THE COMPARATIVE LAW BETWEEN BRAZIL AND SPAIN IN THE ANALYSIS OF DIGITAL INHERITANCE AND ITS DEVELOPMENTS

O DIREITO COMPARADO ENTRE BRASIL E ESPANHA NA ANÁLISE DA HERANÇA DIGITAL E SEUS DESDOBRAMENTOS

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Rui G. Ghellere[1] *– https://orcid.org/0000-0003-1022-5505*
Marcus Vinicius Mariot Pereira[2] *– https://orcid.org/0000-0002-4873-9395*

Abstract

The exponential advance of information technologies and the increasing use of the Internet in everyday life, especially for the storage of material that may or may not be of a patrimonial nature, coupled with an archaic regulatory system regarding inheritance law, both in Brazil and Spain, has brought constant problems of practical order regarding the destination of the "virtual goods and rights" of the "de whose". Thus, the objective is to briefly analyze the Spanish and Brazilian regulatory systems regarding the 'digital inheritance', finding that the current rules are innocuous for an adequate practical solution. The theoretical and historical method was used, which consists of consulting works, journal articles, electronic documents, as well as legislation pertinent to the subject in both countries. We also analyzed how digital law emerges as a new branch of law and which assets can be inherited, never leaving aside privacy in the digital age, human dignity, and the rights of personality, intrinsic to the owner of the digital asset, which endure even after his death.

Keywords: Inheritance Law, Digital Inheritance, Virtual Law, Comparative Law.

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[1] Doutor em Ciências Jurídicas e Sociais, Mestre em Direito Processual Civil e Cidadania, possui MBA Executivo em Direito: Gestão e Business Law pela FGV. Especialista Direito Público pela PUC/MG, pós-graduado em Direitos Humanos, pelo *Ius Gentium Conimbrigae*/Faculdade de Direito de Coimbra. Certificação em LGPD Pela PUC/RG. Conselheiro Estadual da OAB Paraná. Rui@AdvocaciaGhellere.com. https://orcid.org/0000-0003-1022-5505

Traduzido pelo autor, com auxílio de IA (chatgpt)

[2] Advogado, pós-graduado em Direito Processual Civil pela ESA/OAB-PR e pela Faculdade Dom Alberto, em Direito Previdenciário, Advocacia Extrajudicial e Direito e Processo do Trabalho pela Faculdade Legale (FALEGALE). Técnico em Informática pela UTFPR (Universidade Tecnológica Federal do Paraná). Professor de Direito Civil e Processo Civil no Centro Universitário Integrado, onde também supervisiona o Núcleo de Prática Jurídica. Membro da Comissão de Direito Digital da OAB/PR. *E-Mail: Marcus@AdvocaciaGhellere.com.* https://orcid.org/0000-0002-4873-9395

Resumen

El avance exponencial de las tecnologías de la información y el uso cada vez más extendido de Internet en la vida cotidiana, especialmente para el almacenamiento de materiales que pueden tener o no contenido patrimonial, unido a un sistema normativo arcaico en materia de Derecho sucesorio, tanto en Brasil como en España, ha generado constantes problemas prácticos respecto del destino de los "bienes y derechos digitales" del de cujus. Así, el objetivo del presente estudio es analizar brevemente el sistema normativo español y brasileño en lo relativo a la "herencia digital", constatando que las normas vigentes resultan ineficaces para ofrecer una solución práctica adecuada. Se utilizó el método teórico e histórico, consistente en la consulta de obras doctrinales, artículos de revistas especializadas, documentos electrónicos, así como de la legislación pertinente sobre la materia en ambos países. Asimismo, se analizó cómo el Derecho Digital surge como una nueva rama del Derecho y cuáles son los bienes susceptibles de ser heredados, sin dejar nunca de lado la privacidad en la era digital, la dignidad de la persona humana y los derechos de la personalidad, intrínsecos al titular del bien digital, que perduran incluso después de su muerte.

Palabras-clave: Derecho sucesorio; Herencia digital; Derecho digital; Derecho comparado.

Summary: 1. Introduction. 2. Digital Law. 2.1 Digital Law in Brazil. 2.2 Digital Law in Spain. 3. The Modern Concept of Inheritance. 4. Digital Inheritance. 4.1 Digital Assets Subject to Economic Valuation. 4.2 Digital Assets Without Economic Value. 5. Privacy, Human Dignity, and Personality Rights in the Digital Age. 6. Conclusion. 7. References.

1 INTRODUCTION

Over the years, the meanings of words have evolved. The concepts of law, justice, inheritance, and succession have likewise undergone significant transformations, driven both by the passage of time and by the emergence of new technologies. Such developments are not merely necessary; they are fundamental to the advancement of human society.

This is because technology has become increasingly integrated into everyday life, whether for leisure or professional activities. A new legal reality has emerged, one that remains insufficiently addressed by both Brazilian and Spanish legislation but is increasingly being brought before the courts of both jurisdictions for the resolution of disputes.

In Brazil, due to the absence of specific legislation governing many of these issues, judges currently rely on the formal supplementary sources of law. Pursuant to Article 4 of the Brazilian Law of Introduction to the Rules of Brazilian Law (*Lei de Introdução às Normas do Direito Brasileiro* – LINDB[3]), whenever the law is silent, legal gaps shall be filled through analogy, custom, and the general principles of law.

[3] BRASIL. Decreto-Lei N. 4.657, de 4 de setembro de 1942. Art. 4º Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm > Acesso em: 18 ago. 2019.

Spain, in turn, has adopted a somewhat more advanced legislative framework. Nevertheless, it remains insufficient to address several novel issues arising from technological developments, leaving claimants dependent upon judicial interpretation and, consequently, without the legal certainty that should characterize a modern legal system.

