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Germany

New Tensions Amid Radiating Values

Just a few years after it was established in 1951, the Federal Constitutional Court decided that the principles of Germany's new Basic Law needed to be considered in adjudicating public and private action alike. In many ways, the Court's judgment in the landmark *Lüth* case simply mirrored the constitutional drafters' urgency to protect the constitutional order against the future rise of authoritarianism and rights abuses. Such a project arguably required some ability to reach a wider expanse of society in the way horizontal application (*Drittwirkung*) permitted. Following *Lüth*'s paradigmatic account of the need for a kind of parity across spheres, much of the content of subsequent court decisions and the language of other constitutional actors may be read as tracking a republican mode of discourse. The protection of individual rights remained essential in a postwar world. However, rights were often discussed in terms of broader ends, ends which a range of actors within the community were called upon to uphold.

This reorientation to secure an "objective order of values," to use the words of the Court deciding *Lüth*, might be viewed as compatible with other aspects of German political tradition as well. The statist and welfarist orientation of German public law, for example, may also be described as establishing the larger political community's role in securing certain positive ends. In addition, while social welfare is often pursued through means different from horizontal application, a state already charged with such positive objectives might easily regulate private behavior in parallel fashion to horizontality. Winfried Brugger offers a communitarian account of German constitutionalism that makes clear how there is space for such objectives. Ultimately, he describes the German constitutional order in terms of "liberal communitarianism,"[1] attempting to balance individual rights and collective goals. In Brugger's

[1] Winfried Brugger, "Communitarianism as the Social and Legal Theory behind the German Constitution," *International Journal of Constitutional Law* 2:3 (2004), 431–460.

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telling, the communitarianism of German constitutionalism does not require foregoing individual rights, as some might conclude from the term "communitarianism," but does comprehend certain collective goals of the community to which individual rights may give way, despite the typical priorities of liberal constitutionalism.

This dual liberal-communitarian portrait that Brugger paints portends a place for both horizontal application and certain countervailing factors in German constitutional debates. Horizontal application was adopted early on, but only after serious debates and institutional tensions. Indeed, although German governance is often understood to have statist proclivities, other aspects of German politics have roots in liberalism and, at least in the nineteenth century, a kind of libertarian liberalism at that.[2] Taking a cue from Louis Hartz,[3] legal scholar Peter Quint explains that the German Basic Law reflects a similar concern with classical liberal rights to what we find in American constitutional-political history.[4] An insistence on maintaining the integrity of private law as separate pervades the civil law tradition and, in certain ways, the Basic Law's own codification of autonomy and other classical liberal rights.[5] However, while regard for a robust private sphere maintains some hold in German legal history, the new constitutional order enshrined a set of values that such actors as the Constitutional Court would understand as governing increasingly more sectors of German society.

In the terms of this book, the practice of horizontal application, rooted in the language of an objective order of values, tended to a republican interpretation, presupposing a common constitutional morality for which even private actors were understood to be on the hook. While quickly incorporated into legal practice, however, horizontality was also

He contrasts this category of "liberal communitarianism" with "a substantive, conservative communitarianism," and a more "egalitarian-universalistic" vision (459–460).

[2] Peter Quint, "Free Speech and Private Law in German Constitutional Theory," *Maryland Law Review* 48:2 (1989), 249.

[3] Louis Hartz, *The Liberal Tradition in America* (New York: Harvest, 1991).

[4] Quint, "Free Speech and Private Law," 249. It is important to note that German liberalism is different from what is sometimes called Manchester liberalism. Specifically, Germany's liberal values were consistently embedded in a larger context of societal values, giving rise to a social welfare streak at certain times even when such liberal values as *Privatautonomie* were ascendant. This is in contrast with other forms of liberalism that place greater emphasis on laissez-faire capitalism in conjunction with classical liberal values (interview with Christoph Möllers, Berlin, December 9, 2019).

[5] Gary Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010), 15.

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limited in the German Constitutional Court's jurisprudence in that it was not generally applied in such areas as antidiscrimination and equality. In arguments for autonomy, republican interpretations encountered obstacles around these issues into the twenty-first century. In contrast with discourses about a larger constitutional moral order articulating certain ends and the possibility of duties for private actors, cases concerning antidiscrimination and equality engendered discourses much more centered on individual rights, and particularly rights that might run up against broad commitments to equality. Thus, in developing horizontal application, constitutional actors would allocate duties in such a way that insulated private actors from duties related to equality. Instead, the Court primarily applied classical political and civil rights horizontally, couched in language that conceptualized them as common ends, requiring parity across spheres and triggering duties of citizens.

In this way, the discourses employed on the topic of horizontality have gradually made constitutional commitments over into a kind of common good, obliging more actors and spaces in what has traditionally been understood as the private sphere. Jacobsohn and Roznai explain how the adoption of the Basic Law "signals the moment when the foundation for achieving a new identity in that country was established."[6] Horizontal application has served as an instrument to ensure this new identity is realized in toto.[7] The reorientation toward an objective order of values and, by extension, certain common ends precipitated by the Basic Law thus offers ground for a republican interpretation of horizontal application in this context.

This chapter begins by describing the pedigree and commitments underlying Germany's civil law tradition and how interpretations of this tradition interact with interpretations of new commitments assumed under the Basic Law. The chapter proceeds with a discussion of horizontal application, centering on its treatment in German legal scholarship and practice. In particular, theoretical and institutional understandings related to Germany's civil law tradition sometimes run up against newer constitutional aspirations, in general and when applied horizontally. For several decades, discourses pointing toward the pursuit of parity and recognition of private actors' duties in horizontal application only extended to more traditional constitutional commitments, as described above. This came to a head and began to shift in 2005 and 2006, when the

[6] Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (New Haven: Yale University Press, 2020), 111.
[7] Kumm, "Who Is Afraid."

