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Dignidade humana e direitos fundamentais:

Festschrift em homenagem ao Prof. Ingo W. Sarlet

Arte da capa:
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Editora Fundação Fênix

Nesta obra, o leitor terá acesso a artigos de excelência, que evidentemente perpassam o tema dos Direitos Fundamentais. Trata-se de um *Festschrift* com um rigor acadêmico e científico facilmente observado na relação dos autores. São docentes e pesquisadores com experiência em instituições renomadas do Brasil e do exterior que reverenciam a admirável trajetória acadêmica do Professor Ingo Wolfgang Sarlet, amplamente reconhecida por seus pares. O Professor Ingo Sarlet figura entre os constitucionalistas mais citados do Supremo Tribunal Federal. No *Google Scholar*, possui mais de 28 mil referências. Publicou mais de 200 títulos no Brasil e 30 no exterior, entre livros, capítulos e artigos. Este é o grande presente com que fomos agraciados, além, é claro, da pessoa íntegra e generosa que é, sempre disposta a auxiliar os que percorrem o caminho da produção acadêmica de excelência. Por essa razão, esta obra, além de representar um grande respeito e admiração ao Professor Ingo, celebra sua significativa e duradoura contribuição para a sociedade e para as letras jurídicas.

Os Organizadores.

Editora Fundação Fênix

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Série Direito

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SUMÁRIO

21. EFFECTS OF FUNDAMENTAL RIGHTS ON RELATIONS BETWEEN PRIVATE PARTIES AND PERSONALITY PROTECTION: BREAKING NEW GROUND[1]

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Marion Albers[2]

I. Introduction

How to guarantee privacy and personality protection under Internet conditions is the subject of much ongoing debate. As a socio-technical arrangement, the Internet is both a factor in and a product of modern society and comes together with fundamental social change. With regard to fundamental rights and the protection of privacy and personality, the Internet and the social arrangements that it makes possible raise a multitude of more or less novel issues. Among the illustrative examples are the problems of advanced possibilities of far-reaching surveillance, of appropriate regulation of search engines or platform operators, of managing the problem of "digital assets" that persists in social media accounts, or, last but not least, of the questions around a "right to be forgotten".[3] New solutions must be developed in terms of both the doctrinal construction of fundamental rights and the specification of their protection. *Ingo Sarlet* has devoted himself to both these aspects with a constantly vivid interest and profoundly innovative works. As we all know, he is the author of numerous foundational books, articles and other contributions on comprehending fundamental rights and protecting the individual.

In the first part, this article focuses on the notion of the effects of fundamental rights on relations between private parties. This issue is already covered by *Ingo Sarlet´s* doctoral thesis he successfully completed at the renowned University of

[1] Dedicated to *Ingo Sarlet* for his 60th birthday.
[2] *Hamburg University*
[3] See the manifold articles in Marion Albers/Ingo Wolfgang Sarlet (eds.), Personality and Data Protection Rights on the Internet, Dordrecht/Heidelberg/London/New York: Springer (Ius Gentium), 2022.

Munich and thoroughly elaborated in other works he has subsequently written.[4] He has correctly pointed out that the common terms "horizontal effect", "third-party effect" or "*Drittwirkung*" are imprecise and not suited to handle the complexity of the problem.[5] At least, they are based on a preunderstanding which we do not need to share. Thus, as long as I do not quote other scholars or court decisions, I prefer to refer more comprehensively to the "effects of fundamental rights on relations between private parties". The detailed development of such effects becomes particularly important in the Internet society. In my analysis, I focus primarily on the German Basic Law´s fundamental rights and the German Federal Constitutional Court (FCC) jurisdiction. In his numerous collaborations and joint research projects, *Ingo Sarlet* has frequently examined the German legal situation from a comparative point of view. Due to their major significance and the strong position of the FCC, the contents and doctrine of the Basic Law´s fundamental rights have been elaborated widely and in a differentiated manner. Accordingly, the jurisdiction of the FCC is influential within the network of jurisdiction including the FCC, the European Court of Human Rights (ECtHR), and the European Court of Justice (ECJ) – a network of factual and legal interrelationships within which courts and their decisions increasingly interact.[6] The advancements of the understanding of fundamental rights are analyzed as far as the effect of fundamental rights on the relationships between private persons is concerned.

[4] Ingo Wolfgang Sarlet, Die Problematik der sozialen Grundrechte in der brasilianischen Verfassung und im deutschen Grundgesetz. Eine rechtsvergleichende Untersuchung, Peter Lang Verlag, Frankfurt am Main, 1997, pp. 230 ff., 365 ff. See also, as examples, Ingo Wolfgang Sarlet, Direitos fundamentais e direito privado: algumas considerações em torno da vinculação dos particulares aos direitos fundamentais, Boletim Científico ESMPU, Brasília, n.16, 2005, pp. 193-259; Ingo Wolfgang Sarlet, Proteção de dados pessoais como direito fundamental na Constituição Federal Brasileira de 1988: Contributo para a construção de uma dogmática constitucionalmente adequada, Revista Brasileira de Direitos Fundamentais & Justiça ano 14, n. 42 (2020), pp. 179-218 (esp. 206 ff.). Furthermore, Ingo Wolfgang Sarlet (dir.), Constituição, Direitos Fundamentais e Direito Privado, Editora, APGIQ; 3ª edição, 2010.

[5] Ingo Wolfgang Sarlet, Grundrechte und Privatrecht. Einige Bemerkungen zum Einfluss der deutschen Grundrechtsdogmatik und insbesondere der Lehre Canaris' in Brasilien, in: Hans Christoph Grigoleit und Jens Petersen (eds.), Privatrechtsdogmatik im 21. Jahrhundert. Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag, 2017, pp. 1257 – 1279 (1268).

[6] Marion Albers, Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen, in: Grundsatzfragen der Rechtsetzung und Rechtsfindung, VVDStRL Bd. 71, Berlin/Boston: de Gruyter, 2012, p. 257-295 (272 ff., 287 ff.).

The second part turns to the protection of privacy and personality. Traditional notions of fundamental rights and classical concepts of privacy are closely intertwined at several levels. However, there are also fundamental advancements in interpreting the scopes of protection, as can be shown in German constitutional law. The most recent development in this regard is the right to be forgotten – a right that *Ingo Sarlet* has also dealt with thoroughly.[7] In conclusion, a foundation is laid for an understanding of fundamental rights, by means of which they remain effective in the Internet society.

