtual services was *Entrustet*, where the user could create a list of his digital assets and indicate who among his legal successors should access them after his death. Although this portal was taken over in 2012 by another Internet service provider, *SecureSafe*, which did not automatically take over legacy accounts (which may raise some questions, as digital content was deleted if the legacy users were inactive), it still offers

⁴³⁵ Terms-of-service available on-line: <<https://www.facebook.com/help/359046244166395>>, [last accessed: 30 May 2024].

⁴³⁶ Terms-of-service available on-line: <<https://support.google.com/mail/answer/14300>>, [last accessed: 30 May 2024].

⁴³⁷ Terms-of-service available on-line: <<https://www.askspace.com/>>, [last accessed: 30 May 2024].

⁴³⁸ Terms-of-service available on-line: <<https://help.twitter.com/en/rules-and-policies/contact-x-about-a-deceased-family-members-account>>, [last accessed: 30 May 2024].

similar services and allows, among other things, the user to preserve digital content *mortis causa* using the *DataInheritance* function.⁴³⁹ It allows you to designate beneficiaries of digital content in the event of death, to plan the fate of your own virtual world *mortis causa*.⁴⁴⁰

Similar services are emerging in individual countries. However, they are not particularly popular. For example, until recently, there was a service in Poland providing this type of service called *ZostawŚlad.pl*, which was designed to maintain access passwords to various portals, important documents and other types of files, and then pass them on to legal successors after death. Today, this service is no longer available.⁴⁴¹ Similar services were offered a few years ago by others in the world, such as the *Password Box*,⁴⁴² *Cirrus Legacy*⁴⁴³ or *Asset Lock*,⁴⁴⁴ which also no longer exist today. Others, such as *1Password*, are in operation.⁴⁴⁵ In addition, there are virtual accounts which expire automatically if the user does not log on to the service for a contractually stipulated period of time. This is the policy of, e.g., the popular *Dropbox*,⁴⁴⁶ where you can read that “from time to time *Dropbox* removes inactive accounts. If no activity occurs on your *Dropbox* account for an extended period of time, *Dropbox* will send an appropriate notification to you or the account owner in an e-mail.”⁴⁴⁷ Special account deletion services have also appeared on-line, such as *Account Killer*,⁴⁴⁸ the operation of which may be questionable, but in many cases proves to be effective. Moreover, the dead are not only present on typical social networks. Special sites dedicated

⁴³⁹ Terms-of-service available on-line: <<http://www.securesafe.com/>>, [last accessed: 30 May 2024].

⁴⁴⁰ M. Egan, *DataInherit Silver Safe Review*, PC Advisor of 3 June 2010, available on-line: <<http://www.pcadvisor.co.uk/>>, [last accessed: 30 May 2024].

⁴⁴¹ See the website available on-line: <<http://www.zostawslad.pl/>>, [last accessed: 30 May 2024].

⁴⁴² See the website available on-line: <<http://www.passwordbox.com/>>, [last accessed: 30 May 2024].

⁴⁴³ See the website available on-line: <<http://www.cirruslegacy.com/>>, [last accessed: 30 May 2024].

⁴⁴⁴ See the website available on-line: <<http://www.assetloc.com/>>, [last accessed: 30 May 2024].

⁴⁴⁵ See the website available on-line: <<http://www.1password.com/>>, [last accessed: 30 May 2024].

⁴⁴⁶ Terms-of-service available on-line: <<http://www.dropbox.com/>>, [last accessed: 30 May 2024].

⁴⁴⁷ Terms-of-service available on-line: <<https://help.dropbox.com/pl-pl/account-access/email-about-inactive-account>>, [last accessed: 30 May 2024].

⁴⁴⁸ See the website available on-line: <<http://www.accountkiller.com/>>, [last accessed: 30 May 2024].

to people who have died are also created. In the Polish Internet, this is, e.g., *Wirtualny Cmentarz*,⁴⁴⁹ where accounts commemorating several thousand people have already been set up. Interestingly, there are also accounts remembering animals on this site.

The above presentation shows that the practical treatment of the virtual *mortis causa* succession varies. It should be noted that most social networks were created no more than twenty years ago, at the beginning of the twenty-first century (*LinkedIn* was created in 2002, *MySpace* was created in 2003, *Facebook*, *Gmail* were created in 2004, *Twitter* in 2006). During this period, succession authorities have had to grapple many times with the technological challenges of modern times, but in Europe, e.g., this has not resulted in any wider discussion about the possible need for changes in legal regulation in the context of digital assets. Until recently, the main emerging voices in this regard came from Anglo-Saxon doctrine, particularly from the United States of America.⁴⁵⁰ Nowadays, this discussion is broader and involves many legal systems.⁴⁵¹ It has addressed a number of issues, including the question of whether the will of the deceased can be of any relevance, both for the possible commemoration of his person on a plaque in the virtual world and for the appointment of the decision-makers. The question of whether a testamentary disposition may result, for instance, in the deletion of an account from the Internet (together with the assets stored therein) as well as in the deletion of only some data still needs to be answered. Finally, it is important to examine the basis on which digital asset estate planning services⁴⁵² operate and to what extent the heirs should decide on the virtual rights and obligations of the deceased.

Given the technological changes that have taken place in the last decade or so, there is no doubt that technology will continue to be an interesting challenge for lawyers. The fact that at present the main source of the user's entitlement in respect of his account and related digital content is usually the contract he has previously concluded does not necessarily mean that in future

⁴⁴⁹ See the website available on-line: <<http://www.wirtualnycmentarz.pl/>>, [last accessed: 30 May 2024].

⁴⁵⁰ Cf., e.g.: Darrow and Ferrera (n 42) 281 ff; Mentrek (n 23) 195 ff; Beyer and Griffin (n 98) 1 ff; Koppel (n 46) 1 ff.

⁴⁵¹ Cf., e.g.: Magnani (n 47) 519 ff; Szulewski (n 47) 732 ff; Berti and Zanetti (n 47) 2 ff; Mateusz Mądel, 'Następstwo prawne treści cyfrowych z perspektywy prawa Stanów Zjednoczonych Ameryki' (2016) 7 *Prawo Mediów Elektronicznych* 1; Esperança Ginebra Molins (n 36) 912 ff.

⁴⁵² These services involve, among other things, the transfer of account details to a person nominated by the deceased user.

the provisions of the law of succession will apply to such legal relationships. While contractual entitlements are not absolute, it is theoretically possible to shape them in such a way that they lead to the termination of the account with the death of the user. It seems, however, that the economic value that may follow a social account will become a tempting argument for some circles to immortalise virtual lives.

In this connection, it is reasonable to take into account the will of the current user of the social media account as to the further fate of such an account. It cannot be convincingly demonstrated that the content associated with such an account is not of a pecuniary nature (as explained earlier), therefore becoming an object of interest for succession law. Hence, in the absence of an appropriate instruction from the deceased, the decision in this regard should generally be taken by the legal successors of the account holder. It should certainly not be the decision of the Internet service provider, especially in an era of open access to such services.

In the above context, it is worth recalling two much-discussed cases at the time concerning access to digital assets. The first one was decided in the United States of America. The second one was decided in Germany. Both provoked significant discussion and contributed, it is believed, to changes in the perception of this area of law.

The first case concerned access to the e-mail of an American soldier who had been killed in Iraq.⁴⁵³ The deceased's father sought access to his e-mail account because of the content he expected to find there for the publication of his memoir, which was the testator's previously expressed intention. The email provider - *Yahoo!* - refused this access on the grounds of privacy and the rules of use of the e-mail service, which stipulated that access to the account could not be provided to third parties.

In April 2005, the probate court ordered the release of the deceased email account data prejudging the ability of the user's successors in title to his virtual rights and obligations.⁴⁵⁴ Judge Eugene Arthur Moore of the Probate Court of Oakland County, Michigan, ordered *Yahoo!* to deliver the contents of any and all e-mail, documents, and photos stored in the account of *Justin Ellsworth* to his father via CD-ROM and written format. On 20 May 2005, the deceased father, John Ellsworth, reported to the court that he had

⁴⁵³ In re Estate of Ellsworth, No. 2005-296, 651-DE; Cf. Darrow and Ferrera (n 42) 281 ff.

⁴⁵⁴ There was an on-line website <<http://www.justinellsworth.net/>> about the case, which unfortunately is no longer available.

received a CD-ROM and three bankers boxes of his son's e-mails. Among the more than 10,000 pages of material sent by *Yahoo!*, the deceased father found correspondence from people he had never even heard of.⁴⁵⁵

The circumstances of the case identified, inter alia, that when Justin Ellsworth initially established his account with Yahoo, he chose a password to protect his account from unauthorised access. Given the events following his death, it is clear that Justin never shared his password with his father. Additionally, in order to establish his account, Justin agreed with *Yahoo!*'s terms-of-service. *Yahoo!* stated that, in the absence of a court order, disclosure of the contents of the account would have violated its privacy policy. Indeed, *Yahoo!* required that users "agree and consent to the *Yahoo!* terms of service and privacy policy" during the sign-up process. The terms-of-service indicate that survivors have no rights to access the e-mail accounts of the deceased. Under the section entitled "No Right of Survivorship and Non-Transferability" account holders must agree "that your *Yahoo* account is non-transferable and any rights to your *Yahoo* ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated, and all contents therein permanently deleted". Justin Ellsworth also did not have a valid last will and testament when he died.⁴⁵⁶

In such circumstances, the court ordered access to the deceased's e-mail for his heir. The case was widely publicised⁴⁵⁷ not only in the United States of America, but also in other countries.⁴⁵⁸ In turn, its conclusions can and certainly have inspired the addressing of the problems of digital assets in the *mortis causa* context. Despite the questioning of the status of e-mail as an inheritable good, the nature of e-mail has already been invoked in many places, which has led, among other things, to e-mail Internet service providers such as *Yahoo!* changing their approach to the matter. At present, the Internet service providers' policies, if any common denominator can be found for them, generally take into account the property interests of the heirs.

The second case worth recalling in a broader context is the issue of access to content on a *Facebook* account. More space should be devoted to

⁴⁵⁵ Cf. Cummings (n 46) 898–948.

⁴⁵⁶ In re Estate of Ellsworth, No. 2005-296, 651-DE.

⁴⁵⁷ Elizabeth D Barwick, 'All Blogs Go to Heaven: Preserving Valuable Digital Assets Without the Uniform Fiduciary Access to Digital Assets Act's Removal of Third Part. Privacy Protections' (2016) 50 Georgia Law Review 595.

⁴⁵⁸ Cf., e.g.: Mart. Otero Crespo, 'La sucesión en los «bienes digitales». La respuesta plurilegislativa española' (2019) 6 Revista de Derecho Civil 89, 89–133.

this case, especially as it may be an important inspiration for many similar cases decided in continental European countries, where, at present, there is usually no specific legal regulation of succession in the digital world. Indeed, this case was decided, in principle, on the basis of “traditional norms”, treating the digital asset as a normal object of succession.

Recalling the broader context of the case, it is important to clarify that *Facebook* is a social network that creates technologies and services that enable users to connect, build communities and grow their businesses. *Facebook* does not charge for its use. Instead, companies and organisations pay *Facebook* to display ads for their products and services. By using *Facebook*, the user agrees to be shown ads that *Facebook* thinks will be of interest to him. *Facebook* uses user’s personal information to determine which ads to show him. The use of *Facebook* is unique: from the posts, stories, events, ads and other content that users can see in the news section or on the video platform, to the pages users follow and other features they may use. In order for *Facebook* to operate its service globally, it is necessary to store and distribute content and data in data centres and systems around the world, including outside the country of user’s residence. Such infrastructure is operated or controlled by *Facebook* and its affiliates.⁴⁵⁹

Facebook terms-of-service (formerly known as the Statement of Rights and Responsibilities)⁴⁶⁰ constitute the entire agreement between the user and *Facebook* in relation to the use of *Facebook* products. This agreement is concluded on the Internet as a result of creating an account on this social networking site and accepting its terms-of-service. According to *Facebook*’s terms-of-service, the *Facebook* community is safer and more responsible when real people are behind the comments and actions. Therefore, users are required to: use the first and last name they use on a daily basis; provide accurate information about themselves; to create only one account (their own) and to use the timeline for their own purposes; not to share the password, not to allow others to use *Facebook* account, and not to transfer *Facebook* account to another person (without *Facebook*’s permission).

Furthermore, the transfer of any of user’s rights or obligations under these terms of service to another person without *Facebook*’s consent is

⁴⁵⁹ Cf. Edwards and Harbinja (n 46) 2. Lilian Edwards and Edina Harbinja, “What Happens to My Facebook Profile When I Die?” Legal Issues Around Transmission of Digital Assets on Death,” *CREATe Working Paper* 5, no. 5 (2013): 2.

⁴⁶⁰ Facebook terms-of-service, date of last update: 12 January 2024, available on-line: <<https://www.facebook.com/legal/terms>>, [last accessed: 30 May 2024].

prohibited. However, the user can designate a person (known as the account custodian) to manage the account when it becomes “*in memoriam*”. Only the account custodian, or a person designated by the user in a valid will or other such document in which the user has expressly willed disclosure in the event of death or incapacity, may request disclosure of the contents of the account that has been granted “*in memoriam*” status.⁴⁶¹ The “*in memoriam*” account status is related to the death of its user. As *Facebook* points out, it wants to respect the wishes of its users regarding what should happen to the account after their death. If a family member or friend uses the appropriate form to send a request for account conversion, the account will receive a special “*in memoriam*” status after verification, unless the owner has requested that the account be deleted in the event of their death.⁴⁶²

According to *Facebook*, giving an account an “*in memoriam*” status protects it from, among other things, other people logging into it. An account with an “*in memoriam*” status is still visible on *Facebook* but can only be managed by an account custodian chosen by the account holder. If the account owner has not chosen a custodian for the account, no one will actively look after the account after the request for “*in memoriam*” status was sent. If the account owner has requested that the account be permanently deleted after their death, *Facebook* will delete the account once it is notified of the account owner’s death.⁴⁶³

Such provisions of the terms of service can and do raise important questions in practice. It is not clear from them who, or whether, becomes entitled to the digital content associated with a *Facebook* account after the user’s death. Access to an account does not imply that the content therein is transferred to another person. The option of deleting an account is also highly controversial. What happens then to the data stored on the account after the death of the user? What should happen? Who and on what grounds should be given access to it? The answers to these questions are not obvious and, in seeking them, it is worth looking at what has happened in Germany in this context between 2015 and 2020 using one case example.

The German case on access to the account of a *Facebook* user is interesting in that the German courts have taken a clear stance on the

⁴⁶¹ *ibid.*

⁴⁶² Cf., also: McCallig (n 42); Tim R Samples, Katherine Ireland and Caroline Kraczon, ‘The Law and Linguistics of Social Platform Terms-of-Use’ (2024) 39 *Berkeley Technology Law Journal* 48, 49 ff.

⁴⁶³ *ibid.*

question of whether the heirs of a user of a social networking site account have access to all the rights and obligations of that user. The case seemed to have two rounds. The first round was the main round, related to the succession of the content of the account. The second round, in turn, concerned the enforcement of the final judgment related to the first round. The whole thing ended with the German Federal Supreme Court ruling of 2020.⁴⁶⁴

The facts of the case are as follows. It all started in 2012, when a 15-year-old girl committed suicide, following which her parents, who were in possession of access data to her *Facebook* account, sought information on the reasons behind the suicide. As the deceased's account had already been converted into an "*in memoriam*" status following a request from another person, the parents were unable to log in to the account, with the result that they requested access to its content from *Facebook*, and that access was refused.⁴⁶⁵

The case also established, what is worth to mention, that the mother explained that her daughter had given her the password and had allowed her to access her data. Because the access was blocked due to the account transformation, she asked *Facebook* to unblock the user account because she wanted to have access to the account in the same way as her deceased daughter. She claimed, inter alia, that the heirs shall be given access to the full user account and the content therein belonging to her deceased daughter. Because of account transformation, the deceased friends had access to the account with "*in memoriam*" status and could post their entries, whereas the heir who was not among the daughter's *Facebook* friends did not have such access.⁴⁶⁶ When the claimant entered the correct password in order to log in to her deceased daughter's profile, the following sentence appeared: "this account has *in memoriam* status", and when she entered an incorrect password, a message appeared: "the password you entered is incorrect". *Facebook* believed the heirs could not inherit the *Facebook* profile, primarily raising arguments related to the application of regulations on protection of personal rights, personal data, and secrecy of correspondence, indicating

⁴⁶⁴ Cf. Fuchs (n 65) 1–7.

⁴⁶⁵ Cf. Roger Van den Bergh and Franziska Weber, 'The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?' (2021) 44 *World Competition* 29.

⁴⁶⁶ Wolfgang Kerber and Karsten K Zolna, 'The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law' (2022) 54 *European Journal of Law and Economics* 217.

that not only the rights of the deceased, but also her communication partners were protected in this way.⁴⁶⁷

After the proceedings, the court of first instance (*Landgericht Berlin*) ordered on 17 December 2015 that the heirs be given access to the deceased's entire account and the communication content stored there.⁴⁶⁸ After determining that German law would apply in the case (which was disputed by the defendant), it pointed out that under §1922 of the German Civil Code, the deceased's *Facebook* profile passed to her heirs by universal succession.

In giving reasons for this decision, the court cited several arguments. First of all, according to the court, the contract concluded by the deceased with the service provider is a legal obligation relationship having features of a rental, specific work (task) and service contracts,⁴⁶⁹ which according to German law may be inherited. In analysing the existing legal relationship, the court emphasised that the fact that no monetary consideration is received from such a "user" does not preclude the hereditary nature of the existing legal relationship, and thus the rights and obligations arising from the contract between the parties, including the right of access to the account, may in principle pass by way of universal succession. In the court's view, the principle of universal succession also applies to personal digital data of the deceased's estate, and such is the nature of the *Facebook* profile. The court pointed out that the succession in this part has a digital character, which only *prima facie* distinguishes it from a traditional succession. In the court's opinion it is impossible to treat differently a digital and an "analogue" succession. Such an approach would lead to acceptance of a situation whereby letters and diaries, regardless of their content, would be inherited, while e-mails and private messages on *Facebook* would not. In the court's view, under the agreement with the respondent, the deceased had the right to access *Facebook*'s servers, and this right, together with the contractual relationship, was transferred to the user's heirs. According to the court, it is this contractual relationship that is an estate within the meaning of §1922 of the German Civil Code.⁴⁷⁰

⁴⁶⁷ The facts of the case and reasoning of the courts were already presented in a different place. Cf. Załucki, 'Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies' (n 44) 671–684.

⁴⁶⁸ Judgement of 17 December 2015, *Landgericht Berlin*, 20 O 172/15.

⁴⁶⁹ It can also be translated into English as a lease, contract for specific work and a labour contract.

⁴⁷⁰ Such arguments, among others, appeared in the reasons for the judgment of the court of first instance.

Analysing further the content of the legal relationship existing between the deceased and the defendant, the court emphasized that the succession in the present case cannot be excluded because of the special connection of the concluded contract with the person of the deceased. Admittedly, the heredity of a contractual relationship may, in accordance with §399 of the German Civil Code, be excluded if its content is adapted to the person entitled or obliged to such an extent that, in the event of a change in the obliged party, the benefit will be changed in its essence. This is because the nature of the obligation may result in a protectable interest for the debtor to provide performance only to a specific person. The court pointed out that although *Facebook's* terms-of-service provide that a user's profile is strongly linked to a person, in the court's opinion there is no need to protect the defendant in this case, as an agreement of this kind is concluded *en masse*, without any detailed verification of a specific user, and the user's identity is verified in day-to-day operations only in exceptional cases.

Therefore, in the court's opinion, the users do not take advantage of the defendant's personal trust in any way. For this reason, according to the court, the defendant, denying access to the account, cannot invoke the fact that the analogue world knows the regulations aimed at preserving secrecy in relation to heirs (the court cited regulations concerning access to medical records, professional or archival secrecy). In the above-mentioned paragraphs of *Facebook's* terms-of-service, there is no contractually agreed lack of inheritance of the user's account. The purpose of these regulations is to guarantee the interests of the defendant by the security of each user's account, as well as the security of the social network. The user should not pass on his password or give access to it to third parties in order not to jeopardize the security of the account. Defendant, according to the *Facebook* terms-of-service, is thus not concerned with regulating the succession of an account, but with guaranteeing its security. This, according to the court, is not at risk if the account is made available to an heir to settle an inheritance.⁴⁷¹

As an obstacle to succession in this case, the court also considered the regulations concerning protection of deceased posthumous personality arising from article 1(1) of German Basic Law, regulations concerning protection of telecommunication secret, especially §88(3) of *Telekommunikationsgesetz* (Telecommunications Act) in connection with article 10(1) of German Basic Law, and regulations concerning protection of personal data. In doing so, the court was convinced that these provisions did not preclude succession in

⁴⁷¹ Cf. *ibid.*

the present case. It also wondered whether the defendant's "*in memoriam*" status directive, which was in effect at the time, precluded the heirs' claim. The court concluded in this regard that as a result of succession, the heirs accede to the contract on the same terms as had been concluded with the testator, thus taking into account the terms of use stipulated by the defendant, but the directive of "*in memoriam*" status has legal effect. It also pointed out that in the case of contractual relationships with international Internet providers, their general terms and conditions are always subject to content control pursuant to §305 ff. of the German Civil Code. The provision in the *Facebook* terms-of-service stipulating that any person on the *Facebook* friends list can have his account transferred to "*in memoriam*" status, with the consequence that the heirs cannot log on with the valid access data, is an unfair disadvantage for the user and his heirs pursuant to §307(1) and (2) (1) of the German Civil Code. Under these circumstances, the court upheld the claims of the heirs and ordered that access to the deceased's account be allowed in the state prior to the transformation of its status.⁴⁷²

However, on appeal by the defendant, the court of appeal (*Kammergericht Berlin*) in its judgement of 31 May 2017 has reversed the first instance judgement and dismissed the action.⁴⁷³ According to the arguments of the appellant, the regional court wrongly assumed that the disputed *Facebook* account could be inherited and wrongly justified this with the fact that the "digital estate" should not be treated differently than the "analogue estate". According to this view, the first instance court has misunderstood the fundamental problem of the discussion about the "digital estate". Meanwhile, the special feature is that the data and information that a deceased has left in digital media is not on a physical object (thing) that belongs to the estate (e.g. stored on a computer or USB stick). Rather, the data and information are stored exclusively on the provider's servers. This difference is essential. Because the reason why diaries and letters pass to the heirs in the "analogue world" is that the heir receives ownership of the physical property "diary" or "letter" regardless of the content. In the case of the "digital estate" on e-mail or social media accounts, there is a lack of a physical thing (that is in the estate) as a point of contact.

Also, according to this view, the regional court assumed that the universal succession in accordance with §1922 of the German Civil Code basically also includes claims under the law of obligations and contractual

⁴⁷² Cf. *ibid.*

⁴⁷³ Judgement of 31 May 2017, *Kammergericht Berlin*, 21 U 9/16.

relationships. However, the regional court wrongly followed the view that a distinction was not made between the property law and non-property law part of the (digital) estate. Data and information in letters or diaries only passed to the heir because the heir acquires the letter or diary as a physical object, insofar as it was the property of the deceased. If this is not the case, an express legal regulation is required for inheritance. To the extent that this view is justified by the fact that a distinction between property law and non-property law is impractical, since digital content is usually a mixture of property and highly personal content, this does not do not reflect the importance of the legal interests concerned. It is an idea that shapes inheritance law that only property law positions can be inherited. Non-property rights, ie. highly personal legal positions are not inheritable and expire with the death of the deceased. This is an expression of the deceased's general right to personality. This principle is also reflected in the assessment of the inheritance of contractual relationships, which are then not inheritable, one cannot simply pass over with reference to reasons of practicality. Especially with a social media service such as that operated by the defendant as an on-line platform, which has the purpose of allowing users to exchange ideas with friends and families, the content and data stored in an account are largely more private (highly personal) in nature. If one were to follow the opposite view, content, and data which, due to their highly personal nature, are not inheritable, would be "infected" by the property-related content and data and would be withdrawn from the protection aimed at not being inherited.⁴⁷⁴

Also, according to the arguments of the appellant, the regional court wrongly denied the highly personal nature of the contract between the defendant and the deceased. The defendant has presented extensively on the highly personal nature of the contract between *Facebook* and the deceased, that the contract between the user and the defendant forbids the user to make the *Facebook* account available to third parties or to transfer it to third parties. Every user is also obliged to indicate their identity when registering for the *Facebook* services and not to use any false personal data. If the succession of the contract were affirmed, this would mean that the heir, i.e. a person other than the person who set up the *Facebook* account, would continue to use it under the name and use of the personal data of the deceased, without the other users realising that they are no longer dealing with the deceased. The heir would appear under the identity of the

⁴⁷⁴ *ibid.*

deceased. Because the *Facebook* services are mainly intended for use in the private sector, to maintain personal relationships between people who are spread around the world, and because of this provision for predominantly private purposes, *Facebook* differs from other social networks. Registering on *Facebook* is therefore comparable to membership that is directly linked to the person of the user and cannot be transferred.⁴⁷⁵

The appeal of *Facebook* proved to be well founded. According to the second instance court, the content and design of the *Facebook* contracts themselves leads to the adoption of a view that a user profile is “strongly related to the person of the user”, although for different reasons than one might expect. Therefore, the court’s argumentation is interesting. The court has noticed that according to the terms-of-service, the user is prohibited from sharing his password with others or granting third parties access to his account. Users are also prohibited from transferring the account without the prior consent of the defendant. However, these regulations only relate to the behaviour of the users during their lifetime, but do not make any statements about whether and to what extent rights from the contract are transferred to the heirs in the event of the user’s death. This also applies to the memorial status of the account of the user concerned provided by *Facebook* in the event of a death report. The notes on memorial status that can be found on the defendant’s help pages also do not contain any regulations on the inheritance of rights from the user contract. Rather, it is a description of services. According to the court, the personalisation of the account only serves the “order of the situation”, but not a particular interest of the defendant to only have to provide services to certain people, as also the offer directed to all to register on *Facebook* shows, so that a change in the person of the contract partner does not change the character of the services to be provided by the defendant. According to the court, however, access to digital data cannot be made conditional on whether the data are proprietary in nature or personal. Such a distinction itself is problematic, however, and it is not very clear who should make it and on what basis. So if one thinks of access to data, one should think of all possible data, without such a distinction.⁴⁷⁶

In the facts of the case, however, the court, according to its view, does not have to decide whether the testator’s *Facebook* account is inheritable or not. Even if the heirs were entitled to access the account contents of

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

the deceased despite the mixture of property and highly personal content, its enforceability failed due to §88(3) of *Telekommunikationsgesetz*. This Section forbids the defendant to inform the parents of the deceased about the circumstances and the content of the communication processed via the *Facebook* account of the deceased and still stored on the defendant's servers. Granting appropriate access would in any case violate the rights of the deceased's communication partners protected by the telecommunications secrecy of §88 of *Telekommunikationsgesetz*. The court was not able to determine that the respective communication partners have consented to such an encroachment on the telecommunications secrecy protecting them.⁴⁷⁷

Explaining this view, the court said that participation in a communication via *Facebook* does not constitute consent to the transfer of communication content to the heirs of the original communication partner. It cannot be ascertained that the participants in a communication via *Facebook* naturally had to assume that the communication content would be made available to the heirs after the death of the communication partner. Rather, the participants in a communication via *Facebook* were more likely to assume that such a transfer to the heirs would not take place due to the guidelines on memorial status.⁴⁷⁸

Due to the lack of consent from the communication partner, the defendant cannot be obliged after the applicant's auxiliary request, with which the applicant requests access to the full user account and the communication content contained therein, removing the names and other personal data. Because the telecommunications secrecy also includes the content of the communication, insofar as the plaintiff should mean by removing other personal data that the communication content should be corrected for the points that could allow conclusions to be drawn about the person of the communication partner, such a separation is not possible without the service provider being aware of the content takes away from communication, which is currently denied to him without the consent of the communication partner.⁴⁷⁹

The above reasoning therefore became the basis for amending the judgment and denying access to the account to the heirs. According to

⁴⁷⁷ *ibid.*

⁴⁷⁸ *ibid.*

⁴⁷⁹ *ibid.*

the second instance court, considerations of secrecy in communications outweighed considerations of possible succession.

The decision of the second instance court was appealed by the plaintiff to the German Federal Supreme Court (*Bundesgerichtshof*). This court, hearing the case on 12 July 2018, ruled in favour of the plaintiff.⁴⁸⁰ According to the court, the plaintiff is entitled to demand that the defendant grant the community of heirs' access to the deceased's user account and the content contained therein. Such a claim is hereditary and does not conflict with *post-mortem* personal rights, telecommunications secrecy, data protection regulations or the general personal rights of the deceased's communication partners.