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German Parliament attempted to pass antidiscrimination legislation to fulfill directives from the EU. The controversy surrounding this antidiscrimination legislation, particularly from certain corners of industry and religious groups, evinced an enduring liberal ethos in the discourse, still occasionally in tension with the incremental efforts toward greater societal cohesion that underlie the practice of horizontality. More recently, in the *Stadium Ban* case,[8] among other cases, the Constitutional Court took up the question of the horizontal application of equality and began to speak about this constitutional value in language that may be interpreted in republican terms.

The Public–Private Divide in Germany's Legal Tradition

Certain corners of German law long maintained presuppositions of individualism and autonomy, both in the structure of the legal system and in the content of the law itself. As was the case in many European countries in the nineteenth century, the German system comprised two distinct categories of law and, corresponding to those categories, independent systems of courts.[9] The Civil Code constituted the private law, "the body of rules that seeks to do justice between private individuals and which does not ordinarily concern the state as a party,"[10] while the public law pertains to "obligations or regulations of the political organs of the state."[11] These systems of law originally operated independently of one another and, in general, did not intersect.

German jurists located the Civil Code in the ancient tradition of Roman law, thus endowing private law and its practitioners with great prestige. On the other hand, the public law was relatively new and primarily concerned with the administration of social insurance and welfare programs following Bismarck's 1890 reforms.[12] Public law thus lacked the same storied history and reputation for rigor that came to be associated with the Civil Code. Nevertheless, jurists understood the distinction as indispensable. Indeed, by separating the rules governing the state from those governing private relations, the law both delineated a

[8] *Stadium Ban*, 1 BvR, 2080/09, April 11, 2018.
[9] John Henry Merryman, *The Civil Law Tradition*, 3rd ed. (Stanford: Stanford University Press, 2007); Alan Watson, *The Making of the Civil Law* (Cambridge, MA: Harvard University Press, 1981), 144–157.
[10] Quint, "Free Speech and Private Law," 255.
[11] Ibid., 256.
[12] Ibid.

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separate sphere of private life and outlined ostensibly neutral rules of engagement for private interchange.[13] Quint explains:

> The apparatus of the state was excluded from private law, except to the extent necessary for the judiciary to allocate the private rights recognized by the Civil Code, and these rights generally implied a maximum of individual autonomy and a minimum of intervention to redress individual or group inequalities already existing in society.[14]

Thus, the Civil Code reflected what Philip Pettit calls freedom as non-interference.[15] Though both public and private law were necessary to governance, it was the Civil Code, the private law, that jurists credited with preserving freedom for Germany. In contrast, even when the Weimar Constitution later adopted a long list of rights, these rights were deemed judicially unenforceable[16] and still failed to occupy the same position as did the Civil Code in the German imagination.

Apart from the systemic structure that allowed for the referee of private relationships separately from the constraints of public law, the substantive content of law and belief in the Civil Code's neutrality shows liberal predilections of a certain kind in the contemporaneous legal world. In particular, the rules of private law "were thought to enhance a more general freedom of individuals not to be interfered with by the state – particularly in commercial relationships but also in other areas of everyday life."[17] Thus the Civil Code promised order and protection in such areas of private interchange as contracts, torts, inheritance, and family relationships. Indeed, some continue to point to the Civil Code as an essential source of freedom for the German people, even after the

[13] This calls up such arguments as Herbert Wechsler's call for neutral principles ("Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73:1 [1959], 1–35), on the one hand, against the likes of Robert L. Hale ("Coercion and Distribution in a Supposedly Non-coercive State," *Political Science Quarterly* 38 [1923], 470–494) and Tushnet (*Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* [Princeton: Princeton University Press, 2008]); see also Kumm, "Who Is Afraid," 341–342, 365–366.

[14] Quint, "Free Speech and Private Law," 255.

[15] Philip Pettit, *On the People's Terms* (Cambridge: Cambridge University Press, 2012), chap. 1.

[16] Kumm, "Who Is Afraid," 342, goes on to explain that this decision not to make rights justiciable was, at least in part, a result of observation of the United States' experience with a Supreme Court.

[17] Quint, "Free Speech and Private Law," 256.

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adoption of the Basic Law.[18] Moreover, such guarantees as those of private autonomy (*Privatautonomie*) were "highly cherished" for their role in securing a new middle class seeking economic freedom in the nineteenth century.[19] Thus, notwithstanding a few exceptions,[20] the bourgeois idea "that contracting parties are formally free and equal"[21] and that private transactions ought not to be hindered defined much of the substance of German law until the early twentieth century, when certain elements of such precepts were called into question.

From Neutral Rights to Constitutional Ends

The perception of neutrality of the Civil Code was disputed in the early twentieth century as scholars and political actors observed that political choices undergirded decisions pertaining to both the code's legislation and interpretation. Severe economic crisis also generated a new urgency to modify the private law to meet the escalating needs of the country.[22] Later, in the wake of the Second World War, the realization that the Weimar Constitution could be so easily leveraged to serve odious political ends further exposed the problems of striving for value neutrality in the law.[23] As political and constitutional reformers moved to amend Germany's Civil Code and adopt a new Basic Law, the country's constitutive principles underwent a kind of transformation. To be sure, the Weimar Constitution was a significant influence on the new constitution, and the Civil Code was initially imported into the new regime unamended. Nevertheless, new commitments and historical memory

[18] See ibid., 263, including fn. 60 paraphrasing Günther Dürig, "Grundrechte und Zivilrechtsprechung," in *Festschrift Zum 75. Geburtstag von Hans Nawiasky*, ed. Theodor Maunz (Munich: Isar Verlag, 1956), 157–190.