Furthermore, the law of succession arises fundamentally from the death of an individual. Since death is one of the few certainties of human existence, it is intrinsically connected to both humanity and the legal system. Both the Brazilian and Spanish legal systems establish guiding principles and general rules governing the legal effects arising from an individual's death, including, for example, the succession of the deceased's assets and liabilities[4].

Accordingly, both Brazilian and Spanish legislation have, since their inception, contained provisions regulating hereditary succession, establishing the proper allocation of the deceased's estate (*de cujus*) upon death. However, in both jurisdictions there have been few, if any, legislative amendments in the field of succession law concerning the categories of property capable of being inherited. This is because the assets enumerated by law merely reflected the social and economic reality existing at the time those statutes were enacted.

With the advent of the Internet and other digital technologies, together with their widespread use by society, the legal frameworks currently in force in both Brazil and Spain no longer accurately reflect the realities of contemporary society. Consequently, they require further scholarly analysis and legislative modernization, particularly with respect to the legal treatment and succession of the so-called **Digital Assets and Digital Rights** belonging to the *de cujus*.

Nowadays, it is common throughout the world for individuals to use the Internet to store documents, creative works, and digital files that possess significant economic and/or sentimental value. Likewise, the Internet may serve as a source of income, including in circumstances where the continued generation of revenue does not require the account holder's ongoing personal involvement, thereby allowing such economic exploitation to continue even after the death of its owner.

Accordingly, there is an increasing need to examine how the law should evolve in order to address the legal consequences arising in both the digital and succession contexts when an individual dies.

2 DIGITAL LAW

First and foremost, it is essential to understand, interpret, and apply the law as a coherent and integrated whole. The traditional division of law into distinct branches serves primarily academic purposes. Broadly speaking, legal doctrine classifies the legal system into two principal branches: public law and private law,

[4] According to Venosa (VENOSA, Sílvio de Salvo. *Direito Civil: Direito das Sucessões*. 13th ed. São Paulo: Atlas, 2013, vol. 7), the expression *de cujus* has become firmly established in legal terminology to refer to the deceased person whose estate is the subject of succession proceedings. The term derives from the Latin expression *de cujus successione agitur*.

each of which is further subdivided into increasingly specialized fields encompassing the legal order as a whole.

The emergence of a new branch of law becomes necessary when the evolution of society and human relationships reaches a point at which the existing legal framework is no longer capable of adequately regulating or protecting such developments.

In developing the **Pure Theory of Law**, the Austrian jurist and legal philosopher Hans Kelsen argued that legal norms must, in essence, reflect the contemporary realities and needs of the society to which they are addressed.[5].

Accordingly, it is inappropriate to apply anachronistic legal norms—namely, those enacted in past historical periods that no longer reflect the prevailing social and legal context. As the law is in a constant state of evolution, it requires a normative framework that remains aligned with the historical moment and the changing needs of society.[6]

Along similar lines, the Brazilian jurist Miguel Reale, in his renowned **Three-Dimensional Theory of Law**, maintains that law is the product of three interdependent dimensions: **fact, value, and norm**. According to this theory, only a factual circumstance that is regarded as socially relevant is capable of giving rise to a legal norm. Consequently, the legal order is inherently dynamic, undergoing continuous transformation in response to evolving social realities.[7]

With the advent of the **Digital Revolution** over the past decades, it has become evident that the Internet is no longer a temporary innovation but a permanent and integral component of modern society. It has become indispensable to the daily lives of virtually everyone. However, while digital technologies continue to evolve at an unprecedented pace, legislative development remains comparatively slow and often outdated. This disparity clearly demonstrates the need for a normative transformation, beginning with the recognition and consolidation of a new branch of legal science known as **Digital Law**.

As aptly observed by Eugênio Facchini Neto and Karine Silva Demoliner:

> *The Internet has revolutionized the way we live in society. The digital world is remarkable for the extraordinary ease with which information can be accessed and for having effectively transformed the world into a global village. Everything and everyone is within anyone's reach. Public oversight has become more effective and more democratic. Communication brings people closer together and eliminates distances. It has also created immeasurable business opportunities*[8].

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5 COELHO, Fábio Ulhôa, Para entender Kelsen. 4ª ed. São Paulo: Saraiva, 2001.p 47.

6 FREITAS, Viviane de Andrade, Aspectos fundamentais da Teoria Pura do Direito de Hans Kelsen. Revista Jus Navigandi, ISSN 1518-4862, Teresina, ano 21, n. 4724, 7 jun. 2016. Disponível em: https://jus.com.br/artigos/49444. Acesso em: 18 ago. 2019.

7 ALMEIDA, Juliana Evangelista de; ALMEIDA, Daniel Evangelista Vasconcelos, Direito à "morte" digital: Right to digital "death"? Belo Horizonte. 2015. Disponível em: <http://www.publicadireito.com.br/artigos/?cod=e3f8cedce7f1fa45>. Acesso em: 15 jun. 2019.

8 FACCHINI NETO, Eugênio; DEMOLINE, Karine Silva. Direito à privacidade na era digital: uma releitura do art. XII da Declaração Universal dos Direitos Humanos (DUDH) na sociedade do espetáculo. Revista Internacional Consinter de Direito, v. 5, n. 9, p.140, jul./dez. 2019.

Accordingly, the emergence and study of this new branch of law cannot be regarded as *sui generis*[9], since it is the result of the convergence of several well-established legal disciplines, including civil law, criminal law, corporate law, tax law, constitutional law, family law, among others, all of which apply, to varying degrees, within the field now recognized as **Digital Law**.

As Pinheiro explains:

> *Digital Law has therefore emerged as a contemporary branch of law that increasingly demands a strategic approach from legal professionals, emphasizing prevention far more than reaction. It is neither a law of technology nor a law of machines. Rather, it is simply the new law, providing the necessary legal responses to ensure the continued protection of legal certainty in the relationships between natural and legal persons*[10].