The inheritance of the claim to access to the user account resulting from the user contract is neither excluded by the contractual provisions, nor can an exclusion of inheritance from the nature of the contract. A differentiation according to the type of content of the data stored on the account is also to be rejected.⁴⁸¹

The right to access the user account and the content stored there arises from the contract under the law of obligations between the deceased and the defendant, which has been transferred to the heirs. According to §1922(1) of the German Civil Code, the entire property is transferred to the heirs. In principle, this also includes claims and liabilities from contracts under the law of obligations such as the present user contract, whereby the heir enters into the contractual legal position with all rights and obligations. The inheritance nature of claims can be contractually excluded. However, this is not the case here. The nature of the contract also does not result in non-inheritance.⁴⁸²

Interesting, in the context of the ruling of the court of the second instance, are the considerations concerning the issue of secrecy of correspondence. The Federal Supreme Court has stated that telecommunications secrecy protects neither the deceased nor the respective communication partner from the heir becoming aware of the content of the user account. This applies both to the content that has not yet been accessed by the deceased at the time of death and to the content that has already been acknowledged and temporarily or finally stored on the defendant's servers. According to the

⁴⁸⁰ Judgement of 12 July 2018, *Bundesgerichtshof*, III ZR 183/17.

⁴⁸¹ *ibid.*

⁴⁸² *ibid.*

court, from an inheritance law perspective, there is no reason to treat digital content differently since the decisive criterion of the ultimate personality is equally affected for analogue and digital content. A comparison with the legal situation under inheritance law in the case of analogue letter mail as well as digital content that is printed out or stored on the deceased's media and for which there is a transfer under inheritance law confirms this result. In the case of digital content - should telecommunications secrecy be applied to the heir - the possibility of access for him would depend on the one hand whether the content is embodied in the form of printouts or stored on a medium of the deceased and on the other hand whether it can only be accessed digitally on the provider's servers. The heir would have access to a message sent to the deceased's user account via the defendant's "messenger" if he had saved it on his own medium while the heir would be denied access to the same message, if the testator had left the message on the defendant's server. This different treatment of the same content depending on the storage medium or the embodiment and thus ultimately on coincidences is not justified. In all cases, the level of confidentiality interest of both the sender and the recipient is the same.⁴⁸³

According to §88(3)(sentence 1) of *Telekommunikationsgesetz*, service providers are prohibited from gaining knowledge of the content or the specific circumstances of the telecommunication for themselves or others beyond what is necessary for the commercial provision of telecommunication services including the protection of their technical systems. It can be left open whether and with regard to which services the defendant is a provider of telecommunications services or telemedia services. A violation of §88(3) of *Telekommunikationsgesetz* does not exist because the heir of a communication partner, contrary to the opinion of the appellate court, is not an "other" within the meaning of this provision. Others within the meaning of §88(3) of *Telekommunikationsgesetz* are persons or institutions that are not involved in the protected communication process. Those involved in a telecommunications process should be protected from the content and the details of the telecommunications becoming accessible to third parties who are not involved in the process. The heir is not a different person in this sense, but rather, with the inheritance, has become a participant in the communication processes that were not terminated at the time of the

⁴⁸³ *ibid.*

inheritance and are therefore subject to the protection of telecommunications secrecy.⁴⁸⁴

In the light of the above, therefore, the parents of a *Facebook* user's deceased should - by virtue of universal succession - be given access to the deceased's on-line account. A *Facebook* account is therefore, according to the court, a hereditary property.⁴⁸⁵ This position, certainly, is a landmark position expressed against the background of European continental law, where inheritance is acquired by universal succession. Certainly, the position of German law and practice cannot go unnoticed in the context of those legal systems that have no additional legal regulation concerning the inheritance of digital content.⁴⁸⁶ However, the case continued.⁴⁸⁷

The decision of the German Federal Supreme Court did not, as it soon turned out, resolve the heirs' access to the *Facebook* account. Admittedly, shortly after the Federal Supreme Court verdict, the deceased's mother received a USB stick containing a single PDF file of over 14,000 pages, which *Facebook* claimed contained a copy of the deceased's account data. However, according to the deceased's mother, the document was unreadable, lacked internal structure and was partly written in English, all of which made it impossible to search for the specific information she was looking for. According to the mother of the deceased, the handover of a USB stick does not grant access in the sense of the Federal Supreme Court judgement that has taken place in the main case. "Granting access" means that the debtor has to do this so that the heirs are able to see the contents of the user account in the same way as a person who logs in to it with the password. In different words, it is not sufficient to grant access only to the communication content held in the user's account, but also to the complete user account. For this reason, the mother of the deceased filed an enforcement application with the court related to the enforcement of the final judgment.

The court of first instance (*Landgericht Berlin*), acting as an enforcement authority, found on the 13 February 2019 that *Facebook* had failed to fulfil its obligation and ordered access to the full user account and the therein

⁴⁸⁴ *ibid.*

⁴⁸⁵ Kubis and others (n 59) *passim*.

⁴⁸⁶ Cf. Edina Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (University of Strathclyde 2017) 239 ff.

⁴⁸⁷ Cf. Nicola Preuß, 'Digitaler Nachlass – Vererbbarkeit eines Kontos bei einem sozialen Netzwerk' (2018) 70 *Neue Juristische Wochenschrift* 3146.

the communication content held by the deceased under the user account.⁴⁸⁸ According to the court, the debtor cannot successfully counter this by stating that it cannot grant login access to the account in which the creditor can only check the content, but cannot use the functions of the service (e.g. post or send messages). For this reason, the debtor cannot plead that if the heirs were granted access to the account, other users would believe that the account would still be used by the deceased as if she had never died and would thus be misled. In this respect, too, the debtor can be expected to take technical precautions to ensure that other *Facebook* users do not receive any suggestions to befriend the user account or receive no birthday reminders. It is incomprehensible why it should not be technically possible for the debtor to override these functions for granting access and to enable a “write-protected” or “passive” mode for access to an account in a memorial state. This is just a matter of programming. Incidentally, the present case is not about to provide the obligee with permanent access to the disputed user account; it should only be given knowledge of the information in the disputed user account in a reasonable time through access - as with any other inspection. Therefore, in the court’s view, the enforcement of the judgment in this case must consist in giving the heirs access to the account, which will be analogous to access by the deceased herself to her account.

However, *Facebook* disagreed with this argumentation and appealed to the court of second instance (*Kammergericht Berlin*). The latter court amended the ruling of the court of first instance and decided on the 9 December 2019 that *Facebook* was only obliged to provide existing account content. It argued that there was no entitlement to grant access to the account as such and the *Facebook* was free to decide how to provide the content of the account.⁴⁸⁹

The deceased’s mother again disagreed with this view and appealed this ruling to the Federal Supreme Court. The Federal Supreme Court has explained its earlier judgement and on the 27.08.2020 highlighted that *Facebook* not only had to grant access to the communication content held in the user account, but also had to give the heirs the opportunity to take cognisance of the user account itself and the content on the same way as the original authorised person holding the account was able to.⁴⁹⁰ According to the Federal Supreme Court, the concluded contract with its rights and obligations was transferred to the heirs by way of universal succession and

⁴⁸⁸ Judgement of 13 February 2019, *Landgericht Berlin*, 20 O 172/15.

⁴⁸⁹ Judgement of 9 December 2019, *Kammergericht Berlin*, 21 W 11/19.

⁴⁹⁰ Judgement of 27 August 2020, *Bundesgerichtshof*, III ZB 30/20.

therefore the heirs were to be granted access to the user account in the same way as the deceased had previously been granted it. Providing a USB stick with an extensive PDF file does not fulfil the obligation of the debtor. According to the court, the heirs should therefore be able to use the account as the deceased did.⁴⁹¹

This ruling has caused *Facebook* to change its terms-of-service. At present, as has already been pointed out, there is a provision stating that after the transformation into the “*in memoriam*” account, only the account custodian, or a person designated by the user in a valid will or other such document in which the user have expressly willed disclosure in the event of death or incapacity, may request disclosure of the contents of the account that has been granted “*in memoriam*” status.

The case of succession of a *Facebook* account, decided according to German law, is an interesting source especially for those lawmakers who do not contain legal regulations concerning succession of digital content in their legal system.⁴⁹² The ruling will allow similar cases to be solved in other countries which are competent for the settlement of a given succession case. Of course, the doctrine of succession law already indicates many dilemmas in connection with the German ruling.⁴⁹³ Nevertheless, deviation from the view expressed in German law will only be possible if the opposite view is duly substantiated. The German court still does not seem to have answered the question of who owns the content of the deceased *Facebook* user’s account but has only ruled on the question of access to the content (although this can probably also be understood differently). It is also interesting to note that even if one were to assume full heredity of the content stored in this way, what relevance would there be in this context of a different will expressed by the deceased *Facebook* user, which the deceased *Facebook* user is entitled to under, *inter alia*, one of the provisions of the terms of service: “Deleting your account when you pass away: You can choose to have your account permanently deleted should you pass away. This means that when someone lets us know that you’ve passed away, all your messages, photos, comments, relations, and info will be immediately and permanently removed from *Facebook*”. Therefore, is the German case and its emerging developments a well-done lesson for the future?

⁴⁹¹ Seidler (n 48) 141–145.

⁴⁹² Matthias Pruns, ‘Vererblichkeit des Vertrags zu einem Konto eines sozialen Netzwerks’ (2018) 18 *Zeitschrift für die Steuer- und Erbrechtspraxis* 269.

⁴⁹³ Seifert (n 42) 1169–1180.

Having regard to the above, when assessing the contractual terms-of-service, whether using *Facebook* or other social networking services, it is important to bear in mind the importance of the applicable legal norms and their relationship to the contractual terms. The mere stipulation in a given legal system of the inheritance of digital assets does not necessarily mean that such a process must take place. It will depend on other factors.

5. CONCLUSIONS ABOUT THE POSSIBLE CONFLICT BETWEEN THE RIGHT TO PRIVACY, THE RIGHT TO PERSONAL DATA PROTECTION AND THE RIGHT OF SUCCESSION

The digital world and its benefits including the digital assets that we use every day are characterised by a certain specificity. It seems essential to take these specificities into account in the context of the status of digital assets after the death of their user. Digital assets connected to the Internet and the processing of various types of data are not and cannot be subject to a traditional exchange of goods and services (without taking into account the Internet specificity), but one that takes place via the Internet environment. In this environment, the privacy of each user, in the broadest sense of the term, is important, which, it may be thought, cannot fail to be relevant in the context of the desire for a statutory solution to the problem of post-mortal status of digital assets. While there are no theoretical obstacles to the succession of virtual content, the specifics of this content, the way it is produced and the possible provisions of the rules of use (rules of procedure) seem to have a possible impact on the possible legal regulation of this area. All those elements that somehow stand between traditional succession and its possible exemptions - due to the personal and closely related nature of digital assets - should be recognised in this context. The sphere of property and the sphere of privacy in this area undoubtedly intermingle. It seems to be telling in this context that posthumous privacy must be reshaped to adapt to the digital age.

A concept of succession of digital assets that does not consider the rules of privacy and data protection or the interests of Internet service providers, possibly other safeguards, both from the point of view of the interests of the deceased and those of third parties, would be rather flawed. Indeed, a digital asset is not a mere object to which an ordinary property value as for an ordinary thing can be attributed and subjected to the application of traditional legal regulations. However, a digital asset is more than that, which

means that the optimal legal solution for their *post-mortem* status must take into account their complex specificity.

Therefore, prior to further considerations as to the optimal shape of an appropriate future legal regulation, it is worthwhile to present how individual legislators have so far decided to resolve this matter (if they have done so at all). In this respect, one can encounter several paradigms in the regulations of individual countries.

CHAPTER 4. SUCCESSION, FIDUCIARY ACCESS, OR SOMETHING ELSE? THE POST-MORTAL STATUS OF DIGITAL ASSETS IN THE LEGISLATION OF SELECTED COUNTRIES

1. INTRODUCTION

Constitutional law and international law solutions related to the mechanism of inheritance and the values potentially conflicting with it (privacy, protection of personal data, etc.) should be treated as important determinants of statutory solutions paving the way for the possible adoption of laws that would regulate a given social phenomenon, in our case - the post-mortal status of digital goods.⁴⁹⁴ Although, until recently, in European legal thought the concept of the influence of the constitution on civil law relations aroused considerable resistance and criticism,⁴⁹⁵ the view nowadays according to which no provision of civil law may be applied in contradiction to the system of values defined by fundamental rights seems to prevail.⁴⁹⁶ The constitution - as the supreme law established in the legal system of most states - not only regulates the system and functioning of public authorities and the legal status of the individual *vis-à-vis* the state, but also has a tangible impact on the entirety of social relations, including private law relations,

⁴⁹⁴ Cf. Christo Meyer, 'When Two Worlds Collide: Digital Assets and Your Estate Plan' (2024) 30 *Trusts & Trustees* 181.

⁴⁹⁵ Cf. Jan Limbach, 'Promieniowanie konstytucji na prawo prywatne' (1999) 8 *Kwartalnik Prawa Prywatnego* 406; Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387.

⁴⁹⁶ Cf. Adam Doliwa, 'The Constitutional Principle of Social Justice and Its Impact on the Understanding of Equity in Civil Law' (2020) 58 *Przegląd Prawa Konstytucyjnego* 367.

as does international law.⁴⁹⁷ It also entails the acceptance of the normative value of the constitution and acts of international law and the admissibility of their direct application by the legislator and the bodies applying the law. The axiology derived from them consequently permeates private law, as well as other branches of the legal system, affecting the legal situation of individuals and state bodies.⁴⁹⁸

One of the reflections of the principle of direct application of the constitution and acts of international law is the view of the horizontal impact of the freedoms and rights expressed therein.⁴⁹⁹ Firstly, the axiology of these norms, and in particular the fundamental rights indicated therein, set the framework for the freedom of the legislator to shape private law provisions.⁵⁰⁰ Secondly, the norms, principles and values derived therefrom may be used by the courts in the process of interpreting private law provisions, especially general clauses or vague phrases of civil law.⁵⁰¹ Thirdly, these norms may themselves set limits on the autonomy of the will to perform conventional legal acts.⁵⁰² Fourthly, they determine the legally protected behaviour of individuals and the permitted actions of public authorities.⁵⁰³

Such an understanding of the legal order may result, among other things, in the possibility for an individual to demand from public authorities to introduce such legal mechanisms that will prevent infringements of fundamental rights by fellow citizens or remove the effects of such infringements,⁵⁰⁴ which - in the context of the findings to date - may also apply to the manner of dealing with digital assets after the death of its user. In this case, the obligation of behaviour resulting from the content

⁴⁹⁷ Tom Barkhuysen and Siewert D. Lindenbergh (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers 2006) passim.

⁴⁹⁸ Cf. Grzegorz Kryszewski, 'Axiology of the Constitution of the Republic of Poland of 2 April 1997' (2015) 28 *Przegląd Prawa Konstytucyjnego* 228.

⁴⁹⁹ Hugh Collins, 'Private Law, Fundamental Rights and the Rule of Law' (2018) 121 *West Virginia Law Review* 1.

⁵⁰⁰ Cf. Fabrizio Criscuolo, 'Constitutional Axiology and Part. Autonomy' (2017) 3 *Italian Law Journal* 357.

⁵⁰¹ Cf. Paucar (n 9) 245–262.

⁵⁰² Cf. Francisco Fernández Segado, 'La dimensión axiológica del Derecho Constitucional' (1992) 1 *Cuadernos de la Cátedra Fadrique Furió Ceriol* 15.

⁵⁰³ Cf. Jan Podkowik, 'Problem horyzontalnego działania praw jednostki w orzecznictwie sądów w sprawach cywilnych' in Monika Florczak-Wątor (ed), *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki* (Wydawnictwo Uniwersytetu Jagiellońskiego 2015) 93–96.

⁵⁰⁴ Popescu (n 8) 150 ff.

of constitutional norms and acts of international law is imposed on the legislator, who should ensure such a system of legal norms that the social demand for the regulation of a specific phenomenon is satisfied.⁵⁰⁵

There is no doubt that this can happen through the rules of succession law.⁵⁰⁶ In such a context, the rules of succession law in a given legal system, including those determining what is included in the estate and subject to inheritance, cannot be arbitrary. While it is true that the development of the norms of succession law is strongly linked to the historical, economic, social and religious development of a given society and that, therefore, the succession laws of the various countries of the world differ from one another,⁵⁰⁷ the fundamentals of succession - the main institution of succession law - are essentially the same in the different legal systems.⁵⁰⁸ This is due to the fact that, while the specific solutions adopted in the countries concerned find their paradigm in the legal traditions of those countries and the social consciousness of their citizens, the general solutions, on the other hand, are similar in all systems.⁵⁰⁹ Therefore, in the countries which provide for a mechanism of succession consisting in the transfer of certain property rights and obligations from the deceased to the heir, the same grounds (determinants) for specific statutory regulations may be observed. First of all, they have constitutional and international sources. This concerns, among other things, inheritance and its protection, including the rights of the deceased's closest relatives, for which certain standards have been created within the framework of basic laws and international conventions (primarily concerning the protection of human rights), which are used, or should be used, by individual legislators.⁵¹⁰

The legislator should therefore take such points of reference into account when drafting succession law, as should the courts and other authorities when applying it. In principle, it is of course possible for successions to vary from country to country, but this must respect certain

⁵⁰⁵ Cf. Tom Barkhuysen and Michiel van Emmerik, 'Constitutionalisation of Private Law: The European Convention on Human Rights Perspective' (2006) 2 Constitutional Law Library 43, 43–57.

⁵⁰⁶ Cf. Singh, Shrivastava and Ruj (n 43) 983–1003.

⁵⁰⁷ Cf. Pintens (n 157) 8–12, 24–34, 82–90.

⁵⁰⁸ Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (n 195) 36 ff.

⁵⁰⁹ Cf. Franciszek Longchamps de Bérrier, *Law of Succession. Roman Legal Framework and Comparative Law Perspective* (Wolters Kluwer 2011) 23 ff.

⁵¹⁰ Cf. Michelle Cottier, 'Adapting Inheritance Law to Changing Social Realities : Questions of Methodology from a Comparative Perspective' (2014) 4 Oñati Socio-Legal Series 196.

values, the standards of which derive from the constitutional order and international legal regulations,⁵¹¹ to ensure that, against the background of a particular national regulation, the rules of law relating to the statutory succession may possibly be regarded as not interfering with the right of succession.⁵¹² A violation of these standards may have certain important consequences for the state in question, the dimension of which may vary due to the lack of a uniform instrument to counteract violations of constitutional, international or European law.

It is undoubtedly necessary today to take a broad view of the issue of property rights and obligations that are subject to succession on the death of their subject. In addition to the classic constructions of property rights whose succession is beyond doubt - such as the ownership - modern reality also requires consideration of new conglomerates of rights and obligations which seem to pursue a certain economic interest of the deceased. Hence, the legal and succession status of digital assets such as cloud computing, accounts on on-line platforms, blockchain etc., among others, must be determined. A proper approach to the concept of succession as a conglomeration of property rights and obligations of a civil law nature must take into account the fact that succession should not be thought of only from a national perspective, but in the spirit of international or European standards.⁵¹³ In today's reality, a lot of legal problems in the context of succession law may arise precisely from those assets which are connected with technological progress, especially with the virtual digital world.⁵¹⁴ Undoubtedly, interactivity, interaction or the exchange of knowledge and information between users are the keynotes of today's Internet. A tangible result of this is the proliferation of digital assets created and published by users, where this content comes in many different forms, including as videos shared on *YouTube*, books published on *Amazon*, blogs, avatars, artefacts or virtual worlds created by users of gaming accounts, as already outlined.⁵¹⁵

With the above in mind, it is worth reflecting further on whether the legal norms currently in force in selected countries, in particular those related to the post-mortal status of digital assets, properly address the problem of

⁵¹¹ Verbeke and Leleu (n 254) 459–479.

⁵¹² Cf. Mączyński, 'Prawo dziedziczenia i jego ochrona w świetle orzecznictwa Trybunału Konstytucyjnego' (n 147) 322–342.

⁵¹³ Țicău-Suditu (n 247) 47 ff.

⁵¹⁴ Cf. Antoine (n 74) 15 ff.

⁵¹⁵ Naseh (n 4) 2 ff.

the remaining of digital assets after the death of their user or whether certain corrections and new legislative activities are necessary in this respect. As an example, the focus of attention will be on these jurisdictions where the issue of post-mortal status of digital assets has so far received either a reaction from doctrine or practice, noting also some legislative changes introduced in selected legal systems.

This part of the book therefore aims to present the current normative state of affairs with regard to the status of digital assets in the event of the death of their user and to assess specific solutions, which will consequently allow further consideration of the desired shape of the legislation in this area.

At this point it is still worth starting by recalling once again that the succession law - for this is the area in which we will mainly be dealing - is the domain of national law. For this reason, solutions tested in one legal order will not necessarily correspond to another legislation. Therefore, the law of succession differs from, e.g., issues related to the protection of human rights presented earlier in that the latter have a rather universal dimension. However, it must be pointed out that human rights regulations may shape succession law legislation, as has already been signalled on many occasions. Indeed, the right of succession as a human right is protected, *inter alia*, at the constitutional and international level, which means that in today's reality it would be difficult to ignore these models. In this regard, e.g., from a European point of view, the European Convention on Human Rights, which in Article 1 of Additional Protocol No. 1 provides, *inter alia*, in principle, that no one may be deprived of his property, is relevant, which of course applies accordingly to succession.⁵¹⁶ However, the national legislator is free to decide how to shape the succession in compliance with this standard. It is therefore for the national law to decide what the legal status of the digital assets is, including whether it is possible to influence the will of the user on its legal situation after his death and thus whether to use the succession mechanism or other legal constructions.

In the context of national succession law regulations, one can see a certain paradox of the current legal situation of digital assets. On the one hand, digital assets, like human rights, have a universal dimension and are not territorially limited. On the other hand, e.g. the Polish legislator in regulating their inheritance status does not necessarily have to act in the same way as e.g. the American legislator in this respect. This, however, is

⁵¹⁶ Zgliniński (n 110) 98 ff.

not a desirable situation and it also raises further doubts, if only by creating the basis for a possible forum shopping for a specific succession case, which always seemed to be a negative circumstance.⁵¹⁷

Therefore, in view of the traditional approach, which generally links the legal situation of the succession of digital assets to the legal regulation of succession in a given legal system, it should be recalled that succession is doctrinally defined as the entry of an heir (or several heirs) into the legal situation of the deceased as a result of the death of an individual, involving in particular the acquisition of property rights and obligations to which the deceased was subject.⁵¹⁸ By succession, the heir acquires all the rights and obligations forming part of the estate, thus becoming the deceased's overall legal successor.⁵¹⁹

The basis for succession (or, more precisely, for the appointment to inherit) is usually the will of the testator, generally expressed in a last will and testament.⁵²⁰ However, it may also be the applicable legal regulations (this also depends on the possible recognition by the legislator of so-called succession contracts and the definition of their place in the legal system).⁵²¹ In this connection, a distinction is generally made between testamentary and statutory succession. Statutory succession occurs when the deceased person has not made a valid will or none of the persons appointed in the will can or wants to inherit. In such a case, the applicable law must precisely define and determine the circle of heirs, the order and the proportions of the statutory succession.⁵²²

⁵¹⁷ Cf. Lokin (n 272); Nagy (n 264); Karl Friedrich Nordmeier, 'Grundfragen Der Rechtswal in Der Neuen EU-Erbrechtverordnung - Eine Untersuchung Des Art. 22 ErbRVO' (2013) 3 Zeitschrift für das Privatrecht der Europäischen Union 148.

⁵¹⁸ Cf. RFD Barlow and others, *Williams on Wills* (Lexis Nexis 2014) 1 ff; Burandt, Rojahn and Lauck (n 145) 10 ff; Esquivel and Acuna (n 101) 10 ff; Dennis R Hower and Peter T Kahn, *Wills, Trusts, and Estate Administration* (Delmar Cengage Learning 2012) 10 ff.

⁵¹⁹ Herbert Bartsch and Malte B Bartsch, *Das Aktuelle Erbrecht* (Walhalla Fachverlag 2010) 15 ff; Robert H Sitkoff and Jesse Dukeminier, *Wills, Trusts and Estates* (Wolters Kluwer 2017) 2 ff.

⁵²⁰ Pamela R Champine, 'My Will Be Done: Accommodating the Erring and the Atypical Testator' (2014) 80 Nebraska Law Review 388; Mark Glover, 'The Timing of Testation' (2018) 107 Kentucky Law Journal 221; Jainam Chirag Shah and others, 'Crypto-Wills: Transferring Digital Assets by Maintaining Wills on the Blockchain' in Jagdish Chand Bansal and others (eds), *Communication and Intelligent Systems* (Springer 2020) 407–416; Laufer (n 187) 277 ff.

⁵²¹ Cf. Debernardi (n 265) 71 ff; Susana Navas Navarro, 'El Pacto Sucesorio de Atribución Particular En El Código Civil de Catalunya' (2009) 2 inDret 2.

⁵²² Dot Reid, 'Why Is It So Difficult to Reform the Law of Intestate Succession?' (2020) 24 Edinburgh Law Review 111; Mariusz Załucki, 'Inheritance Law in the Republic of Poland and

The rules on the disposition of property by statute are related to the particular situation in which the succession estate finds itself after the death of the deceased. In the absence of a disposition on death, it is necessary to establish a statutory mechanism for the transfer of all the rights and obligations of the deceased individual to his successors in title. It must therefore be clear from the law what is being acquired, under what conditions and by whom. Legal continuity is important in this regard because property does not cease with the death of an individual, nor do the debts that the individual has incurred usually cease. The function of the statutory succession regulation is therefore to find the optimal circle of heirs, socially acceptable, not only in terms of “what is due to whom”, but also in terms of “who is responsible for it”. Therefore, legal regulation cannot be arbitrary in this regard.

However, this does not necessarily mean that the succession mechanism should apply to digital assets. Other solutions are possible. It is time to zoom in on them. Perhaps an exploration of the existing legislation in this area will eventually allow a position to be taken on the desirable direction of the legal regulations shaping post-mortal status of digital assets.

2. SOLUTIONS FROM THE LAW OF THE UNITED STATES OF AMERICA

After these preliminary assumptions, it may be pointed out that in many legal systems which do not provide for any specific regulation as to the status of digital assets in the event of the death of their user, the problem of legal succession in this respect is usually solved precisely on the basis of succession rules. In principle, it is irrelevant whether the succession is by operation of law or by testamentary succession. Assuming that digital assets are of a pecuniary nature, they are - and are generally considered to be - potentially capable of being inherited.

In this context, it should be noted that there is no doubt that there is no consensus in the ordinary legislation of the individual states as to how and whether to regulate the possible succession of digital assets. This is a matter that has already caused controversy on more than one occasion, despite which it has rarely received a statutory response.

Issues of the succession of digital assets after the death of an Internet user caused significant practical problems before any academic discussion or

Other Former Eastern Bloc Countries: Recodification of the Circle of Statutory Heirs' (2010) 152 *Electronic Journal of Comparative Law* 1.

legislative work was undertaken. This is particularly evident in the examples of state legislation in the United States of America, perhaps the most advanced country in the exploration of the on-line space, where, according to available statistics, more than 90% of the population actively uses social media.⁵²³ As one might think, problems of practice - evident in a wide variety of cases of this kind - have led to the present state of legislation in this country, forcing legislative action, as it were. The area of the local legal system - as one may think - should be the starting point for further analyses and proposals, if only because it was there that the first practical problems and attempts to solve them, also at the legislative level, appeared.⁵²⁴ Today, the law of the United States of America is considerably developed in this area and its experiences may - and certainly do - constitute a point of reference and inspiration for many other legislations.⁵²⁵

Before proceeding to a detailed discussion of the law of the United States of America, it should be emphasised how different the succession legal solutions there are from those traditionally known, e.g., in continental Europe.⁵²⁶ The transfer of the rights and obligations of a deceased person to other parties takes place there in a process known as probate.⁵²⁷ It is the process completed when a decedent leaves assets to distribute, meaning general administration of the estate.⁵²⁸ It is the analysis and transfer of estate assets previously owned by a deceased person. In this process an executor or personal representative is appointed who administers the estate and distributes assets to the intended beneficiaries. In the continental European tradition, it is possible to speak of someone such as the executor of a last will or the liquidator of an estate, whose tasks are primarily to determine the composition of the estate, to pay the debts of the estate and to distribute

⁵²³ Cf. Report: Social media usage in the United States - Statistics & Facts, available on-line: <<https://www.statista.com/topics/3196/social-media-usage-in-the-united-states/>>, [last accessed: 30 May 2024]. It is estimated that more than 302 million US citizens are actively using social media.

⁵²⁴ Marinioni (n 59) 9 ff.

⁵²⁵ Angelo Magnani, 'Il patrimonio digitale e la sua devoluzione ereditaria' (2019) 3 Vita Notarile 1281.

⁵²⁶ Hower and Kahn (n 518).

⁵²⁷ Cf. John H Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1984) 97 Harvard Law Review 1108; Elizabeth R Carter, *Probate and Succession Administration: Selected Issues* (LSU Law 2017) 4 ff.

⁵²⁸ Cf. Muhammad Amrullah bin Drs Nasrul and others, 'Administration of the Deceased's Estates: An Analysys to the Effect of Nomination' (2018) 1 Social & Behavioural Sciences 218.

the estate.⁵²⁹ The role of such a person is fiduciary in nature, hence the legal system there has been shaped over the years to include fiduciary access to the deceased's assets, including digital assets.⁵³⁰ Usually, it is the fiduciaries and not the heirs who should be granted appropriate access. Heirs' access to digital resources is a consequence of this access by fiduciaries.