[19] Jorg Fedtke, "*Drittwirkung* in Germany," in *Human Rights and the Private Sphere*, ed. Dawn Oliver and Jorg Fedtke (Oxford: Rutledge-Cavendish, 2007), 129.

[20] Most notably the general clause of the BGB, Section 138. This provision in the Civil Code was intended to allow legislators to regulate private behavior according to social norms (Quint, "Free Speech and Private Law," fn. 18; Georg Sommeregger, "The Horizontalization of Equality: The German Attempt to Promote Non-discrimination in the Private Sphere via Legislation," in *The Constitution in Private Relations*, ed. András Sajó and Renáta Uitz [Utrecht: Eleven, 2005], 33–53).

[21] K. Zwiegert and H. Kotz, *An Introduction to Comparative Law*, trans. Tony Weir (Oxford: Oxford University Press, 1987), quoted by Quint, "Free Speech and Private Law," fn. 25; see also Morton J. Horowitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982), 1423–1428.

[22] Kumm, "Who Is Afraid," 341–342.

[23] Quint, "Free Speech and Private Law," 262.

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imbued the law with new meanings. Most notably, dignity figured prominently in the new constitution. The very first provision of the Basic Law states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[24] Such an emphasis on dignity is consistent with liberalism's concern for the individual and even expands on Kantian strands some scholars identify in earlier instantiations of German law.[25] In his book *Human Dignity*, Aharon Barak states that there is "no other constitution in which human dignity has such a central role."[26] Indeed, that dignity is enshrined as Germany's supreme constitutional value, never to be amended, reflects its uncompromising rejection of the abuses of human dignity inflicted by the Third Reich.

While this new commitment to dignity certainly comports with the more liberal threads of Germany's legal tradition, it depends less on a conception of separate public and private spheres, even as it continues to operate in a civil law system. Indeed, with this and other additions to the Basic Law, the content and very purpose of fundamental law expands.[27] Barak explains that most approaches to understanding the role of dignity in German constitutionalism employ the context of "the framework of society. Human dignity is not the human dignity of a person on a desert island."[28] In this way, we see a shift from the individualism and aspiration to value neutrality of the nineteenth century to something of a moral proposition for how the individual ought to be treated in German society and, by extension, what society itself ought to look like. Returning to the provision of the Basic Law, the second clause reads: "To *respect* and *protect* [dignity] shall be the duty of all state authority."[29] Barak explains that this provision has the potential to make both negative and positive

[24] Basic Law Article 1 Section 1.

[25] See Quint, "Free Speech and Private Law," 255, and accompanying citations: Hans Hattenhauer, *Die Geistesgeschichtlichen Grundlagen Des Deutschen Rechts*, 3rd ed. (Heidelberg: Müller, 1983); Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (Berlin: Springer Verlag, 1975).

[26] Aharon Barak, "Human Dignity in German Constitutional Law," in *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 231.

[27] As David Robertson explains, constitution-makers no longer restrict the constitutional text to the structure and limits of government, but rather articulate aspirations and even an identity for the polity, as well ("Thick Constitutional Readings: When Classical Distinctions Are Irrelevant," *Georgia Journal of International and Comparative Law* 35 [2007], 277–331); see also Jacobsohn, *Constitutional Identity*.

[28] Barak, "Human Dignity in German Constitutional Law," 236.

[29] Basic Law Article 1, Section 1, emphasis added.

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demands of government.[30] The duty to respect requires that the state not do anything to offend human dignity, a principle that seems to grow fairly naturally out of the liberal threads of the German legal tradition. The duty to protect, on the other hand, seems to require that the state take some positive action in pursuance of human dignity, though the text itself does not specify what this ought to entail. Almost a decade after the adoption of the Basic Law, the Federal Constitutional Court offered additional meaning and clarity on this duty to protect, interpreting it to require the defense of human dignity against violations by private actors.[31]

In this way, human dignity emerges as both a value, or an end, of the German constitution and a right. As a value, it constitutes the basis of the German polity and, to this extent, engenders a kind of "common good." The important distinction between subjective and objective rights, explained in Chapter 2, further illuminates this development. To reiterate, subjective rights align with the typical conception of rights as justiciable and as giving rise to claims against particular parties, usually the state. In contrast, objective rights comprise the broader values or ends of a given constitutional order.[32] Objective rights are not immediately justiciable, though sometimes judges may decide cases in ways that derive duties from them. Discussing this shift to extract some understanding of values, of a common good, out of what formerly would have been mere rights claims, Habermas discusses the now-recurring commitment to human dignity in national constitutions today. He states:

> "Human dignity" performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that citizens of a political community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons. *The guarantee of these human rights gives rise to the status of citizens who, as subjects of equal rights, have a claim to be respected in their human dignity.*[33]

[30] Barak, "Human Dignity in German Constitutional Law," 237–238.

[31] BVerfGE 7, 198 (1958); BVerfGI 39, 1 – Abortion I (1975); see also Jud Mathews, *Extending Rights' Reach* (Oxford: Oxford University Press, 2018), 68–72.

[32] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010); see also Quint, "Free Speech and Private Law," 261–262.

[33] Jurgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy* 41:4 (2010), 469, emphasis in the original.