Along the same lines, Patricia Peck, a lawyer specializing in Digital Law, argues that this branch of law may be defined as follows:

> *(...) Digital Law provides the opportunity to apply, within a coherent legal framework, a series of principles and solutions that had previously been applied in a fragmented manner—principles and solutions rooted in what is commonly referred to as* ***Customary Law****. This coherence of legal reasoning makes it possible to achieve consistent outcomes and to fill gaps that had never before been adequately addressed, both in the physical and the virtual environments, since it is the manifestation of human will, in its various forms, that unites these two worlds within the legal context.*[11]

It may therefore be concluded that whenever society, as a whole, changes the way its members interact with one another, the law must likewise evolve to keep pace with such continuous and ongoing transformation. It is evident, however, that legislation cannot progress at the same speed as society itself. Nevertheless, it should strive to remain as closely aligned as possible with social change in order to preserve its effectiveness and avoid becoming obsolete and devoid of practical purpose.

It is also worth noting that, in 2011, the United Nations (UN) recognized access to the Internet as a fundamental human right, emphasizing that it is unacceptable for States to fail to invest in technologies capable of connecting their populations or to enact legislation aimed at restricting communication through the global Internet[12].

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9 The Latin expression *sui generis* literally means **"of its own kind"** or **"unique in its nature.**

10 PINHEIRO, Patrícia Peck e Cristiana Moraes Sleiman, Tudo que você precisa saber sobre direito digital no dia a dia, São Paulo: Saraiva. 2009, p. 25.

11 PINHEIRO, Patrícia Peck, Direito Digital, 5 ed. rev. atual. e ampl. de acordo com as Leis n° 12.735 e 12.737, de 2012. São Paulo: Saraiva, 2013, p. 77.

12 ONU afirma que acesso à internet é um direito humano. 2011. Disponível em: <http://g1.globo.com/tecnologia/noticia/2011/06/onu-afirma-que-acesso-internet-e-umdireito-humano.html>. Acesso em: 04 set. 19.

Some countries, however, had already enacted legislation on this subject long before the United Nations' recognition of Internet access as a fundamental human right. A notable example is Estonia, a Northern European country with a population of approximately 1.3 million inhabitants, whose Parliament enacted legislation in 2000 granting digitally certified signatures the same legal validity as traditional handwritten signatures, which had been used for centuries.

Even so, both Spain and Brazil have made only modest legislative advances in this area, particularly with regard to the regulation of **digital succession rights**.

2.1 Digital Law In Brazil

Constitutional Amendment Proposal (PEC) No. 6/2011, introduced by Senator Rodrigo Rollemberg (PSB/DF), was submitted to the Brazilian Federal Senate with the objective of including access to the Internet among the social rights set forth in Article 6 of the Federal Constitution, thereby recognizing it as a constitutionally protected social right.

However, the proposal was archived at the end of the legislative term pursuant to Article 332 of the Internal Rules of Procedure of the Federal Senate, which provides that all legislative proposals still pending at the close of a legislative session shall be archived.

Nevertheless, a similar proposal remains under legislative consideration. Originally introduced in 2015 and advancing through the legislative process in 2017, Constitutional Amendment Proposal (PEC) No. 185/15 was declared admissible by the Chamber of Deputies' Constitution, Justice and Citizenship Committee (Comissão de Constituição e Justiça e de Cidadania – CCJ). The proposal seeks to include **universal access to the Internet** among the fundamental rights guaranteed by the Federal Constitution by inserting subsection LXXIX into Article 5.

In this context, it is also necessary to consider the financial implications that such constitutional recognition would have for Brazilian society. If Internet access is ultimately classified as a **fundamental right**, the State would be required to ensure that all Brazilians have effective access to the Internet. Such a commitment would necessarily entail, for example, the provision of adequate technological infrastructure, including access to computers and reliable, high-quality Internet connectivity.

Furthermore, Law No. 12,965/2014, commonly known as the **Brazilian Civil Rights Framework for the Internet (Marco Civil da Internet)**, provides in Article 7, within the chapter addressing users' rights and guarantees, that Internet access is essential to the exercise of citizenship. However, the statute makes no reference to the transmission of digital assets through inheritance or to the classification of virtual assets as property capable of forming part of a decedent's estate.

There is little doubt that the constitutional recognition of Internet access and digital technologies as fundamental rights under Brazilian law is only a matter of time. Such recognition will inevitably produce significant consequences across the

legal system as a whole, making it essential to establish appropriate legal safeguards and regulatory provisions capable of ensuring the effective protection of citizens' rights.

2.2 Digital Law In Spain

Spain began regulating the Internet at an early stage with the enactment of **Law No. 34/2002**, which governs electronic commerce and information society services. At the time of its enactment, the legislation was regarded as highly progressive, as it already contained provisions concerning, among other matters, the liability of third parties and the responsibility of hosting service providers (FERREIRA, 2017[13]).

> *In Spain, legislation specifically addressing the Internet has existed since 2002, notably through **Law No. 34/2002**, which regulates electronic commerce and information society services. Article 16 of that statute specifically addresses third-party liability in relation to hosting service providers.*

Another example is the controversial **Sinde Law**, which entered into force in 2012 with the primary purpose of combating piracy. The law imposed severe sanctions on content providers in cases of copyright infringement[14]. Under this legal framework, websites may be shut down or blocked within ten days. The law applies not only to websites that host unlawful content, but also to websites containing links that redirect users to other sites hosting such content.

Likewise, the law enabled greater control over content made available on the Internet, since service providers are required to disclose to the State the data necessary to identify users who commit unlawful acts. However, the statute does not provide for any penalty against individuals who download unlawful content[15].