II. Advancement of the understanding of fundamental rights

In the constitutional architecture of continental Europe, fundamental rights are basic norms which are enshrined in textual codifications and, in principle, hierarchically superior to statutory regulations. In Germany, they are anchored in the Basic Law (*Grundgesetz*). Above and beyond the historical context of the national constitutional state in which fundamental rights emerged, they have now become supranational in the Charter of Fundamental Rights of the European Union (CFR). At the level of international law, human rights are laid down in the European Convention of Human Rights (ECHR).

In terms of their structure, the fundamental rights of the Basic Law involve, on the one hand, the scope of protection and, on the other, reservations in the form of legal limitation or regulatory possibilities assigned to the legislator. The scopes of protection link specific issues with a promise of freedom, inviolability, or protection. For example, free development of one's personality, freedom of conscience and religious convictions, special protection of marriage and the family, or inviolability of the home and of the privacy of telecommunications are regulated in this way. The guarantees of freedoms appear far-reaching at first glance. However, the reservations enable the legislature to limit, shape, or concretize these guarantees by means of statutory regulations which, in turn, must comply with the constitutional requirements. These regulations then provide the necessary legal foundations for the

[7] Ingo Wolfgang Sarlet, The Protection of Personality in the Digital Environment: An Analysis of the So-Called Right to be Forgotten, in: Albers and Sarlet (n. 1), pp. 133- 178.

decisions of the executive or judiciary. This entire arrangement – which is elaborated in detail in many ways – is intended to balance individual interests with public interests. The legal statements of the fundamental rights include not only constitutional obligations for the state, but provide protected persons with subjective rights as well: the holders of fundamental rights can enforce the observance of these rights through the courts.

Besides their textual anchors in the established codification, fundamental rights are also characterized and advanced by judicial doctrines on fundamental rights and by case law. "Judicial doctrine" can be described as a storehouse of knowledge consisting of concepts, foundational principles, and structures derived from legal or supra-legal concepts, to which science, legislation, or court rulings, among others, contribute.[8] The case law of the FCC is influential in the German legal system as well as in the network of national and European courts. Looking at both the text and the judicial doctrines and case law enables us to understand the protection fundamental rights provide.

1. From Rights to Defense against Interferences to the Multidimensionality of Protective Effects

According to the traditional perspective, which is reflected in the jurisdiction both of the FCC and of the ECtHR, fundamental rights serve primarily as defensive rights of the individual against interventions by the state.[9] The protected persons have certain freedoms or positions and defend themselves against state measures infringing on their freedom by means of legal redress if those measures disregard constitutional law requirements. Here, "freedom" is understood as freedom from the state. Consequently, fundamental rights are directed toward the protection of freedoms that already exist.[10] Conditions affecting the potential for individual freedom, its social constitution, or its social context are disregarded. This approach results in specific subject matters within the fundamental rights which are to be

[8] Albers (n. 4), p. 270 f.
[9] Cf. Decisions of the FCC, Vol. 7, pp. 198 ff. (204 f.).
[10] Vgl. Ernst-Wolfgang Böckenförde, Grundrechtstheorie und Grundrechtsinterpretation, Neue Juristische Wochenschrift, 1974, pp. 1529-1538 (1532).

protected. Protection is guaranteed, in particular, for individual self-determination, individual preferences or possibilities for decisions and behavior, the body, or property.[11] Laws or administrative measures based on laws are assessed as interferences in fundamental rights if and because they limit the protected individual opportunities for decisions and behaviors. Such interferences are not *per se* illegal. But they are constitutional only if they have a legal basis and observe the principle of legal certainty, the principle of proportionality, as well as all the other relevant constitutional requirements. In other words, the traditional conception of fundamental rights is characterized by a dichotomy between society and state, by the protection of positions of freedom already existing in society against encroachments, and by the requirement to justify state measures impairing these positions.

Ingo Sarlet, being an outstanding expert on constitutional law, has always emphasized that fundamental rights offer much more.[12] And the FCC moved away from the traditional view of fundamental rights as early as the late 1950s in the famous Lüth decision.[13] Since then, fundamental rights have been understood as fundamental guarantees (one level of abstraction higher than in the protection against encroachment) on the basis of which the state's obligations have yet to be determined and specified. They can still be directed toward the obligation to refrain from encroachments. But they also encompass the state's obligations to shape certain social relationships of behavior or communication, to shape state procedures according to fundamental rights, or to grant elementary support or financial help. And last but not least, they have certain effects on relations between private parties.

Extensions of the functions of the fundamental rights and therefore also of the scope of their protection are recognized in principle today. They are reflected in textual terms in modern catalogs of fundamental rights, for example in the CFR. However, they are not that clear and are partly highly controversial when it comes to details. This is particularly true with regard to the construction and consequences of

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[11] For these interrelationships see Marion Albers, Informationelle Selbstbestimmung, Baden-Baden, Nomos, 2005, pp. 30 ff., available open access under: www.nomos-elibrary.de/10.5771/9783845258638/informationelle-selbstbestimmung.

[12] See his Ph.D-thesis (n. 2), and, among other works, Ingo Wolfgang Sarlet, Luiz Guilherme Marinoni and Daniel Mitidiero, Curso de Direito Constitucional, 11ª edição 2022.

[13] Decisions of the FCC, Vol. 7, pp. 198 - 230.

the effects of fundamental rights on relations between private parties. Of course, questions of these effects are crucial considering the powerful market players and scenarios on the Internet. We will now take a closer look at doctrinal constructions and challenges.

2. Effects of fundamental rights on relations between private parties

a) Paradigm shifts and shortcomings in the judicature of the FCC

In the judicature of the FCC, the decision in favor of effects of constitutional rights between private parties was made early. The Lüth judgment from 1959 is one of the revolutionary decisions of the court.[14] Erich Lüth, Senate Director and Head of the State Press Office of the Free and Hanseatic City of Hamburg, sharply criticized the movie "Unsterbliche Geliebte" ("Immortal Beloved") in private speeches and press releases in front of various audiences and called for a boycott. Veit Harlan had written the script and directed this movie. He was known for directing the anti-Semitic movie "Jud' Süß" during the Nazi era. The Hamburg Regional Court ordered Lüth to desist from his statements on the grounds that they were "offending common decency" under § 826 of the German Civil Code.[15] Lüth filed a constitutional complaint claiming that this judgment violated his fundamental right to freedom of expression. The core problem the FCC had to deal with in its judgment was the question of whether constitutional rights played any role at all in this civil legal dispute. The Court's answer – which must be understood against the background that the Lüth case took place in the period of the renewal of German society after National Socialism – laid the foundation for a far-reaching paradigm shift.