At the same time, there is no consensus in the local doctrine as to whether digital assets should be treated as a type of property, although such views are not uncommon. Such a legal qualification (digital assets as a property) extends the debate beyond fiduciary access and speaks to the inheritability of digital assets. However, there is no doctrine in the common law that gives a general right to access one's property. In the absence of legislation, a number of approaches have been suggested for the treatment of digital assets and access to them.

The origins of the current statutory concepts in this area, existing in the state legislation there, but also as so-called model acts, go back to the early days of social media, and the first cases started to appear in the individual state courts as early as around 2005.⁵³¹ It should be recalled here that the United States of America is a federal state, in which the division of law into federal law and state law plays an important role. The former applies throughout the country, while the latter applies within a specific state. Legal regulations in the *mortis causa* sphere are state regulations, which, despite the fact that they are based on statutes in many places, should be treated as part of common law, which, of course, is related to the role of the courts.⁵³² Of importance in the American legal space are the model laws, which serve as a paradigm for the laws adopted by the individual states.⁵³³ The area of digital assets in the event of the death of their current user is an excellent example of this.

One of the earliest cases to come before the American courts, in addition to the aforementioned battle involving the estate of *Justin Ellsworth* and *Yahoo!*, was the issue of access to late husband's e-mail account, which

⁵²⁹ Jakub Głowacz, *Wykonawca testamentu w prawie polskim na tle porównawczym* (Uniwersytet Łódzki 2016) 40 ff.

⁵³⁰ Gregor Christandl, 'La transmission des comptes Facebook, Instagram, Icloud, etc., en Allemagne et en Autriche' (2023) 18 Graz Law Working Paper 1, 6 ff.

⁵³¹ Cf. Darrow and Ferrera (n 42) 281 ff.

⁵³² Lord Mance, 'In a Manner of Speaking: How Do Common, Civil and European Law Compare?' (2014) 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 231.

⁵³³ Mary Whisner, 'There Oughta Be a Law - A Model Law' (2014) 106 *Law Library Journal* 125.

was said to contain vital information regarding the business conducted jointly by the couple during his lifetime that has taken place in Connecticut.⁵³⁴ When the husband passed away, his widow tried to gain access to her late husband's e-mail account to obtain information regarding their business. The Internet service provider blocked her from doing so. As a result of legislative changes made by the State of Connecticut at the time (Act of 24 June 2005 concerning access to decedents' electronic mail accounts),⁵³⁵ the e-mail service provider was to provide the executor of the will or the administrator of the estate with access to the deceased's account or a copy of its contents. This required a written request, which had to be accompanied by copies of the death certificate and a certificate of appointment of the executor or administrator of the estate.⁵³⁶ According to Section 1(2)(b) of that act, an electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of: (1) a written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.⁵³⁷

The next states to take up the challenge of regulating access to digital resources after the death of a deceased user are Rhode Island and Indiana.⁵³⁸ The 2007 Rhode Island statute was analogous to that of Connecticut and concerned fiduciary access to a deceased person's e-mail account.⁵³⁹ The statute required a court order that includes the indemnification of the service provider.⁵⁴⁰ In contrast, the Indiana statute, also from 2007,⁵⁴¹ was an attempt

⁵³⁴ Senate Bill no. 262 of 5 April 2005.

⁵³⁵ The Bill is available on-line: <<https://www.cga.ct.gov/2005/act/Pa/2005PA-00136-R00SB-00262-PA.htm>>, [last accessed: 30 May 2024].

⁵³⁶ Sherry (n 431).

⁵³⁷ Arkadiusz Wudarski, 'Kształtowanie się zasad dostępu do zasobów cyfrowych w Stanach Zjednoczonych w ramach zarządu powierniczego' (2021) 57 *Forum Prawnicze* 3.

⁵³⁸ Barwick (n 457) 601 ff.

⁵³⁹ Cf. An Act of 3 July 2007 Relating to Probate Practice and Procedure, available on-line: <<http://webserver.rilin.state.ri.us/PublicLaws/law07/law07256.htm>>, [last accessed: 30 May 2024].

⁵⁴⁰ Barwick (n 457) 601.

⁵⁴¹ § 29-1-13 of Indiana Code – Right of Personal Representative to Access Decedent's Electronic Communications and Other Digital Assets, available on-line: <<https://iga.in.gov/laws/2023/>

to take a slightly broader view of digital assets and access to additional types of digital assets.⁵⁴² The terminology of the statute refers to providing access to any documents or information that the deceased left behind in electronic form. The Indiana statute provided that a custodian “shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person’s death, access to or copies of any documents or information of the deceased person stored electronically by the custodian”.⁵⁴³ The custodian, that is, the person who electronically stored the documents or information of another person, was required to refrain from destroying and disposing of them within two years of receiving a court order or request for access. According to the concept at the time, electronic documents were treated as property rights forming part of the estate (estate property). On-line resources were therefore clearly defined as property.⁵⁴⁴

The first attempts to solve the problems of digital assets were therefore a response to the needs of practice, a desire to meet current social needs. They differed significantly from the current American legislation in this area, although the regulations there were already based on fiduciary access. This is undoubtedly due to the peculiarities of the legal system there and the specific understanding of the area of succession law.

The next phase of legislative activity in state legislatures in the United States of America is related to the adoption of laws in Oklahoma,⁵⁴⁵ Idaho,⁵⁴⁶ Virginia,⁵⁴⁷ Nevada,⁵⁴⁸ and Louisiana,⁵⁴⁹ respectively in 2010, 2011, 2013, 2013 and 2014. The solutions adopted in these states varied. In some states, such as Oklahoma, Idaho and Louisiana, the new solutions addressed the need for broader and more detailed regulation, covering access to all digital services of the deceased.⁵⁵⁰ In contrast, Virginia, e.g., focused on regulating

ic/titles/29>, [last accessed: 30 May 2024].

⁵⁴² Sherry (n 431).

⁵⁴³ § 29-1-13-1.1(b) of Indiana Code.

⁵⁴⁴ Alberto B Lopez, ‘Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets’ (2016) 24 *George Mason Law Review* 192, 194.

⁵⁴⁵ House Bill 2800/2010.

⁵⁴⁶ Senate Bill 1044/2011.

⁵⁴⁷ House Bill 1752/2013.

⁵⁴⁸ Senate Bill 131/2013.

⁵⁴⁹ Article 3191(a) Louisiana Code of Civil Procedure.

⁵⁵⁰ Wudarski (n 537) 9.

access to a deceased minor's e-mail account,⁵⁵¹ while in Nevada the legislature only allowed action to be taken to close broadly defined on-line accounts and other digital assets after the deceased, without providing access to their content.⁵⁵²

In these more elaborate regulations, such as Oklahoma and Idaho, the executor of the will and the administrator of the estate, on the other hand, were authorised to take control of the deceased's e-mail accounts and other accounts located on social networks, microblogging sites and websites that allowed the sending of short text messages.⁵⁵³ The assumption of control provided the ability to both use and continue to use the account and to close the account.⁵⁵⁴

As this brief exploration of the development of the legislation at the time shows, the issue of digital assets was addressed differently from state to state, which obviously did not facilitate the practice of law. At the same time, at that time, most state legislatures did not undertake to regulate this issue at all. In turn, this was a period in which numerous inadequacies were recognised and it was decided to undertake work in this area, which was to lead to the unification of US law by means of a model law. The gravity of the situation was recognised by, among others, *the Uniform Law Commission* - ULC. This is how work was undertaken on the *Uniform Fiduciary Access to Digital Assets Act*⁵⁵⁵ - UFADAA,⁵⁵⁶ a model law adopted in 2014.⁵⁵⁷

The purpose of UFADAA was to modernize fiduciary law for the Internet age. It was noted that Internet service agreements, passwords that can only be reset via the account owner's email, and federal and state privacy laws that did not consider the death or incapacity of the account owner may

⁵⁵¹ § 64.2-110(a) of Virginia Code.

⁵⁵² Barwick (n 457) 601.

⁵⁵³ Connor (n 7) 322.

⁵⁵⁴ Lopez (n 544) 503.

⁵⁵⁵ The final report of the drafting committee dated 3 October 2014 may be found on-line: <<http://www.uniformlaws.org>>, [last accessed: 30 May 2024].

⁵⁵⁶ *Uniform Fiduciary Access to Digital Assets Act*, drafted by the National Conference of Commissioners on Uniform State Laws at its annual conference meeting, 11-17 July 2014, available on-line: <<https://www.uniformlaws.org/viewdocument/committee-archive-13?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecd22&tab=librarydocuments>>, [last accessed: 30 May 2024].

⁵⁵⁷ Cf. Victoria Blachly, 'Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know' (2015) 29 Probate & Property 8.

have prevented potential fiduciaries from gaining access to digital assets.⁵⁵⁸ UFADAA has been conceived as an act addressing the problem by ensuring that legally appointed fiduciaries can access, delete, preserve, and distribute digital assets as appropriate.⁵⁵⁹ As indicated, UFADAA was intended to give the people the power to plan for the management and disposition of their digital assets in the same way they were able to make plans for their tangible property: by providing instructions in a will, trust, or power of attorney.⁵⁶⁰ If a person failed to plan, according to UFADAA, the same court-appointed fiduciary that managed the person's tangible assets as a fiduciary for digital assets. This person was supposed to be able to manage the person's digital assets, distributing those assets to heirs or disposing of them as appropriate.⁵⁶¹

UFADAA has defined an account holder as “a person who has entered into a terms of service agreement with a custodian” or a fiduciary for such a person [Section 2(1)]. UFADAA has defined a custodian as “a person that carries, maintains, processes, receives or stores a digital asset of an account holder” [Section 2(8)]. The UFADAA covered personal representatives, conservators, agents acting under powers of attorney, and trustees. By defining the fiduciary as an authorised user, the act gave the fiduciaries the authorization to access digital files. However, UFADAA granted fiduciaries access to digital assets limited to what was necessary to carry out their fiduciary duties [Section 7]. It was not created as a personal access and did not allow a fiduciary to maintain or continue social media accounts by “impersonating” the account holder for whom the fiduciary was acting [Section 7(e)]. The access could have been limited, inter alia, by the will of a decedent [Section 3].⁵⁶²

UFADAA defined “digital asset” as a record that is electronic, not including an underlying asset or liability unless the asset or liability is itself a record that is electronic [Section 2(9)]. This included both the catalogue of electronic communications and the content of electronic communications.⁵⁶³

⁵⁵⁸ Jeehyeon Jenny Lee, ‘Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets’ (2015) 2015 Columbia Business Law Review 54.

⁵⁵⁹ Heather Conway and Sheena Grattan, ‘The “New” New Property: Dealing with Digital Assets on Death’ (2017) 9 Modern Studies in Private Law 99.

⁵⁶⁰ Naomi R Cahn, Christina Kunz and Suzanne Brown Walsh, ‘Digital Assets and Fiduciaries’ in John A Rothchild (ed), *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing 2016).

⁵⁶¹ *ibid.*

⁵⁶² Cf. Lopez (n 544) 203 ff.

⁵⁶³ Cf. Blachly (n 557).

According to UFADAA, a fiduciary that is an account holder or has the right under this act to access a digital asset of an account holder: (1) subject to the terms of service agreement and copyright or other applicable law, may take any action concerning the asset to the extent of the account holder's authority and the fiduciary's powers under (the law of this state); (2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and (3) is, under applicable computer fraud and unauthorized access laws, including (this state's law on unauthorized computer access), an authorized user.⁵⁶⁴

According to the act, if a provision in a terms-of-service agreement limits a fiduciary's access to the digital assets of the account holder, the provision is void as against the strong public policy of this state, unless the account holder, after (the effective date of this [act]), agreed to the provision by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement [Section 7(b)].

The UFADAA prevented the administrator from unilaterally excluding or restricting access to digital content. If the general terms and conditions of the service agreement contained such restrictions, they were to be treated as contrary to the public interest and invalid [Section 8(b)].⁵⁶⁵

At the very least, it follows from the above that the UFADAA incorporated five principles: 1) it gave account holders the control over its future fate; 2) it treated digital assets like any other assets; 3) it provided rules for the most common types of fiduciaries; 4) it has protected custodians and copyright holders; 5) it provided efficient uniformity.⁵⁶⁶ Indeed, firstly, UFADAA allowed account holders to specify whether their digital assets should be preserved, distributed to heirs, or destroyed. Second, it implied, if a fiduciary has the legal authority to inventory and dispose of all of a person's documents, it should not matter whether those documents are printed on paper, stored on a personal computer, or stored in the cloud. Third, the UFADAA provided appropriate default rules governing access for executors, agents, conservators, and trustees, i.e. for all the most common fiduciaries in that legislation. Fourth, fiduciaries authority over digital assets - according to UFADAA - was limited by federal law, including the Copyright Act and

⁵⁶⁴ Cf. Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (n 466) 22 ff.

⁵⁶⁵ Dan Fletcher, 'What Happens to Your Facebook After You Die?' (2016) 12 *The SciTech Lawyer* 1.

⁵⁶⁶ Wudarski (n 537) 12 ff.

the Electronic Communications Privacy Act. Fifth, because state law governs fiduciaries, UFADAA as a uniform law ensured that, regardless of the state, fiduciaries will have equal access to digital assets and custodians will benefit from uniform regulations.⁵⁶⁷

UFADAA as a model legislation was based on the premise that digital accounts are not fundamentally different than physical records with respect to estate law. However, given that on-line accounts are often accessed in private and stored in password-protected formats, to the critics of this legislation it was unlikely that consumers would expect anyone else to have the capacity to access their communications unless they have made a conscious choice to make that information available. Perhaps that is why the regulation did not initially take hold.⁵⁶⁸ Admittedly, Delaware enacted a substantially similar law in 2014 based on a final draft of UFADAA,⁵⁶⁹ but there were also 28 UFADAA bills introduced in 2015 in different US states, however nothing was enacted during that year. Its implementation met strong resistance and came to an abrupt halt.⁵⁷⁰

The resulting situation is well illustrated, e.g., by the legislative process in Illinois. The Senate Bill⁵⁷¹ passed quickly and smoothly through the legislative stages when, in the end, due to the lack of widespread acceptance of the concept resulting from UFADAA, especially in view of the resistance known from other states, it was referred back to committee, which in practice meant that it was “frozen”.⁵⁷² The same happened in other states. This widespread disapproval of UFADAA stemmed - as one might think today - primarily from privacy concerns. It was argued that the implied consent of the deceased to access his digital assets under the UFADAA should be replaced by an implied objection, which was supported, among other things, by research showing that more than 70% of Americans want to protect their

⁵⁶⁷ *ibid.*

⁵⁶⁸ Michael D Walker, ‘The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age’ (2017) 52 *Real Property, Trust and Estate Law Journal* 51.

⁵⁶⁹ House Bill 345/2013. Cf. Elizabeth Holland Capel, ‘Conflict and Solution in Delaware’s Fiduciary Access to Digital Assets and Digital Accounts Act’ (2015) 30 *Berkeley Technology Law Journal* 1211, 1211–1242.

⁵⁷⁰ Cf. Abbey L Cohen, ‘Damage Control; The Adoption of the Uniform Fiduciary Access to Digital Assets Act in Texas’ (2015) 8 *Estate Planning and Community Property Law Journal* 317, 328 ff.

⁵⁷¹ Senate Bill 1376.

⁵⁷² Wudarski (n 537) 16.

privacy after death.⁵⁷³ There was therefore a push to introduce the idea that access to electronic resources would only be possible if the legitimate user had given his consent.⁵⁷⁴

There is no doubt that technology companies and privacy rights groups lobby against the UFADAA. For example, on 12 January 2015, the Center for Democracy & Technology published a joint letter with the American Civil Liberties Union, the Electronic Frontier Foundation, and Consumers Union. The letter stated, “any model that grants full access to all of a decedent’s digital accounts and information by default fails to address the unique features of digitally stored content and creates acute privacy concerns”.⁵⁷⁵ Among other arguments against UFADAA, the letter states the following: 1) digital assets are not analogous to physical records; 2) digital assets implicate the privacy of third parties; 3) conservatorships should not be included in digital legislation; 4) UFADAA conflicts with the Federal Electronic Communications Privacy Act, which was said to ban providers from voluntarily disclosing content to anyone except in very limited circumstances.⁵⁷⁶

Following a wave of criticism of UFADAA, a competing bill - the Privacy Expectation Afterlife and Choices Act (PEAC)⁵⁷⁷ - was prepared by on-line service providers.⁵⁷⁸ Its aim was to ensure that the privacy of a deceased user’s digital content was fully protected, while improving the efficiency of the management of their estate. The bill, which consisted of just seven provisions, started from the opposite premise to UFADAA and significantly restricted access to electronic content.⁵⁷⁹

Section 1(a) of PEAC provides, *inter alia*, that: a probate court that has jurisdiction of the estate of the deceased user may order a provider to disclose

⁵⁷³ Banta, ‘Death and Privacy in the Digital Age’ (n 330) 927–990.

⁵⁷⁴ Cf. Samantha D Haworth, ‘Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act’ (2014) 68 *University of Miami Law Review* 535.

⁵⁷⁵ Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act, CDT (12 January 2015), available on-line: <<https://www.aclu.org/documents/joint-letter-civil-liberty-organizations-respond-uniform-fiduciary-access-digital-assets-act>>, [last accessed: 30 May 2024].

⁵⁷⁶ *ibid*.

⁵⁷⁷ Available on-line: <<https://netchoice.org/national-law-review-opposition-to-the-uniform-fiduciary-access-to-digital-assets-act/>>, [last accessed: 30 May 2024].

⁵⁷⁸ Matthew W Costello, ‘The “PEAC” of Digital Estate Legislation in the United States: Should States “Like” That?’ (2016) 49 *Suffolk University Law Review* 429.

⁵⁷⁹ Brad Reid, ‘Legal Life After Death: Publicity, Physical, and Digital Assets’ (2017) 9 *Southern Journal of Business and Ethics* 108, 119 ff.

to the executor or administrator of the estate a record or other information pertaining to the account of the deceased user that is in electronic storage with the provider, but not the contents of communications or stored contents, if the court makes all of the following findings of facts based upon a sworn declaration of the personal representative or other admissible evidence: (1) the user is deceased; (2) the deceased user was the subscriber to or customer of the provider; (3) the account belonging to the deceased user has been identified with specificity, including a unique identifier assigned by the provider; (4) there are no other owners of, or persons or entities who have registered with the electronic communication service provider with respect to, the deceased user's account; (5) disclosure is not in violation of another applicable federal or state law; (6) the request for disclosure is narrowly tailored to the purpose of administering the estate; (7) the executor or administrator demonstrates a good faith belief that the information requested is relevant to resolve issues regarding assets or liabilities of the estate; (8) the request seeks information spanning no more than 18 months prior to the date of death, or the requester has provided evidence of a need to obtain made a request for information more than that specifically requests data older than 18 months prior to the date of death; (9) the request is not in conflict with the deceased user's will or other written, electronic, or oral expression of the deceased user's intent regarding access to or disposition of information contained in or regarding the user's account.⁵⁸⁰

According to Section 1 (b) of PEAC, a probate court that has jurisdiction of the estate of the deceased user may order a provider to disclose to the executor or administrator of the estate the contents of communications or stored contents, if the court makes plenty of findings of facts based upon a sworn declaration of the personal representative or other admissible evidence, including: (1) the will of the decedent, or a choice made by the deceased user within the product or service or otherwise regarding how the user's contents can be treated after a set period of inactivity after the user's death, or other event evidences the decedent's express consent to the disclosure of the requested contents.⁵⁸¹

The draft PEAC also raised a number of controversies. Among other things, it gave rise to concerns that its provisions could effectively block access to a virtual account. In principle, the proposed solutions could only be effective in a situation where the user had made a will and clearly indicated

⁵⁸⁰ Costello (n 578) 442 ff.

⁵⁸¹ Cf. Barwick (n 457) 614 ff.

in it the person authorised to manage the account. However, as indicated, such cases were expected to be few in practice.⁵⁸² As a result, only four states considered supporting and implementing it: California, Oregon, Virginia and Wyoming. Only Virginia, on the other hand, adopted a law based on PEAC (in 2015),⁵⁸³ which, however, was quickly amended (the legislation was repealed in 2017).⁵⁸⁴

With these circumstances in mind, *the Uniform Law Commission* sought a compromise solution. At its 2015 annual meeting, it proposed amendments to UFADAA, pointing out, among other things, that the bills introduced in certain states were blocked by a coalition of internet-based businesses and privacy advocates that opposed certain provisions of UFADAA and offered their own limited model legislation (a version of which was enacted in Virginia).⁵⁸⁵ It was also pointed out that although many of the opposing parties participated in the drafting process, they did not articulate or engage in serious discussions about their concerns until recently, based on a better understanding of their concerns and on lessons learned from the 2015 enactment effort, the executive committee of the *Uniform Law Commission* is recommending a waiver of the two-year reading rule to permit the conference to consider a set of amendments to UFADAA, drafted by representatives of the UFADAA enactment committee and ULC legislative staff who worked extensively on the legislative effort. The proposed amendments were presented and it was also noted that because these proposed amendments address the primary concerns that arose in the legislative effort, the enactment committee believes that approval of the amendments will serve the essential purposes of the original act and substantially decrease opposition to its enactment.⁵⁸⁶

The annual meeting of *the Uniform Law Commission* led to the adoption on 10-16 July 2015. *Revised Uniform Fiduciary Access to Digital Access Act* (2015)⁵⁸⁷

⁵⁸² Wudarski (n 537) 17–19.

⁵⁸³ § 64.2-109 – § 64.2-115 of Virginia Code.

⁵⁸⁴ Wudarski (n 537) 19.

⁵⁸⁵ Uniform Law Commission, Proposed Changes to the Uniform Fiduciary Access to Digital Assets Act, available on-line: <https://higherlogicdownload.s3.amazonaws.com/UNIFORMLAWS/UFADAA_Explanation%20of%20proposed%20amendments_2015AM1.pdf>, [last accessed: 30 May 2024].

⁵⁸⁶ *ibid.*

⁵⁸⁷ The final draft dated 10 July 2014 may be found on-line: <<http://www.uniformlaws.org>>, [last accessed: 30 May 2024].

- RUFADAA.⁵⁸⁸ It establishes different rules for access to an account and to its digital assets. Under it, an administrator may provide access unless the user has expressly excluded it or a court has ruled otherwise.⁵⁸⁹

The act has gained support from various quarters, including internet service providers. *Facebook* and *Google*, among others, have spoken out. The former pointed out that the act “creates a reasonable compromise regarding disposition of digital accounts upon death or incapacitation”.⁵⁹⁰ In turn, the latter stressed that the revised act “accommodates the needs of settling and administering estates, providing full or limited access to information for guardians, holders of powers of attorney and others assisting people who may be incapacitated, while respecting the account holder’s rights to privacy”.⁵⁹¹

Like the UFADAA, the RUFADAA is based on fiduciary access to the digital assets of the deceased, which is mainly related to the design of the succession procedure there, as already explained. It covers the most typical cases of fiduciaries and issues of their access to digital assets.⁵⁹²

The RUFADAA has slightly modified the definition of “digital asset” indicating that it is an electronic record in which an individual has a right or interest [Section 2(10)]. It also clarified that “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities [Section 2(11)], while accepting that

⁵⁸⁸ *Revised Uniform Fiduciary Access to Digital Assets Act*, drafted by the National Conference of Commissioners on Uniform State Laws at its annual conference meeting, 10-16 July 2015, available on-line: <<https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiJlOWY4NWQ3Yy0xM2YzLTQ5MTgtYTAwMC0wYWJlN2ZhYjdmNjJlQ%3D%3D>>, [last accessed: 30 May 2024].

⁵⁸⁹ Cf. Elizabeth Sy, ‘The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?’ (2016) 32 *Touro Law Review* 647.

⁵⁹⁰ Letter of Support of 12 October 2015, Facebook, available on-line: <<https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiJlOGUxZTJhNy03NDdhLTQyNzQtODhlMS00YjJlMGVjZmVkM2EifQ%3D%3D>>, [last accessed: 30 May 2024].

⁵⁹¹ Letter of Support of 13 October 2015, Google, available on-line: <<https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiJlOGUxZTJhNy03NDdhLTQyNzQtODhlMS00YjJlMGVjZmVkM2EifQ%3D%3D>>, [last accessed: 30 May 2024].

⁵⁹² Sehati (n 90) 754 ff.

“account” means an arrangement under a terms-of-service agreement in which the custodian holds one or more digital assets of the user or provides goods or services to the user, and “user” means a person that has an account with a custodian [Section 2(26)], while clarifying that “custodian” is a person that carries, maintains, processes, receives, or stores a digital asset of a user [Section 2(8)].⁵⁹³

Section 4 of the act provides: (a) A user may use an online tool to allow a custodian to disclose or prohibit a custodian from disclosing some or all of the user’s digital assets, including the contents of electronic communications. If the on-line tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an on-line tool supersedes a contrary direction by the user in a will, trust, power of attorney, or other record. (b) If a user has not used an on-line tool to give direction under subsection (a) regarding disclosure of digital assets, or if a custodian has not provided an on-line tool, a user may allow or 5 prohibit in a will, trust, power of attorney, or other record, the disclosure to a fiduciary of some or all of the user’s digital assets, including the contents of electronic communications sent or received by the user. (c) The user’s direction for disclosure of digital assets under subsection (a) or (b) supersedes a contrary provision in a custodian’s terms-of-service agreement that did not require the user to act affirmatively and distinctly from the user’s assent to the terms-of-service agreement.⁵⁹⁴

According to Section 5: (a) this [act] does not change or impair a right of a custodian or a user under a terms of service agreement to access and use digital assets of a user. (b) This act does not give a fiduciary any new or expanded rights than those held by the user for whom, or for whose estate, the fiduciary acts or represents. (c) A fiduciary’s access to digital assets may be modified or eliminated by a user, by federal law, or by a terms of service agreement when the user has not provided any direction that is recognized in Section 4.⁵⁹⁵

Pursuant to Section 7, if the user consented to disclosure of the contents of electronic communications or if the court directs disclosure, a custodian shall disclose to the personal representative of the estate of a deceased user the content of an electronic communication sent or received by the user if the personal representative gives to the custodian: (1) a written request for

⁵⁹³ Cf. Morse (n 89) 8 ff; Sy (n 589) 650 ff.

⁵⁹⁴ Sy (n 589) 670 ff.

⁵⁹⁵ Arkadiusz Wudarski, ‘Amerykański model dostępu powierniczego do zasobów cyfrowych’ (2021) 65 Forum Prawnicze 19.

disclosure in physical or electronic form; (2) a [certified] copy of the death certificate of the user; (3) a certified copy of [the letter of appointment of the representative or a small-estate affidavit or court order]; (4) unless the user provided direction using an on-line tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the contents of electronic communications; and (5) some other information, if requested by the custodian, including a number, username, or address assigned by the custodian to identify the user's account.⁵⁹⁶

In turn, according to Section 15(a), the legal duties imposed on a fiduciary charged with managing tangible property also apply to the management of digital assets, including when applicable: (1) the duty of care; (2) the duty of loyalty; and (3) the duty of confidentiality.⁵⁹⁷

When comparing UFADAA and RUFADAA, the following four key changes can be observed:

- 1) under the UFADAA, fiduciaries had the same right to access digital assets as the account holder. The RUFADAA switched the default rule, providing that fiduciaries will not have access to the content of a user's digital assets unless the user consented;
- 2) under the UFADAA, boilerplate terms of service that prevented fiduciary access to digital assets were deemed void as against public policy. The RUFADAA uses a three-tier system of priority for user directions regarding fiduciary access. First, it incorporates the new on-line tools for directing fiduciary access. Second, a user's written direction in a will, trust, power of attorney, or other record overrides boilerplate terms of service agreements. Third, if a user provides no direction, the terms-of-service controls, or other law controls if the terms-of-service is silent on fiduciary access;⁵⁹⁸
- 3) under the UFADAA, custodians of a user's digital assets were required to grant access to any validly appointed fiduciary for the user who submitted a request. The RUFADAA changed this to permit fiduciaries access to digital assets only if they petition the

⁵⁹⁶ Sy (n 589) 675 ff.

⁵⁹⁷ Banta, 'Minors and Digital Asset Succession' (n 58) 1703 ff.

⁵⁹⁸ Joseph Ronderos, 'Is Access Enough? Addressing Inheritability of Digital Assets Using the Three-Tier System Under the Revised Uniform Fiduciary Access to Digital Assets Act' (2017) 18 Transactions: Tennessee Journal of Business Law 1031.

court with an explanation of why the asset is needed to wrap up the estate;

- 4) under the UFADAA, the procedure for disclosing digital assets was not specifically addressed. The RUFADAA provides some more options for digital asset disclosure, however it also provides that it should not allow the custodian to have full discretion in the manner of disclosing digital assets.⁵⁹⁹

For the assessment of the legal nature of access to digital assets, it is also relevant that under the RUFADAA a strong emphasis is placed on the deceased's intent. The act also balances *post-mortem* privacy concerns, which, in the discussion on the *mortis causa* fate of digital assets - it seems - cannot go unnoticed. Perhaps this is why, unlike its original version, RUFADAA has met with very broad acceptance among state legislatures and has been implemented in almost all states of the United States of America.⁶⁰⁰ In this regard, it can be pointed out that in the middle of 2024, only the Massachusetts and Oklahoma legislatures were still working towards the adoption of further state laws based on RUFADAA.