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If a constitution proposes an encompassing principle to guide a polity, a "seismograph" as Habermas puts it, then it is no longer a stretch to argue that citizens, too, will have some duties in conformity with this standard. Put differently, human dignity begins to clear the normative jungle formerly occupied by the nineteenth-century commitments to neutrality and individualism, thereby preparing German constitutional ground for the kind of parity across spheres and duties of private actors that horizontal application would ultimately actuate.[34]

This concept of objective rights thus serves as an intellectual bridge in constitutionalism, expanding the meaning of rights to encompass a kind of public morality. In the terms of this book, this move to conceive of dignity as the moral basis for the constitutional order gestures toward a new paradigm of parity, governing and creating duties for actors across spheres according to a common standard. While the Basic Law does not explicitly take this step, dominant accounts of its vision as well as its specific content have laid groundwork for such an interpretation. We get one such glimpse into the expanse of the German constitutional project from Jorg Fedtke's explanation of the years during the Third Reich, of the "climate of fear, terror and oppression, which went far beyond the many single instances of human rights infringements by the regime."[35] He states:

> Nazi ideology permeated society as a whole – the working environment, the arts, journalism, the scientific community, architecture, the church, schools and universities, social relationships, local communities where people went about their daily lives, and even the allegedly safe nucleus of the family home.[36]

As the pathologies and abuses had transcended spheres of life, the reconstituted German law had to be adequately equipped to effect change across spheres as well. Specific provisions in the original text of the Basic Law suggest as much. In addition to the commitment to human dignity, Article 1 Section 3's statement that rights bind the judiciary "as directly applicable law" begins to challenge the understanding of the role of courts in the civil law tradition, that the judiciary's role was simply to administer the Civil Code amid private transactions.[37] Indeed, the idea

[34] See also the *Elfes* case, BVerfGE 32, 6 (1957).
[35] Fedtke, "*Drittwirkung* in Germany," 128.
[36] Ibid., 128–129; see also Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta, 2012), 322.
[37] Fedtke, "*Drittwirkung* in Germany," 127.

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that rights bind the judiciary could be interpreted as a charge that judges continued to remain accountable to constitutional rights and values in the very process of applying the Civil Code.

On such questions, Article 9 Section 3 guarantees the "right to form associations to safeguard and improve working and economic conditions" against all actors, regardless of occupation or profession.[38] Thus, the constitutional drafters left little guesswork about the extent of this provision's application. Though this and the aforementioned provisions in the Basic Law in some sense signaled a certain capaciousness of the constitutional project, their presence also seemed to cut in the opposite direction. Specifically, the act of stating when private actors were implicated by the commitments of the Basic Law was construed as implying that the remainder of the text obligated only state actors. And indeed, it was not long after the Basic Law was adopted that jurists and legal scholars began wrestling with these questions.

Debating Horizontality in the New Constitutional Order

Although the apex courts of the German legal system had already been charged with ensuring consistency *within* each branch of civil law,[39] the prospect of horizontal application suggested for the first time the possibility of consistency, or parity, across areas of law. While some of the content of the Basic Law set the stage to break from the old paradigm and to adopt some version of horizontal application, it did not necessarily entail horizontal application by itself.[40] Indeed, the reconstituted law provoked more questions than it answered with respect to the relationship between private law and public law and the obligations of private actors with respect to public law. And it certainly did not settle the question of German constitutional identity, particularly respecting the weight the civil law's values would maintain in light of the evidently transformative additions to German fundamental law. Much was unsettled regarding horizontal application in the ensuing years as the twentieth century progressed.

[38] Ibid., 126.

[39] Quint, "Free Speech and Private Law," 256.

[40] Fedtke explains that "the existence of an objective duty of the state to protect individual private interests need not necessarily translate into a subjective right of individuals to invoke this protection in court" ("*Drittwirkung* in Germany," 150).

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Given Germany's plural court system, these questions were as much about constitutional identity as they were about institutional power. Indeed, jurists from every area of law weighed in. Many legal scholars and jurists initially reacted by falling back on the orthodoxy of civil law systems, namely, that public law, now the Basic Law, had no influence on private disputes.[41] Some argued that the council responsible for the Basic Law simply was not authorized to adopt a constitution that affected private relationships, even if it had wanted to. Public law was, by definition, meant to give protection against government institutions insofar as they possessed more power, in contrast with private law that was framed to govern relationships among equals.[42] Still others argued against horizontal application in terms drawn from the Basic Law itself. As explained earlier, a few specific provisions suggest that the state has a duty to protect against private abuses (Article 1, Sections 1, 3) or that certain private relationships are, in fact, held to a constitutional standard (Article 9, Section 3). The presence of such provisions could imply that other parts of the Basic Law were not intended to bear on private relationships.

Other scholars challenged the conventional wisdom that the civil law system required a strict separation between public and private law. Quint explains the argument made by some that earlier conceptions of basic rights did not in fact distinguish between public and private offenders.[43] Presumably, too, recent events had demonstrated the ways in which private entities could inflict great harm, whether in consort with state authorities or independently. Hans Carl Nipperdey, chief judge of the Federal Labor Court from 1954 to 1963, believed as much and led the Labor Court in arguing for a conception not merely of horizontal application but of *direct* horizontal application, meaning the Constitution itself could create duties of private individuals rather than simply influence private interchanges through private law.[44] In a series of cases,

[41] Quint cites many German scholars who rehearse these classic arguments (255–257); see, for example, I. K. Zweigert and H. Kotz, *An Introduction to Comparative Law*, trans. Tony Weir (Oxford: Oxford University Press, 1987); Larenz, *Methodenlehre Der Rechtswissenschaft,* 48; Gustav Radbruch, *Einführung in die Rechtswissenschaft*, ed. Konrad Zweigert (Stuttgart: Koehler, 1980), 103–105; Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. (Göttinggen: Vandenhoeck & Ruprecht, 1967), 479–483.

[42] Quint, "Free Speech and Private Law," 257.

[43] Ibid.

[44] Ibid., 259.