First, the FCC determined that the civil law decision prohibited Erich Lüth from making the disputed statements and thereby constituted "objectively a limitation of the complainant in the free expression of his opinion".[16] The Regional Court's

[14] See n. 7.
[15] § 826 of the German Civil Code reads: "A person who, in a manner offending common decency, intentionally inflicts damage on another person is liable to the other person to provide compensation for the damage."
[16] Decisions of the FCC, Vol. 7, 198 (203).

classification of the statements as a prohibited act under § 826 of the German Civil Code would lead "to an exercise of public authority limiting the complainant's freedom of expression".[17] This ruling, the FCC further explained, could violate Lüth's constitutional right to freedom of expression only if the applied rules of civil law would be substantively influenced by the constitutional provision in such a way that they no longer supported the ruling. Then the FCC discussed the "fundamental question whether constitutional provisions affect civil law and how this effect must be conceived in detail".[18] It was true, the Court argued, that "constitutional rights are primarily intended to protect the individual's sphere of freedom against encroachment by public power"; they are primarily "defensive rights of the individual against the state".[19] But it was just as true, that the Basic Law, which was not meant to be a value-neutral order,[20] had established an "objective system of values" in which, "a principal strengthening of the binding force of the constitutional rights is expressed" and which had to be applied as a "constitutional law fundamental decision throughout all areas of law; legislature, administration, and the judiciary are directed and influenced by it".[21] Thus, it goes without saying, it influences private law as well; no rule of private law may conflict with it, and all such rules must be interpreted and applied in accordance with its spirit.[22] The legal content of constitutional rights, as objective norms, has to be unfolded in civil law through the medium of the statutory provisions directly governing this legal field. This entails that, in interpreting and applying these provisions, the civil court judge must comply with the modifications of civil law that result from the influence of constitutional rights. And further: "If he neglects these standards and bases his ruling on disregard for the constitutional law influence on civil law norms, then he not only violates objective constitutional law by failing to consider the content of the constitutional norm (as an objective norm), he, in his capacity as a bearer of public authority, also violates in his ruling the constitutional right to whose compliance the individual is

[17] Decisions of the FCC, Vol. 7, 198 (204).
[18] Decisions of the FCC, Vol. 7, 198 (204).
[19] Decisions of the FCC, Vol. 7, 198 (204).
[20] This takes up, among other things, the judgment on the KPD (Communist Party of Germany), Decisions of the FCC, Vol. 5, 85 (134 ff., 197 ff.).
[21] Decisions of the FCC, Vol. 7, 198 (205).
[22] Decisions of the FCC, Vol. 7, 198 (205).

constitutionally entitled."[23] In the Lüth case, the FCC then came to the conclusion that the decision of the Regional Court had infringed the complainant's right to freedom of expression because this court had not taken into account the influence of this fundamental right in its decision.[24]

As fundamental as this paradigm shift in the Lüth judgment is, a closer analysis reveals that the FCC's doctrinal construction is ambivalent and fragile. As we have just seen, in its initial considerations the Court follows the traditional concept, even if slightly changed, that fundamental rights are rights of defence against interferences of the state. The decision of the Regional Court, or more precisely, the tenor of the judgment as an order against Lüth to desist from making the disputed statements, is classified as a limitation of the complainant's freedom of expression by judicial power. The regular patterns of the constitutional review of whether this interference is compatible with the constitutional rights – that is, legal reservation, constitutional requirements for restricting laws and interferences based on them – are then nonetheless abandoned. The FCC swings to a different doctrinal approach: Decisions of the civil courts may violate fundamental rights if the judges fail to consider the impact of fundamental rights when interpreting and applying private law. The necessary arguments for the presupposition that fundamental rights have any impact at all are provided by the view that constitutional norms establish an objective system of values which, considering the hierarchy of norms, influence all areas of sub-constitutional law, including civil law, and thus entail indirect horizontal effects. The concept of an objective system of values in no way reflects "no more than the idea of a material understanding of constitutional rights", as it has sometimes been argued.[25] Rather, it is a keystone of the argumentation. Values assume universal validity. By using such an abstract approach to interpret constitutional statements, they can be transposed onto an overarching societal level. The value decision for whose sake constitutional norms guarantee a claim to defence is separated from this claim. Thus, they gain a more abstract meaning and can be

[23] Decisions of the FCC, Vol. 7, 198 (206 f.).
[24] The FCC only reviews whether civil court decisions result in violations of fundamental rights, not whether they contain legal errors in general.
[25] For this point of view see Walter Krebs, Freiheitsschutz durch Grundrechte, in: Jura Extra: Grundfragen und Grundlagen des Zivilrechts, Strafrechts und Öffentlichen Rechts, de Gruyter, 1990, pp. 60 – 70 (67).

developed in a multidimensional way; [26] the state's obligations become less determinate and more open. Classified in a hierarchy, constitutional norms can unfold a "radiation effect" on the statutory law subordinate to them, including civil law. The conclusion that, in their activity, civil law legislators and civil courts are obligated to respect the constitutional statements becomes then self-evident.

It is important to notice that this approach is a completely novel doctrinal construction. Among other differences to the construction of rights of defence against interferences of the state, it places the civil court's interpretive and application activity at the center, rather than the tenor and consequences of the verdict as a limitation of constitutional rights. Coherently, the individual rights of the person in question gain a new shape, too: It is no longer the limitation of freedom through the tenor of the order to desist that is crucial. Instead, it is the interpretive activity's disregard for the content of the freedom of expression as an objective constitutional provision to which the subjective constitutional right of the individual is subordinated in the form of a "claim to compliance".