In this respect, one can look, e.g., at the bill being considered in early 2024 in the state of Oklahoma, where, until the new solutions take effect, the matter in question is based on § 58-269 of the *Oklahoma Statutes*. This provision, which regulates certain rules relating to the acquisition of an estate, provides that the administrator of the estate is authorised to take control and decide whether to continue or delete the testator's virtual account, which includes, e.g., a social networking website, any microblogging or short message service website or any e-mail service websites⁶⁰¹.

House Bill 2778, introduced on 18 January 2024,⁶⁰² makes changes in this respect based on RUFADAA. In this regard, it provides for analogous definitions of "digital asset", "account", "user", "custodian" or "electronic" as RUFADAA, also starting from the premise that a user may use an on-line tool to direct the custodian to disclose to a designated recipient or not to

⁵⁹⁹ Cf, more broadly: Sy (n 589) 670–676.

⁶⁰⁰ Jack Holt, James Nicholson and Jan David Smeddinck, 'From Personal Data to Digital Legacy: Exploring Conflicts in the Sharing, Security and Privacy of Post-Mortem Data' in Jure Leskovec and others (eds), *WWW '21: Proceedings of the Web Conference* (Association for Computing Machinery 2021) 2745 ff.

⁶⁰¹ Oklahoma Statutes available on-line: <<http://www.oscn.net/>>, [last accessed: 30 May 2024].

⁶⁰² House Bill 2778/2024, available on-line: <<http://www.oklegislature.gov/BillInfo.aspx?Bill=HB3778&Session=2400&Tab=0>>, [last accessed: 30 May 2024].

disclose some or all of the user's digital assets and clarifying, that the new law does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

It is pointed out in the doctrine, *inter alia*, that the adoption of an act based on RUFADAA seems to be necessary because it will provide a framework for grieving families or closure in difficult times. It is submitted that this structure helps the personal representatives succeed in obtaining access to a decedent's digital accounts because it is based on a system that was approved by the custodians holding the decedent's data. Furthermore, it is emphasised that for practitioners who practice in multiple states, the procedure will be consistent in probates crossing state lines.⁶⁰³ Nevertheless, it is quite strongly emphasised that, despite its many advantages, instead of shoehorning access to digital accounts into a traditional property framework where everything is inheritable, access to digital accounts should take into account the user's personal autonomy, their surrounding relationships or even their vulnerability, and the RUFADAA does not take this nuanced approach.⁶⁰⁴

Having regard to the above, when looking at the current American model of access to digital assets of the deceased, it should be pointed out that RUFADAA, as a model law, is a kind of hybrid, linking digital assets to multiple areas of law to which it refers in different ways. First and foremost, the act defines the concept of "digital asset", which seems to have a general and open-ended character to meet the challenges of the ever-changing virtual part of our life activity and the emergence of new forms of digital assets, while leaving the sphere of possible doubts to be resolved in case law. RUFADAA also introduces the on-line tool as a new way of managing digital content. This is an electronic service provided by the administrator that allows the user to give instructions to the administrator regarding the digital content stored in his account. With this tool, he can express an intent for both disclosure and non-disclosure of all or part of the digital assets. The emphasis on the person of the user and his will can thus be seen, which, in the context of many questionable elements of the use of digital assets, may prove to be an

⁶⁰³ Cf. Christin Mugg and Brody Gustafson, 'Access to a Deceased's Digital Accounts' (2021) 92 Oklahoma Bar Journal 6.

⁶⁰⁴ Shelly Kreiczer-Levy and Ronit Donyets-Kedar, 'Better Left Forgotten : An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power' (2019) 84 Brooklyn Law Review 703.

important remedy for them. The relevant disposition may, moreover, also be contained in another tool, including a service contract, a trust, a power of attorney, a will, as well as in another document. Admittedly, the concept of access by fiduciaries is clearly formulated in the very name of the law and based on a fiduciary administration, but this is related to the American model of succession proceedings. After all, the purpose of access by fiduciaries is, in the first instance, to sustain the operation of the deceased person's on-line account and, subsequently, to prejudge the fate of that account, including possible access to digital content by the deceased person's heirs.⁶⁰⁵

The model indicated above seems to be extremely interesting, if only because it is based on the will of the deceased user of the digital assets. It is his intention, in the first instance, that is relevant to the subsequent fate of the digital assets after his death. In this way, the legal nature of digital assets becomes even more complex, which, however, one may think, is intended to counteract a certain automatism of their legal succession as a process in which many perceive defectiveness. It is therefore certainly an interesting point of reference.

With this in mind, the American approach may be thought to be fruitful. In many states separate legal acts concerning the post-mortal status of digital assets have been accepted.⁶⁰⁶ The idea behind the solutions adopted in these regulations is to grant a specific person (usually the administrator of the estate) the authority to take control of the deceased's virtual account, including deciding whether to keep such account functioning, accessing the content therein, or deciding whether to remove the account from the virtual world.⁶⁰⁷ American solutions are therefore an interesting point of reference for possible draft legislation to regulate in the future the post-mortal status of digital assets.

3. TRADITIONAL APPROACH – THE LAW OF SELECTED EUROPEAN COUNTRIES

American law, due to its structural and conceptual differences, has not yet, at least up to now, triggered any major reflection at the level of European Union countries. Here it must be recalled that, despite the EU Succession Regulation 650/2012 being in force within the European Union,

⁶⁰⁵ Sitkoff and Dukeminier (n 519) 857 ff.

⁶⁰⁶ Jamie Patrick Hopkins and Ilya Alexander Lipin, 'Viable Solutions to the Digital Estate Planning Dilemma' (2014) 99 Iowa Law Review Bulletin 61, 61–71.

⁶⁰⁷ Toygar, Rohm Jr and Zhu (n 34) 113–119.

substantive succession law is still the domain of the national law of individual EU countries.⁶⁰⁸ There are no concrete initiatives at EU level to date to change this situation, nor is there any guidance in the context of a possible harmonisation of the succession law of individual EU states.⁶⁰⁹ Nevertheless, digital assets have already been the focus of practice and legislation in EU states.

The example of German legislation, often a model for other European systems, seems to be one of the most interesting examples of how to approach this matter, where the case law - despite the lack of a specific statutory regulation - has probably settled the most well-known case to date in this area, i.e. the issue of access to the *Facebook* account of a deceased *Facebook* user by her parents, as already presented in this work earlier. The German courts, it may be recalled, held that this was an area subject to succession. They accepted that access to the *Facebook* profile and its contents is a right that can be transferred upon death and does not preclude the posthumous personal rights of the deceased, the secrecy of telecommunications, data protection laws⁶¹⁰ or the general personal rights of the deceased's communication partners.⁶¹¹ In doing so, the decision was widely supported by German lawyers.⁶¹²

As is well known, the German legal order is a system of statute law. The role of jurisprudence mainly comes down to the interpretation of existing norms. The basic legal act in the field of German inheritance law is the German Civil Code of 1896, which still dates from the 19th century. The main regulation is contained in the Book five of the Code (successions) -§ 1922-2385. Other books of the German Civil Code and special laws also contain regulations relevant to succession law. The German regulations are

⁶⁰⁸ Cf. Dieter Leipold, 'Europa Und Das Erbrecht' in Gerhard Köbler, Meinhard Heinze and Wolfgang Hromadka (eds), *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends. Festschrift für A. Söllner zum 70. Geburtstag* (C H Beck 2000) 647–668.

⁶⁰⁹ Paul Terner, 'Perspectives of a European Law of Succession' (2007) 14 Maastricht Journal of European and Comparative Law 147; Mariusz Załucki, 'Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future' (2018) 103 Iowa Law Review 2318.

⁶¹⁰ Florian Deusch, 'Digitaler Nachlass – Vererbbarkeit von Nutzerkonten in sozialen Netzwerken' (2016) 189 Zeitschrift für Erbrecht und Vermögensnachfolge 189, 189–195; Merle Bock, 'Juristische Implikationen des digitalen Nachlasses' (2017) 217 Archiv Für Die Civilistische Praxis 370, 397 ff.

⁶¹¹ Mark-Oliver Mackenrodt, 'Digital Inheritance in Germany' (2018) 7 Journal of European Consumer and Market Law 41, 41–47.

⁶¹² Carolin Pockrandt, *Digitaler Nachlass. Die Übergangsfähigkeit und -weise digitaler Daten unter Berücksichtigung der Rechte Dritter* (Nomos 2020) 19 ff.

in many places based on constructions known since Roman times, which is of course, among other things, a consequence of the reception process of Roman law.⁶¹³ The legislature there therefore adheres to the principle of universal succession. According to § 1922(1) of the German Civil Code, upon the death of an individual, the inheritance passes as a whole, a certain property mass, to the heirs. The inheritance includes all property rights and obligations of the deceased. On the other hand, rights that are closely linked to the person of the deceased as well as rights of a non-property nature are not included in the inheritance.⁶¹⁴ German law gives primacy to succession based on a declaration of will. This means that succession by operation of law takes place in the absence of a declaration of intent by the testator.⁶¹⁵ This was the case with the deceased *Facebook* user, she did not leave a will and the basis for access to her account was the rules of statutory succession.

It is against this background that German case law has clarified that the right of access to a user's account and the content stored therein derives from the *mortis causa* transferability of the contract between the deceased user and *Facebook*. This contractual relationship, which was subject to German law as a consumer contract pursuant to Article 6 of the Rome I Regulation, passed to her heirs upon the death of the user in accordance with the general principle of universal succession after death [§ 1922(1) of the German Civil Code]. According to § 1922 of the German Civil Code, the inheritance as a whole passes to the heirs, and contracts such as the contract for the use of on-line content at issue remain part of this inheritance, so that the heirs are entitled to inherit. Only a contractual exclusion of inheritance or the strictly personal nature of the contract could prevent inheritance, which in this particular case, according to the German courts, did not occur.⁶¹⁶

It was also argued in the German case that the assignability of contractual rights in the event of death can be excluded by the same contract. In the case at hand, *Facebook* has not included such a provision in its terms of use. It was argued, however, that even if a relevant condition had been included in the terms of use of the social network in question, this condition would also not have been able to withstand the content of the general terms and conditions of contracts under § 307 (1) and (2) of

⁶¹³ Binder (n 101) 1 ff.

⁶¹⁴ Brox and Walker (n 102) 6 ff.

⁶¹⁵ Anne Röthel, 'Testamentsformen' (2014) 5 *Juristische Ausbildung* 475.

⁶¹⁶ Załucki, 'Contractual Limitations in the Mortis Causa Legal Succession on the Example of the Facebook Contract. The German Facebook Case' (n 87) 106–123.

the German Civil Code, which would have been applicable to its judicial review.⁶¹⁷ This is due to the fact that non-transferability in the event of death alters the benefit obligations, which is said to constitute a “disproportionately adverse condition” within the meaning of § 307 (1) and (2) of the German Civil Code. The effect would be that, upon notification of death by any third party, the next of kin would no longer have access to the deceased’s account and thus lose their right to benefits. The principle of universal succession would therefore be deprived of its essence.⁶¹⁸

Furthermore, it was argued in the German argumentation that the transfer (succession) of an Internet services contract may also be excluded due to its nature.⁶¹⁹ Contracts are not transferable if the substance of the provision changes as a result of the ascension of heirs, as in the case of a service contract in which the person of the service provider is relevant. Issues of privacy and secrecy of correspondence may also be relevant.⁶²⁰ According to the German court, however, this did not apply to a social network contract, as the obligation to allow access does not change, regardless of whether it is the existing user or his heir who gains access to the profile.⁶²¹ The provision of the account to the heirs is merely a technical service that can also be provided to the heirs.

Undoubtedly, therefore, German solutions developed in case law from that country may seem to be an important inspiration, a paradigm, especially for those legal systems where - as in German law - there are no relevant additional statutory provisions on the legal succession of digital assets and the legal succession takes place according to general principles, subject to traditional provisions.⁶²² In such cases, the proprietary nature of the digital assets is one of the fundamental issues, in principle the decisive issue, concerning the legal succession, inheritance and the entry of heirs into the rights and obligations of the Internet user resulting from the contract with the Internet service provider.⁶²³ The position of German law is clear

⁶¹⁷ Bergh and Weber (n 465) 29 ff.

⁶¹⁸ Bock (n 610) 370–417.

⁶¹⁹ Kerber and Zolna (n 466) 217–250.

⁶²⁰ Seifert (n 42) 1169 ff.

⁶²¹ Pockrandt (n 612) 21 ff.

⁶²² Cf. Fras (n 33) 67 ff.

⁶²³ Christandl (n 530) 2–9.

on this point: digital assets as goods of a proprietary nature are subject to succession on general principles.⁶²⁴

German law is of course not the only European system that has faced similar problems. Relevant to many European legislations is, e.g., also Austrian law, where the main source of civil law is the Austrian Civil Code which dates from 1811.⁶²⁵ Succession law is contained in Book two of this code, relating to the various ways of acquiring property [§ 531-824].⁶²⁶ Succession in Austrian law also has the character of universal succession.⁶²⁷ The Austrian Civil Code points precisely to universal succession as the effect of inheritance, where the heir enters into all the property rights and obligations of the testator [§ 531 ff. of the Austrian Civil Code].⁶²⁸ The succession estate thus includes the totality of private legal rights and obligations which are of a pecuniary nature and are not extinguished by the death of the individual concerned. The succession, on the other hand, only opens upon the death of the testator [§ 536 of the Austrian Civil Code].⁶²⁹ After the death of a natural person, however, before the heir takes over the deceased's property rights and obligations, a special procedure, the so-called *Verlassenschaftsverfahren*, is first initiated *ex officio*.⁶³⁰ According to the principle deriving from § 797 of the Austrian Civil Code, no one is allowed to take possession of the inheritance on their own authority (arbitrarily).⁶³¹ This can only take place by means of a court decision preceded by legal proceedings. In the initial stage of the proceedings, the so-called court commissioner, who is usually a notary, makes an initial assessment of the value of the estate, determines, inter alia, whether the estate is encumbered with debts (based on information from banks, insurance companies, possible creditors, family, etc.) and notifies all (future) heirs of the initiation of the proceedings. Only later does the acceptance of the inheritance take place.

⁶²⁴ Cf., e.g.: Bock (n 591); Mackenrodt (n 592); Preuß (n 468); Seifert (n 26); Seidler (n 32); Pockrandt (n 593) - *passim*.

⁶²⁵ Cf. Katja Škrubej, 'Austrian General Civil Code (1812) and the Slovenes: The Blinding Legacy of Legal Monism' (2013) 63 *Zbornik Pravnog fakulteta u Zagrebu* 1063.

⁶²⁶ Cf. Gregor Christandl and Kristin Nemeth, 'Austrian Succession Law Rewritten: A Comparative Analysis' (2020) 28 *European Review of Private Law* 149.

⁶²⁷ Cf. Rudolf Welser, *Erbrecht* (Manz Verlag 2019) 9 ff.

⁶²⁸ Michael Gruber and others, *Erbrecht und Vermögensnachfolge* (Springer 2010) 39 ff.

⁶²⁹ Rudolf Welser, *Der Erbrechts-Kommentar §§ 531 - 824 ABGB* (Manz Verlag 2019) 20 ff.

⁶³⁰ Manfred Umlauf, 'Die Änderungen im Verlassenschaftsverfahren durch die Ausserstreitreform' (2002) 110 *Schriftenreihe des Bundesministeriums für Justiz* 75.

⁶³¹ Lutska Galyna and others, 'The Analysis of the Implementation of Inheritance Law in Selected EU Countries' (2022) 11 *Amazonia Investiga* 149.

At the same time, and it should be emphasised, Austrian law *expressis verbis* provides for a subjective right to inheritance (private) for the heirs, defining it as an absolute right, effective against anyone who wishes to appropriate the inheritance [§ 532 of the Austrian Civil Code].⁶³²

Against such a normative background, in the context of the legal succession of digital assets, the view prevalent in Germany has generally been taken over in Austrian law, which has happened mainly through the doctrine. For this reason, the most common view is that the right to access the user account is transferred to the heirs. A case of this kind has already been dealt with, among others, by an Austrian court.⁶³³ It concerned access to the deceased's *iCloud* service. The district court in Dornbirn had to decide whether the heirs could access the deceased's data stored in the cloud. The judgment in the case ordered the cloud service to grant access to the heirs, essentially adopting the reasoning of the German Federal Court of Justice from the *Facebook* case.⁶³⁴ Interestingly, Apple agreed to reset the password for the deceased's heir to allow full access to the user's *iCloud* account, although, as practice shows, previously the highly personal right of the deceased was usually invoked in such cases in response to such requests from various individuals and access data was refused to the heirs.⁶³⁵

However, so far - as of mid-2024, in Austria the courts have not considered more broadly whether on-line platforms are subject to a duty of confidentiality similar to, e.g., that of a doctor, notary or lawyer, as can be read in the German position,⁶³⁶ as indicated by the doctrine. As some scholars point out, on-line platforms are precisely subject to a duty of confidentiality similar to that of a doctor, notary or lawyer. In order for this to be the case, the platform must be considered a data controller, which according to Section 6(1) of the Austrian Data Protection Act⁶³⁷ applies to both data controllers and subcontractors under the General Data Protection Regulation.

⁶³² Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch, *Großkommentar Zum ABGB - Klang Kommentar: §§ 531-551 ABGB, Erbrecht* (Verlag Österreich 2016) *passim*.

⁶³³ Cf. Joachim Pierer, 'Die Privatsphäre des Erblassers - zugleich ein Beitrag zum sog „digitalen Nachlass“' (2020) 152 Österreichische Notariatszeitung 281, 285.

⁶³⁴ Cf. Bezirksgericht Dornbirn, judgment of 3 March 2020, C 943/2019.

⁶³⁵ Cf. Eimantas Kadys, 'Inheriting Access to a Social Network Account' (2024) 80 *Studia Prawno-Ekonomiczne* 9, 20.

⁶³⁶ Cf. Christandl (n 530) 9 ff.

⁶³⁷ Section 6(1) of *Datenschutzgesetz 2018* states: "The controller, the processor and their employees, i.e. employees and persons in a quasi-employee relationship, shall ensure the confidentiality of personal data from data processing activities that have been entrusted or

Against the background of Austrian law it can be argued that - according to general case law on the protection of posthumous secrecy - such platforms are only obliged to disclose personal data if the heirs or next of kin have a legitimate interest and the deceased expressly wished to do so, or if the disclosure corresponds to the implied will of the deceased. It would be up to the holder of the secret or the legal expert to assess whether this is in accordance with his will.⁶³⁸ However, as is argued in the Austrian doctrine, there is an important difference between a treatment contract with a doctor or a consultancy contract with a notary or lawyer, as these contractual relationships are either already terminated at the time of death or are not passed on to the heirs due to their strictly personal nature, whereas the user's contract with the Internet service provider is in principle passed on to the heirs.⁶³⁹ It follows that the heirs take over the contractual position of the deceased in the case of a user's contract with the Internet service provider, and must therefore access the communication content of that user account as a part. to the contract. However, it is permissible to protect the secret posthumously if the deceased has excluded inheritance or if the general terms and conditions of the contract effectively exclude inheritance.⁶⁴⁰

Therefore, as can be seen, also Austrian law has a rather clear position in this area. Digital assets as property rights are fit to be included in the inheritance and subject to the existing succession rules.⁶⁴¹

In various comparative works, Dutch law is also a frequent point of reference. It may be recalled that Dutch law is set in a similar normative context as German or Austrian law. The reformed Dutch Civil Code of 1992 there is, moreover, considered to be one of the most modern civil codes in the world and is therefore often a source of inspiration.⁶⁴² The norms concerning the law of succession are contained in the new fourth book of

have become accessible to them solely due to their employment, without prejudice to other statutory obligations of confidentiality, unless a legitimate reason for the transmission of the data that have been entrusted or have become accessible to them exists (confidentiality of data)".

⁶³⁸ Cf. Johanna Schratter, *Der digitale Nachlass im österreichischen Zivilrecht* (Karl-Franzens-Universität Graz 2021) 54 ff.

⁶³⁹ Christandl (n 530) 9–10.

⁶⁴⁰ *ibid.*

⁶⁴¹ Markus Gumilar, *Der digitale Nachlass: Mit besonderem Augenmerk auf die notarielle Praxis*, vol 68 (Manz Verlag 2023) 9 ff.

⁶⁴² Cf. Martijn W Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' (2006) 12 *European Law Journal* 279.

the Code (“Succession Law”), which came into force on 1 January 2003.⁶⁴³ According to Article 4:1(1) of the Dutch Civil Code, the titles of succession are the law and the disposition of the last will. The testator’s disposition waives the effects of the statutory succession, provided that it establishes or disinherits the heir [Article 4:2(2) of the Dutch Civil Code]. An heir who is a natural person must be alive at the time of the opening of the succession, one who is a legal person must exist at that time [Article 4:9 of the Dutch Civil Code].⁶⁴⁴

Succession - according to the Dutch law - is an example of acquisition by general title. In Dutch law, digital assets are considered to be a type of property and therefore the rules of succession apply to them. There are no specific principles that apply solely to the liquidation of a digital inheritance. Digital assets are therefore inherited in the same manner as any other type of asset. Heirs succeed by operation of law to the rights capable of transmission and to whatever the deceased possessed or held, whether this was digital or material. The same is with the Internet services contract - heirs succeed by operation of law into the position of the deceased in the contract unless the contract stipulates otherwise.⁶⁴⁵ Terms and conditions that apply to the specific contract for digital services must therefore be checked to see what the rights of the heirs are under the contract.⁶⁴⁶

The current rules therefore apply as for the succession of property. According to the indication of the doctrine there, if the contract is mute on what happens to the account after the death of the user, then the provider must provide access to the service to the heirs under the same conditions as it did to the now deceased user. The heirs may then decide what to do with the account of the deceased.⁶⁴⁷ Therefore, Dutch law has also recognised,

⁶⁴³ Jeroen MJ Chorus, Piet Hein Maria Gerver and Ewoud H Hondius, *Introduction to Dutch Law* (Kluwer Law International 2006) 194.

⁶⁴⁴ For more on succession law in the Netherlands cf. Barbara E Reinhartz, ‘Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?’ (2007) 11 *Electronic Journal of Comparative Law* 1.

⁶⁴⁵ Anna Berlee, ‘Digital Inheritance in the Netherlands’ (2017) 182 *Journal of European Consumer and Market Law* 256, 257.

⁶⁴⁶ However, the subject of post-mortal status of digital assets is being explored by the Dutch doctrine. A wide-ranging report recently published proposes further research and the choice of one of three routes, i.e. basing the future solution on contract law (and in particular consumer contract law), data protection law or fiduciary access, therefore analogous to US solutions. Cf. Mireille MM Van Eechoud and others, *Data na de dood - juridische aspecten van digitale nalatenschappen* (Universiteit van Amsterdam 2021) 81 ff.

⁶⁴⁷ Berlee (n 645).

at least so far, that there is no need for specific regulation of the matter of post-mortal status of digital assets. Until today general rules are supposed to be sufficient. However, perhaps there will be changes in the future.⁶⁴⁸

In another European country, Switzerland, the law there also does not contain a different solution. In fact, it is also indicated in Switzerland that digital assets are transferred after the death of the testator in accordance with the rules of succession law.⁶⁴⁹ As is well known, the most important source of civil law in this civil country is the Swiss Civil Code, enacted in 1907.⁶⁵⁰ The norms of succession law are to be found in book three of the Code [“Succession Law” - Articles 457-640]. Swiss law is based on the premise that the legal status of the deceased with his death will continue regardless of the legal status of his heirs (*ipso iure* succession).⁶⁵¹ In this context, the principle of universal succession applies, whereby all of the deceased’s assets, including all of his debts, are transferred to his heirs.⁶⁵² This principle also applies where the heirs are not aware that they are entitled to inherit.⁶⁵³

According to the Swiss law, the digital assets therefore pass by universal succession [Article 560 of the Swiss Civil Code].⁶⁵⁴ In this regard, the doctrine submits, among other things, that the transfer to successors in title may be also codetermined by the terms of use of the on-line service, as the deceased has concluded a contract with the on-line service provider and is bound by the applicable terms of use that are contained in the contract.⁶⁵⁵ It is also argued that it is permissible for the testator to give instructions on the handling of his digital assets. Such instructions may be filed with the provider, addressed to the executor or the heirs in the form of an e-mail,

⁶⁴⁸ Van Eechoud and others (n 646) 81 ff.

⁶⁴⁹ Künzle (n 63) 39 ff.

⁶⁵⁰ Eugen Bucher, ‘The Path to a Harmonized Swiss Civil Code’ (2008) 72 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 661, 661–685.

⁶⁵¹ Cf. Michelle Cottier, ‘Ein zeitgemässes Erbrecht für die Schweiz: Bericht zur Motion 10.3524 Gutzwiller “Für ein zeitgemässes Erbrecht” zuhanden des Bundesamtes für Justiz’ (2014) Sonderheft *Not@lex/succesio* 29.

⁶⁵² Paul Eitel, *Grundlagen des Erbrechts* (Universität Luzern 2013) 10 ff.

⁶⁵³ Ruth Arnet, Peter Breitschmid and Alexandra Jungo, *Handkommentar zum Schweizer Privatrecht: Erbrecht. Art. 457–640 ZGB, inkl. BGGB* (Schulthess Verlag 2023) passim.

⁶⁵⁴ Cf. Daniel Abt and Thomas Weibel, *Praxiskommentar Erbrecht, Nachlassplanung, Nachlassabwicklung, Willensvoll-streckung, Prozessführung*, (Helbing Lichtenhahn Verlag 2023) 1250 ff.

⁶⁵⁵ Künzle (n 63).

a written declaration or a testamentary instruction.⁶⁵⁶ Such instructions are not intended to be relevant in connection with the transfer of property to heirs, but they may play a role where the account is a carrier of personal (sensitive) data. Indeed, if such an instruction (in whatever form) exists, then, as the doctrine there indicates, the provider can no longer argue to the heirs that the protection of the deceased prohibits access to this data.⁶⁵⁷

There doctrine in Switzerland carried out interesting considerations,⁶⁵⁸ if only in the context of privacy and data processing issues.⁶⁵⁹ Among other things, it was considered whether heirs could have access to sensitive data that the deceased had stored about themselves or other persons. The starting point for answering such a question is supposed to be the principle that the protection of personal rights (including the protection of personal data) ends with the death of the entitled person.⁶⁶⁰ With such a conception, therefore, there are no legal obstacles and the restrictions on the succession of digital assets cannot arise from the personal assets of the deceased. It is added here that personal rights cannot be inherited, so the heirs do not become the new owners of such data. However, relatives also do not become owners of personal data. However, relatives and heirs regularly have an interest of their own, which is known as protecting the memory of the deceased.⁶⁶¹

In the above context, the draft Data Protection Act 2017 deserves attention.⁶⁶² Proposed Article 16 of the draft contains a provision that regulates various aspects of the management of the data of a deceased person, being based on the assumption that, since the purpose of data protection is, inter alia, the protection of personal rights, this principle should also apply to the data of deceased persons. The draft provides for the deceased's

⁶⁵⁶ Stephanie Hrubesch-Millauer, Stephan Wolf and Martin Eggel, *Digitales Erbrecht - Perspektiven aus der Schweiz. Beiträge zum Einfluss des «Digitalen» auf das Erbrecht und die erbrechtliche Planung* (Nomos 2021) passim.

⁶⁵⁷ Cf. Elke Brucker-Kley and others, *Sterben und Erben in der digitalen Welt* (ZHAW School of Management and Law 2012) 11 ff.

⁶⁵⁸ Antoinne Eigenmann, 'Successions numériques' in Maryse Pradervand-Kernen, Michel Mooser and Antoine Eigenmann (eds), *Journée de droit successoral* (Stämpfli Editions 2021) 41–86.

⁶⁵⁹ Künzle (n 63) 43 ff.

⁶⁶⁰ *ibid.*

⁶⁶¹ Hrubesch-Millauer, Wolf and Eggel (n 656) passim.

⁶⁶² *Loi sur la protection des données. Révision totale et modification d'autres lois fédérales* of 15 September 2017, No 17.059. See parliamentary work document: Message concernant la loi fédérale sur la révision totale de la loi fédérale sur la protection des données et sur la modification d'autres lois fédérales of 15 September 2017, 6662–6667.

previously expressed wishes to be taken into account, also granting the right to erase or destroy the deceased's data, thus bringing about his digital death.