With regard to **digital inheritance**, the Spanish legal framework may be summarized as follows: (i) the **Spanish Civil Code**, which governs succession in relation to property in general; (ii) **Organic Law No. 1/1982**, concerning the civil protection of honor, personal and family privacy, and one's own image; (iii) the **Organic Law on the Protection of Personal Data of 1999**, which remained in force until the approval of the new Organic Law on the Protection of Personal Data, then still under legislative consideration; and (iv) the **European General Data Protection Regulation (GDPR)**, which likewise governs the protection of personal data.

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[13] FERREIRA, JONAS RENATO, Direito Comparado- Direito Digital Brasileiro. disponível em <https://www.adlogados.com/artigos/visualizar/direito-comparado-direito-digital-brasileiro.> Acesso em 01 jun. 2021.

[14] CARTILHA MARCO CIVIL DA INTERNET – Ministério Público do Estado de São Paulo. Disponível em: <https://criminal.mppr.mp.br/arquivos/File/Cartilha_Marco_Civil_da_Internet.pdf> Acesso em 01 jun. 2021.

[15] VENTURA, FELIPE. Nova Lei antipirataria na Espanha fecha sites ilegais em até dez dias. Gizmodo Brasil. Publicado em 16 de fevereiro de 2012. <https://gizmodo.uol.com.br/nova-lei-antipirataria-na-espanha-fecha-sites-ilegais-em-ate-dez-dias/> Acesso em 01 jun 2021.

With respect to the liability of online service providers for damages caused to third parties, Fiorillo *et al.* offer the following insightful observations:

> *An interpretative and comparative analysis of the issues discussed above reveals that, in Spain, both the domestic legal system and the European Union legal framework recognize that the principle of human dignity and the rights to freedom of expression and information are not absolute. Consequently, online service providers are required to maintain appropriate mechanisms capable of preventing the dissemination of content that unlawfully infringes upon an individual's reputation or image, failing which they may incur legal liability.*[16]

It should be emphasized, however, that the legal framework governing digital assets remains, as in Brazil, ambiguous, non-specific, and insufficiently developed.

3 THE MODERN CONCEPT OF INHERITANCE

In brief, inheritance, in both Brazil and Spain, consists of the estate left by the deceased to his or her heirs. Accordingly, it is essential to examine the legal concept of **estate** in order to clarify the subject under discussion. As explained by Sílvio de Salvo Venosa:

> *Accordingly, inheritance falls within the broader concept of an estate. It should be understood as the estate of the **de cujus**. An estate may be defined as the aggregate of all proprietary rights and obligations, including both assets and liabilities, belonging to a person. Consequently, inheritance consists of the estate of the deceased, that is, the estate of the **de cujus**.*[17]

According to Pablo Stolze:

> *Under the classical conception, an **estate** is the economic expression of the individual, intrinsically linked to legal personality and understood as an abstract legal universality that exists throughout a person's lifetime, regardless of the substitution, increase, or decrease of the assets composing it.*[18]

Nevertheless, this traditional concept has been the subject of considerable criticism and has gradually evolved into a broader understanding. A significant portion of legal scholarship and case law now advocates the application of an objective criterion based on the **universality of rights** comprising the estate left by the *de cujus*. Under this approach, the analysis is no longer confined to tangible assets possessing economic value; rather, it encompasses the entire body of legal

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16 FIORILLO, Celso Antonio Pacheco; FULLER, Greice Patrícia; LIMA, Marco Antonio. Aspectos Atuais e Problemáticos no Âmbito da Responsabilidade do Provedor de Serviços em Face do Meio Ambiente Digital no Direito Ambiental Brasileiro e Espanhol. Revista Internacional Consinter de Direito, v. 5, n. 9, p. 119-140, jul./dez. 2019.

17 VENOSA, S. S, Direito civil: direito das sucessões, v. 7. 15. ed. São Paulo: Atlas, 2015. p. 07.

18 GAGLIANO, Pablo Stolze Novo curso de direito civil, volume 7: direito das sucessões / Pablo Stolze Gagliano, Rodolfo Pamplona Filho. – 6. ed. – São Paulo: Saraiva Educação, 2019. P. 55

relationships associated with a natural or legal person, provided that such rights and obligations possess at least a minimum degree of economic value.

What is beyond dispute—and is expressly provided for under both Brazilian and Spanish legislation—is that the estate constitutes a single and indivisible legal universality, held jointly by the heirs under a regime of co-ownership until the partition of the estate is completed.

The first provision governing succession under the Spanish Civil Code, namely **Article 657**, contained in Title III (*De las Sucesiones*), under the heading *Disposiciones Generales*, embodies the **principle of *saisine***, a fundamental doctrine of succession law that is likewise enshrined in Article 1,784 of the Brazilian Civil Code. Under this principle, the death of the deceased automatically and immediately transfers the estate to his or her successors.

4 DIGITAL INHERITANCE

Digital inheritance comprises all digital assets acquired by the *de cujus* during his or her lifetime that are stored on servers, digital platforms, and computerized systems. Neither the Brazilian Civil Code nor the Spanish Civil Code, nor any other legislation governing succession in either jurisdiction, contains specific provisions addressing digital inheritance. This legislative gap may prove both detrimental and problematic in particular cases, given the social, economic, and sentimental value that such digital assets and files may possess.

In principle, digital assets encompass both intellectual property and the rights and obligations assumed by the *de cujus*, all of which form part of the digital estate and may therefore be subject to succession.

> *In principle, digital assets include both intellectual property stored on any type of digital device and all rights and obligations assumed by the de cujus (such as contracts, subscriptions, and similar legal relationships). Together, these elements constitute the **digital estate** and may therefore be transferred through inheritance*[19].

It is evident that, in the absence of specific and comprehensive legislation governing digital inheritance in either Brazil or Spain, the safest course of action is for individuals to execute a will expressly setting out the intended disposition of their digital assets and digital rights.