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before and even after the Constitutional Court decided *Lüth*, the Labor Court adopted this position that basic rights, and particularly those rights that are most constitutive to the German project, could be deployed directly against private individuals. Indeed, these rights were so important as to constitute "general rules for the governance of all of society."[45] Nipperdey and other advocates of direct horizontal application cited elements of the Basic Law itself in support of their position. For example, Article 20 Section 1's description of the polity as "a democratic and social federal state" suggests that some intervention of the state in private affairs was permitted "to ameliorate various forms of societal, rather than governmental, oppression."[46]

The Labor Court certainly had strategic incentives to argue in favor of direct horizontal application, insofar as this move allowed the Labor Court to touch what was previously beyond its reach – the Basic Law. Indeed, this approach would effectively place the Labor Court alongside the Constitutional Court as "an alternative source of constitutional adjudication."[47] Other jurists and scholars of private law came to opposite conclusions, however, fearing that the ultimate result of horizontal application would be not to expand the domain of the private law courts, such as the Labor Court, but to expand the role of the Constitutional Court as overseer of private law. Arguably, such jurists and scholars had reason to resist horizontal application also, to ensure their status as experts and final arbiters in their respective areas of law.[48]

Within these strategic considerations one may interpret a real intellectual disagreement, a clash of visions, about the identity of the new German constitution and how seemingly competing values would relate in the future. Some scholars understood the system of law to be essentially the same as before. Human dignity and other values that gained expression in the Basic Law certainly changed the landscape of constitutional law but, such arguments maintained, bore neither on the essential civil law framework nor on the governance of private relations. Others, most notably Nipperdey, took the new content of German fundamental law to be more transformative, to include a new charge to

[45] Ibid., 260; Mathews, *Extending Rights' Reach*, 28.
[46] Quint, "Free Speech and Private Law," 260; see also Article 28, Section 1 of the Basic Law.
[47] Mathews, *Extending Rights' Reach*, 44.
[48] Fedtke, "*Drittwirkung* in Germany," 139. A similar set of concerns motivated institutional tensions between the South African Supreme Court of Appeal and the Constitutional Court after the latter was established under the new constitutional dispensation.

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order civil society according to the principles of the Basic Law.[49] Many parties had a stake in these questions and found support for their preferred answers in the particular factors they chose to emphasize out of the seeming disharmony[50] – whether they found an institutional separation built into the civil law, which was thought also to support individual autonomy, or perceived an expanded social character the Basic Law introduced to the constitutional-legal schema. Such interpretations appear in particular decisions of the civil courts leading up to the Constitutional Court's decision in *Lüth*.

In 1954, the Federal Court of Justice first held that personality rights (i.e., the right to freely develop one's personality under Article 2) could be applied horizontally in the *Schacht* case.[51] Just six months later, the Labor Court would argue for direct horizontal application, declaring that certain rights were so constitutive to the Basic Law that they ought to apply to public and private actors alike.[52] The case involved an employee who was fired for distributing pamphlets in support of the Communist Party at his workplace, thus implicating Article 3 Section 3 (prohibiting discrimination on the basis of political views) and Article 5 Section 1 (guaranteeing the freedom of expression).[53] Though the Court decided in this particular case that the employer had dismissed the employee for reasons not related to political censorship, they took the opportunity to declare that the Basic Law did create rights obligations for employers and other private actors. Quint translates part of the opinion, that certain fundamental values "entered into [the basic legal] framework, and neither the organization of a workplace nor agreements nor acts of legal peers should be allowed to contradict those values . . . Thus these basic rights affect not only the relationship of the individual citizen to the state, but also the interrelationship of the citizens as legal equals."[54]

[49] Fedtke, "*Drittwirkung* in Germany," 140.
[50] Jacobsohn, *Constitutional Identity*, 15.
[51] BGHZ 13, 334, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=740. Nuno Ferreira explains that this case determined that "private letters can only be published with the consent of their authors and under the terms defined by them" as a function of the right to free development of personality (*Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children* [New York: Routledge, 2011], 34).
[52] 1 BAGE 185, 191 (1954); Ferreira, *Fundamental Rights*, 34.
[53] Fedtke, "*Drittwirkung* in Germany," 139–140.
[54] Quint, "Free Speech and Private Law," 260, fn. 47; 1 BAGE 185, 193 (1954).

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The Labor Court thus staked its territory in the debate over the nature of the Basic Law and its ability to reach private relationships. The Basic Law, the Court argued, furnished guidelines (or an *ordre public*) for organizing the larger German society. While the catalog of individual rights in the Basic Law[55] certainly featured in these decisions and continued to form the content of German law, the Court also drew from the idea of social justice (*Sozialstaatsprinzip*) present in Articles 20 and 28 to justify their broader view of what the Basic Law aimed to accomplish.[56] Moreover, although the Labor Court's reasoning was grounded in a conception of freedom, it was a more expansive conception that sought to account for the realities of power relationships and discrepancies in bargaining positions.[57] One might say, in the terms of this book's republican framework, that it transcended freedom as noninterference in favor of something akin to freedom as nondomination.

The Labor Court would continue in this vein a few years later in the *Zölibat*[58] decision. In this case, a woman was dismissed from her job at a hospital when she got married, as she had violated a term of employment requiring that workers remain single. The Court considered deciding the case on the basis of certain potentially relevant provisions of the Civil Code.[59] However, it instead opted to continue developing the concept of direct horizontal effect of constitutional rights, deciding the case on the basis of Article 6 Section 1 (protecting marriage and the family) as well as Article 2 Section 1 (guaranteeing free development of personality).[60] The Court doubled down on the claim of its previous decisions that private relationships and transactions ought not to contradict the *ordre public* established by the Basic Law. Nipperdey argued:

> A number of constitutional rights do not merely guarantee individual freedom against the power of the state, but rather are ordering principles for society, which have immediate significance even for the private legal dealings of citizens amongst one another. The Senate [of the Court] has also previously indicated, that private law agreements, legal transactions and undertakings may not be set in opposition to that which one may call

[55] Fedtke "*Drittwirkung* in Germany," 137.
[56] Ibid., 139–140; 1 BAGE 185, 193 (1954).
[57] Fedtke, "*Drittwirkung* in Germany," 139–140; 1 BAGE 185, 193 (1954).
[58] 4 BAGE, 274 (1957).
[59] For example, the public policy or "good morals" general clauses, which I will discuss later on.
[60] Mathews, *Extending Rights' Reach,* 45.