According to Section 1 of this draft, the data controller was to grant free access to the personal data of a deceased person if the following conditions were met: (a) there is a legitimate interest in the inspection or the applicant is directly related to the deceased, was married to the deceased, entered into a registered partnership with the deceased or was actually married to the deceased at the time of death, or is the executor of the deceased's will; (b) the deceased did not expressly forbid the inspection during his lifetime and does not need special protection; (c) there is no overriding interest of the data controller or a third part. that would prevent the inspection. Section 2 of the draft, on the other hand, provided that if the controller refuses on the grounds of professional or professional secrecy, the entitled persons may in such a case apply to the competent authority for an exemption from secrecy. In addition, according to Section 3 of the draft, the heirs or executors of the estate could require the controller to erase or destroy the deceased's personal data, except in the following cases: a) the deceased expressly prohibited it during his lifetime; b) the erasure or destruction is contrary to the overriding interests of the deceased, the controller or third parties; c) the erasure or destruction is contrary to an overriding public interest.⁶⁶³

At the legislative stage, however, there was opposition to the introduction of such a regulation. Possible imprecise effects were pointed out, in favour of the traditional view that it is the existing civil law solutions (Swiss Civil Code) that are sufficient.⁶⁶⁴ The law of 25 September 2020, which was finally passed, did not opt for provisions in this area.⁶⁶⁵

Basically, therefore, in the local Swiss law, although the issue of the post-mortal status of digital assets is approached rather traditionally and the general succession mechanism is used in this respect, legal science also pays attention to other aspects, as it were, looking for alternatives to the succession mechanism or the possibility of that there may be grounds to exclude this mechanism. As one may think, this is - at least recently - a certain trend when it comes to how to solve the problem of post-mortal digital assets in this area. Significant importance is beginning to be attributed to the will of the

⁶⁶³ *ibid.*

⁶⁶⁴ This has also been recognised in foreign literature, cf. Esperança Ginebra Molins (n 36) 908 ff.

⁶⁶⁵ Cf. Sylvain Métille, 'La (nouvelle) Loi fédérale sur la protection des données du 25 septembre 2020: des principes, des droits et des obligations' (2022) *Die Revision des Datenschutzgesetzes des Bundes / La révision de la Loi fédérale sur la protection des données* 1.

user of digital assets, resulting perhaps in more concrete statutory solutions in the future in the context of hitherto vaguely related legal solutions, such as the right to property and the right to privacy.

Looking at the above-mentioned - as one may think - canons of European civil law, one can see certain patterns that measure up to practice. These solutions do not, for the time being, show much interest in further exploring other possibilities, which is related to the conviction that traditional mechanisms seem to be sufficient.

However, the presentation of selected legal systems of European countries would not be complete without discussing some solutions from countries which, as countries from the so-called Eastern Bloc, have recently metamorphosed (recodified) their laws, moving away from solutions remembering the Soviet doctrine and adopting new civil codes based on modern legal thought.⁶⁶⁶

One such country is, e.g., Poland. According to Article 922 § 1 of the Polish Civil Code, the pecuniary rights and obligations of the deceased constitute his inheritance estate.⁶⁶⁷ Article 922 § 1 of the Polish Civil Code refers only to pecuniary rights and pecuniary obligations under private law. Therefore, only private law subjective pecuniary rights and private law pecuniary obligations constitute the inheritance estate. Neither private law subjective non-pecuniary rights and private law non-pecuniary obligations are included in the inheritance, nor are those pecuniary rights and obligations which are not of a private law nature or rights closely related to the person of the deceased (according to Article 922 § 2 of the Polish Civil Code, the inheritance shall not include the rights and duties strictly connected with the deceased as well as those rights which, at the time of his death, devolve to designated persons regardless of whether they are his heir).⁶⁶⁸

Appointment to the inheritance may result only from the law or the will of the deceased [Article 926 § 1 of the Polish Civil Code].⁶⁶⁹ The occurrence of succession prerequisites on the part of both the testator and the heir triggers the succession mechanism. The regulation of the acquisition

⁶⁶⁶ Cf. Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe. Autonomous Developments or Legal Transplants?* (Mohr Siebeck 2010) *passim*.

⁶⁶⁷ Paweł Księżak, *Prawo spadkowe* (Wolters Kluwer 2017) 47 ff.

⁶⁶⁸ Cf. Sylwester Wójcik and Mariusz Załucki, *Podstawy prawa cywilnego. Prawo spadkowe* (Wolters Kluwer 2015) 26 ff.

⁶⁶⁹ Michał Niedoślą, 'Powołanie spadkobiercy' (1986) 42 *Nowe Prawo* 58.

of an inheritance in Polish inheritance law is based on the premise that, from the moment of the testator's death, the inheritance left by him may not for a moment be anyone's inheritance; already from the moment the inheritance is opened, the inheritance must belong to someone. A consequence of this assumption is the principle expressed in Article 925 of the Polish Civil Code that due to succession the heir acquires the inheritance from the moment the inheritance is opened (universal succession).⁶⁷⁰

Polish law does not provide for any specific regulation concerning the post-mortal status of digital assets. In this respect, it is generally assumed that these goods are of a pecuniary nature and therefore subject to succession on general principles, just like other goods of this kind.⁶⁷¹ In the doctrine, the view has emerged, *inter alia*, that a social platform account can by no means serve individual purposes only, since it functions as an element of a network, which benefits all of its users by sharing digital content and building interpersonal connections.⁶⁷² This is supposed to speak precisely in favour of succession, not in favour of the personal nature of this type of goods, which could exclude succession. Nevertheless, it is submitted that the heir cannot use the account in the same way as the deceased.⁶⁷³ It is however unclear what is meant by this.

In practice, cases concerning this type of goods are yet not known, at least they are not widely discussed. Nevertheless, the Polish legal sciences recognise that in today's reality considerable legal problems in the context of succession law may arise from goods connected with technological progress, especially with the virtual digital world.⁶⁷⁴ There is no doubt that interactivity, interaction or the exchange of knowledge and information between users are the keynotes of today's Internet. A tangible result of this is the proliferation of digital content created and published by users, where this content comes in many different forms. It is emphasised there that international standards, solutions developed in other countries, can be helpful in clarifying the legal

⁶⁷⁰ Księżak (n 667) 88.

⁶⁷¹ Grochowski (n 67) 1196 ff.

⁶⁷² Mart. Pietrzak and Paweł Pabiańczyk, 'Co się dzieje z kontem na Facebooku po naszej śmierci? Dopuszczalność dziedziczenia konta użytkownika serwisu społecznościowego - aspekt cywilno- prawny' (2017) 7 *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 56, 63.

⁶⁷³ Szulewski (n 47) 743.

⁶⁷⁴ Cf. Kamil Trzpis, 'Problematyka następstwa prawnego *mortis causa* kont na platformach dystrybucji cyfrowej gier komputerowych' (2022) 13 *Prawo Mediów Elektronicznych* 26.

status of digital assets.⁶⁷⁵ One such example, which is often cited, is, among others, the case pending before the German courts concerning access to digital content on *Facebook* after the death of an account user.⁶⁷⁶ This often leads to the position that a proper understanding of the term “right of succession” as a derivative of the “right of property” against the background of constitutional, international and European acts of law seems to support precisely such a position as that expressed in German case law. Hence, it is stated in the Polish doctrine that the rights and obligations arising from the contracts concluded by the Internet user with the service provider are hereditary and form part of the inheritance estate.⁶⁷⁷

Part of the Polish doctrine recognises the issue of protection of privacy of deceased persons, which, in the context of the problem of legal status of digital assets after the death of an Internet user discussed here, cannot remain without significance.⁶⁷⁸ There is even an idea in legal science that the personal goods of an individual do not end with the death of that person.⁶⁷⁹ Moreover, it has been pointed out that there are some personal goods that only come into existence after the death of a person.⁶⁸⁰ The whole issue is, of course, very controversial, but it seems to add a new breath to the discussion about the fate of the digital assets of a deceased individual. For it appears that the nature of the content left by an individual on the Internet, which appears to be somewhat more personal than has been emphasised so far, may argue in favour of an appropriate decision being taken by the holder of those assets, but *ante mortem*. This would mean that the fate of the digital assets after the death of their user would be decided by the declaration of will of that user, only expressed before death. In this way, the hybrid nature

⁶⁷⁵ Hanna Wencel, ‘Dziedziczenie treści cyfrowych na podstawie regulaminu portalu społecznościowego Facebook’ (2021) 12 *Prawo Mediów Elektronicznych* 30.

⁶⁷⁶ Mateusz Mądel, ‘Dostęp do treści cyfrowych zmarłego użytkownika usług internetowych na tle orzeczenia Federalnego Trybunału Sprawiedliwości w Niemczech’ (2020) 15 *Transformacje Prawa Prywatnego* 125.

⁶⁷⁷ Cf. Anetta Breczko and Mart. Andruszkiewicz, ‘Prawo Spadkowe w Obliczu Postępu Technologicznego (Nowe Wyzwania w XXI Wieku)’ (2017) 22 *Białostockie Studia Prawnicze* 27; Fras (n 33); Marcin Wrazidło, ‘Następstwo prawne dóbr cyfrowych post mortem’ (2023) 32 *Problemy Prawa Prywatnego Międzynarodowego* 123.

⁶⁷⁸ Mariusz Załucki, ‘The Approach of Family and Succession Law to Digital Assets’ in Ewa Dawidziuk, Anna Tarwacka and Patricia Panero (eds), *Family, Law, and Society: from Roman Law to the Present Day* (Peter Lang 2023) 471–486.

⁶⁷⁹ Cf. Mazurkiewicz (n 372) *passim*; Zuzanna Lisowska, ‘Dobra osobiste zmarłych i możliwość ich ochrony w Internecie’ (2016) 7 *Prawo Mediów Elektronicznych* 40.

⁶⁸⁰ *ibid.*

of these goods would be recognised. However, so far in Polish law there is no appropriate legal regulation for such a action of the deceased, and his possible will expressed before death may be important for the identification of a legal successor and not, e.g., for the cancelation of specific digital assets.

Some scholars propose to change this state of affairs. Among other things, it is proposed that digital assets be excluded from the scope of the deceased's rights and obligations under succession law. The user could, in an electronic declaration to the service provider, instruct the service provider to make the digital content stored on the account available after his death to relatives selected from among the statutory circle, failing which the service provider would be obliged to archive this content which would then form part of the succession.⁶⁸¹ On the latter point, a different solution is also proposed, modifying the above concept in the direction of a complete exclusion of digital assets from the inheritance estate, where the user's failure to make a declaration regulating their legal succession would be tantamount to a binding order for the service provider to delete the entire account and its content.⁶⁸² In either case, however, an amendment to the statutory provisions would be necessary. So far, no legislation is pending on this issue.

Another country of the so-called Eastern Bloc, where a significant metamorphosis of private law has taken place, e.g., is Romania. A relevant recodification of private law was also carried out there.⁶⁸³ The most important event was the adoption of the new Civil Code in 2009. After many attempts and three major unsuccessful drafts (1940, 1971 and 2004), a new Civil Code was introduced in Romania by Law No. 287/2009,⁶⁸⁴ which entered into force on 1 October 2011 by Law No. 71/2011.⁶⁸⁵ The former Romanian Civil Code was adopted and issued in 1864, entering into force in 1865, being mostly inspired by the French Civil Code of 1804.⁶⁸⁶

⁶⁸¹ Mateusz Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci* (Krakowska Akademia 2017) 265–269.

⁶⁸² Cf. Wrazidło (n 677) 146 ff.

⁶⁸³ Ioan Les and Sebastian Spinei, 'Reflections on the New Romanian Codes Abstract' (2013) 1 *Ius et Administratio* 37, 37–46.

⁶⁸⁴ Law No. 287/2009.

⁶⁸⁵ Law No. 71/2011 on the application of Law No. 287/2009.

⁶⁸⁶ See on this process in the countries of Central and Eastern Europe, e.g.: Olivier Moreteau, 'A Summary Reflection on the Future of Civil Codes in Europe' in P Apathy and others (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag* (2010) 1139 ff.

Article 953 of the new Romanian Civil Code states that the inheritance is “the transmission of the patrimony of a deceased natural person to one or more living persons”. With reference to inheritance opening, Article 954 § 1 of the Romanian Civil Code stipulates that a person’s inheritance shall be opened on his decease. The inheritance opening date is the date of the decease. The juridical importance of the succession opening date resides in the following: according to this date, there are determined the persons appointed to inherit the deceased person’s patrimony; according to this date, there is an assessment of the successional capacity of the persons appointed for the inheritance, as well as for their rights; in relation to this date, the deceased person’s estate constituency is identified etc.⁶⁸⁷

In the Romanian law, against such a normative background, in the context of digital assets, the links between succession, privacy and the protection of personal data are recognised. It is submitted that the existence of personality rights may determine the *mortis causa* trading of goods with an economic value. The processing of the data with personal character can injury the right to intimate life, to family and private life and that is why this activity can only be developed in the cases and under the conditions stated by law.⁶⁸⁸ In this regard the Romanian Law No. 677/2001 on the protection of the data with personal character is being mentioned.⁶⁸⁹ In the situation when a given good of an economic nature has at the same time a personal character (is strongly connected with a given individual), it is the regulations concerning the protection of personal data that may determine the *mortis causa* fate of this good, the possibility to use it in civil law transactions.⁶⁹⁰

Romanian law therefore recognises a certain need for a different approach to digital assets from traditionally inheritable objects. This is not a theme present exclusively in Romanian law. It does, however, allow to think about digital assets in the context of succession in slightly different terms than in the case of analogue assets.⁶⁹¹ This is certainly an important observation that will be further discussed.

⁶⁸⁷ Cristina Dinu and Ionela Barsan, ‘Succession Problems in the Context of the New Civil Code and in International Private Law Relations’ (2014) 7 Bulletin of the Transilvania University of Brasov 69.

⁶⁸⁸ Chelaru (n 370).

⁶⁸⁹ Romanian Data Protection Law, available on-line: <https://www.dataprotection.ro>>, [last accessed: 30 May 2024].

⁶⁹⁰ Chelaru (n 370) 5 ff.

⁶⁹¹ Cf. Aniela-Flavia Țicău-Suditu, ‘Digital Legacy’ (2020) 66 *Analele Științifice ale Universității “Alexandru Ioan Cuza” din Iași. Științe Juridice* 245.

An analogous approach can also be seen in other countries in that part of Europe, although, one would think, further exploration of them, at this stage, would no longer add value to the discussion at hand.

With this background in mind, it is therefore accepted in countries with a traditional - not to say old-fashioned - approach to the issue of the post-mortal status of digital assets that, as a general rule, digital assets as property rights of a pecuniary nature are included in the inheritance estate of a deceased natural person, with all the consequences this entails. It is presented in the doctrine as entering by an heir (or several heirs) in the legal situation of the decedent, being the result of an individual's death, and it consists, particularly, in acquisition of property rights and obligations whose subject was the decedent. In other words, succession is a transfer of rights and obligations of the deceased to one or more persons (heirs).⁶⁹² By succession, the heir acquires all the rights and obligations related to the inheritance estate, becoming in this way the general successor of the decedent.⁶⁹³ The grounds for succession (or more precisely - entitlement to inherit) are usually the last will of a testator, or the applicable laws.

Since the composition of an inheritance estate is generally defined by the law as all the proprietary nature rights and obligations of the deceased, the inheritance estate consists only of economic value rights of private law nature, as well as obligations of this kind. In this respect, there is generally no doubt that ownership and rights of proprietary nature pass to the legal successors of the deceased, nor is there any doubt that the pecuniary value debts of the deceased are subject to succession. Despite the various doubts, digital assets are treated as part of this group. They are therefore potentially capable of being inherited, which in countries where there is no specific regulation in this respect usually happens or can happen, especially since the practice in this respect is not yet widely developed.

Recently, there has been a trend in this area to refer to the need to take into account regulations relating in particular to the processing of personal data in connection with digital assets, which is undoubtedly and directly linked to the Internet environment and a derivative of the broader significance of the right to privacy in this environment. However, while a number of the solutions proposed in individual countries are still of a postulatory nature, it can be assumed that, in this area too, there is a trend towards the need for

⁶⁹² Cf. Esquivel and Acuna (n 101) 10 ff.

⁶⁹³ Cf. Wójcik and Załucki (n 668) 21 ff.

future legislation clarifying the area in question. Particularly in countries that have not yet grappled with the existing problems of digital assets in practice (where there is no published case law and the reflection of the *mortis causa* status of digital assets takes place on the basis of speculation by legal academics), future solutions in this area appear to be highly unclear. For legal certainty, this does not seem desirable.

4. MOVING AWAY FROM THE TRADITIONAL APPROACH - THE LAW OF SOME OTHER EUROPEAN COUNTRIES

It is not unusual in European law for digital assets to be treated as an object which, like traditional goods, is included in an inheritance estate on account of its proprietary character. This is because, in the discussion on the legal nature of digital assets, as already mentioned, the question of their proprietary character arises first and foremost, which, in the context of succession law, must and obviously does have consequences. Nevertheless, this is not the only approach at present. It is interesting to note, moreover, that if at all any European legislator decides to amend the existing legislation because of the unresolved problem of post-mortal status of digital goods, it usually adopts a different concept from the traditional one and therefore not based solely on a strictly proprietary understanding of digital assets. This is one of the reasons why these solutions are worth looking into.

Such a different approach takes place, e.g., in France. The law in this country, at least for some time, has approached the post-mortal status of digital assets on the death of an existing user from the perspective of data protection law.⁶⁹⁴ While succession is the domain of the law of succession, which is notably enshrined in book three of the French Civil Code [Articles 711-2278], and the opening of the succession under French law occurs upon the death of the testator [Article 720 of the French Civil Code], interesting solutions have been enacted there that are complementary to the general rules of succession.⁶⁹⁵

In this regard, in 2016, a law was passed,⁶⁹⁶ according to which anyone can set general or specific directives for preservation, deletion, and disclosure

⁶⁹⁴ Philippe Ropenga, 'Digital Assets in French Successions' *Alacriter - blog - Insights into contracts, intenational law, trusts and estates* (26 February 2020) 1.

⁶⁹⁵ However, cf. Fanny Georges and Virginie Julliard, 'Profilopraxie et apposition des stigmates de la mort: comment les proches transforment-ils la page Facebook d'un défunt pour la postérité?' (2016) 37 *Linguas e Instrumentos Lingüísticos* 231.

⁶⁹⁶ Loi no. 2016-1321 du 7 octobre 2016 pour une République numérique.

of their personal data after death [art. 63(2) of the Act on the Digital Republic]. As the doctrine indicates, these directives would be registered with a certified third part. or with the service provider who holds the data.⁶⁹⁷ The directives allow the access to the data of a deceased person stored in a digital world.⁶⁹⁸ When the deceased has not left any instructions, heirs can make a claim regarding the data to liquidate the estate or to take the death into account, for instance by updating a profile or closing an account.⁶⁹⁹

Successively, in 2018, Law on Data Processing, Data Files and Individual Liberties,⁷⁰⁰ better known as the Data Processing and Individual Liberties Law (Law No. 78-17), that regulates the processing of personal data, was amended. According to the current Article 85(I) of the Law no. 78-17, any person may define directives relating to the conservation, deletion and communication of their personal data after their death. These directives may be general or specific.

General directives concern all personal data relating to the person concerned and may be registered with a trusted digital third part. certified by the *Commission nationale de l'informatique et des libertés* (French data protection authority). The specific directives concern the processing of personal data mentioned in these directives. They are registered with the data controllers concerned. They are subject to the specific consent of the data subject and cannot result from the data subject's mere approval of the general conditions of use.

The general and specific directives shall define the way in which the person intends the rights to personal data to be exercised after his death. Compliance with these directives is without prejudice to the provisions applicable to public archives containing personal data. The person may modify or revoke his instructions at any time.⁷⁰¹

⁶⁹⁷ Cf. Edina Harbinja, 'Digital Inheritance and Post-Mortem Privacy in Europe' (2019), available on-line: <<https://www.dataguidance.com/opinion/international-digital-inheritance-and-post-mortem>>, [last accessed: 30 May 2024].

⁶⁹⁸ Philippe Mouron, 'La loi pour une République numérique' (2016) 41 *Revue Européenne des Médias et du Numérique* 15.

⁶⁹⁹ Cf. Ropenga (n 694) 1–6.

⁷⁰⁰ Ordonnance n° 2018-1125 du 12 décembre 2018 prise en application de l'article 32 de la loi n° 2018-493 du 20 juin 2018 relative à la protection des données personnelles et portant modification de la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés et diverses dispositions concernant la protection des données à caractère personnel.

⁷⁰¹ Emmanuel Netter and others, *Regards sur le nouveau droit des données personnelles* (Centre de droit privé et de Sciences criminelles d'Amiens 2019) 35 ff.

The abovementioned directives may designate a person to be responsible for their execution. This person is then entitled, upon the data subject's death, to take cognisance of the directives and request their implementation from the data controllers concerned. In the absence of such designation or, unless otherwise instructed, in the event of the death of the designated person, his heirs shall be entitled to take cognisance of the directives on the death of their author and to request their implementation from the data controllers concerned. Any contractual clause in the general conditions of use of a processing operation relating to personal data that limits the abovementioned prerogatives granted to the individual shall be deemed unwritten.⁷⁰²

According to the Article 85(II) of the Law no. 78-17, in the absence of directives or a statement to the contrary in such directives, the heirs of the person concerned may exercise, after his death, the rights to the data to the extent necessary: 1. For the organisation and settlement of the deceased's succession. To this end, the heirs may access the processing of personal data concerning them to identify and obtain communication of information useful for the liquidation and division of the estate. They may also receive communication of digital assets or data similar to family mementos that may be passed on to the heirs; 2. The data controllers must consider the death of the data subject. To this end, the heirs may have the deceased's user accounts closed, oppose the continuation of the processing of personal data concerning him or have them updated. If the heirs so request, the data controller must prove, at no cost to the applicant, that it has carried out the operations required under the previous paragraph. Disagreements between heirs shall be brought before the competent judicial court.⁷⁰³

At the same time, according to the Article 85(III) of the Law no. 78-17, all providers of on-line communication services to the public have the duty to inform the user what will happen to the data concerning him on his death and shall allow him to choose whether or not to share his data with a third part. designated by him.⁷⁰⁴

⁷⁰² Cf. Lucien Castex, Edina Harbinja and Julien Rossi, 'Défendre les vivants ou les morts? Controverses sous-jacentes au droit des données post mortem à travers une perspective comparée franco-américaine' (2018) 4 Réseaux 117.

⁷⁰³ Nathalie Mallet-Poujol, 'Le droit à l'effacement des données personnelles' in Sylvain Chatry and Thierry Gobert (eds), *Numérique – Nouveaux droits, nouveaux usages* (Editions Mare & Martin 2017) 83 ff.

⁷⁰⁴ Candice Bordes, 'Prévoir sa mort numérique. Le devenir des données numériques post mortem' (2020) 9 Revue des droits et libertés fondamentaux 1, 2 ff.

At present, as can be seen, the legal succession of digital assets in France is regulated separately from the general principles of succession law, and is essentially based on the will of the deceased person, taking into account data protection laws.⁷⁰⁵ This differs from traditional solutions, which in this respect refer only to general principles (which, however, certainly do not exclude the influence of the deceased's will on the fate of this estate).⁷⁰⁶

This type of solution is becoming increasingly common. Interesting solutions in this area have been adopted, for instance, by the Portuguese legislator, where the law of succession is the domain of civil law and the existing Portuguese Civil Code, which provides for general succession [Article 2024 of the Portuguese Civil Code].⁷⁰⁷ The legislator there has introduced legal solutions to the processing of personal data of the deceased into its law, following the guideline of recital 27 of the preamble to the General Data Protection Regulation. Currently, Portuguese Law No. 58/2019 of 8 August 2019 (Portuguese Data Protection Law),⁷⁰⁸ which regulates the implementation of the General Data Protection Regulation in the Portuguese legal system, addresses the issue of digital assets after the death of its user also from the perspective of personal data protection. According to Article 17 of this Law, the personal data of deceased persons are protected under the terms of the General Data Protection Regulation and this Law when they fall within the special categories of personal data referred to in Article 9(1) of the General Data Protection Regulation, or when they relate to privacy, image or communications data, except in the cases provided for in paragraph 2 of this article [Article 17(1) of the Portuguese Data Protection Law]. The rights provided for in the General Data Protection Regulation relating to the personal data of deceased persons covered by the previous paragraph, namely the rights of access, rectification and erasure, shall be exercised by whoever the deceased person has designated for this purpose or, failing that, by their respective heirs [Article 17(2) of the Portuguese Data Protection Law]. Data subjects may also, under the applicable legal terms, make it impossible to

⁷⁰⁵ Cf. Lucien Castex, 'Les éternités numériques. Un essai d'analyse prospective' (2016) 126 *Revue Lamy droit de l'immatériel* 49.

⁷⁰⁶ Cf. Mackenrodt (n 611) 41–47.

⁷⁰⁷ Duarte Canau, *Direito das Sucessões* (Universidade de Lisboa 2021) 1 ff.

⁷⁰⁸ Lei n.º 58/2019 - Assegura a execução, na ordem jurídica nacional, do Regulamento (UE) 2016/679 do Parlamento e do Conselho, de 27 de abril de 2016, relativo à proteção das pessoas singulares no que diz respeito ao tratamento de dados pessoais e à livre circulação desses dados, *Diário da República* 2019, No. 150.

exercise the rights referred to in the previous paragraph after their death [Article 17(3) of the Portuguese Data Protection Law].⁷⁰⁹

Therefore, as can be seen, the Portuguese solution clearly identifies data protection problems, emphasising the need to protect the personal data of the deceased, referring primarily to the will of the deceased expressed *ante mortem*. The real purpose of Portuguese Law No. 58/2019 is to protect the fundamental rights and freedoms of individuals - with regard to the processing of personal data - and to promote the free movement of such data.⁷¹⁰ When the owner of the data has not forbidden access to it after his death, it allows the heirs, or whoever the deceased has designated, to access, rectify or delete the data, under the general terms of the General Data Protection Regulation. It should be noted that the heirs or other person appointed to handle the deceased's data does not own the deceased's rights, but rather has rights over the deceased's rights (subsidiary rights).⁷¹¹ In this context, special treatment, or special character, is given to sensitive data. And regardless of the solutions contained therein, the doctrine there suggests that it is recommended to consider how many digital assets a person has in his sphere and to express his will about them. Firstly, by considering whether he wants to grant access to his heirs after his death, and secondly, to implement this will in his last will.⁷¹²

Following this model, the Italian legislator did the same. Italy has adopted, in the context of the post-mortal status of digital assets, the perspective of personal data protection in the new art. 2-terdecies of the Code on the Protection of Personal Data (introduced by the Legislative Decree of 10 August 2018) - Italian Data Protection Law.⁷¹³ The main purpose of this law, is the adaptation of national laws to the General Data Protection Regulation.

⁷⁰⁹ Sousa e Silva (n 45) 74–83; de Marinheiro Mota (n 80) 29 ff.

⁷¹⁰ Sousa e Silva (n 424) 203–233.

⁷¹¹ Mart. Falcão and Miguel Dinis Pestana Serra, *Direito das Sucessões - Da Teoria à Prática* (Almedina 2017) 19 ff.

⁷¹² de Marinheiro Mota (n 80) 34 ff.

⁷¹³ Decreto legislativo 10 agosto 2018, n. 101: 'Disposizioni per l'adeguamento della normativa nazionale alle disposizioni del regolamento (UE) 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE' (regolamento generale sulla protezione dei dati) (GU (Gazzetta ufficiale) Serie Generale n. 205 del 4.9.2018).

According to the general rule of the new law, the rights encompassed within articles 15-22 General Data Protection Regulation (right of access, right of rectification, right to be forgotten, right to restriction of processing, right of notification, right to data portability, right to object, right not to be subject to a decision based solely on automated processing) which are related to deceased persons could be exercised by a person who acts in their own interest or acts to protect the interests of the deceased, as an agent or for familial reasons that are worthy of protection [Article 2-terdecies (1) of Italian Data Protection Law].⁷¹⁴ However, the exercise of these rights referred shall not be permitted in the cases provided for by law or when, limited to the direct offer of information society services, the person concerned has expressly prohibited by a written declaration submitted to the data controller or communicated to the latter [Article 2-terdecies (2) of Italian Data Protection Law].⁷¹⁵ The interested party's intention to prohibit the exercise of the abovementioned rights must be unequivocal and must be specific, free and informed; the prohibition may concern the exercise of only some of the rights [Article 2-terdecies (3) of Italian Data Protection Law].⁷¹⁶ The person concerned has at any time the right to withdraw or amend the prohibition [Article 2-terdecies (4) of Italian Data Protection Law]. In any event, the prohibition may not produce effects detrimental to the exercise by third parties of the property rights resulting from the death of the person concerned as well as of the right to defend their interests before the courts [Article 2-terdecies (5) of Italian Data Protection Law].⁷¹⁷

In Italian law, one well-known case is the 2021 Milan court decision,⁷¹⁸ in which the court dealt with access to personal data from an *iCloud* account belonging to a deceased person. Access to the data was requested by the parents of the deceased, who had been involved in a car accident and subsequently died. The deceased was the owner of an *iPhone* on which, through the *iCloud* service, he stored data, including photos and videos, which were the subject of the request in the case. The applicants relied,

⁷¹⁴ Andrea Vigorito, 'Postmortem Exercise of Data Protection Rights: The Apple Case' in Giorgio Resta and Vincenzo Zeno-Zencovich (eds), *Governance of/through Big Data* (Roma Tre-Press 2023) 687–695.