The constructive ambivalences that are hidden in the Lüth judgment pervade the subsequent judicature of the FCC as well as of other courts and scholarly approaches. They lead to the fact that the *Drittwirkung* of fundamental rights – a term that is quite established in German doctrinal descriptions – is not as clear as it seems. Actually it is, as will be shown in the following passage, a doctrinal chaos. Nevertheless, it is hardly surprising that the Lüth decision led to a far-reaching and differentiated expansion of the guarantees fundamental rights provide. [27] If constitutional rights are no longer read as being tailored to specific state duties,

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[26] According to Ernst-Wolfgang Böckenförde, Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik, Der Staat 1990, pp. 1 – 31 (7 ff.), the constitutional rights, understood as an order of values, acquire a new quality by being separated from the immediate state-citizen relation and becoming an objective norm without a precisely specified subject matter and addressee of regulation. Robert Alexy, Grundrechte als subjektive Rechte und als objektive Normen, Der Staat 1990, pp. 49 – 68 (57), advocates the view that the doctrinal construction chosen in the Lüth-decision abstracts from the holder of the right (the entitled person), the addressee of the right (the obligated person), and the modalities of the subject matter of the right (refraining from interventions). At any rate, it is correct that the statements are separated from the state-citizen relationship and the obligations are no longer limited solely to the duty to refrain from interventions.

[27] Aptly on the significance of the Lüth ruling, see Rainer Wahl, Die objektivrechtliche Dimension der Grundrechte im internationalen Vergleich, in: D. Merten and H.-J. Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa, Vol I: Entwicklung und Grundlagen, C.F. Müller, 2004, p. 745 ff.

namely to refraining from intervention subject to a law covering the intervention, but interpreted as an objective system of values enshrined in the constitutional provisions, then the legal ramifications cannot be limited to the problems of the decided case, neither in relation to a specific constitutional right nor concerning the issue of the effects between private parties. The Lüth decision is the starting point of a transition to a multidimensional understanding of fundamental rights, among other things, to the development of duties to protect.

b) Constitutional rights as civil legislation's and civil courts' duty to protect

Duties to protect were established for the first time in an abstract norm control procedure concerning the decriminalization of abortion. The FCC delivered its leading decision in the year 1975.[28] The anchors were the right to life guaranteed in Art. 2 par. 2 S. 1 GG and the dignity of the human being, which according to the text of Art. 1 par. 1 GG is not only to be respected, but also to be protected. The Court left open the highly controversial and difficult question of the applicability of constitutional rights to the nasciturus. As constitutional provisions embody an objective system of values – the FCC can refer to its case law since Lüth –, the relevant duties of the state can already be discovered in the objective statements of the constitutional provisions.[29] The state's duty to protect is initially situated on a quite abstract level and then fanned out in various directions: duties to protect are "comprehensive"[30] and prohibit direct state interventions as well as requiring the state's protection and fostering of the legally protected right, here above all to preserve the protected unborn life against illegal interventions by third parties.[31] Both the exclusion of the question whether subjective rights of the nasciturus can be recognized and the initially comprehensive understanding of the duty to protect explain the focus on the duties of the state rather than on the rights of protected individuals. "Duty to protect" is the wording of the

[28] Decisions of the FCC, Vol. 39, 1. See also the FCC's second ruling on abortion, Decisions of the FCC, Vol. 88, 203 (230 ff., 251 ff.).
[29] Decisions of the FCC, Vol. 39, 1 (41 f.).
[30] What can be applied here to all the various protective dimensions of constitutional rights is taken up in the Schleyer ruling in a truncated formulation context and, in this decision, can be understood as a requirement to optimize, Decisions of the FCC, Vol. 46, 160 (164).
[31] Decisions of the FCC, Vol. 39, 1 (42).

doctrinal figure and not, for example, a right to protection as complementary to the right to defence. Only in later cases which are concerned with the state's duties to protect against harmful conduct by third parties, the FCC states clearly that the duty to protect is complemented by "the right [...] to protection"[32] the affected individual may claim.

Against the background of this landmark decision on abortion, the duty to protect was addressed from the beginning not only to legislature, but also to the judiciary and the executive. Developed in a criminal law context, it quickly extended to fields regulated solely by civil law. It was first of all Claus-Wilhelm Canaris, one of the scientific teachers of *Ingo Sarlet* during his PhD-time in Munich, who made the "duty to protect" meaningful for the doctrinal foundation of the effects of fundamental rights on relations between private parties.[33] Under such a conception, the claims to protection against the damage caused by other private parties are based on the duty-to-protect function of the constitutional rights that are inherent and that would have been "rediscovered". From this starting point, the following configuration was arrived at: The one party could assert claims on the state's duty to protect the endangered good against the damage caused by the other party. The other party could defend against the encroachment that arises through the state's protective measures.

Such a dichotomy between one side's claims to protection and the other side's right to defend against encroachments is meanwhile often taken as a basis to establish and explain the relevance and impact of fundamental rights on relationships between private persons. However, it is important to note that this approach is very different from the doctrinal construction established in the Lüth-judgment. The solution developed there focuses on effects of constitutional provisions between private parties mediated by the duties of civil legislation and civil jurisdiction against the background of the hierarchy of norms, not on antagonistic fundamental rights of two or more private parties against the state. Qualitatively, those effects would be qualified as legal effects that constitutional provisions have

[32]Thus aptly: Decisions of the FCC, Vol. 103, 89 (100).

[33] Claus-Wilhelm Canaris, Grundrechte und Privatrecht, Archiv für die civilistische Praxis (AcP) 184 (1984), pp. 201 – 246 (225 ff.); see also Claus-Wilhelm Canaris, Grundrechte und Privatrecht. Eine Zwischenbilanz, de Gruyter, 1999, p. 39 ff., 43 ff., 55 ff., 71 ff. For the influence of Canaris´ works in Brazil see Sarlet (n. 3), pp. 1271 ff.

between private parties whereas in the construction of antagonistic rights constitutional relationships exist only between each party and the state; "*Drittwirkung*" would be a purely factual effect.

c) A variety of approaches and pitfalls

On a closer inspection, the supposedly clarified *Drittwirkung* is a doctrinal chaos. In the jurisprudential debate, there is a variety of perspectives and anything but a consensus.[34]

Criticism of the approach the FCC has chosen in the Lüth-decision was loud and has not fallen silent to this day. However, the criticism has been very heterogeneous. There are still some civil law experts who criticize the *Drittwirkung* as being a "methodological coup d'état"[35] and endeavor to push back the effects of constitutional rights in civil law as far as possible. One of the objections is the reflection that the civil courts evaluate the legal relationship between private parties solely as a dispute-resolving instance, and since private parties are not bound by constitutional rights, constitutional norms could not be the standard for the court's judgment of this legal relationship.[36] Another objection highlights that, if interpreted as value decisions with a "radiation effect", constitutional norms would lose the normative precision they need in order to become juridically manageable.[37] In turn, civil law with its multifaceted and highly differentiated patterns of solution would be inappropriately superimposed.