In 2011, the technology section (*Caderno TEC*) of the Brazilian newspaper *Folha de São Paulo* published a report on digital inheritance. Based on a British survey, the report concluded that people in the United Kingdom were already concerned about the value of the assets they stored in the cloud and had begun including in their wills collections of music, films, and books that existed exclusively in digital form.

[19] DIGITAL GUIDE IONOS. *La herencia digital: gestionar nuestro legado em la red.* Disponível em: <https://www.ionos.es/digitalguide/paginas-web/derecho-digital/la-herencia-digital/>

> *A recent study conducted by the Centre for Creative and Social Technologies at Goldsmiths, University of London, found that **30% of British respondents** regard their online possessions as part of their **digital inheritance**, while **5%** have already taken legal steps to determine the disposition of those assets after their death. A further **6%** reported that they intended to do so in the near future.*
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> *The researchers estimated that, collectively, British citizens held digital assets stored in the cloud worth the equivalent of approximately **R$ 6.2 billion**. According to Kelly Harmer's own estimates, her digital estate—including more than one thousand music albums purchased exclusively online—was worth approximately **R$ 27,000**.*[20]

The same report also observed a significant change in the relationship between lawyers and their clients, reflecting the emergence of this new legal reality. According to Chris Brauer, Co-Director of the Centre and one of the study's authors, this change has occurred because lawyers now routinely ask their clients whether they own valuable online assets, and many clients discover that the answer is affirmative.[21]

As a general rule, when an individual creates an account on a social networking platform, a cloud backup and file synchronization service, or even an e-mail service provider, there is virtually no opportunity to negotiate the contractual terms. In many instances, users do not even read the contractual provisions presented to them, as these agreements are typically concluded through **standard-form contracts (contracts of adhesion)**.

Consequently, users—and parties to such agreements—generally neither know nor exercise effective control over the disposition of their digital files and digital assets upon their death.

Therefore, based on the broader interpretation of the legal concept of an **estate** discussed in the preceding section, and in the absence of an express declaration of the *de cujus* regarding the disposition of his or her digital estate, only those digital assets to which an economic value can be attributed should be transferred through inheritance. On this point, Augusto and Oliveira observe:

> *Under the Brazilian legal system, there is no legal impediment to recognizing the transfer of digital files as part of an individual's estate, particularly when they arise from legal relationships possessing economic value. The inclusion of such content within the decedent's estate also makes it possible to transmit the deceased's cultural legacy to his or her heirs, thereby ensuring the continuity of knowledge and preserving the identity of the individual within his or her social context.*[22]

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[20] Herança Digital. Caderno TEC da Folha de São Paulo, 2011. Disponível em: <https://www 1.folha.uol.com.br/fsp/tec/tc0211201101.htm>. Acesso em: 12 jun. 2021

[21] Herança Digital. idem. Acesso em: 21 ago. 2019

[22] AUGUSTO, N. C.; OLIVEIRA, R. N. M. de, A possibilidade da transmissão de bens digitais "causa mortis" em relação aos direitos personalíssimos do "de cujus". In: CONGRESSO INTERNACIONAL DE DIREITO E CONTEMPORANEIDADE: MÍDIAS E DIREITOS DA SOCIEDADE EM REDE, 3., 2015, Santa Maria. Anais... Santa Maria, 2015. Disponível em: <http://coral.ufsm.br/congressodireito/anais/2015/6-16.pdf>. Acesso em: 26 jul. 2019.

Nevertheless, neither Brazilian nor Spanish legislation prevents individuals from including provisions concerning their digital assets in **wills** or **codicils**. In Spain, an equivalent mechanism exists in the form of the **holographic will (*testamento ológrafo*)**, through which individuals may determine the disposition of their digital assets, regardless of whether such assets possess economic value.

A **codicil**, in turn, consists of testamentary dispositions of limited scope or value. In essence, it is a simplified expression of a person's last wishes that does not require the same formalities as a will, since it concerns matters regarded as being of lesser importance to both the deceased and his or her heirs.

Cases involving digital inheritance have increasingly come before courts around the world. In response, several technology companies have developed tools designed to facilitate the posthumous management and transfer of digital assets. Facebook and Google, for example, have introduced features such as **Legacy Contact** and the **Inactive Account Manager**, enabling account holders to designate a trusted individual to manage certain aspects of their accounts after death[23] while establishing limitations intended to preserve the privacy of the *de cujus*.

4.1 Digital Assets With Economic Value

As society continues to evolve at an increasingly rapid pace, so too has the legal understanding of what constitutes an asset capable of economic valuation. Traditionally, only tangible, physical, and corporeal property was regarded as forming part of an individual's estate. Technological development, however, has fundamentally altered this perspective. Today, virtual assets are fully capable of possessing economic value, in some cases reaching substantial monetary amounts.

As Sâmia Frantz observes, economically valuable digital assets include, for example, collections of original works created by the individual, such as music, poems, literary texts, and photographs, as well as digital currencies, including **Bitcoin**[24]**.** As a general rule, digital assets existing in virtual environments that possess an inherent economic value should form part of the decedent's estate, since they fall within the legal concept of an **estate** and, consequently, are subject to inheritance.

Costa Filho states:

> *Digital assets stored in virtual environments that are capable of economic valuation unquestionably form part of the estate and, therefore, belong to the heirs irrespective of any express provision in a will. By contrast, heirs may gain access to and take possession of digital assets lacking economic value only upon the prior expression of the de cujus' wishes and by judicial authorization.*[25]

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[23] BRANCO, Sérgio, Memória e esquecimento na internet. Porto Alegre, Arquipélago Editorial, 2017. P. 68.