⁷¹⁵ Cf. Davide Sisto, 'Digital Death. Le trasformazioni digitali della morte e del lutto' (2018) 1 Lessico di etica pubblica 49.

⁷¹⁶ Valeria Confortini, *Persona e patrimonio nella successione digitale* (Giappichelli Editore 2023) 17 ff.

⁷¹⁷ *ibid.*

⁷¹⁸ Tribunale Ordinare di Milano of 9 February 2021, no. 44578/2020.

inter alia, precisely on the provision of Article 2-terdecies of Italian Data Protection Law. The court ordered the defendant to grant the applicants access to the data contained in their son's cloud, pointing out that the new Italian law contains a principle according to which the legal succession (continuation) of the rights of the data subject occurs after his death, while at the same time it is possible for certain authorised persons to exercise them *post-mortem*. The court emphasised, inter alia, that this is not permissible if the data subject has expressly prohibited this in a written declaration to the controller. The relevant will of the data subject must be unambiguous, concrete, free and informed. The relevant prohibition must not have the effect of disadvantaging third parties in the exercise of their property rights. As, in the court's view, access to data after the deceased could serve the purpose of a project to keep his memory alive, and as there was no negative declaration by the right holder, the court assumed that the parents were entitled to exercise the right of access to their deceased son's personal data.⁷¹⁹

Therefore, as can be seen, at least as far as the above is concerned, the Italian solution seems to separate the problems of succession law from the issue of access to digital assets, creating, as it were, an additional path of access to the digital assets of the deceased for persons who can be counted among the catalogue of persons entitled to exercise rights related to the personal data of the deceased after their death.⁷²⁰ The law of personal data protection applies independently of the regulation of the law of succession, although - as it follows from the law of personal data protection - it does not infringe the regulation of the law of succession. This necessarily implies access under the data protection law, which is in a sense fiduciary in nature. Indeed, it is the heirs who may be entitled to property of the digital assets, whereas the use of digital assets on the basis of data protection is primarily for access for personal data processing purposes. Nonetheless, the link between personal data and succession law that takes place in Italian law seems interesting and it is certainly worth observing the practice that will emerge against this background in the future.

A complex and yet intervening situation regarding the succession of digital assets takes place also in Spain, where succession law is not only the domain of general national law, but also of the individual autonomous communities. Generally speaking, in Spain, looking at digital assets is usually done from a patrimonial point of view and, therefore, assets that constitute

⁷¹⁹ Cf. Vigorito (n 714) 687 ff.

⁷²⁰ Cf. Bartolini and Patti (n 318) 1181–1194.

a person's digital inheritance and that do not expire upon death are assumed to form part of the inheritance estate [Article 659 of the Spanish General Civil Code].⁷²¹ Therefore, it is not possible in Spain, as a general rule, to speak of "digital inheritance" as something different from "analogue inheritance".⁷²²

However, as is often argued, in the case of content stored in an on-line account, the matter becomes more complicated because, on the one hand, there is a third part, with whom the user has entered into a contractual relationship and, on the other hand, the concept of "access", which is distinguished, e.g., in the Italian example discussed above, becomes relevant.⁷²³ It is precisely these "assets" that the Spanish legislator has been trying to focus on for some time, and has also recognised the data protection issues in this area.

The Spanish Organic Law 3/2018 of 5 December 2018 on the protection of personal data and the guarantee of digital rights (LOPD - Spanish Data Protection Law), essentially start, with a personal approach, i.e. the protection of the data of deceased persons [Article 3 of the Spanish Data Protection Law]. It follows from the wording of Article 3(1)(II) of the Spanish Data Protection Law that if a deceased person has prohibited access to his data or the law prohibits it, this does not affect the right of the heirs to access the data of the deceased's estate, which must prejudice the perception of personal data protection and at the same time tipping the scales in favour of property rights.⁷²⁴ This emphasises that the deceased can determine the fate of his digital assets *ante mortem*, just like the rest of his inheritance estate. If, on the other hand, the deceased has not made any provisions in this regard, the digital content of the inheritance estate will follow the fate of the rest of the estate.⁷²⁵

It is also pointed out that, along with the succession provisions, the deceased may also provide for other provisions, in the form of instructions to certain persons to perform certain acts in relation to the "digital assets" that the deceased leaves behind. The concept of "digital wills", e.g., from which the Catalan legislation derives, responds to this idea. At the same time, the Spanish Data Protection Law allows the deceased to designate a person

⁷²¹ Sanz (n 192) 955–977.

⁷²² Silvia Díaz Alabart. *La protección de los datos y contenidos digitales de las personas fallecidas* (Editorial Reus 2020) 16 ff.

⁷²³ Esperança Ginebra Molins (n 36) 911 ff.

⁷²⁴ Soler Martínez (n 307) 101 ff.

⁷²⁵ Otero Crespo (n 458) 98 ff.

entitled to the protection of his personal data [Article 3(2) of the Spanish Data Protection Law] or to exercise civil actions after his death for the protection of honour, privacy or image, and in the absence of a designation, the defence of *memoria defuncti*, as the infringement of the deceased person's assets is termed in the local doctrine, will be available to certain relatives (spouse, descendants, ascendants and siblings of the person concerned who were alive at the time of death).⁷²⁶

Reflecting on the post-mortal status of digital assets it is worth taking a broader look at the Catalan solutions. In this respect, the law of 27 June 2017 of digital wills and modification of the second and fourth books of the Civil Code of Catalonia deserves special attention.⁷²⁷ This law distinguishes according to whether or not the person has expressed their “digital will in the event of death”, understood as the provisions established by a person so that, after his death, the heir or the universal executor, if applicable, or the person designated to execute the inheritance estate - particular executor [Article 429-12.1 of the Catalan Civil Code] or, specifically, “digital executor” or for the digital environment - to act before the digital service providers with whom the deceased has active accounts [Article 411-10.1 of the Catalan Civil Code].⁷²⁸

If the testator has expressed his “digital will in the event of death”, the law itself provides, by way of example, some of the powers that may be included. According to Article 411-10.2 of the Catalan Civil Code, the testator may determine the content and specific scope of the assignment to be carried out, including that the designated person carries out one or some of the following actions: to notify the digital service providers of his death; to request the digital service providers to cancel his active accounts; to request the digital service providers to execute the contractual clauses or to activate the policies established for cases of death of the holders of active accounts and, if applicable, to give him a copy of the digital archives on their servers.⁷²⁹

⁷²⁶ Cf. *ibid* 105; Esperança Ginebra Molins (n 36) 918.

⁷²⁷ Law 10/2017 of 27 June 2017, de les voluntats digitals i de modificació dels llibres segon i quart del Codi civil de Catalunya, available on-line: <<https://portaljuridic.gencat.cat/eli/es-ct/l/2017/06/27/10>>, [last accessed: 30 May 2024].

⁷²⁸ Javier Plaza Penadés, ‘La ley catalana de voluntades digitales’ (2017) 45 *Revista Aranzadi de derecho y nuevas tecnologías* 19, 19–21.

⁷²⁹ Cf. Judith Solé Resina, ‘Las voluntades digitales: marco normativo’ (2018) 71 *Anuario de derecho civil* 417, 429–434.

In general, even if the deceased has expressed his “digital will”, Catalan law is fully respectful of the content of the contract signed between the deceased user and the service provider, admitting that there may be no option to hand over the digital files. As pointed out in the doctrine, a different question is whether, in the case of stipulations that have not been individually negotiated, these can be attacked as abusive. Apart from this, within the possibility of requesting service providers to execute contractual clauses or to activate the policies established for cases of death, it would be possible to demand compliance with what the owner himself may have ordered through an online tool.⁷³⁰

With regard to wills, codicils and testamentary memoirs, what is now described as “digital wills” was already a possible content of these *mortis causa* legal transactions, although the new regulation may fulfil - as is sometimes pointed out - a pedagogical function, taking into account the widespread use of digital environments. In this sense, the new law has added a second paragraph to Article 421-2 of the Catalan Civil Code, according to which: “the last will, in addition to the provisions of paragraph 1, may contain the digital wishes of the deceased and the designation of a person responsible for its execution. In the absence of a designation, the heir, the executor or the administrator of the estate may execute the digital wills or entrust their execution to another person” [Article 421-2.2 of the Catalan Civil Code]. The Catalan legislator also provides for the execution of the digital wills of the deceased to be configured as a mode imposed on the heir or legatee, or their substitutes [Article 428-1.1 *in fine* of the Catalan Civil Code].⁷³¹

According to the Catalan law, if the deceased has not expressed his digital will (he has not specifically appointed a “digital executor”), the heir or the universal executor - if there is one - can carry out the actions listed in Article 411-10.2 of the Catalan Civil Code - unless, obviously, the deceased has expressly forbidden it, in accordance with the contracts that the deceased has signed with the digital service providers or in accordance with the policies that these providers have in force [Article 411-10.5 of the Catalan Civil Code].⁷³²

As the doctrine submits, in this respect, two issues should be highlighted: on the one hand, that, as there is an heir and a universal executor,

⁷³⁰ Gerardo Aguas Valero, ‘El testamento digital’ (2022) 28 Revista de derecho aragonés 65, 65–90.

⁷³¹ Esperança Ginebra Molins (n 36) 918 ff.

⁷³² Resina (n 729) 433 ff.

no priority is established between them; on the other hand, that Catalan law is scrupulously respectful of the terms of the contract signed between the deceased user and the on-line service provider and gives prevalence to the agreed conditions, and even to the policies of the service providers, over the digital will expressed by the deceased. This entails respecting - in principle unless they could be considered abusive - the non-transferability clauses.⁷³³

In any case, if the deceased has not established otherwise in his “digital wills”, the person who is responsible for executing them (“digital executor”, heir or universal executor) cannot have access to the contents of his digital accounts and files, unless he obtains the corresponding judicial authorisation [Article 411-10.6 of the Catalan Civil Code]. It should be borne in mind that, in some cases, access to certain contents may be relevant for the management of the inheritance; it may be that the exercise of certain rights against third parties depends on them, or that they are contents that have, in themselves, patrimonial value.⁷³⁴

It should therefore be noted that the Catalan legislator treats the problems of legal succession of digital assets from a somewhat different position than, e.g., in connection with problems of personal data protection. Against this background, however, it is argued that the solutions of the Spanish Data Protection Law and the desire to protect the personal data of third parties (as well as the protection of privacy) may give rise to further doubts to be resolved in the future.⁷³⁵ Indeed, the Spanish Data Protection Law, as one of the few in EU law, provides rules for the protection of the personal data of deceased persons, which is linked to the aforementioned mandate to prepare a possible relevant national regulation contained in the General Data Protection Regulation (Recital 27). The Spanish Data Protection Law, on the other hand, after excluding from the scope of application of the law the processing of the data of deceased persons, without prejudice to the provisions of Article 3 [Art. 2(2)(b) of the Spanish Data Protection Law], allows that persons related to the deceased by family or de facto reasons or their heirs - unless the deceased had expressly prohibited it or it is so provided by law - or persons or institutions that the deceased had expressly designated may request access to them, as well as their rectification or erasure, if necessary subject to the instructions of the deceased.⁷³⁶

⁷³³ Esperança Ginebra Molins (n 36) 922 ff.

⁷³⁴ Valero (n 730) 72 ff.

⁷³⁵ Esperança Ginebra Molins (n 36) 924 ff.

⁷³⁶ *ibid.*

On the other hand, from the perspective of access to the digital content of deceased persons managed by information society service providers, and in terms very similar to those of Article 3 of the Spanish Data Protection Law, Article 96 of this act refers to the misnamed “digital will”; the latter expression is used to refer to the possibility of providing for *post-mortem* access to digital content managed by third parties.⁷³⁷

In addition, according to Article 96 of the Spanish Data Protection Law, persons related to the deceased familiarly or in fact, as well as their heirs, may contact information society service providers to access such content and give them instructions they deem appropriate on its use, destination or deletion [Article 96(1)(a I) of the Spanish Data Protection Law] - or to a data controller or processor to request access and, where appropriate, rectification or deletion of personal data [Article 3(1)(I) of the Spanish Data Protection Law]. Such persons may not access content about the deceased - or data about the deceased - where the deceased has expressly prohibited it or it is provided by law. However, such a prohibition does not affect the right of the heirs to access content that may form part of the estate [Article 96(1)(a) of the Spanish Data Protection Law] - nor the right of the heirs to access data about the deceased [Article 3(1)(II) of the Spanish Data Protection Law].⁷³⁸

Examples of European solutions could be multiplied even further. However, the area which would emerge from this, as one may think, would not contribute much more to the ongoing discussion on the future normative solution dealing with the legal situation of digital assets in the event of the death of their user. Indeed, it suffices to compare the legal systems indicated, against the background of the systems discussed so far, to see that the post-mortal situation of digital assets is not uniform. Solutions are beginning to prevail which do not necessarily link the problems of succession law with access to digital assets after the death of their on-line user. Legislators are placing the emphasis on the will of the user expressed *ante mortem*, which seems to be a Solomon solution. It is the decision of the hitherto entitled person in this area that can determine certain issues, including, inter alia, whether other persons should be entitled to access digital assets after his death. It is only when such a will is lacking that legislations usually differ as to the consequences of such lack of will. This is also where problems usually start.

⁷³⁷ Valero (n 730) 95 ff.

⁷³⁸ Esperança Ginebra Molins (n 36) 926.

5. APPROACH OF SOME OTHER SELECTED COUNTRIES

For a complete picture of the issue of post-mortal status of digital assets (in the event of the death of their user), it is also worth looking at a few more concepts for solutions to this problem that are found in some other countries, especially as this is still an area of debate. Looking at a selection of legislative developments and doctrinal discussion in this regard may add interesting arguments as to a particular solution.

For these reasons, Canadian solutions, e.g., are important in this respect, where, as in the United States of America, model solutions regarding digital assets have been adopted at a general level. It should be recalled in this respect that in Canada succession law is the domain of the law of the individual Canadian provinces.⁷³⁹ Until the adoption of model solutions in the Canadian legal system (2016), the provinces of Alberta (2014) and British Columbia (2009) had relevant regulations under which fiduciary access to the digital assets of the deceased was possible.⁷⁴⁰ As for the other provinces, to the extent that digital assets are not always considered to be property or a “thing” mentioned in the applicable statute, it could have been argued that probate and estates legislation used to provide that the personal representative has no responsibility, or right, to manage those assets. This was one of the reasons why it was decided to undertake legislative work on a model law to guarantee such access, which was, it is arguable, a reflection of prevailing US trends in this regard. Significantly, the drafting committee of the Uniform Law Conference of Canada, which prepared the draft model law, were in favour of a statutory rule to confirm the implied authority of a fiduciary over all digital assets rather than to specifically address the property argument.⁷⁴¹

In August 2016, the Uniform Law Conference of Canada (ULCC) adopted model legislation on access to the digital assets of individuals by persons standing in a fiduciary relationship with them.⁷⁴² The Act, called *Uniform Access to Digital Assets by Fiduciaries Act* (2016), as it is written

⁷³⁹ Cf. Germain Briere, *Les successions* (Éditions Yvon Blais 1994) 23 ff.

⁷⁴⁰ Cf. Emily Lynch, ‘Legal Implications Triggered by an Internet User’s Death: Reconciling Legislative and Online Contract Approaches in Canada’ (2020) 29 *Dalhousie Journal of Legal Studies* 135, 145 ff.

⁷⁴¹ Donna L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act - Progress Report* (Uniform Law Conference of Canada 2015) passim.

⁷⁴² Uniform Law Commission, *Uniform Access to Digital Assets by Fiduciaries Act* (2016), (Uniform Law Conference of Canada, 2016), available on-line: <<http://www.ulcc.ca>>, [last accessed: 30 May 2024].

in the introduction to it, addresses four types of fiduciaries: a personal representative of a deceased's estate, a guardian appointed for an account holder, an attorney acting under a power of attorney and a trustee.⁷⁴³ The Uniform Act confirms that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have. The Uniform Act does not deal with any other efforts to access digital assets. Family members, friends or other interested persons - as explained by the authors of this act - may seek access, but, unless those persons are fiduciaries, their efforts will be subject to other laws and will not be covered by the Uniform Act.⁷⁴⁴

The *Uniform Act* defines "digital assets" as "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means" [Section 1]. This definition of "digital assets" was intended to be broad enough to capture all types of electronically stored information.⁷⁴⁵

The *Uniform Act* does not purport to change the legal framework of fiduciaries. Instead, the *Uniform Act* confirms "that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have." Its purpose is not to create new powers, but to affirm and codify a fiduciary's existing authority to deal with all of the assets of the deceased or incapacitated person "without restriction on whether the asset is tangible or digital property". A fiduciary's right to access digital assets is subject to the terms of the instrument empowering the fiduciary. The fiduciary's access to a record defined as a digital asset does not entitle the fiduciary to own the asset or otherwise engage in transactions with the asset.⁷⁴⁶

The *Uniform Act* confirms that any provision in a service agreement that limits a fiduciary's access to the digital asset is void unless the account holder expressly decides otherwise (the will of the deceased account holder) or agrees to that provision after the legislation comes into force [Section

⁷⁴³ Faye L. Woodman, 'Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation' (2017) 15 Canadian Journal of Law and Technology 194, 193 ff.

⁷⁴⁴ Lynch (n 740) 143 ff.

⁷⁴⁵ Carol Willes, 'Digital and Other Unique Assets: Recommendations and Best Practices in Estate & Incapacity Planning and Administration' (2018) 24 East Region Solicitors Conference 15.

⁷⁴⁶ Cf. Aaron Grinhaus, 'Digital Assets, Cryptocurrencies and Estate Planning' (2020) 26 East Region Solicitors Conference 2.

3]. Once the proper documentation establishing the fiduciary's authority is submitted, the custodian must provide the fiduciary with access to the digital asset within 30 days [Section 7]. According to the Section 5 of the Uniform Act, a fiduciary who has the right under this act to access a digital asset of an account holder (a) may, subject to any applicable law, take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity, (b) is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary, and (c) is deemed to be an authorised user of the digital asset.⁷⁴⁷

It is worth mentioning that the position of the drafters of the Uniform Act is that no Canadian privacy legislation will hinder the operation of the act and, implicitly that under current law, fiduciary access is not barred by privacy legislation. They have stated that the privacy acts do not prevent the disclosure of personal information of an individual to a fiduciary because "the fiduciary is obliged to obtain the information to fulfil their duties". However, it is understood that privacy rights continue after death, and therefore privacy legislation might impose limitations on custodians (i.e. on-line service providers).

Custodians are governed by the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA).⁷⁴⁸ PIPEDA provides for specific situations where an organisation can disclose personal information without the individual's consent.⁷⁴⁹ PIPEDA provides for the release of information about an individual if they have been deceased for 20 years or more. Where an individual has been deceased for less than 20 years, a custodian's disclosure of personal information without consent is permitted pursuant to an order of "the court, person, or body with jurisdiction to compel the product of information" and where required "by law". Therefore, PIPEDA does not compel on-line service providers to permit disclosure of personal information in estate administration.⁷⁵⁰

⁷⁴⁷ Woodman (n 743) 204 ff.

⁷⁴⁸ *Personal Information Protection and Electronic Documents Act* (PIPEDA), available on-line: <laws.justice.gc.ca>, [last accessed: 30 May 2024].

⁷⁴⁹ Cf. Dominic Jaar and Patrick E Zeller, 'Canadian Privacy Law: The Personal Information Protection and Electronic Documents Act (PIPEDA)' (2009) 2 *International In-house Counsel Journal* 1135.

⁷⁵⁰ L. A. Histrop, P. Bhumgara, Canada: Treatment Of Digital Assets On Death, Mondaq of 7 December 2021, available on-line: <<https://www.mondaq.com/canada/>

Following the Uniform Act, Saskatchewan enacted the *Fiduciaries Access to Digital Information Act* (2020),⁷⁵¹ which came into force on June 29, 2020. Prince Edward Island has adopted the *Access to Digital Assets Act* (2022), which was proclaimed on January 1, 2022.⁷⁵² New Brunswick passed the *Fiduciaries Access to Digital Assets Act* (2022) on December 16, 2022.⁷⁵³ Most recently, Yukon Territory passed the *Fiduciaries Access to Digital Assets Act* (2023) on November 15, 2023.⁷⁵⁴ These solutions were essentially based on the Uniform Act.

For example, the Yukon Territory law can be pointed out here. Like the Uniform Act, it indicates the definition of “digital asset”. It explains that this category means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means, or by any other similar means [Section 1]. It states that the fiduciary of an account holder has the right to access a digital asset of the account holder [Section 3(1)] and can take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity [Section 5(1)(a)]. It also explains that the fiduciary’s right of access is subject to the terms, inter alia, the will of the deceased account holder [Section 3(2)(a)].⁷⁵⁵

Canadian law, if it can be stated in general terms, is therefore in favour of access to the deceased’s on-line account and the content therein in the form of digital assets. This access is based on fiduciary tools, essentially disregarding privacy issues, while nevertheless being based on the will of the deceased who, as account holder, can express his will as to the specific contractual provision contained in the agreement with the Internet service

wills-intestacy-estate-planning/1138924/treatment-of-digital-assets-on-death>, [last accessed: 30 May 2024].

⁷⁵¹ *Fiduciaries Access to Digital Information Act* (2020), available on-line: <<https://www.canlii.org/en/sk/laws/stat/ss-2020-c-6/latest/ss-2020-c-6.html>>, [last accessed: 30 May 2024].

⁷⁵² *Access to Digital Assets Act* (2022), available on-line: <https://www.princeedwardisland.ca/sites/default/files/legislation/a-01-1-_access_to_digital_assets_act.pdf>, [last accessed: 30 May 2024].

⁷⁵³ *Fiduciaries Access to Digital Assets Act* (2022), available on-line: <<https://legnb.ca/en/legislation/bills/60/2/19/fiduciaries-access-to-digital-assets-act>>, [last accessed: 30 May 2024].

⁷⁵⁴ *Fiduciaries Access to Digital Assets Act* (2023), available on-line: <<https://laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2023/2023-0015/2023-0015.pdf>>, [last accessed: 30 May 2024].

⁷⁵⁵ The emphasis on the last will therefore seems to be increasingly exposed in the various statutory solutions.

provider as to the fate of his account and the digital assets therein. In practice, however, the will of the deceased account holder, which is protected under the Uniform Act and may be decisive for the fate of the digital assets after the death of the user, may play an important role. In the context of succession planning, it is pointed out that, perhaps most critically, the deceased should ensure that an inventory of all digital assets, usernames and passwords is kept in a password-protected location separate from the will. This could be an on-line service for storing passwords or a handwritten list kept in a safe or secure deposit box.⁷⁵⁶ Thus, the statements of Canadian doctrine allow the legal successors of the deceased Internet user to succeed to their rights and obligations.⁷⁵⁷

In a slightly different legal environment, in Turkey, where the civil law is the result of the reception of the law of European countries, especially the Austrian, German, French and Swiss codes,⁷⁵⁸ and the inheritance is acquired by general succession as the totality of the rights and obligations of the deceased [Article 599 of the Turkish Civil Code],⁷⁵⁹ the problem of the succession of digital assets was confronted by a Turkish court. In local law there is no legal regulation regarding the descent of digital assets to heirs.

A Turkish court grappling with the issue of the legal succession of digital assets has decided to include them in the inheritance estate. In a case before an Antalya court concerning access to a deceased spouse's digital assets outstanding on the *iCloud* service, under the analysis that digital assets are an undeniable reality, that there are digital systems called cryptocurrencies that have started to be used even in international payments, and that social media accounts provide astronomical advertising revenues that are increasing day by day, having established that there is a loophole in this regard, the court concluded that it is necessary to establish the deceased's digital assets, such as the deceased's e-mail and social media accounts, digital wallet accounts, etc. as assets of the deceased that are subject to succession.⁷⁶⁰

⁷⁵⁶ L. A. Histrop, P. Bhumgara, Canada: Treatment Of Digital Assets On Death, Mondaq of 7 December 2021, available on-line: <<https://www.mondaq.com/canada/wills-intestacy-estate-planning/1138924/treatment-of-digital-assets-on-death>>, [last accessed: 30 May 2024].

⁷⁵⁷ Lynch (n 740) 145 ff.

⁷⁵⁸ Arzu Oguz, 'The Role of Comparative Law in the Development of Turkish Civil Law' (2005) 17 Pace International Law Rev 373.

⁷⁵⁹ Cf. Rona Serozan and Baki İlkay Engin, *Miras Hukuku* (Seçkin Yayıncılık 2014) 10 ff.

⁷⁶⁰ Antalya BAM Judgment - 6th Hukuk Dairesi of 13 November 2020, Esas No.: 2020/1149. Karar No.: 2020/905.

Following this ruling, the doctrine therein pointed out, *inter alia*, that social media accounts have a personal nature, just like, e.g., diaries or photo albums of the deceased, which can in principle be inherited. Since a social media account is based on a contractual relationship, there is, in principle, no obstacle for a legal successor to assume the rights and obligations of the deceased, which is possible on the basis of Articles 653 and 599 of the Turkish Civil Code. However, the deceased's social media accounts may contain personal data, such as correspondence and photos belonging to third parties. In this case, the two constitutional rights of succession and protection of personal data conflict with each other.⁷⁶¹ In turn, the resolution of this conflict should take place in favour of the inheritance. The social media accounts should be passed on to the heirs in their entirety, in accordance with the principle of universal succession.⁷⁶²

However, it is argued in the Turkish doctrine that there is a need for a detailed legal regulation of how the legal succession of digital assets should be implemented in practice. Given the range of problematic issues that arise in practice, leaving the resolution of all these issues to judicial decision-making may lead to a long and uncertain process, which seems undesirable.⁷⁶³

Also in the United Kingdom, the former EU Member-state, the general legislation does not specifically regulate the issue of digital legacy. However, after the 2019 decision of Central London County Court in *Rachel Thompson vs. Apple*⁷⁶⁴ lawsuit ordering Apple to grant access to the deceased husband account digital inheritance gained considerable publicity being advocated by both official and activist organisations. However, no significant legislative step was taken since the decision was issued.

According to the British legal science, the need for legal regulation is evident by the rising amount of lawsuits related to digital assets. A relevant process took place, e.g., in 2022, where the England and Wales High Court

⁷⁶¹ Orhan Gazi Sarıdağ, 'Antalya Bölge Adliye Mahkemesi 6. Hukuk Dairesi'nin 13.11.2020 Tarihli Kararı Çerçevesinde Dijital Terekenin Kapsamının İncelenmesi' (2022) 4 Bilişim Hukuku Dergisi 191, 191–232.

⁷⁶² Hasan Altındal and Yusuf Enes Arslan, 'Türk Hukukunda Dijital Miras: Karşılaşılan Sorunlar Ve Uluslararası Uygulamalar Çerçevesinde Bazı Çözüm Önerileri' (2021) 25 Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 313, 313–351.

⁷⁶³ Sarıdağ (n 761) 225.

⁷⁶⁴ *Rachel Thompson vs. Apple* [2019], (unreported). Cf. Prashant Mali and Aswathy Prakash G, 'Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and Its Legal Implications' (2019) 15 National Law School Journal Volume 124, 133 ff.

(Commercial Court) ruled in favour of recognition of NFT's the type of digital property.⁷⁶⁵

Perhaps for these reasons, the Law Commission of England and Wales in 2023 published recommendations for reform and development of the law relating to digital assets.⁷⁶⁶ Of interest in this report are, inter alia, the following findings, which indicate that, while it is true that, because digital assets are not tangible and differ significantly from physical assets, and from rights-based assets like debts and financial securities, they do not fit within traditional categories of personal property, nonetheless, the Law Commission argues that the flexibility of common law can accommodate a distinct category of personal property to better recognise and protect their unique features. The Law Commission also recommends legislation to confirm the existence of this category and remove any uncertainty. At the same time, the document indicates that the Commission does not consider succession in this paper. However, if a digital asset is found to be an object of personal property rights at law, then it will be capable of forming part of a deceased person's estate. It was also explained that some stakeholders have argued that access to social media accounts, e-mail accounts and other end user licence agreement-based accounts should also be capable of passing on succession. In doing so, it was pointed out that the Law Commission should undertake a separate project looking specifically at the rights of access on death and incapacity to such accounts.⁷⁶⁷

To conclude this review of legal solutions from different places in the world, it is also worth mentioning the discussion taking place in Australia. The law there generally lacks specific regulation of the succession of digital assets, which are treated like traditional goods and are therefore as able to be inherited.⁷⁶⁸ Against this state of affairs, however, the need for change and reform is raised from time to time. For this reason, e.g., the New South Wales Reform Commission has proposed legislation for a digital access scheme, where an authorised digital executor could be designated to access digital records of the deceased in a last will. In addition, in 2023 Australian

⁷⁶⁵ *Soleymani v. Nifty Gateway LLC (Rev2)* [2022] EWHC 773.

⁷⁶⁶ Available on-line: <<https://lawcom.gov.uk/project/digital-assets/>>, [last accessed: 30 May 2024].