Some law scholars, however, stand firmly behind the idea of *Drittwirkung* in form of horizontal effects of constitutional provisions mediated by the duties of civil legislation and civil jurisdiction. Other law scholars engage in the far-reaching

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[34] See more thoroughly Marion Albers, L'effet horizontal des droits fondamentaux dans le cadre d'une conception à multi-niveaux, in: Thomas Hochmann/Jörn Reinhardt (Hrsg.), L'effet horizontal des droits fondamentaux, Editions Pedone, Paris, 2018, p. 177–216 (191 ff.).

[35] Uwe Diederichsen, Das BVerfG als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre, AcP 198 (1998), pp. 171 – 260 (226).

[36] Much quoted: Karl Doehring, Staatsrecht der Bundesrepublik Deutschland, Alfred Metzner Verlag, Frankfurt a. M., 3rd edition 1984, p. 209: "The court must respect constitutional rights to the extent that they are valid; their validity does not depend on a court's decision."

[37] Martin Oldiges, Neue Aspekte der Grundrechtsgeltung im Privatrecht, in: Rudolf Wendt, Wolfram Höfling, Ulrich Karpen and Martin Oldiges (eds.), Staat, Wirtschaft, Steuern. Festschrift für Karl Heinrich Friauf, C.F. Müller, Heidelberg, 1996, pp. 281 – 309 (288).

turnaround that results from a reconstruction via the figures of defence against encroachment on the one hand and duty to protect on the other.[38] Such a reconstruction means that *Drittwirkung* as a doctrinal category becomes superfluous. Against the background of one side's claims to protection by the state and the other side's right to defend against encroachments by the state we no longer need a doctrinal construction called *Drittwirkung*.

The judicature of the FCC meanwhile provides ample material on the effect of constitutional rights among private parties. Detailed analyses, however, show the heterogeneity of the constructions and numerous misleading formulations. The Court takes recourse sometimes to (horizontal) effects of constitutional provisions mediated by the duties of civil legislation and civil jurisdiction, sometimes to the duty to protect or the right to being protected against harms by other private persons, and sometimes to the right to defend oneself against encroachments whereby the decision of a civil court is classified as such an encroachment. It may even happen that the FCC lists all doctrinal constructions side by side in one decision without differentiation.[39]

This overview displays conceptual weaknesses in each approach. In the heterogeneous patterns of argumentation, the first thing that stands out is how unclear many fundamental terms are and how divergently they are applied. This is particularly true of the question whether and to what degree the term "effect" means factual effects, reflex effects, or legal effects and of the chronically unclear terms "immediate" and "mediated", or "direct" and "indirect". Sometimes the same terms are used with differing understandings. All this, especially against the background of the FCC's varying approaches, fosters a lack of doctrinal clarity we have to struggle with today. The problem is that this state of affairs leads to ambiguity in determining

[38] With approaches that differ in detail, Canaris, Grundrechte und Privatrecht. Eine Zwischenbilanz (n. 31), p. 11 ff., 30 ff., 37 ff. (Direitos Fundamentais e Direito Privado, Coimbra: Almedina, 2003); Matthias Ruffert, Vorrang der Verfassung und Eigenständigkeit des Privatrechts. Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes, Mohr Siebeck, Tübingen, 2001, p. 88 ff., 141 ff.; Wolfram Cremer, Freiheitsgrundrechte. Funktionen und Strukturen, Mohr Siebeck, Tübingen, 2003, p. 411 ff.; Jörg Neuner, Die Einwirkung der Grundrechte auf das deutsche Privatrecht, in: Jörg Neuner (ed.), Grundrechte und Privatrecht aus rechtsvergleichender Sicht, Mohr Siebeck, Tübingen, 2007, pp. 159 - 176 (170 ff.).

[39] For an example of such a list resulting in fragile argumentation, see the Helnwein-decision, Decisions of the FCC, Vol. 99, 185 (193 ff.).

the content and scope of fundamental rights in the relationship between private parties. This meets a societal situation in which the issues of constitutional bindings between private individuals are more urgent than ever before. Thus, there is sufficient reason to revisit the effects of fundamental rights on relations between private parties.

d) Revisiting effects of fundamental rights on relations between private parties

aa) The framework: A multi-level conception

My basic point of view is that the effects of fundamental rights on relations between private parties have to be understood as a novel approach to constitutional guarantees that is crucial in modern society. This approach encompasses the effects of constitutional norms between private parties in a sophisticated manner and cannot be replaced, as increasingly proposed, by the dichotomy between rights to defence and to protection. However, in order to address the objections raised, we need to clarify preconditions, necessary assumptions and consequences of the concept in more detail.

First of all, it is true that – even though a civil court is more than "la bouche qui prononce les paroles de la loi"[40] – constitutional statements can only be decisive for the court's judgment of the conflict between private parties if these statements are legally relevant in the first place. Precisely this is also the precondition for the possibility that, when interpreting and applying civil law norms, a civil court can fail to recognize the content and extent of the constitutional standards. But this insight does not lead to the necessity to abandon the idea that fundamental rights have legal effects on relations between private parties or to make this approach superfluous in a dichotomy between rights to defense and to protection. On the contrary, we must acknowledge the notion of constitutional norms that is obscured in the ambiguity of the Lüth-judgment and subsequent decisions of the FCC: Constitutional norms include statements on the relationship between private parties and they can apply to

[40] C.-L. Montesquieu, De l´esprit des lois, Garnier, 1777, Vol. XI, Chap. VI, p. 327.

this relationship. They are valid, however, solely on the abstract level in the form of objective norms influencing statutory law and not in the form of specified duties and rights that a private person could claim from another private person. Claims and duties between private parties are based solely on the provisions of civil law. Thus, the validity of constitutional norms is conveyed through the medium of civil law. All that they "directly" obligate are civil law legislature and civil judiciary.[41] Nevertheless, this does not question the legal relevance and applicability of constitutional statements with regard to the relationships between private parties.