[24] Herança digital e direito sucessório: tudo o que você precisa saber. Disponível em: < https://blog.sajadv.com.br/heranca-digital/ >. Acesso em: 21 ago. 2019>

[25] COSTA FILHO, Marco Aurélio de Farias. Herança digital: Valor patrimonial e sucessão de bens armazenados virtualmente. Revista Jurídica da Seção Judiciária de Pernambuco. 2016, p. 213

Furthermore, both the Brazilian and Spanish legal systems prohibit the intentional concealment of estate assets by the administrator of the estate, an heir, or the executor of the will, imposing sanctions that vary according to the status of the person responsible for the misconduct.

Under Brazilian law, where such concealment is committed by an heir, that heir forfeits all rights to the concealed asset or, if it has already been disposed of, becomes liable for its value together with any resulting damages, pursuant to Articles 1,992 and 1,995 of the Brazilian Civil Code.

Where the concealment is committed by the administrator of the estate (*inventariante*), he or she shall be removed from that office and, if also an heir or surviving spouse entitled to a share of the marital property, shall likewise forfeit any rights over the concealed asset. In Brazilian law, concealment is deemed to occur only after the filing of the initial and final estate declarations, when assets are intentionally omitted and the declarant falsely asserts that no additional assets remain to be included in the probate proceedings, pursuant to Articles 1,993 and 1,996 of the Brazilian Civil Code and Article 621 of the Brazilian Code of Civil Procedure.

Finally, where the concealment is committed by the **executor of the will (*testamenteiro*)**, the executor shall be removed from office and shall forfeit the statutory remuneration (known in Brazilian law as the *vintena*), pursuant to Article 625(VI) of the Brazilian Code of Civil Procedure.

Moreover, it should not be overlooked that the Internet and social media platforms are increasingly being used as a primary means of generating income, often constituting an individual's sole source of livelihood due to their accessibility and extensive reach. To illustrate this issue, one may consider the example of a deceased person who leaves behind a highly profitable website that generates advertising revenue. Because such an activity does not depend upon the personal performance of its creator, it may be continued by another individual or, even if no successor actively manages it, the website may remain accessible indefinitely and continue generating revenue for as long as it remains online.

Accordingly, where digital assets are disposed of by testamentary provisions and the deceased leaves **forced heirs**, the economic value of such digital assets must necessarily be determined. Depending on the nature of the digital asset involved, its value may exceed one-half of the decedent's estate, thereby violating the rule established in Article 1,857(1) of the Brazilian Civil Code, which provides that a testator may freely dispose of only one-half of his or her estate, the remaining portion being reserved by law for the forced heirs.

Furthermore, with regard to digital assets possessing economic value, it may be concluded that the digital estates of Internet users continue to expand year after year. Given the ongoing pace of technological development, the logical expectation is that the economic value of such digital assets will increase exponentially.

In 2012, the digital security company McAfee conducted a survey concerning the value of digital assets in Brazil. The study revealed that the average value

attributed by Brazilian respondents to their digital estates was approximately **R$ 238,826.00** (two hundred and thirty-eight thousand, eight hundred and twenty-six Brazilian reais). To illustrate the significance of this amount, each respondent, on average, valued his or her digital estate at more than **383 times the monthly minimum wage** then in force in Brazil, which at the time of the survey was **R$ 622.00** (six hundred and twenty-two Brazilian reais).

Furthermore, the same survey found that approximately **38%** of respondents' digital files—representing an average of **3,712 files** stored on digital devices—were considered irreplaceable. These files were collectively valued at more than **R$ 90,745.00** (ninety thousand, seven hundred and forty-five Brazilian reais).

The survey assessed a wide range of digital assets, including downloaded music, personal memories (such as photographs), personal communications (including e-mails and notes), personal records (such as health, financial, and insurance information), career-related information (including résumés, professional credentials, cover letters, and e-mail contacts), as well as hobbies and creative projects.

4.2 Digital Assets Without Economic Value

There are also situations in which the Internet is used not as a means of generating income, but rather as a repository for digital content such as photographs, e-books, music, and videos. In such cases, many digital files may not possess measurable economic value; nevertheless, they often carry considerable sentimental or informational significance for their owner.

Accordingly, neither Brazilian nor Spanish law prevents digital assets lacking economic value from being transferred to the deceased's heirs through testamentary dispositions, such as a will.

However, as discussed in the preceding sections, testamentary succession is subject to statutory limitations. Within this context, Augusto and Oliveira observe that:

> *It should be noted, however, that not all of the deceased's rights and obligations are capable of being transmitted through succession. Certain rights are extinguished upon death because of their strictly personal nature, such as parental authority, guardianship, curatorship, and political rights. Likewise, certain proprietary rights and obligations arising from obligations of a non-fungible and strictly personal character are also non-transferable.*[26]

Even where digital assets are of a strictly personal nature and the corresponding rights are extinguished upon the user's death, it must also be recognized that one of the defining characteristics of the Internet is its capacity to disseminate information rapidly and on a global scale. Consequently, once a news

[26] AUGUSTO, Naiara Czarnobai; A possibilidade jurídica da transmissão de bens digitais "causa mortis" em relação aos direitos personalíssimos do "de cujus" 3 congressos internacional direito e contemporaneidade: mídias e direitos da sociedade em rede. Anais 3 Santa Maria (RS): UFSM, 2015. Disponível em: http://coral.ufsm.br/congressodireito/anais/2015/6-16.pdf. Acesso em: 02 set. 19

item, image, or video has been widely distributed online, it may remain permanently accessible, leaving its creator or owner with no effective means of measuring the extent of its dissemination or exercising control over its subsequent circulation.

5 PRIVACY, HUMAN DIGNITY, AND PERSONALITY RIGHTS IN THE DIGITAL AGE

It is evident that the enactment of specific legislation governing this legal issue in both Brazil and Spain is becoming increasingly likely and is, indeed, necessary. Nevertheless, any future legislative framework must not overlook the legal protection afforded to the honor, privacy, and intimacy of the *de cujus* when addressing the succession of digital assets.