⁷⁶⁷ Report: Law Commission, *Digital assets: final report*, 27 June 2023, HC 1486, Law Commission No. 412.

⁷⁶⁸ Rosalind F Croucher and Prue Vines, *Succession: Families, Property and Death* (Lexis Nexis 2023) 10 ff.

government has proposed regulatory framework for digital asset platforms.⁷⁶⁹ While this document does not directly address the issue of succession to the deceased, it is no less likely to be the starting point for further proposals. Currently, and this should be reiterated, there is no legislation in Australia which addresses the post-mortal status of digital assets after the death of a user. But, given the prevalence of digital assets, it is increasingly likely that legislation will be put into place in the future.⁷⁷⁰

Mention may also be made of Brazilian legislation, where the question that is asked in the first place is whether a person's digital assets can constitute an inheritance from that person. According to Article 1.791 of the Brazilian Civil Code, an inheritance constitutes a homogeneous whole (a mass of property) that passes to the heirs. Although the new digital reality has not been precisely regulated (yet) in the system there, there are various proposals in the public discourse to change this.⁷⁷¹ One of these envisages, among other things, a provision whereby the entire contents of digital accounts or files belonging to an Internet user were to be passed on to heirs by way of succession.⁷⁷² At the same time, problems are recognised with regard to leaving personal data on the Internet, in which area the construction of succession is also proposed, as well as access to the deceased's assets via Internet service providers.⁷⁷³

The Brazilian state has also witnessed several rulings by the courts there that dealt with the legal succession of digital assets. For example, the Court of Justice of the State of Mato Grosso do Sul in 2013 dealt with the deactivation of a *Facebook* profile, due to the publication of various posts on the profile of a deceased person. The court ordered the deletion of the profile.⁷⁷⁴ Meanwhile, in another case, from 2017, the Court of Justice of the State of Minas Gerais denied access to the deceased applicant's daughter's cloud data.⁷⁷⁵ And in 2021, the Court of Justice of São Paulo disregarded

⁷⁶⁹ Cf. Australian Government, Regulating Digital Asset Platforms. Proposal paper, October 2023.

⁷⁷⁰ It is even pointed out in some places that current Australian law means "taking digital assets to the grave".

⁷⁷¹ de Marinheiro Mota (n 80) 58 ff.

⁷⁷² Cf. Projeto de Lei no. 4.099, de 2012, which aimed to include the inheritance of digital assets in Article 1788 of the Brazilian Civil Code.

⁷⁷³ Flavio Tartuce, 'Herança Digital E Sucessão Legítima. Primeiras Reflexões' (2019) 5 Revista Jurídica Luso- Brasileira 871, 871–878.

⁷⁷⁴ Case no. 0001007- 27.2013.8.12.0110.

⁷⁷⁵ Case no. 002337592.2017.8.13.0520.

claims related to the automatic termination of an account (deletion of the account by the provider).⁷⁷⁶

The discussion in Brazil, however, emphasises that due to the complexity of the matter, it is difficult to enact legislation, although many believe that this would be desirable. It is likely that a similar situation exists in other jurisdictions, both in Latin America and in other countries not yet mentioned. There is a public expectation that the problem of the legal succession of a deceased user's digital assets should be resolved.

6. CONCLUSIONS AND OBSERVED TREND

The above review of the legislation of selected countries on the succession of digital assets upon the death of their user may lead to the first important conclusions.

Firstly, a separate regulation of the succession of digital assets in the event of the death of their user seems to be necessary. The existing general solutions are not sufficient, even if in some countries the problems related to this issue are solved by case law. A harmonisation of the approach of individual legislators and a future uniform regulation of this problem seems necessary in this case. For obvious reasons, this will be difficult.

Secondly, the problem of the legal succession of digital assets after the death of their user is not only a problem of succession law and inheritance estate as traditionally understood. The characteristics of digital assets and the solutions applied worldwide must lead to the conclusion that the right of succession conflicts here with, at the very least, the right to privacy of the deceased and his communication partners. It is necessary to resolve this conflict uniformly and to advocate the primacy of either of them.

Thirdly, the right of access to digital assets is an area in which there is a strong emphasis on the last will of the deceased, the user of digital content on-line. It is noticeable that legislators and, at the same time, Internet service providers want the Internet user to decide the fate of his digital assets *mortis causa*. The law generally allows for this possibility, which seems to be a Solomon solution to the possible and eventual conflict between right of succession and the right to privacy.

Fourthly, post-mortal digital assets is also an area which, in the absence of a last will expressed by the deceased upon death, should resolve the

⁷⁷⁶ Case no. 1119688-66.2019.8.26.0100186.

problem of succession to these assets upon death. Possible solutions envisage, first of all, the succession of the deceased to his heirs or the management of his digital assets by persons close to him, regardless of the status of the heirs. These are certainly avenues that should not be neglected in the future regulation of this area.

Fifthly, the area of personal data protection, the importance of which is beginning to grow. Undoubtedly, the Internet is a place of mass data processing and digital assets are based on this type of data exchange. Hence, the future area of legal regulation of digital assets in the event of the death of their user should also take into account issues of personal data processing, which can be seen as complementary to the issue of succession.

Sixthly, the range of solutions in this area (legal succession of digital assets in the event of the death of their user) seems relatively wide. They range from the designation of a legal successor, through intermediate solutions, to the decision to convert or terminate an on-line account and the digital assets contained therein. Having analysed the current solutions and their determinants, it does not appear that general succession is the only possible solution in this area. It is, of course, admissible, but at the same time - as one might think - it should take into account not only the question of the property status of the digital assets, but also, and perhaps even primarily, the relevant safeguards necessary to be noticed in the interests of the deceased and third parties, especially his communication partners.

At the very least, the above conclusions can be taken as a guideline for the future legal regulation of this area, which, it can again be emphasised, seems to be necessary.

CHAPTER 5. HOW TO REGULATE THE POST-MORTAL STATUS OF DIGITAL ASSETS?

1. INTRODUCTION

The discussion so far has aimed to clarify the legal status of digital assets and the possible ways of dealing with this type of goods after the death of their user. The conclusions that result from this analysis, in the simplest terms and after a profound synthesis, boil down to pointing out that digital assets are goods of a pecuniary nature which, after the death of their user, may potentially belong to the inheritance estate. Their association with the privacy of the user and his communication partners, as well as their rootedness in the area of personal data processing, links the traditional instruments of succession law with elements of the right to privacy and the right to data protection.⁷⁷⁷ Consequently, this linkage becomes the impetus for a treatment of digital assets after the death of their user that takes into account these two non-obvious spheres of influence on their post-mortal status.⁷⁷⁸ For this reason, when designing future legal solutions for the post-mortal status of digital assets, one cannot limit oneself to solutions based on the traditional concept of succession law; one must also take into account the regulation of the right to privacy and the right to data protection.⁷⁷⁹

⁷⁷⁷ Cf. Harbinja, *Digit. Death, Digit. Assets Post-Mortem Priv.* (n 94) 204 ff.

⁷⁷⁸ Cf. Guilherme Vargas Puchta and Zilda Mara Consalter, 'Digital Inheritance in the Light of the Fundamental Right to Data Protection' (2023) 3 *Scientific Journal of Applied Social and Clinical Science* 2, 3 ff.

⁷⁷⁹ Sousa e Silva (n 45) 79–83.

The above is the result of observation of the functioning of the circulation of digital assets,⁷⁸⁰ the practice of Internet service providers⁷⁸¹ and legislative trends⁷⁸² as to the solutions emerging in some jurisdictions. A return to traditional concepts, as well as life without the Internet,⁷⁸³ seems impossible today. Therefore, when thinking about the succession of digital assets, it is also important to recognise the areas of privacy and processing of personal data that are potentially in conflict with each other. However, resolving this conflict and taking sides with one of the prevailing concepts is not an easy task.

On the one hand, the protection of pecuniary assets, which goes back to constitutional law and international law, opposes the automatic cancellation of this category of assets from the succession rule.⁷⁸⁴ On the other hand, however, the right to privacy and the right to the protection of personal data - both of which also derive from constitutional and international law⁷⁸⁵ - are rights whose limitation is possible only according to precise rules stemming from the applicable law and serving to protect other freedoms or rights.⁷⁸⁶ Assuming, therefore, the pecuniary nature of digital assets and their suitability for succession,⁷⁸⁷ it is important to consider possible limitations to the succession based on privacy and processing needs.⁷⁸⁸ A rational legislator, taking into account all these specific reference points, when designing a solution to the post-mortal status of digital assets, must therefore resolve the potential conflict. This should be done in a proportionate, optimising and necessary manner, and with an indication of how the right of succession can be restricted due to the need to realise other rights. The legislator must use legal means by which the objective justifying the restriction can be achieved.⁷⁸⁹

⁷⁸⁰ Merhi (n 31) 35 ff.

⁷⁸¹ Klasiček and Nedić (n 425) 217–240.

⁷⁸² Terletska (n 85) *passim*.

⁷⁸³ Cf. Louis Garb and Mariusz Załucki, 'The Other Side of the Fence: The Forgotten Human Right' (2024) 2 *Transatlantic Law Journal* 1, 1–8.

⁷⁸⁴ Țicău-Suditu (n 247) 47–59.

⁷⁸⁵ Karamuço (n 416) 224–230.

⁷⁸⁶ Custers and Maltieri (n 418) 1–13.

⁷⁸⁷ Cf. Birnhack and Morse (n 300) 280 ff.

⁷⁸⁸ Davey (n 51) 12 ff.

⁷⁸⁹ Cf. Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *REVUS. Journal for Constitutional Theory and Philosophy of Law* 51.

The protection of privacy and the protection of personal data seem to be sufficient objectives that could, in some cases, limit the succession. If there are several ways of restricting this right, as is conceivable in this respect, the legislator must opt for those restrictions which, in view of the legitimate aim, will be the restrictions which can be considered the least onerous.⁷⁹⁰ It must avoid a situation where a legislative measure that legitimately restricts a person's freedom or right simultaneously results in a restriction of other rights.⁷⁹¹ This may be the case when, by protecting an inheritance and limiting the rights of others, one may at the same time cause an unjustified limitation of the protection of their privacy. Weighing up conflicting principles and determining which of them takes precedence is therefore not an easy task. Proportionality in this area, understood as an effective means of setting limits to interference with other rights, must be applied.⁷⁹² In doing so, it must be borne in mind that the principle of proportionality and the resulting prohibition on interfering with the essence of rights applies both at the level of law-making, where it is determined whether a given provision in the abstract does not constitute an unacceptable interference with human rights, and at the level of law application, where consideration is given as to whether there has been undue interference with the rights of a particular person.⁷⁹³

With this in mind, it is necessary to reflect on an optimal model for solving the problem of the post-mortal status of digital assets in the event of the death of their user, which may allow the framework of such a solution to be designed. The following remarks will be devoted to this objective.

2. OPTIMAL MODEL FOR THE POST-MORTAL STATUS OF DIGITAL ASSETS

The research carried out has shown the specific nature of digital assets as proprietary goods linked to the Internet environment. The participation of the user of these goods in the global communication network determines the

⁷⁹⁰ Cf. Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094.

⁷⁹¹ Cf. Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere But Here?' (2012) 22 Duke Journal of Comparative and International Law 291.a

⁷⁹² Zoltán Pozsár-Szentmiklósy, 'The Role of the Principle of Proportionality in Identifying Legal Capacity to Fundamental Rights' (2023) 32 Studia Iuridica Lublinensia 333.

⁷⁹³ Cf. Mike Wienbracke, 'Der Verhältnismäßigkeitsgrundsatz' (2013) 6 Zeitschrift für das Juristische Studium 392; Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709.

status of these goods, linking it not only to the user's competence to exercise a kind of power over them, but also to the communication and exchange of information that takes place thanks to the Internet.⁷⁹⁴ It is through the implementation of the principle of the autonomy of the user's will⁷⁹⁵ that the user decides to participate in the exchange of data on the Internet, and it is as a consequence of this principle that the data posted by the user remains on the Internet, constituting his property.⁷⁹⁶ The death of a user, which is often unexpected, raises important issues that relate, among other things, to the further fate of this data, both from the point of view of heirs and third parties.⁷⁹⁷ The latter category includes all those with whom the data processed by the user was somehow connected, if only in the way that they had the possibility to get acquainted with it. Digital assets are linked to the personal data of their user.⁷⁹⁸ The sociality of the Internet, compounded by social networks, is therefore a legal issue that also needs to be regulated in the context of *mortis causa* legal transactions.⁷⁹⁹

Attempts made so far to regulate the status of digital assets after the death of their user suggest that, despite the legal nature of these assets, it is possible and desirable to move away from traditional succession, which would mean digital assets becoming part of the inheritance estate of a deceased Internet user. Succession in such a case, acceptable as one option in the palette of potential solutions, does not take into account the distinctiveness of digital assets from traditional goods enjoyed in the analogue world.⁸⁰⁰ The question arises whether these goods (assets) should indeed be treated separately or whether they can be subject to the same solutions as traditional goods.

An analysis of the Internet environment and the arguments raised in its wake would seem to support the assumption of the separability of digital assets. Although the inheritance should constitute a homogeneous mass of assets, some assets, due to their nature, should not - as one might think -

⁷⁹⁴ Conway and Grattan (n 559).

⁷⁹⁵ Cf. Karen J Sneddon, 'The Will as Personal Narrative' (2012) 20 Elder Law Journal 355.

⁷⁹⁶ Cf. Stepanov (n 420) 65–85.

⁷⁹⁷ Esperança Ginebra Molins (n 43) 209–235.

⁷⁹⁸ Davide Sisto, 'Morte e immortalità digitale: la vita dei dati online e l'interazione postuma' (2018) 2 Funes. Journal of narratives and social sciences 111, 111–122.

⁷⁹⁹ Darrow and Ferrera (n 42) 281–320.

⁸⁰⁰ Cf. Granell (n 48) 51–135.

share the fate of all elements making up the inheritance.⁸⁰¹ Digital assets are precisely such assets. They are created in a specific way, in a specific place. They also function in a specific way, according to specific rules.⁸⁰² They must be traded under the control of the Internet user in order to reflect the nature of the Internet environment, taking into account the circumstances of the voluntary creation and use of a digital asset.⁸⁰³ This applies to both *inter vivos* and *mortis causa* legal relationships. From the point of view of the subject matter of the work, however, only the latter is relevant.

It follows from the above that a picture of the post-mortal status of digital assets which would regulate the subsequent fate of these assets after the death of their user, in a manner separate from traditional succession law solutions, appears to be optimal. The question is therefore whether such a solution would be acceptable at all or whether there are obstacles to it. Without prejudging anything at this point, it should, however, be recalled that this is already slowly happening - in some countries around the world.⁸⁰⁴ In fact, as the solutions of some countries have been presented so far, laws are increasingly boldly appearing that deal with this very issue, i.e. the post-mortal status of digital assets.⁸⁰⁵

Although it is customarily accepted that an inheritance is the totality of the property rights and obligations of the deceased, of a private law nature, it is not always, or perhaps even rarely, the case in reality that the inheritance includes all the property rights and obligations of the deceased.⁸⁰⁶ This is because in individual statutory solutions, in individual countries around the world, there are, e.g., property assets that are excluded from the inheritance estate and pass to other persons according to different criteria than the inheritance estate of the deceased. Thus, there are special provisions in the world which, while excluding a right from the succession, independently regulate its fate after the death of the beneficiary.⁸⁰⁷ Thus, such a right is not subject to universal succession but to singular succession, according to

⁸⁰¹ Cottier (n 510).

⁸⁰² Prasad Roy (n 85) 514 ff.

⁸⁰³ Peña Pérez (n 241) 733–752.

⁸⁰⁴ Bartolini and Patti (n 318); Grinhaus (n 746) 2 ff; Sehati (n 90) 746 ff.

⁸⁰⁵ Cf. Kadys (n 635) 9–27.

⁸⁰⁶ Cf. Lange (n 104) *passim*.

⁸⁰⁷ Franciszek Longchamps de Brier, “Donatio Mortis Causa” and “Legatum per Vindicationem”. New Remarks on the Methodology of Private Law Studies’ (2022) 88 *Studia et Documenta Historiae et Iuris* 41.

the rules indicated in the special provision.⁸⁰⁸ These are exceptional cases; nevertheless, where such rules are in force, the legal effects of the death of the beneficiary are regulated separately from the law of succession. It is generally accepted that such an effect may originate only in a law and not in a legal transaction; however, a law may confer on the parties the competence to exclude or include certain items from the inheritance estate.⁸⁰⁹

This is particularly important in countries which base their succession on the construction of universal succession and the principle of succession *ipso iure* upon the death of a natural person.⁸¹⁰ These are principles that are deeply rooted in public perception, dating back to Roman times, although they are not - as already mentioned - present in *common law* countries or countries that have opted for constructions in which the succession property becomes a separate legal entity and is administered in trust, as well as countries that adhere to the principle of *hereditas iacens*.⁸¹¹ Nevertheless, succession, irrespective of its specific legal construction, is usually framed as a universal process, covering all the assets and liabilities of the deceased together. This is usually irrespective of whether or not the deceased disposed of these assets in his last will (in which case - generally - succession under the substantive law occurs). The universality of the succession thus implies the acquisition of the deceased's estate by the heirs in its entirety.⁸¹²

Any restrictions on the succession of certain rights or obligations must be found in statute. They may be, *inter alia*, of an objective nature. The legislator may, for instance, make the transfer of a specific right to the heirs subject to the performance of specific acts, including, for instance, by the deceased *ante mortem*. It is thus possible to shape the composition of the succession, and thus the scope of the universality of the succession,

⁸⁰⁸ Hanna Witczak, 'Status prawny zapisobiercy windykacyjnego (zagadnienia wybrane)' (2012) 5 TEKA Komisji Prawniczej PAN oddział w Lublinie 173.

⁸⁰⁹ Darwall (n 186); Goran Duus-Otterstrom, 'Freedom of Will and the Value of Choice' (2011) 37 Social Theory and Practice 256; Jan Peter Schmidt, 'Grundlagen Der Testierfähigkeit in Deutschland Und Europa' (2012) 220 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1022.

⁸¹⁰ Jan Peter Schmidt, 'Transfer of Property on Death and Creditor Protection: The Meaning and Role of "Universal Succession" in Andrew JM Steven, Ross G Anderson and John MacLeod (eds), *Nothing So Practical as a Good Theory: Festschrift for George L. Gretton* (Edinburgh University Press) 323–337.

⁸¹¹ JC Sonnekus, 'The Fundamental Differences in the Principles Governing Property Law and Succession from a South African Law Perspective' (2014) 3 European Property Law Journal 1.

⁸¹² Cf. Krzysztof Pacuła, 'The Principle of a Single Estate and Its Role in Delimiting the Applicable Laws' (2020) 26 Problemy Prawa Prywatnego Międzynarodowego 107.

by means of legal acts within the scope and with the authorisation of the law.⁸¹³ The will of the deceased may thus be relevant for determining the *post-mortem* situation of the assets which the deceased enjoyed during his lifetime. For this, however, an express provision of the law is necessary. Such goods may then either have the status of heritable rights and excluded from the inheritance estate, or the status of non-heritable rights but included in the inheritance estate. A dispositive provision may therefore allow for the possibility of excluding or including such assets in the estate by way of a legal transaction by the beneficiary.⁸¹⁴

The law may therefore allow an asset to be made transferable *mortis causa*, or to be deprived of such a character - by means of a unilateral legal act by the testator, possibly also by concluding an agreement with third parties. It is also theoretically possible to imagine a situation in which it would follow from the law that a third part. *post-mortem* could decide on the hereditary character of the asset in question.

The law in force already knows similar cases of optional solutions *mortis causa*, just to give an example of solutions found in some legal systems, according to which it is permissible to contractually stipulate that the death of the principal will cause the termination of the legal relationship⁸¹⁵ (which would be different from the general rule of non-termination of such legal relationships), a provision that the power of attorney does not terminate upon the death of the appointor (which would be different from the general rule of termination of such legal relations),⁸¹⁶ or the exclusion of the passing on of the obligation to carry out a property order to the heirs of the obliged part. (which would be different from the general rule of passing on of property obligations to the heirs).⁸¹⁷

An exploration of the various legal systems, in particular those based on the principle of universal succession, shows that there may be, and generally there are, exceptions to this principle which allow certain rights

⁸¹³ Cf. Witold Borysiak, *Dziedziczenie: konstrukcja prawna i ochrona* (Wolters Kluwer 2013) 202, and the literature cited therein.

⁸¹⁴ *ibid.*

⁸¹⁵ Cf. William McCormick, 'Termination of Agency by Death or Incapacity Let Us Know How Access to This Document Benefits You.' (1960) 22 Montana Law Review 74.

⁸¹⁶ Warren A Seavey, 'Termination by Death of Proprietary Powers of Attorney' (1922) 31 Yale Law Journal 283.

⁸¹⁷ Cf. Bartosz Kucia and others, *Shaping the Status of Heirs by Contractual Components under the Polish and German Inheritance Law* (V&R unipress 2023) *passim*.

or obligations to pass to others by way of singular succession after the death of their original subject. This may, e.g., be the result of an agreement between the testator and third parties making the effect of the transfer of rights and obligations to other persons conditional upon the death of a person, or merely the result of an independent act of the deceased.⁸¹⁸

This type of legal construction, most often under the title of a bequest, especially as a legacy per vindicationem, is found in many legal systems.⁸¹⁹ It is an instrument known, e.g., in France, Italy, Spain, Poland, Portugal, but also in the Canadian province of Quebec, Argentina or Brazil. The effect of this type of legal transaction *mortis causa* is that a given asset designated by identity and belonging to the deceased at the time of his death is transferred to the person designated in such a transaction, regardless of whether that person is the deceased's heir. The effects of the act take effect *erga omnes*.⁸²⁰

A future testator may therefore perform legal acts during his lifetime which will result in a property gain for the benefit of others, which will only occur at his death. Such an act is generally permissible in the various systems of succession law, and it is up to the individual legislator to make use of it in the legal system. If the legislator provides for such a possibility and the testator makes use of it, the effect of the act performed will be a singular succession *mortis causa*. The transfer of certain assets in this manner thus takes place, as it were, alongside the law of succession, independently of the inheritance.⁸²¹

Therefore, if the legislator decided to exclude digital assets from the succession and devote a separate legal regulation to them, which in the light of the above remarks is not only possible but desirable, it would have to resolve several elements in the relevant regulation. Firstly, whether to automatically exclude these assets from the succession, thereby entrusting the exclusive decision as to their fate to the existence of a legal transaction (extending, as it were, their fate), or only to allow by way of a legal transaction

⁸¹⁸ Lucius Caflisch, 'The Law of State Succession Theoretical Observations' (1963) 10 Netherlands International Law Review 337.

⁸¹⁹ Lourdes Salomon, 'The Acquisition of Possession in Legacies per Vindicationem in Classical Roman Law and Its Influence in the Modern Civil Codes' (2006) 65 Roman Legal Tradition 65.

⁸²⁰ Cf. Piotr Tereszkievicz and Anna Wysocka-Bar, 'Legacy by Vindication Under the EU Succession Regulation No. 650/2012 Following the Kubicka Judgment of the ECJ' (2019) 27 European Review of Private Law 875.

⁸²¹ Justyna Bieda and Michał Kłos, 'Zapis windykacyjny - powrót do przeszłości' (2013) 68 Państwo i Prawo 15.

their exclusion from the succession. Secondly, to decide whether this should depend exclusively on the will of the deceased user of the digital assets or, alternatively, on the will of another party. Thirdly, whether that will should be expressed *ante mortem* or - in the event that the decision is transferred to a third part. - whether this could happen at some time after the death of the user.

In the light of current findings and observations of emerging trends, I think it is worth giving precedence in this regard to the will of the deceased, a value that enjoys constitutional and international protection, understood against the background of constitutional acts and international law as a subject's right to dispose of his assets in the event of death.⁸²² It is therefore up to the deceased to decide before his death whether his existing digital assets should be transferred to other persons.

If it is to be assumed that digital assets should be excluded from the succession, their fate should be decided by the beneficiary of these assets *ante mortem*. Such solutions seem to be gaining ground in various legal systems, e.g. in the USA,⁸²³ France,⁸²⁴ Spain⁸²⁵ or Portugal.⁸²⁶ They have their justification in the principle of freedom of disposal of property upon death, whereby the testator can freely dispose of his property, without any restrictions, by allocating it to other persons or by deciding not to give it the attribute of succession (*mortis causa*).⁸²⁷

The decision as to whether to include or exclude these goods from the inheritance estate should therefore be made in favour of the option which most respects the will of the holder of the goods. If, therefore, it is assumed that it is the beneficiary who makes the conscious decision as to the post-mortal fate of his digital assets, then the status of these assets should be left entirely to his discretion. However, the absence of a decision in this regard by the hitherto entitled person, while at the same time accepting the principle of non-transferability of these assets to his successors in title, could, at least *prima facie*, be in opposition to the principle of succession of

⁸²² Cf. Viglione (n 107) 773–789.

⁸²³ Cf. Morse (n 89) 8 ff.

⁸²⁴ Cf. Manuella Bourassin, 'L'hérité numérique. Propos conclusifs' (2023) 12 *Solution Notaire Hebdo* 23, 23 ff.

⁸²⁵ Cf. Crespo (n 309) 167 ff.

⁸²⁶ Cf. Sousa e Silva (n 45) 74–83.

⁸²⁷ Cf. Erik Jayme, 'Part. Autonomy in International Succession and Family Law: New Tendencies' (2009) 11 *Yearbook of Private International Law* 1.

immovable property and would be, to that extent, a measure interfering too much in the right of succession, which could then be considered as a measure disproportionate to the objective it is supposed to achieve. The dilemma of what to do in the absence of a decision in this regard by the right holder, the current user of the digital assets, therefore also needs to be resolved.

Moreover, in this respect, it should be further noted that, if the decision in this respect is left to the user, then such shaping of the right relating to digital assets may also be hindered, at least *prima facie*, by issues relating to protection of privacy and personal data of the deceased Internet user and his communication partners.⁸²⁸ However, it seems, and this is evidenced by examples from existing case law in some countries, that on-line presence is voluntary and that by agreeing to participate in it, everyone accepts the rules therein, including privacy-related restrictions. Privacy and data protection as possible obstacles to the transfer of digital assets to third parties should be understood in this context primarily as mechanisms to protect the privacy and personal data of the deceased.⁸²⁹ In the event of a collision, it would be the deceased in this respect who would make the relevant decision, which would in principle shape the post-mortal status of their digital assets.

If the account is taken over by succession, there is no interference with the rights of third parties, as is the case, e.g., with the succession of traditional correspondence. For an informed Internet user, it is obvious that once a message is sent, a post is made, a specific content is uploaded, including a photo or a video, the user no longer has control over who finds out about this content, to whom this content is made available and that the sender of this content cannot, in principle, demand the return of a message which has already been transmitted.⁸³⁰ Thus, since the Internet participant bears the risk that third parties will gain access to the content stored in his account, he should take into account all the more the possibility that the legal successors of the deceased Internet user may gain access to it.⁸³¹ The legal successor becomes the person entitled to use the Internet account and the content therein.

⁸²⁸ Cf. Davydova, Didenko and Tomina (n 83) 3 ff.

⁸²⁹ Jackson Adams and Hala Almahmoud, 'The Meaning of Privacy in the Digital Era' (2023) 15 *International Journal of Security and Privacy in Pervasive Computing* 1.

⁸³⁰ Cf. Ana Dharmo, Iris Dharmo and Iris Manastirliu, 'Fundamental Rights and New Technologies' (2023) 10 *Interdisciplinary Journal of Research and Development* 121.

⁸³¹ Cf. Roßnagel and others (n 328) 3–48.

The legal succession of digital assets is therefore not prevented by the posthumous right to protection of personal rights, privacy (including the secrecy of correspondence), or data protection regulations, including the right to protection of goods belonging to the deceased's communication partners. In the event of a change of the beneficiary - in the context of a contract with an Internet service provider - the substance of the provision does not change fundamentally.⁸³² The performance of the service provider is typical, and the user does not commit to any predetermined behaviour, but only has the right to use the functionalities of the respective website, including, e.g., the publication of certain types of content (e.g. photos, videos, stories or statuses).⁸³³ This type of benefit can also be successfully performed by the successors of the original user even if it is not the same use as that of the deceased user. It should be indicated in the law so that it is clear that, in terms of access to digital assets, it is possible for the personal data of the deceased linked to the digital asset in question to be processed by their legal successors.⁸³⁴

Therefore, it is the deceased's legal act in the event of his death that must determine whether the digital assets in question have hereditary status, i.e. whether they will pass on to any other persons after his death.⁸³⁵ These persons do not have to be mentioned in the act at the same time. It seems that it would be sufficient to determine the hereditary status of the assets, the possibility of succession and the entry of other persons into the rights and obligations of the deceased, taking into account the nature of digital assets. The appointment of a successor could take place on general principles, either those established separately for this category of assets in the applicable legislation, or according to the rules of statutory succession. In the latter case, the activity of the deceased Internet user could therefore be limited solely to determining the status of the assets concerned.

An appropriate decision by the user regarding the post-mortal status of digital assets could therefore open the way for their acquisition, by way of succession, by third parties. It is desirable in this regard to trust the will of the deceased and to structure the law in such a way that the will of the

⁸³² Kerber and Zolna (n 466) 217–250.