Hence, as a starting point, constitutional norms include freedom-protecting normative statements as to how the legal relationships between private persons are to be shaped. Civil legislature and civil jurisdiction are obligated to regulate the relationships between private parties and their mutual civil-law claims and duties in harmony with the relevant constitutional statements. This is a "direct" and not in any way "mediated" binding effect. Derived from this legal binding, those protected by these statements are entitled to claim against the state (legislature, judiciary, or certain administrative bodies) that it will comply with the protective statements of the constitutional norms. But in contrast, the latter do not stipulate any duties or claims of private parties between each other.[42] Subjective rights result from the constitutional norms only in relation to the state; subjective claims of private parties in relation to each other result solely from civil law. "Indirect" or "mediated" effect of fundamental rights means that the person who makes a civil law claim has a claim against the state that the state comply with relevant constitutional statements, whose fulfilment substantively influences the claim against the other private person, so that, conveyed in this manner via the "medium of civil law", constitutional norms affect the relationship between private parties. Qualitatively, this effect is to be classified neither as a legal reflex nor as a purely factual effect, but as a legal effect – a legal effect in a quite sophisticated overall conception.

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[41] The quality of their obligation does not thereby differ; it is, however, functionally specifically formed. To the degree that civil law norms are not to be measured against the standard of constitutional rights as already existing norms, but must first be created via legislation, one must take recourse to the intended or conceivable norms in the framework of a hypothetical examination.

[42] Here, the FRAPORT decision is unclear when it says that private parties can "be obligated by constitutional rights", Decisions of the FCC, Vol. 128, 226 (248).

Such effects of fundamental rights on relations between private parties are characterized by the fact that, from the beginning, we have two levels of regulation and thus a multi-level conception. The constitutional norms contain objective statements as well as the duties of the civil legislature or the civil judiciary and the claims of private parties against the state, while the claims and duties of private parties toward each other are anchored in civil law. Due to this anchoring, legislature or courts necessarily take up the existing civil law or civil law that is to be regulated as a relatively independent order *within which* the duties and claims of private parties toward each other are to be regulated. In this construction, the relative independence of civil law as such is necessarily preexisting. However, the extent of the depth of this independence is not. This can be differentiated between specific fields because "civil law" covers very different areas and legal relationships. If we had enough space here to unfold an even more complex perspective, we would also reach the insight that *Ingo Sarlet* has highlighted: The relationship between the Constitution (with special emphasis on fundamental rights) and private law has always been characterized "by a dialectical and dynamic relationship of mutual influence".[43]

If we understand the effects of constitutional rights between private parties within the framework of such a multi-level conception, our gaze is soon directed to the question concealed behind some of the doctrinal disputes: what substantive statements do the constitutional norms actually make about the relationship between private parties? Are they the same statements as those in relation to the state? Or are other contents, tailored to the relationships between private parties, to be developed already from the start?

bb) The contents of constitutional guarantees in the relationship between private parties

The "objective system of values" and the "radiation effect" which are introduced in the Lüth-decision are admittedly too weak a concept to enable it to deliver answers to the question of what exactly the content of the constitutional

[43] Sarlet (n. 3), p. 1264.

guidelines is. However, on the basis of the more elaborated multi-level concept of the effects of fundamental rights on relations between private parties just presented we can move away from this vague description. The constitutional statements can and must be made concrete via content-oriented norm interpretation.

The discussions of the contents of the constitutional norms that address the relationship between private parties often present private autonomy as the central principle.[44] In this view, holders of constitutional rights are free to shape their legal relationships themselves, with the accompanying legal consequences; they themselves thereby specify, realize, and protect their interests in the form they desire.[45] Private autonomy always points to the relationship between private parties and the state as well, if only because *legal* relationships in state orders do not completely shape themselves. Nevertheless, in the liberal tradition the core element of autonomy aims at private parties' possibilities in distinction from the state: Unlike the state, private parties are permitted to act in accordance with their ideas and interests without justifying themselves or having to reveal their goals and motives. Interests need not be egoistic, but can also be altruistic.

As relevant as autonomy is, it cannot comprise everything. The spectrum that constitutional statements provide for the relationship between private parties is in no way limited to the focus on autonomy. Privacy and personality protection, freedom of expression, and the inviolability of telecommunication confidentiality are rich examples. Particularly interesting about these protected goods is that they are recognizably tailored also to the relationship between private parties.[46] Detailed analyses, which are still a research desideratum in many ways, can thereby show the degree to which constitutional statements are relevant in the relationship between private parties and the degree to which those relationships parallel or differ from

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[44] For example Ruffert (n. 35), p. 287 ff.

[45] On the content of private autonomy, Decisions of the FCC, Vol. 81, 242, par. 48: "On the basis of private autonomy, which is the structural element of a free society, the contract partners shape their legal relations on their own responsibility. They determine themselves how their divergent interests are to be suitably balanced, and they thereby simultaneously dispose of their constitutional rights-protected positions, without state compulsion. The state must respect regulations instituted in the framework of private autonomy."

[46] See also Sarlet (n. 3), p. 1261, 1265. Cf. further Bernhard Schlink, Die Amtshilfe, Duncker & Humblot, 1982, p. 192 ff., who – following Ernst Forsthoff, Der Persönlichkeitsschutz im Verwaltungsrecht, in Festschrift für den 45. Deutschen Juristentag, C. F. Müller, 1964, pp. 41 – 60, esp. p. 46 ff. –classifies privacy as a protected good that does not exist at all in relation to the state.

state-citizen relationships. In the fields that then fan out, traditional approaches will turn into a more differentiated picture. With regard to protecting privacy and personality rights, *Ingo Sarlet* has often outlined this in his works.