According to Article 1 of the **Brazilian Federal Constitution**, the foundational principles of the Federative Republic of Brazil are sovereignty, citizenship, the social values of labor and free enterprise, political pluralism, and, above all, **human dignity**, which constitutes the fundamental principle underlying the entire system of fundamental rights.

The **Spanish Constitution**, in turn, provides in Article 1 that: "*Spain is hereby established as a social and democratic State governed by the rule of law, whose supreme values are liberty, justice, equality, and political pluralism*"[27].

According to the Brazilian scholar Pedro Lenza, **personality rights** are existential subjective rights that are intrinsic and inherent to the very existence of the human person. The legal system grants every natural person the legal authority to protect the attributes of his or her personality. Accordingly, these subjective rights may be violated, and such a violation gives rise to a legal claim, that is, an enforceable right to seek legal protection.[28]

It should also be noted that, in addition to being recognized as fundamental constitutional principles within the Brazilian legal system, personality rights are expressly protected by Articles 5 (caput and items V, X, XII, XXVI, LIV, LX, LXXII, and LXXV), 199(4), 225(1)(V), 227 (caput and paragraph 6), and 230 of the **Brazilian Federal Constitution**.

It is also important to emphasize that, in both legal systems, **personality rights** are grounded in the principle of **human dignity**. Accordingly, these two legal concepts are intrinsically interconnected and should therefore be interpreted and applied from the same constitutional perspective.

As a general rule, pursuant to Article 11 of the **Brazilian Civil Code**, personality rights are **inalienable**, **non-waivable**, and **non-transferable**. Consequently, they are extinguished upon the death of the individual. The same principle applies under Spanish law by virtue of Article 32 of the **Spanish Civil**

[27] Tradução livre do original: "España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo político."

[28] LENZA, Pedro, OAB primeira fase: volume único. 2. ed. São Paulo: Saraiva, 2017. P. 200

Code. Nevertheless, certain aspects of the deceased's personality rights may continue to receive legal protection through actions brought by close family members.

> *What is transmitted through succession is not the **personality right** itself, but rather the patrimonial effects arising from that right, where such effects exist. The personality right remains inviolable and non-transferable, even if its holder wishes to transfer it, since what is inherent to the individual cannot be separated from the person. A person does not transfer his or her image and thereby become deprived of it for a period of time. Rather, what may be transferred or licensed is a specific manifestation of that image—such as a photograph, a film, or a recording—which derives from the underlying personality right. The rule established by the Civil Code is therefore correct. Distinguishing between the non-transferability of personality rights themselves and the transferability of their patrimonial effects, the Brazilian Superior Court of Justice (STJ), in **REsp No. 268.660**, recognized the right of a mother to defend the image of her deceased daughter, holding that: "The image of a well-known person continues to produce economic effects even after death; consequently, the deceased's successors acquire standing, in their own right, to seek compensation before the courts. Such standing concerns the patrimonial effects of succession (including compensation for non-pecuniary damage). By contrast, the protection of the deceased daughter's image does not constitute the mother's own substantive right, but rather her legal standing to protect the rights of another."*[29]

Under Brazilian law, the right to privacy is expressly protected by Article 5(X) of the **Federal Constitution**, Article 21 of the **Brazilian Civil Code**, and Articles 7(I), 21, and 23 of **Law No. 12,965/2014**, commonly known as the **Brazilian Civil Rights Framework for the Internet (Marco Civil da Internet)**. Privacy is recognized as an inviolable right that must be respected by Internet application providers, and violations of this right may give rise to civil liability where third-party rights are infringed.

Article 21 of the **Brazilian Civil Code** establishes the principle of the inviolability of the private life of natural persons. Pursuant to that provision, upon the request of an interested party, the courts shall adopt the measures necessary to prevent or bring to an end any act that violates this right. Legal scholarship likewise recognizes that the fundamental element of the **right to intimacy**, as one of the principal manifestations of the broader right to privacy, is the individual's entitlement to preserve a sphere of personal seclusion, ensuring that certain aspects of his or her private life remain beyond the knowledge of third parties[30].

Similarly, Article 18(3) of the **Spanish Constitution** guarantees the secrecy of communications, irrespective of whether their content is of an intimate nature. This constitutional protection extends not only to the substance of communications but also to their metadata and to the identities of the communicating parties. Consequently, careful consideration must be given to balancing the *de cujus*'

[29] LOBO, Paulo, Direito Civil: parte geral. 6 ed. São Paulo: Saraiva, 2017. P. 132

[30] BITTAR, Carlos Alberto, Os Direitos da Personalidade, 3. ed., Rio de Janeiro: Forense, 1999, p. 49.

constitutional right to privacy against the alleged succession rights of his or her heirs with respect to access to such communications and digital content.

Accordingly:

> *...the most appropriate course of action is to specify by will what should happen to one's online accounts and profiles, who should succeed to subscriptions for online services and streaming platforms, who should inherit one's collection of digital films and music, and who should receive the funds held in a PayPal account.*[31].

There are numerous situations in everyday life that are inherently associated with the concepts of privacy and intimacy, traditional correspondence being a clear example. The same rationale applies to certain digital files and assets stored in virtual environments, particularly e-mails, which constitute the electronic equivalent of traditional correspondence. Accordingly, the content of such communications should enjoy the same legal protection afforded to physical correspondence. Under Brazilian law, this protection does not cease merely because of the individual's death and must therefore continue to be respected even *post mortem*.