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> the ordering structure, the *ordre public* of the actual political and legal regime.[61]

The immediate result of this line of argument was to expand the protections offered by constitutional rights by recognizing employers and other private actors as themselves having constitutional duties. Nevertheless, Nipperdey's reasoning reveals an additional innovation that constitutional rights mandate a particular social order. What in one sense was an expansion of rights protections was in another sense a directive that private actors "uphold the public order and the common good."[62] In this way, the Labor Court argued for a constitution that weighted parity in applying the Basic Law greater than the prior distinctions of the civil law system, and that weighted constitutional ends and their corresponding duties greater than certain exercises of rights.

In arguing specifically for direct horizontal application, moreover, the Labor Court showed some readiness to dismantle the distinction between public and private, previously thought essential in guaranteeing individual freedom.[63] Jud Mathews suggests that the constitutional theory underlying such decisions in the Labor Court had an "anti-individualistic and antiliberal" bent.[64] In fact, some German scholars find enough in these decisions to argue that "this orientation toward the priority of collective interests over individual interests reflects a holdover from the labor law doctrines of the Third Reich."[65] Nipperdey's interpretations track the pre-Basic Law version of private law, which was "a very value-laden, not liberal, national socialist private law."[66] The "national socialist, anti-liberal . . . way of doing politics" informed the private law so that it almost always privileged the objective order over the subjectivity we find

[61] 4 BAGE, 274 (1957); Mathews, *Extending Rights' Reach*, 45.

[62] Mathews, *Extending Rights' Reach*, 45.

[63] Even still the Labor Court showed some hesitance, setting a high bar for direct horizontal application in insisting that the rights violation be of the gravest nature (Quint, "Free Speech and Private Law," 259–260, 265).

[64] Mathews, *Extending Rights' Reach*, 45. He later states, with less qualification, that the Labor Court's decision to apply direct horizontal effect reflected its "statist orientation to the project of constitutionalism" (46).

[65] Mathews, *Extending Rights' Reach*, 45, and accompanying citation: Thomas Henne, "Die neue Wertordnung in Zivilrecht – speziell Familien-und Arbeitsrecht," in *Das Bonner Grundgesetz: Altes Recht und neue Verfassung in den ernsten Jahrzehnten der Bundesrepublic Deutschland (1949–1969),* ed. Michael Stolleis (Berlin: Berliner Wissenschafts-Verlag, 2006), 21.

[66] Interview with Christoph Möllers, Berlin, December 9, 2019.

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in liberalism.[67] Put differently, Nipperdey "domesticizes, civilizes, constitutionalizes that idea [of prioritizing the objective] into German labor law."[68] The Labor Court's judgments put much weight on the capacity of rights to dictate social goods and thereby expressed much confidence in restructuring institutions that were previously thought necessary to protect freedom in the German constitutional order. Put differently, the discourses coming out of the Labor Court at this time suggest a readiness, indeed an eagerness, to adopt a conception of the common good in labor law, governing even private sectors according to objective public values.

Despite the Labor Court's argument that the Basic Law established a new *ordre public*, the question of horizontal application was by no means settled. In its decisions, the Labor Court had identified one possible equilibrium amid the disharmony in German law as it had been reconstituted, choosing to emphasize the principles of the Basic Law as obligating a wider expanse of German society and even obligating private actors directly. This was in contrast with the legal orthodoxy that still persisted even after 1949 when the Basic Law was adopted, that separation between public and private spheres and systems of law was essential and served such values as *Privatautonomie*. The Federal Constitutional Court would refer to these positions as two "extreme" views,[69] suggesting that there could be another, intermediate interpretation of the German constitutional order and, moreover, that such an alternative may be preferable. And indeed, just a few months after the Labor Court decided the *Zölibat* case, the Constitutional Court offered its own take on the question of horizontal effect as the supreme authority responsible for interpreting the Basic Law.

The *Lüth* Case: Challenging and Preserving Civil Law

In 1958, the Constitutional Court handed down the *Lüth* decision,[70] a case that continually features in scholarship as foundational for the practice of horizontal application. The facts of the case appear in Chapter 2, but I present them again here for the sake of a thorough

[67] Ibid. Möllers follows Alexy in the way he employs the terms "objective" and "subjective."
[68] Interview with Christoph Möllers, Berlin, December 9, 2019. According to Möllers, that such developments would come from the Labor Courts was unsurprising given that labor laws are "the least liberal private law" to the extent that they comprise the most regulation.
[69] *Lüth,* BverfGE 7, 198 (1958); Quint, "Free Speech and Private Law," 258.
[70] BVerfGE 7, 198 (1958).

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analysis. After being acquitted of war crimes for producing an anti-Semitic film during the war, former Nazi propagandist Veit Harlan directed a new film in 1950, the title of which translates to *Immortal Beloved*. In response, journalist Erich Lüth called for a boycott of the film. Harlan, in turn, called for an injunction against Lüth on the grounds that he intended to harm Harlan's economic prospects. The district court in Hamburg granted the injunction, only for it to be overturned in 1958 when the Federal Constitutional Court finally weighed in. As explained in Chapter 2, the Constitutional Court took issue with the fact that the lower court had not properly accounted for the Basic Law's "order of objective moral and legal principles" – that is, the fact that the Basic Law establishes not only subjective rights (that create rights obligations between particular parties) but also principles to guide the life of the broader polity. These principles had a "radiating effect" on all sectors of German law for which all courts had to account. The lower court had consequently erred when it held that the Civil Code alone governed the case's outcome without considering how the values of the Basic Law might intervene in the calculus. The Constitutional Court was careful to stipulate that this was still ultimately a dispute between private persons and, as such, ultimately governed by the Civil Code. Nevertheless, Lüth's right to the freedom of expression (guaranteed under Article 5 Section 1) was also relevant to the question at hand as a commitment of the Basic Law. Moreover, though all provisions of the Basic Law were potentially relevant to such calculations, the right to freedom of expression was of particular import insofar as it was "absolutely constitutive" (*schlechthin konstituierend*) in a liberal constitutional order.[71] The fact that this was a dispute between private actors did not exempt the courts from considering how the relevant provisions of the Civil Code comported with the commitments of the Basic Law and particularly such foremost guarantees as the freedom of expression.