III. Advancements in Protecting Rights to Privacy and Personality

1. The Right to Privacy

The idea of fundamental rights and conceptions of privacy are traditionally closely interwoven. The background is that the common understanding of privacy is shaped by several basic dichotomies: The first of these dichotomies is the contrasting of privacy and the state, which is constitutive for liberal thought and plays an important role here. The second dichotomy is the differentiation between privacy and publicness, wherein the concept of "publicness" is used to mean different things[47]. The third is the differentiation between the individual's private matters and the spheres of decision and influence (also) open to others. This differentiation is linked to one´s individuality, but is not identical to it. These guiding dichotomies seem easy to comprehend; however, a closer scrutiny quickly reveals the numerous premises and the complexity of the converse terms. Nonetheless and although there is "no *single* history about what is private" [48], a basic understanding emerges: Privacy assigns something to a person or a group of persons as their own concern and establishes limits to others' access to it. This basic notion takes on various nuanced shades of meaning depending on the context and the scientific lens, and privacy touches upon a broad spectrum of topics. Varying across cultures and historical epochs, they include the body, facets of the personality, religious convictions and conscience, spaces such as place of residence, property, close relationships such as partnership and family, or confidential documents and communications. [49] The

[47] Vgl. auch Jeff Weintraub, The Theory and Politics of the Public/Private Distinction, in: Jeff Weintraub and Krishan Kumar (eds.), Public and Private in Thought and Practice. Perspectives on a Grand Dichotomy, 1997, pp. 1 – 42 (1 ff.).
[48] Beate Rössler, Der Wert des Privaten, Frankfurt a.M. 2001, p.15.
[49] Cf. with a broad historical overview the contributions in Philippe Ariès/Georges Duby, Histoire de la vie privée, Vol. 5 (1985–1987).

mechanisms of allocation as one's own and the concept of access are to be understood just as broadly. The latter includes invasions of spaces and the body, determination of decisions by third parties, processes of surveillance, or dissemination through the media.[50] All this can quite simply be associated with the traditional interpretations of fundamental rights: Liberal thought on fundamental rights presupposes a differentiation between bourgeois or private society and the state. In addition, the structure of fundamental rights provisions reflects the differentiation between private matters of the individual, which *prima facie* enjoy protection based on fundamental rights, and the interests of other citizens or the general public, which can only take effect through passing a law. Additionally, fundamental rights cover different protected goods such as inviolability of home, freedom of religion or freedom of thought, or property, which have often been classified under an overarching concept of privacy.

Meanwhile, the strong traditional link between fundamental rights and privacy has been dissolved. Both have undergone significant changes. We have already addressed some advancements of the understanding of fundamental rights and their transition to multidimensional fundamental norms. Likewise, and in response to societal change, privacy has become a very heterogeneous and differentiated concept. Accurately it is described as an "umbrella term".[51]

This development is reflected in the understanding of the fundamental right to privacy and its scope of protection. How to interpret the right to privacy in detail depends, of course, on the specific legal system and codification. If we turn our attention to the German Basic Law and the jurisdiction of the FCC, we can notice that the "right to privacy" has long been a broadly defined right. Derived from Art. 2 (1) in connection with Art. 1 (1) of the Basic Law, it has covered many constellations: the protection of medical files stored at the doctor's workplace from access by security

[50] See the description of *privacy* by Sissela Bok, Secrets – On the Ethics of Concealment and Revelation, 1983, p. 10 f.: „the condition of being protected from unwanted access by others – either physical access, personal information, or attention".

[51] Daniel Solove, Understanding Privacy, Harvard University Press, Cambridge, 2008 p. 45. See also more closely Bert-Jaap Koops, Bryce Newell, Tjerk Timan, Ivan Skorvanek, Tom Chokrevski and Maša Galič, A Typology of Privacy, University of Pennsylvania Journal of International Law, Vol 38 (2), 2017, pp. 483 - 575; Sohail Aftab, Protecting the right to privacy in Pakistan: Learning from theoretical approaches and European experiences, Dissertation Hamburg 2022, pp. 39 ff., to be published by Springer (Ius Gentium).

authorities,[52] the use of secret tape recordings in a civil court proceeding,[53] the publishing of a fictitious interview about private matters in the press,[54] or a television movie about a murder in which the criminal, who has since been released, can be identified (the famous *Lebach*-case)[55].

The turning point in this regard has been the *Eppler*-decision.[56] According to the facts of the case, *Erhard Eppler*. a well-known member of the Social Democratic Party of Germany, was blamed for making a public statement on a public matter which he proved he had not made in this way and requested injunctive relief. In this case of an alleged public statement on a public matter, the FCC did not choose the way of extending the right to respect for privacy. Instead, it developed a new normative foundation of the protection: the general right of personality.[57] This development is facilitated by the fact that the wording of Article 2 (1) of the Basic Law promises everyone the right to freely develop their personality.

In the subsequent case law of the FCC, the general right of personality becomes the new foundation for the decisions of the Court. Not only does such a foundation include the right to privacy, but it also enables to sharpen this right and to understand it - beyond a right to be left alone - as freedom in sociality. The right to privacy includes, firstly, matters that are typically classified as "private" due to their informational content, because their public discussion or exposure is considered indecent, or if a disclosure is considered shameful or provokes adverse reactions from others. Secondly, the protection extends to a spatial area where the individual can relax or may enjoy intimacy and close relationships.[58] Given such a description of the scope of protection, questions of the effects of the fundamental right to privacy on relationships between private parties suggest themselves.

[52] Decisions of the FCC, Vol. 32, 373; Vol. 44, 353.
[53] Decisions of the FCC, Vol. 44, 238.
[54] Decisions of the FCC, Vol. 34, 269.
[55] Decisions of the FCC, Vol. 35, 202.
[56] Decisions of the FCC, Vol. 54, 148.
[57] Decisions of the FCC, Vol. 54, 148 (153 ff.).
[58] FCC, Judgment of the First Senate of 15. December 1999, 1 BvR 653/96, Rn. 76, 77, available under www.bverfg.de.

2. The Right of Personality

Since the Eppler-decision, the general right of personality is the pivotal right in the case law of the FCC. It offers the possibility to move away from the traditional implications and restrictions of the concept of privacy. The general right of personality is understood as a deliberately vague umbrella right that can react to novel threats, for example, those due to new technologies. The FCC has recognized manifold strands, including the guarantee of the private sphere, the right to one's own image or speech and the right to determine the portrayal of one's person, the right to social recognition and to personal honor, rights to be protected against media reporting, or the right to informational self-determination.[59] Many cases involve issues of effects of fundamental rights on relations between private parties. An illustrative example in the case law is the right to be forgotten.