Accordingly, with respect to digital assets, the principle of privacy must always remain a central consideration, since they frequently contain a wide range of highly personal information concerning the individual. On this point, Sérgio Branco observes, in discussing memory and the right to be forgotten on the Internet, that the expectation of confidentiality in digital environments is considerably greater than the expectation of privacy ordinarily enjoyed in the physical world.[32]

Accordingly, both Brazilian and Spanish law have, to date, given priority to the protection of the deceased's privacy, recognizing it as an extension of his or her personality rights, with respect to the data and digital assets stored in virtual environments, even when weighed against the succession rights of the heirs. This apparent conflict between privacy rights and succession rights arises only where the *de cujus* has failed to express his or her final wishes concerning such digital assets and data, whether by means of a will or, where legally permissible, a codicil.

Once again, the observations of Eugênio Facchini Neto and Karine Silva Demoliner are particularly instructive:[33]:

> *This is true for both developing and developed countries. As Posner recently observed, "the fact that no one can function in modern society without continuously*

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[31] Tradução livre de: "Así las cosas, lo más recomendable es establecer por testamento qué va a pasar con tus cuentas y perfiles, quién se encargará de cancelar suscripciones, a quién le legarás tu colección de películas y discos virtuales y qué pasará con tu depósito en PayPal. Eso sí, sin olvidar dejar las contraseñas actualizadas a buen recaudo pero al alcance de tus herederos." Disponível em https://www.ionos.es/digitalguide/paginas-web/derecho-digital/la-herencia-digital/

[32] BRANCO, Sérgio. Memória e esquecimento na internet. Porto Alegre: Arquipélago Editorial, 2017. P. 110.

[33] FACCHINI NETO, Eugênio; DEMOLINE, Karine Silva. Direito à privacidade na era digital: uma releitura do art. XII da Declaração Universal dos Direitos Humanos (DUDH) na sociedade do espetáculo. Revista Internacional Consinter de Direito, v. 5, n. 9, p.140, jul./dez. 2019.

> *disclosing personal information to a wide range of entities has accustomed most Americans to a dramatic reduction in their informational privacy."*
>
> *Indeed, we live in an increasingly intrusive world, one in which personal privacy is being dramatically eroded. Perhaps this is an inexorable trend that can only be acknowledged. "Privacy is dead. Get over it." Thus declared Scott McNealy, Chief Executive Officer of Sun Microsystems, in 1999. He was not alone. The obituary for privacy has since been written by numerous scholars and commentators. Perhaps so. Others, however, contend that such a requiem is premature and that the protection of privacy remains a cause worth defending. The invaders may stand at the gates, but the citadel will not fall without resistance. After describing the world of* ***surveillance capitalism*** *in more than five hundred pages, Shoshana Zuboff concludes her work by observing: "The Berlin Wall fell for many reasons, but above all because the people of East Berlin said: 'No more!' We too can become the authors of many new 'great and beautiful' facts that reclaim the digital future as the home of humanity. No more! Let this be our declaration." (Author's free translation.)*

Accordingly, the issue of **digital inheritance** must always be examined alongside—and in tension with—the *de cujus*' right to privacy. To what extent should information that remains "locked away in the digital cloud" be accessible to the deceased's successors? Are there secrets that the *de cujus* is entitled to take to the grave? Does the right to privacy, together with its constitutional protection, cease upon death, thereby allowing such rights to be effectively "inherited" by the deceased's successors? These are practical questions for which the current legal framework still fails to provide satisfactory answers.

6 CONCLUSION

This study has examined the legal feasibility and practical necessity of recognizing the **digital estate** as part of an individual's estate under both Brazilian and Spanish law. It has done so in light of the exponential growth in the use of digital technologies in everyday life and the legal challenges surrounding the transfer of digital assets through succession, while consistently taking into account the competing interests arising from the deceased's right to privacy.

This brief essay has not sought to provide an exhaustive analysis of a subject of such breadth and complexity. Rather, its purpose has been to raise essential questions concerning the emerging field of succession law as it relates to digital assets and digital rights. These are issues that legal scholarship must continue to explore in order to guide future legislative action and reduce the legal uncertainty that presently surrounds this area of law.

It is evident that, at present, neither Brazil nor Spain has enacted specific legislation governing the transmission of the *de cujus*' digital assets to his or her heirs, although the legislatures of both countries have already begun to address this matter.

Until a comprehensive statutory framework is established, the most appropriate legal solution remains the execution of a **will** or, where legally permissible, a **codicil**, expressly providing for the disposition of digital assets.

In Brazil, where the *de cujus* has left no testamentary instructions regarding his or her digital assets, a clear conflict arises between constitutionally protected rights. On the one hand, there is the **right to inheritance**, expressly guaranteed by Article 5(XXX) of the **Brazilian Federal Constitution**. On the other hand, there is the **right to privacy**, protected by Article 5(X) of the same Constitution. Reconciling these competing constitutional interests remains one of the principal legal challenges in the field of digital inheritance.

A similar tension exists under Spanish law. Article 33(1) of the **Spanish Constitution** recognizes that *"the right to private property and to inheritance is guaranteed"* (*"Se reconoce el derecho a la propiedad privada y a la herencia"*). This constitutional guarantee must, however, be balanced against the protections afforded by **Organic Law No. 1/1982**, concerning the civil protection of honor, personal and family privacy, and one's own image, as well as by the **Organic Law on the Protection of Personal Data of 1999**, which remained in force until the enactment of the subsequent Organic Law on data protection. These legal instruments collectively safeguard the privacy and personal data of individuals, including in situations involving post-mortem digital assets.

Accordingly, it is evident that a **digital estate** may possess patrimonial value and, as such, form part of the deceased's estate for purposes of succession. Nevertheless, given the current regulatory landscape—characterized by the absence of settled case law and specific legislation governing digital inheritance—it must be acknowledged that, unless effective legal measures are adopted, a substantial portion of an individual's digital estate is likely to be lost upon death, to the detriment of his or her heirs in both Brazil and Spain. This outcome is a direct consequence of the legal uncertainty that continues to surround this area of law.

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