That the Constitutional Court's decision in *Lüth* employed a doctrine of horizontal effect would seem to follow from the Labor Court's preceding decisions. Indeed, both Courts conceive of rights as objective values aiming toward a common good of society. Moreover, both grounded their decisions in a concession that such values could be abused in the context of private relationships and interactions with the state alike. Crucial, however, was the difference in mechanisms employed by each

[71] Quint, "Free Speech and Private Law," 283.

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court. In *Lüth* the Constitutional Court struck a kind of middle ground in deciding that the values of the Basic Law applied to private actors only indirectly, that is, by way of their influence on private law. Thus, government actors across branches were charged with ensuring the compatibility of law with constitutional values, from the initial processes of legislation to the interpretation of law in courts. In so reasoning, the Constitutional Court charted a middle path between two "extremes," departing from a strict understanding of the separation between public and private law as well as from the Labor Court's argument that the Basic Law itself creates duties of private actors. First proposed by eminent law professor Günter Dürig, this intermediate position of indirect horizontal effect was quickly accepted, even praised, by scholars and jurists alike.[72]

The decision in *Lüth* and the particular way in which the Constitutional Court developed horizontal effect for the German polity marked a sort of moment of truth with respect to both the larger architecture of law and courts, as well as the actual content of law. With respect to the architecture of law and courts, some legal scholars have questioned whether the indirect effect that *Lüth* introduces actually produces outcomes different from those that would be produced under direct horizontal effect. Both ultimately entail the balancing of rights, the argument goes, even if the indirect method involves the intermediate translation into private law.[73] While this is an important point and perhaps true in some cases, it does not fully appreciate the theoretic difference between these methods of horizontal application given the particularities of the German system, or the practical fact that constitutional actors themselves view them as meaningfully different. In its formulation, the Constitutional Court arguably found a balance between competing narratives associated with the old civil law system and the primacy of new constitutional values. More than a mere symbolic difference, moreover, the adoption of indirect horizontal effect has the practical result of keeping the civil law, and all its attendant discourses, relevant in such balancing considerations. The Constitutional Court did not decide that the Basic Law controlled all outcomes, just that it had to be *considered* against the existing rules of the civil law.[74] In this way, the

[72] Ibid., 265, fn. 66; Ackermann, *Human Dignity*, 321.
[73] Kumm, "Who Is Afraid"; Mathews, *Extending Rights' Reach*.
[74] As Chapter 6 will recount, certain judgments in South African constitutional law have, in a similar way, attempted to carve out space for areas such as contract law and common law more generally.

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Court preserved the potential of the Civil Code, and its attendant discourses, to factor into cases as a separate source of content and values.

In navigating old and new legal traditions in this way, moreover, the compromise in *Lüth* had the practical effect of preserving largely intact and distinct systems of law and courts. As Michelman explains, horizontal application in Germany is limited by the very fact that it operates in a dualist system of civil law and constitutional law.[75] Following *Lüth*, the Constitutional Court did expand its power to hold civil law questions up to a constitutional standard.[76] Nevertheless, even after *Lüth*, the Court spoke of "honoring this restriction of its competence"[77] and of not using this new power to encroach on the interpretive role of its counterpart apex courts. It insisted that courts at every level and even the legislature show due consideration for the principles of the Basic Law, but did not insist on any particular interpretation of these principles, so long as the ordinary courts' balancing was not egregiously off.[78] Furthermore, the private law courts remained the final interpreters in their respective areas of law wherein the Constitutional Court largely refrained from interfering. Indeed, beginning in *Lüth* and continuing in subsequent horizontality cases, the Basic Law's influence reaches only to a couple of specific provisions in the Civil Code known as the "general clauses." One of the most important of these, Section 826 of the Civil Code, states: "Whoever intentionally causes injury to another person in a manner contrary to good morals has the duty of compensating for that injury."[79] The Civil Code's reference to "good morals" seems to admit some external

[75] Frank Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward Elgar, 2011), 289–290.

[76] In arguing that the Basic Law influences the duties of private actors not directly but in the way constitutional values influence the civil law, the Constitutional Court was reasserting its role as the supreme interpreter of the Basic Law. Whereas direct horizontal effect served to give the Labor Court a significant say in interpreting constitutional principles and their effect on private actors, by insisting that the question in *Lüth* was at base one of civil law, the Constitutional Court also reinserted itself into the equation. On such an approach, the civil courts would once again engage directly with the civil law and, in theory, rely more on the Constitutional Court's interpretations of the constitutional law (Mathews, *Extending Rights' Reach*). Though this argument makes sense in the abstract, it is not necessarily borne out by subsequent cases, such as *Mephisto* (see Quint, "Free Speech and Private Law").

[77] Michelman, "Interplay," 289.

[78] Interview with Justice Dieter Grimm, Berlin, December 4, 2019.

[79] Quint, "Free Speech and Private Law," 349; for discussions of *Lüth*, see "Free Speech and Private Law," 284–285, and Sommeregger, "Horizontalization of Equality," 43.