3. The Right to be Forgotten

Among the recent decisions that the FCC has made in the context of personality protection are those on the right to be forgotten. The concept of "forgetting" here does not aim at a particular single person forgetting something, but at "forgetting" on a societal level. Understood in this sense, forgetting intertwines the content-dimension with the time-dimension of societal communication: An information about someone or something that has once been part of the communication is no longer present, although people, were the information still available, might consider it relevant.[60] Court decisions are to be seen against the overarching background of societal debates: The Internet, as the popular thesis goes, does not forget. While this thesis must be differentiated and relativized, it is at least true that the Internet has turned around the traditional relationship between remembering and forgetting and fundamentally changed the conditions of forgetting

[59] See more closely Albers (n. 9), pp. 151 ff.
[60] Anna Schimke, Forgetting as a Social Concept. Contextualizing the Right to Be Forgotten, in: Albers and Sarlet (n. 1), pp. 179 – 211 (181 ff.).

in society.[61] For the courts, the challenge was then to ensure "forgetting" through law and individual rights. Respective guarantees can be developed where it is possible to justify protective positions of the person affected that require precisely this. A "right to be forgotten" differs from claims for injunctive relief against dissemination of communication content that is unlawful from the outset, for example because of false allegations. It is characterized by the change in the assessment of lawfulness from lawful to unlawful in the passage of time. A right to be forgotten is therefore at stake if the communication of certain content was previously lawful but is now unlawful because the information should disappear from societal communication.

Ingo Sarlet has carefully worked out that the case law in the various countries, for which the famous Google-decision of the ECJ in 2014[62] provided a starting point, has been able to build upon already existing previous case law.[63] He has illustrated this in detail with a view to the rulings of Brazilian courts. This insight also applies to the case law of the FCC and German civil courts. Previous judgments can offer patterns of conflict description and conflict resolution, however, only to a certain extent.

The Google-decision of the ECJ made in 2014 has already highlighted new peculiarities of Internet communication, among other things, the rise of new players such as search-engine operators. The question of whether the communication of a certain piece of information is still lawful or has become unlawful due to the passage of time can vary depending on the communication context and on the players involved, here regarding the online archive and the search-engine operator. Search-engines have a significant contribution to the worldwide dissemination of personal data. With their list of results, their users quickly receive a structured overview of the information that can be found about the person in question on the Internet. Hence, the search results list represents a *sui generis* type of publication that has to be differentiated from the publication on the website of the online archive.[64] It requires

[61] Thus, the observation that something has been forgotten in certain communication contexts presupposes quite complex metaperspectives.
[62] ECJ, Judgment of the Court (Grand Chamber), 13 May 2014, C-131/12, available under: https://curia.europa.eu.
[63] Sarlet (n. 5), pp. 148 ff.
[64] ECJ, Judgment of the Court (Grand Chamber), 13 May 2014, C-131/12, available under: https://curia.europa.eu, sect. 35 ff.

a balancing tailored to the consequences resulting from data processing by a search engine[65] as well as the development of claims tailored to the features of the search results lists, namely, that they are significantly shaped by automated processes. Thus, claims are directed at the "removal" of the objectionable data and links from the list of results.[66]

In Germany, the case law of the courts aims at integrating previous conflict resolution patterns, such as those outlined in the Lebach-decision of the FCC, with Internet-specific novel solutions. In its orders on the right to be forgotten made in 2019[67], the FCC outlines the characteristics of Internet communication, refines and modifies the relevant scopes of protection of fundamental rights and, in contrast to the ECJ, defines the rights of search-engine operators and Internet users in a more complex manner and undertakes a more comprehensive balancing of rights. Most interesting are the reflections on the general right of personality in terms of its content and of its effects on the relations between private parties. The FCC emphasizes that "the possibility for matters to be forgotten forms part of the temporal dimension of freedom" because individuals must have "the chance to move on from errors and mistakes" and be protected "against the risk of being indefinitely confronted in public with their past opinions, statements or actions"[68]. However, the scope of protection of the right to be forgotten is determined from the outset by its being embedded in social contexts. The general personality right does not entitle individuals to filter and restrict all publicly accessible information about them based on their free discretion and own preferences and does not provide protection against events being remembered in a historically responsible manner. Notably, the FCC also distinguishes the personality right protecting against statements affecting one´s person from the right to informational self-determination. The Court then highlights for the latter that, while it enables individuals in relation to the state to, in principle,

[65] There has been much justified criticism that the ECJ does not work out the various interests very thoroughly in the Google-decision made in 2014.
[66] With accurate emphasis on the various claims, some of them novel, that can be developed, Sarlet (n. 5), pp. 160 ff.
[67] FCC, Orders of the First Senate of 6 November 2019, 1 BvR 16/13 and 1 BvR 276/17; both available under www.bverfg.de.
[68] FCC, Order of the First Senate of 6 November 2019, 1 BvR 16/13, available under www.bverfg.de, sect. 105.

decide by themselves on the disclosure and use of their personal data, it provides individuals in relation to other private actors merely the possibility of influencing, in nuanced ways, the context and manner in which their data is accessible to and can be used by others. Thus, "its indirect effects on private law relationships differ from its direct effects vis-à-vis the state".[69]

The decisions of the FCC on the right to be forgotten are innovative in many respects. It is not only necessary to work out the specific features of the Internet. In cases on the Internet that are bilateral or multilateral conflicts between private individuals, the relevant scopes of protection of fundamental rights can and may need to be concretized in their own way, that is, they can and may need to be formulated differently than vis-à-vis the state. This provides a fresh approach to the doctrine of *Drittwirkung* and is in line with the insights we have already arrived at.

IV. Outlook

Ingo Sarlet has always had an eye for the latest challenges facing society and has always been among those who have provided sound and innovative proposals for the further development of the law. Questions about how fundamental rights have an impact on legal relationships between private parties and how to guarantee privacy and personality protection under the conditions of the Internet can serve as illustrative examples. The future, which will be shaped by the rise of artificial intelligence, among other things, prepares further exciting tasks for him and for us.

[69] FCC, Order of the First Senate of 6 November 2019, 1 BvR 16/13, available under www.bverfg.de, Headnote 3 and sect. 86 ff.