⁸³³ Georges and Julliard (n 695) 231 ff.

⁸³⁴ Pruns (n 492) 269 ff.

⁸³⁵ Scott T Jarboe, 'Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistic Approach' (2002) 80 Washington University Law Quarterly 1365.

deceased is the decisive factor with regard to the possibility of third parties entering into their rights and obligations.

At the same time, the situation in which a deceased Internet user has not expressed a relevant will *ante mortem* needs to be resolved. In such a case, two opposing solutions are likely to come into play. First, it can be considered that the absence of a will expressed by the deceased implies the absence of a will to continue the existence of specific goods in the digital world and that rights to those goods would, by virtue of the deceased's death, shall be cancelled. Secondly, it can be considered that the relevant decision as to the further fate of the digital assets would be taken by a third party. It is, however, difficult to clearly indicate the circle of persons potentially entitled to make such decisions.⁸³⁶ It can be assumed that they should be people who had the status of relatives of the deceased, which would make it possible, among other things, to cultivate his memory in the Internet environment.

Considering the above alternatives, there are, as one may think, many arguments in favour of the idea that the will of the previous user of the digital assets, expressed *ante mortem*, should continue to be decisive. This concept would be an emanation of the autonomy of the will of private law subjects (to which they are entitled during their lifetime), which is to be understood, among other things, as the ability of legal subjects to shape, on the basis and within the limits of the law, their legal situation by means of legal transactions, an expression of individual self-determination.⁸³⁷ This is not only about the legal situation of the deceased, but also about the legal situation of other persons, since the objectives that an individual can achieve during his lifetime through *inter vivos* acts should also be achievable through *mortis causa* acts. The disposal of property, as a component of the right of property, implies the freedom to acquire property, to retain it and to dispose of it. The latter includes, in particular, the disposal of property (in whole or in part. through *inter vivos* and *mortis causa* acts by the holder. In the case of *mortis causa* actions, the possibility of determining the fate of the property oneself in the event of death must also be guaranteed. This is a mechanism that adapts the succession to the circumstances of the individual case.

⁸³⁶ Cf. Mieke Puelinckx-Coene, 'La Protection Des Differents Membres de La Famille Par Le Droit Familial Patrimonial En Europe' (2004) 12 European Review of Private Law 143; Glover (n 114) 411–456.

⁸³⁷ Cf. the motives of the Judgement of the German Federal Constitutional Court of 30 August 2000, 1 BvR 2464/97.

In the light of the above, it would appear that a view has to be defended in which it is necessary to start from the assumption that no one knows better than the testator how the legal succession after his death should be shaped.⁸³⁸ The legislature should therefore grant the future testator the possibility to determine the fate of his estate himself in the event of death, while at the same time guaranteeing the primacy of the testator's will in this regard. This concept can be reduced to three dimensions: the testator knows better how to protect the interests of his family; the testator knows better how to protect the interests of those actually close to him; and the testator knows better how to protect the economically organised part. of his estate.⁸³⁹

In this context, due to the specific status of digital assets, it is likely that it is the holder of these assets (user) who, by assessing the use of these assets to date, will be in a position to prejudge their future fate, taking into account the welfare of family, relatives and the economic guarantees of future succession. It is his assessment, expressed *ante mortem*, that must be binding. It is he who, by also assessing privacy and personal data issues, should be able to decide on the further fate of his digital assets. Of course, this decision may vary in each individual case. It should also be possible to change this decision, using rules analogous to those for changing the content of the declaration of last will.⁸⁴⁰

The optimal solution would therefore be that the digital assets do not automatically become the object of succession and do not form part of inheritance estate. An appropriate legal regulation should provide that these assets should be included in the category of property which will be inherited only after the death of the person who was previously entitled to them, if there is a will to continue their existence. Such a will, as I indicated above, should be made first and foremost by the user of the digital assets. The idea that the digital assets would be part of the inheritance estate or subject to a singular succession in the absence of the hitherto user's decision does not appear to be correct and seems to interfere with the freedom to dispose of property on death, taking into account the nature of the digital assets and the need to protect privacy and personal data. Alternatively, decision in this regard can be left to third parties, whose circle would have to be determined

⁸³⁸ Adam J Hirsch and William KS Wang, 'A Qualitative Theory of the Dead Hand' (1992) 68 Indiana Law Journal 1, 12.

⁸³⁹ Cf. Anna Paluch, *Granice swobody rozrządzania majątkiem na wypadek śmierci w prawie polskim* (CH Beck 2021) 33–71.

⁸⁴⁰ David Horton, 'Revoking Wills' (2022) 97 Notre Dame Law Review 563, 563 ff.

by a criterion defining the basis for the persons indicated to take the relevant decision. If, therefore, it is to be decided that the fate of these assets should depend on someone after the death of the hitherto beneficiary, at least two possibilities arise as well. The first would be that it would be the user who, during his lifetime, would designate the legitimate circle and thus initiate the procedure for the transfer of rights and obligations arising from the digital assets. The second is that this would be an automatic process.

To this extent, I believe that it is necessary to base the relevant decision on the will of the deceased. There should be no room for automatism here. It would violate the principle of the autonomy of the will of the parties and its juridical emanation in the form of the freedom of disposal of property in the event of death, which, in the context of the protection of privacy and personal data, includes the decision to make the goods in question transferable *mortis causa*.⁸⁴¹ If the right holder fails to take such a decision, then the rights to the digital assets and the associated data should be cancelled. The extinction in such a case does not imply transfer into the public domain, but rather the cancellation of the digital asset and the related data.⁸⁴² Therefore, there should be few exceptions to such a categorical cancellation of the digital asset. Access to the data of a deceased user may be in the important interest (overriding interest) of the user himself, of the controller of this data and, in some cases, of third parties. The cancellation of a digital asset of a definitive nature could make it impossible to satisfy this interest. There should therefore be a transitional period during which the digital asset and the related data should be stored.

Consideration should also be given to the effects of the transfer of rights and obligations arising from digital assets to another person after the death of the previous user. It seems that access to these digital assets cannot mean using most of them under the same conditions as the deceased Internet user used them.⁸⁴³ For example, it is difficult to imagine that the legal successors of the deceased continue to publish certain content on the Internet under his name (as him). It seems therefore possible to consider that the successors in title enter into the contractual rights and obligations, but not in the sense of active use of the account, i.e. in the way it was used by the deceased, but in a passive way, consisting in the possibility to consult

⁸⁴¹ Załucki, 'The Approach of Family and Succession Law to Digital Assets' (n 678) 472–486.

⁸⁴² Cf. Roberto Caso and Federica Giovanella, *Balancing Copyright Law in the Digital Age* (Springer 2015) 27 ff.

⁸⁴³ Lee (n 558) 644 ff.

the digital content stored there and to benefit from it. In this context, it would therefore be possible to transform the account in a specific way by disabling its existing functionalities, with the possibility for successors to access the existing content.

In fact, the *mortis causa* succession of digital assets is the succession of allowing access to those assets, not the ability to use those assets as the deceased user used them (on the same terms). Digital assets are anything created and stored digitally that has or provides value. Access to these assets by the legal successors of the deceased is therefore the assumption of authority over these assets, a kind of control.⁸⁴⁴ This includes: the ability to prevent others from obtaining substantially all of the benefit from the digital asset, but also the replacement, modification, or cancellation of a digital asset. It is necessary here to indicate that the further use of the digital asset, if at all possible, is the use by the persons who are successors in title to the original user thereof.

The above, it would seem, is a solution that, in the context of the future regulation of the *post-mortal* status of digital assets, appears to be an optimal solution that reconciles conflicting interests, taking into account, in the first instance, the principle of autonomy of the will and the disposition of assets in the event of death, recognising also issues of privacy and the processing of personal data.⁸⁴⁵

3. PROPOSAL FOR THE DESIGN OF PROVISIONS CONFERRING THE POST-MORTAL STATUS OF DIGITAL ASSETS (DE LEGE FERENDA)

Legal academics, increasingly seem to recognise the problems associated with the legal succession of digital assets.⁸⁴⁶ This is evidenced by various publications that have been appearing for several years. There are various opinions on this topic, which seem to approve of the possibilities of succession of digital assets. Sometimes specific proposals are also indicated. And although - as one may think - the legal succession of digital assets is possible on the basis of existing succession law, the difference of digital assets from traditional goods argues for the need to regulate them separately.⁸⁴⁷

⁸⁴⁴ Brucker-Kley and others (n 657) 11 ff.

⁸⁴⁵ Cf. Castex, Harbinja and Rossi (n 702) 117–148.

⁸⁴⁶ Cf. Meyer (n 494) 181–183.

⁸⁴⁷ Karin Sein, 'Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law' (2018) 27 *Juridica International* 117.

As discussed above, the optimal model for the legal succession of digital assets after the death of their user is the one based on the will of the deceased user of these assets, without which this category of rights and obligations would be excluded from the inheritance estate. These goods should constitute an autonomous body of assets, the fate of which - *mortis causa* - should be decided by their „owner”. This decision would concern all his personal data related to the digital asset in question, thus taking into account his area of privacy.⁸⁴⁸ It would be his decision that would possibly allow third parties to access and process this data, therefore overruling the possibility of an invasion of his privacy. This would have to be his conscious *ante-mortem* decision, on the possibility of which he would have to be informed in an appropriate manner. Such an obligation should be incumbent on the Internet service provider, which should then implement this will *post-mortem*.

It would therefore seem that the future regulation of the legal succession of digital assets could begin with a legal norm based on the principle of autonomy of will, prejudging the post-mortal status of digital assets, while also addressing the Internet service provider and taking into account his obligations.⁸⁴⁹ In addition to determining the *mortis causa* transferability of a digital asset, this would include an obligation to inform the user of the possibility of making a disposal concerning the fate of his digital asset after his death and its legal consequences. Furthermore, it should imply an obligation to grant access to the on-line services to which the deceased was subject (after his death). At the same time, the beneficiary would decide on the subsequent fate of such a digital asset, including replacement, modification, and cancellation of a digital asset. These dispositions would be in accordance with data protection rules, which could be processed for post-mortal access to digital assets. On the other hand, in the absence of an appropriate disposition expressed by the deceased *ante mortem*, the digital asset should not be accessible to other persons. In such a case, however, it should not be considered as nobody's property, the possession and ownership of which can then be acquired by another person. The absence of an expressed will by the deceased should result in the cancellation of this digital asset. The law could provide for an exception in this respect in the form of overriding interests of the deceased, the data controller or third parties. In the latter case, however, it should only be a case of limited access to the digital asset

⁸⁴⁸ Beverley-Smith, Ohly and Lucs-Schloetter (n 235) 3 ff.

⁸⁴⁹ Such a decision would be a kind of digital footprint for generations to come. Cf., also: Varnado (n 28) 719 ff.

and the related personal data in order to pursue some important interest. The court of succession should then decide whether there is an overriding interest of the deceased and whether there is indeed, e.g., an indispensable link between the deceased and the person requesting access which would justify granting such access. Until that time, the Internet service provider should be obliged to store the data.

Such a norm, or indeed a group of rules governing the post-mortal status of digital assets, could therefore read as follows:

- 1) *A digital asset and all related personal data of a user of an on-line service shall not form part of the inheritance estate upon his death.*
- 2) *A user of an on-line service who uses a digital asset through that service may, in the event of his death, dispose the Internet service provider to provide access to the designated digital asset with all the related personal data stored through the operated on-line service to a specified person.*
- 3) *The effect of such disposal and the resulting access shall not only be the possibility of processing the personal data of the deceased, but also the ability of a specified person to obtain substantially all the benefits from the digital asset, to prevent others from obtaining such benefits, as well as to decide on the replacement, modification, or cancellation of that digital asset and related personal data.*
- 4) *In the absence of a disposition referred to in section (2), the digital asset with all the related personal data of a deceased's user shall be cancelled, unless cancellation is contrary to the overriding interests of the deceased, the data controller or a third party, and access to the digital asset is requested by a person having such an interest. In such a case, before appropriate access is granted, the court of succession must decide whether such an overriding interest exists. Until then, but no longer than 5 years after the death of the user, the digital asset and related personal data should be stored by the Internet service provider.*
- 5) *Appropriate access, as referred to in section (4), means only the access necessary to realise the overriding interest of the person requesting such access.*
- 6) *Access to and use of the digital asset and all related personal data after the death of the user, as referred to in section (3), should be*

performed in a way that identifies the beneficiary in relation to other users of the on-line service.

- 7) *All Internet service providers have an obligation to inform the user what might happen to his digital asset and the related personal data on his death, as well as enable the user to take a decision on the matter. This is without prejudice to the provisions on the disposals of property upon death, including last wills.*

When considering the distinctiveness of the proposed succession in relation to the inheritance estate, it may be recalled that the expansion of the catalogue of rights and obligations passing to designated persons outside the legal construction of the universal succession has sometimes been criticised in the literature. As has been pointed out, it may lead to the depletion of the succession to the detriment of creditors and persons entitled to various specific rights from the inheritance estate (e.g. a reserved portion).⁸⁵⁰ It is also argued that such practices lead to a „decomposition of the inheritance”, and the possible expansion of the catalogue of rights and obligations passing to certain persons regardless of whether they are heirs or not, may result in a depletion of the inheritance and a worsening of the situation of heirs as well as creditors who are limited in their ability to satisfy their claims from the assets left by the deceased. However, these are not arguments which, given the nature and specificity of digital assets, should be shared.

In view of the doubts under the current succession law, including those relating to the will of the deceased, privacy or the protection of personal data,⁸⁵¹ the proposed solution seems to be the one which would least interfere with the traditional and established principles of succession law. Instead, it would ensure the effect of the legal succession of digital assets from a deceased user of on-line services and would allow the user of the service during his lifetime to influence who, and if at all, will have access to the digital content he has collected. Moreover, such a solution would legitimise the solutions developed so far in practice by some Internet service providers.⁸⁵²

The main objective of the proposed solution is to exclude digital assets from the traditional concept of succession, depriving them of their automatic

⁸⁵⁰ Cf. Michelle Harris, ‘Common Law Restraint on Testamentary Freedom’ (2007) 3 National Academy of Elder Law Attorneys Journal 239, 240 ff.

⁸⁵¹ Cf. Harbinja, *Digit. Death, Digit. Assets Post-Mortem Priv.* (n 94) 204 ff.

⁸⁵² Cf. Mateusz Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci* (CH Beck 2018) 263–270.

status as inherited goods. It would be up to the deceased user of the digital assets to decide *ante mortem* whether succession takes place in respect of these assets. At the same time, it would be possible to access these goods in the event of a need to realise an overriding interest of a person who, after the death of the deceased, before the court of succession, would demonstrate such a need. This access would, however, be limited to the interest of the person concerned, thus minimising the effects of the cancellation of the digital asset.

An appropriate mechanism for the disposal of digital assets in the event of death, according to the proposal, should be set up by the Internet service provider.⁸⁵³ The Internet service provider should be responsible for such an obligation, which can of course be enforced on the basis of data protection rules. However, this would by no means mean that only this type of disposition of data containing a digital asset would be permissible. Any other instrument for such a disposition, notably a last will prepared according to the rules applicable to such a legal transaction, would fulfil the role of a disposition referred to in the proposed provision. The deceased would thus have an alternative path: an ordinary property disposition or a property disposition in the digital world.

The form of this additional disposition of the deceased's property must meet the characteristics of the Internet environment. Thus, as one might think, it should be a form of legal transaction that meets at least the criteria of a documentary form, therefore allowing for the making of a declaration of intent that can be preserved on any medium allowing for the future reproduction of that declaration.⁸⁵⁴

The effect of the disposition of the deceased's property would be the possibility of posthumous access to his data, the possibility of economic exploitation of the digital asset, as well as the decision on the replacement, modification, or cancellation of that digital asset. Thus, in reality, the successor in title would gain control over a digital asset of a proprietary type, except that it is a question of economic benefit and not of using the asset on the same terms as the deceased, as well as deciding on the future fate of the digital asset. In fact, it is therefore an issue of the various transformations that the digital asset may undergo, up to and including the decision to cancel it.

⁸⁵³ This could be something like a digital will, with certain minimum requirements under current legislation. Cf. Valero (n 730) 65–90.

⁸⁵⁴ Załucki, *Wills Formalities Versus Testator's Intention: Functional Model of Effective Testation for Informal Wills* (n 158) 157 ff.

For the continued access and use of the digital asset, it would be necessary to identify the user, which is primarily intended to counteract the belief that the original user is continuing to use the asset, which could, among other things, give the impression that he is still alive. Such misleading actions should not enjoy legal protection and could therefore ultimately be prosecuted under data protection or privacy legislation, not only by the deceased, but also by third parties. The use of their personal data would then have to be qualified as unlawful, as would the processing of the deceased's data.⁸⁵⁵

The cancelation of the digital asset and all the data related to it would, in principle, take place automatically, in the event of the death of the user and his failure to decide whether to grant access to the digital asset to a legal successor. This seems to be a normal consequence of the proposed solution, where the will of the deceased should be the decisive criterion as to the *post-mortem* fate of his digital asset. The absence of a decision would therefore be tantamount to a legal fiction of the existence of a decision to cancel the digital asset and the associated data.

Nevertheless, it is possible to envisage situations where there is a strong overriding interest of the deceased, of the data controller or of third parties not to cancel data concerning a digital asset, if only to clarify the reasons for the user's death, which does not seem to be so unobvious, as shown, e.g., by the German *Facebook* case⁸⁵⁶ or the US case of *Justin Ellsworth*,⁸⁵⁷ which are milestones in case law on access to digital assets after the death of the user. In such cases, the relevant decision should be taken by the court of succession at the request of the person concerned by access to the digital asset. It is the court of succession which will be in a position to properly assess the applicant's intentions, reasons and possible use.

Such access, if granted by the court of succession, would not be full and therefore have not a general succession nature. It would be an access whose content would be the pursuit of a valid interest. The scope of such access would be decided by the court of succession on a case-by-case basis. In order to enable such an interest to be fulfilled, the Internet service provider should be obliged to store data concerning the digital asset. A period of five

⁸⁵⁵ Cf. Buitelaar (n 224) 129–142.

⁸⁵⁶ Bergh and Weber (n 465) 29 ff.

⁸⁵⁷ Darrow and Ferrera (n 42) 281 ff.

years after the death of the current user seems sufficient to deal with this type of case.

The access that a person will gain will concern digital assets and the personal data associated with them. Indeed, the specific nature of the Internet environment is such that these assets do not exist in a vacuum, they are linked to necessary data that are often processed in the course of using the asset in question. The project prejudices the entitlement of the legal successor of a deceased user to use the digital asset and the associated data.

Of course, there are many other possible ways to address the post-mortal status of digital assets.⁸⁵⁸ However, as one might think, the proposal takes into account not only the rules of succession law, but also intrusive solutions protecting privacy and personal data. This is the current trend of legal regulations in this area, encountered more and more often, linking together the non-obvious spheres of interaction of the different legal norms of succession, privacy and data protection. Therefore, I believe that the above proposal should be seen as another element in the discussion on the post-mortal status of digital assets of the deceased. The proposal pretends to be one that resolves the issue fairly uniformly and comprehensively, at least in the substantive legal sphere.

The proposed solution fundamentally differs from existing national solutions in that it combines elements of succession, privacy and protection of personal data in one place. In this way, there would probably be no need to seek a solution for the post-mortal status of digital assets in several places, which could also simplify the handling of these assets after the death of the user. There are undoubtedly still a number of issues that need to be resolved before a solution can be adopted, but the above should be seen as an attempt at a comprehensive approach and a possible starting point for further discussion, which - at least at the level of continental European countries - is still largely lacking. Indeed, existing statements are, by definition, rather local in nature, which is somewhat of a paradox when one considers the essentially global nature of digital assets.

The place where the proposed rules should be located is still debatable. However, as they concern the handling of a given property after the death of a deceased Internet user and their effect is, *inter alia*, the exclusion of certain property from the inheritance estate, there is in principle no contraindication for them to be included in a different law than the one regulating the transfer

⁸⁵⁸ Cf., e.g.: Saridağ (n 761) 191 ff.

of inherited property to other entities (usually civil codes). Indeed, today the issues regulated by the project appear in several laws. In addition to the civil code of different countries, these generally involve data protection laws and privacy regulations. Perhaps in the future it would be possible to address all these issues comprehensively and, e.g., incorporate them into civil codes.

In order to make this kind of change to the succession law, it is worth considering whether it is possible on a wider scale, whether it has a universal dimension, or whether it is intended solely for one legal system.⁸⁵⁹ Bearing in mind that, despite the differences in the various succession law systems, the legal nature of digital assets is essentially the same everywhere, there are no obstacles to adopting an analogous solution in the various countries interested in solving the problem of the post-mortal status of digital assets. The proposed solution therefore seems like it is able to be accepted on a wider scale, not only in one legal system. The proposal is intended to be uniform and capable of implementation to any legal system. It is designed to be universal.⁸⁶⁰

This is one of the reasons why this proposal is not a rule proposed for an international instrument. It is rather a model rule to be emulated, similar in nature to those used in some model legal systems, such as the *Uniform Probate Code* or an analogous act, in which it could be successfully introduced. In this respect, one would rather count on so-called spontaneous harmonisation in practice,⁸⁶¹ i.e. a situation in which one legislator decided on a revolution of this kind and others followed suit.⁸⁶² Looking at the current legislations in this area, it seems that this should be another step in adapting the law of succession to the requirements of modern times.⁸⁶³ A step that seems necessary and is able to revolutionize the current law on digital assets and its succession. I therefore propose that the provisions on the post-mortal

⁸⁵⁹ For some time now, there has been a discussion in Europe about the possibilities and instruments of legal unification. Cf. Stefan Leible, *Wege zu einem Europäischen Privatrecht* (Universität Bayreuth 2001) 390 ff.

⁸⁶⁰ This proposal is intended to allow consistency of legal system in the various countries interested in solving the problem of digital assets. Cf. Laura Miraut Martín, 'The Relativity of the Idea of Consistency of Legal Systems' (2023) 22 *Legal and Administrative Studies* 21.

⁸⁶¹ Cf. Beckert (n 76) 79–120.

⁸⁶² Cottier (n 510) 196–221.

⁸⁶³ There is no doubt that a proper discussion about the need for changes to the law of succession has been going on for a good dozen years. Digital assets and their status are only one part of it. Cf. Dieter Leipold, 'Ist unser Erbrecht noch zeitgemäß?' (2010) 65 *Juristen Zeitung* 802; Anne Röthel, *Ist unser Erbrecht noch zeitgemäß?* (CH Beck 2010) passim.

status of digital assets, regardless of longitude and latitude, should be given the wording suggested above.

CLOSING REMARKS AND RECOMMENDATIONS

The matter of digital assets after the death of their initial user, as can be seen from the above, is a complex one, combining elements of succession, privacy and the protection of personal data.⁸⁶⁴ The analyses carried out have shown that digital assets, despite their essentially proprietary nature, should not be subject to the traditional rules of succession law. However, in spite of this (purely succession law) approach in some countries, there are elements specific to this type of assets that are particularly linked to the sphere of privacy and the processing of personal data, which should have an impact on their succession law status.

Regulations typical of solutions protecting human rights, which undoubtedly include the right to succession, the right to privacy and the right to protection of personal data, should take into account all these spheres of potential impact on digital assets and their status when the post-mortal status of these goods is at stake.⁸⁶⁵ Everyday life shows that the processing of personal data of the deceased may constitute a potential threat to the veneration of his memory, which, *inter alia*, argues in favour of including this sphere in the provisions of universally applicable laws. The law should therefore regulate who, on what terms, and whether should have access to digital assets and related data at all. It is not possible, and certainly not desirable, for digital assets to be transferred to third parties in exactly the same way as, e.g., movable property is transferred to successors in title.

⁸⁶⁴ This seems to be a new opening for succession law, which has so far had only a limited interest in these other areas. However, the content of the other rights mentioned is also subject to change. Cf. Wojciech Załuski, 'The Right to Privacy. Its Value in a Technologically Developed Society' (2024) 34 *Studia Prawnicze. Rozprawy i Materiały* 13.

⁸⁶⁵ This is currently an interesting trend in legal development, cf. Luciano Floridi, *Protection of Information and the Right to Privacy - A New Equilibrium?* (Springer 2014) *passim*.

Digital assets have their own specific characteristics linked to the Internet environment and their further use - as the deceased did - may mislead other network participants.⁸⁶⁶

The considerations carried out within the framework of the above-mentioned assumptions led to the conviction that the optimal solution for the regulation of the post-mortal status of digital assets is to entrust the decision as to how to deal with these assets to an authorised person, their current user, who should make such a decision *mortis causa*. It is the user who is best placed to assess the risks to his privacy and the circulation of data concerning him and thus to decide on their legal status. The decision as to whether a digital asset should be heritable or whether the legal successors of a deceased Internet user should have access to the digital asset after his death must - as a rule - rest with this user. This is the result of the confrontation of the right to succession with the right to privacy and the right to protection of personal data.

In order to meet the growing need for the regulation of the post-mortal status of digital assets in the various countries, particularly those which have not yet taken a decision on this issue, a legislative proposal has been drawn up to provide a workable model. According to this proposal, the post-mortal status of digital assets should be regulated by introducing the following group of provisions into the legal system:

- 1) *A digital asset and all related personal data of a user of an on-line service shall not form part of the inheritance estate upon his death.*
- 2) *A user of an on-line service who uses a digital asset through that service may, in the event of his death, dispose the Internet service provider to provide access to the designated digital asset with all the related personal data stored through the operated on-line service to a specified person.*
- 3) *The effect of such disposal and the resulting access shall not only be the possibility of processing the personal data of the deceased, but also the ability of a specified person to obtain substantially all the benefits from the digital asset, to prevent others from obtaining such benefits, as well as to decide on the replacement, modification, or cancellation of that digital asset and related personal data.*

⁸⁶⁶ Some analogy can be seen in this area with, among other things, the fraudulent use of celebrity images. Cf. Tabrez Ahmad and SR Swain, 'Celebrity Rights: Protection under IP Laws' (2011) 16 Journal of Intellectual Property Rights 7.

- 4) *In the absence of a disposition referred to in section (2), the digital asset with all the related personal data of a deceased's user shall be cancelled, unless cancellation is contrary to the overriding interests of the deceased, the data controller or a third party, and access to the digital asset is requested by a person having such an interest. In such a case, before appropriate access is granted, the court of succession must decide whether such an overriding interest exists. Until then, but no longer than 5 years after the death of the user, the digital asset and related personal data should be stored by the Internet service provider.*
- 5) *Appropriate access, as referred to in section (4), means only the access necessary to realise the overriding interest of the person requesting such access.*
- 6) *Access to and use of the digital asset and all related personal data after the death of the user, as referred to in section (3), should be performed in a way that identifies the beneficiary in relation to other users of the on-line service.*
- 7) *All Internet service providers have an obligation to inform the user what might happen to his digital asset and the related personal data on his death, as well as enable the user to take a decision on the matter. This is without prejudice to the provisions on the disposals of property upon death, including last wills.*

The proposed solution shifts the burden of deciding the post-mortal status of digital assets to the user. It is the user who is responsible for what happens to the digital assets after his death, for which he is competent under the law of succession and its emanation in the form of a free disposition of property in the event of death, where he can decide *inter alia* on the *post-mortem* transferability of certain goods to third parties. This is a type of singular succession, taking place outside the general rules of succession law, considering privacy and the *post-mortem* processing of personal data insofar as this would be necessary for the access of the person concerned to a digital asset.

The use of a deceased Internet user's digital asset is primarily the ability to obtain substantially all the benefits from this asset, coupled at the same time with the ability to prevent others from obtaining such benefits. Post-mortal access to the digital asset should make this possible. However, the situation of the successor in title is not, and cannot be equated with that of

the previous beneficiary, making it impossible to speak of a literal accession of the successor in title to the rights and obligations of the deceased. The proposal takes this into account. The post-mortal status of digital assets must be based on an informed decision based not only on property issues, but also on issues of privacy and the processing of personal data.

Finally, it should be added that I am aware of the various ongoing work in various bodies relating to the status of digital assets, including that aimed at developing model solutions in the event of the death of a user.⁸⁶⁷ This should be appreciated and it should be pointed out that more institutionalised work can certainly provide a range of valuable material for discussion. At the same time, I am of the opinion that each of the proposals directed towards the future shape of this area of law requires consideration. Nonetheless, the legislative moment is now opportune, and the post-mortal status of digital assets urgently needs to be regulated.

⁸⁶⁷ The relevant work is being carried out, e.g., by the European Law Institute, and the International Institute for the Unification of Private Law. These works are available on-line:

ELI: <<https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-succession-of-digital-assets-data-and-other-digital-remains/>>, [last accessed: 30 May 2024];

UNIDROIT: <<https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/>>, [last accessed: 30 May 2024].

Cf. Spyridon V Bazinas, 'Digital Assets and Private Law: Is There a Need for a Uniform Law?' [2024] *Uniform Law Review*, advance article available on-line: <<https://doi.org/10.1093/ulr/unae005>>, [last accessed: 30 May 2024].

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