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standard of evaluation,[80] and the Constitutional Court exploited this opening to bring the principles of the Basic Law to bear on private law. In so doing, however, it effectively limited its own interpretive authority to these particular provisions so as not to fashion itself as a "super ordinary court"[81] that can reinterpret any provision of the Code as it wishes. In those instances when the Constitutional Court cannot reach a "constitutionally satisfactory solution" without breaching jurisdictional divides, it actually looks to the legislature to revise the law.[82] Thus, "simultaneous, colliding commitments"[83] persist in Germany's practice of indirect horizontal effect, as separate systems of law and courts persist alongside the idea that the Basic Law sets the standard across spheres.

In addition to preserving a separation of public and private systems and structures, *Lüth* may be described as sustaining a kind of liberal, rights-centric discourse with respect to the content of the law. Of course, the Court endorsed the need to propagate a *society* committed to certain common norms – the freedom of expression was prioritized in *Lüth* in part for its public value and not solely for Lüth's private interests and rights as an individual.[84] At the same time, the particular right of freedom of expression, even while enforced as a societal norm, is familiar and valued as an individual right in the liberal tradition. In the terms of this book, then, should *Lüth* be understood to signify a primacy of liberal, and not republican, discourses? Recall Chapter 2's account of horizontal application as a republican vein in liberal constitutionalism. The republican interpretation advanced here does not claim that liberal values are no longer present, but that horizontality engenders new modes of discussing and disseminating these (and other) values, such that they may

[80] Indeed, the presence of these general clauses in the Civil Code suggests that legislators in the nineteenth century had already accepted the idea that social values might bear on the private legal order. However, the norms underlying these clauses were generally weak (interview with Christoph Möllers, Berlin, December 9, 2019). With *Lüth*, we see a formalization and even expansion of this mechanism in the Civil Code, as the Basic Law came to form the content of "good morals." Previously legislators maintained the primary role in defining what "good morals" meant, thus keeping the discussion within the realm of private law. After *Lüth*, however, the content of "good morals" would come from a standard external to private law, namely, the Basic Law itself. From this point on, the Constitutional Court necessarily involved itself and the Basic Law in private matters, thus bringing public values explicitly to bear on private orderings.

[81] Michelman, "Interplay," 289.

[82] Ibid., 290.

[83] Ibid.

[84] Quint, "Free Speech and Private Law," 284; Sommeregger, "Horizontalization of Equality," 43.

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be interpreted no longer merely as rights but often come to be discussed as ends. Freedom of expression is described in *Lüth* not only as a right but also as part of the content of an "objective moral order," a kind of common good for which a wider range of actors becomes responsible. Also worth noting is the role dignity plays in *Lüth*'s defense of freedom of expression, as discussed earlier. Discourses of human dignity characterize much postwar constitutionalism and, in its common associations with social welfare, generally ask more of society than do older accounts of liberalism.

The Basic Law and *Lüth*'s interpretation of it thus marked a change in German law, turning the putative neutrality of Weimar toward a system of objective values. Nevertheless, the Constitutional Court preserved certain traditional understandings present in interpretations of the Civil Code and contrary to the Labor Court's endorsement of direct horizontal application. Indeed, in one telling, the Constitutional Court adopted indirect horizontal effect in lieu of direct effect in an effort to preserve a particular conception of liberty and prevent it from turning into a duty, per se.[85] In sum, while new language about the obligations of private individuals emerged with this new societal morality, older discourses emphasizing individual rights and such values as autonomy persisted. Perhaps illustrative of this, on the very same day the Court decided the *Lüth* case, it handed down another decision in which the right to freedom of expression itself gave way to "certain traditional property interests."[86] Various episodes in the years following *Lüth* evince persistent disharmony in constitutional discourses, efforts both to preserve old structures and understandings and to foster a common obligation to constitutional norms in society.

As the Court in *Lüth* preserved some domain for private law in settling on indirect horizontal application, some perceive the "reassertion of private law" in such subsequent decisions as the *Mephisto* case.[87] This 1971 decision involved a novel, entitled *Mephisto*, whose main character was modeled on the life of German actor Gustaf Gründgens. Klauss Mann, the author, had formerly been friends with Gründgens. While Mann admitted that certain details of the character were based on the actor's life, he insisted that he did not intend the novel to be a portrait of any particular person. Nevertheless, Gründgens's heir filed an action

[85] Interview with Justice Dieter Grimm, Berlin, December 4, 2019.
[86] 7 BVerfGE 230, 1958; Quint, "Free Speech and Private Law," 286–287.
[87] 30 BVerfGE 173 (1971); see also Quint, "Free Speech and Private Law," 291.

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against Mann under the Civil Code's general clause 823(l), providing a civil remedy against infringement on "the life, body, health, freedom, property" of Gründgens.[88] In its judgment, the Constitutional Court interpreted the *constitutional* rights of human dignity and free development of personality (Articles 1 and 2, respectively) to encompass – that is, elevate to constitutional status – these rights formulated in the Civil Code.[89] In other words, the Civil Code actually gave content to the Basic Law, insofar as the Court incorporated these traditional formulations into its understanding of human dignity and personality. In this way, these rights could be balanced against and even take precedence over such rights as to artistic endeavor (Article 5 Section 3) that occur in the Basic Law explicitly.[90] One might speculate how *Mephisto* and other cases might have differed had the Labor Court's approach of direct horizontal application gained traction. Specifically, constitutional rights obligations would have applied to private actors directly. Thus, private law would not serve as a necessary intermediary or enjoy the same opportunity to bear on decisions as a unique source of values.

While *Mephisto* goes further than many cases in the extent to which the Civil Code informs constitutional interpretations, it is not unique in putting into dialogue private law and the Basic Law and, more to the point, holding up the private law as a source of values in its own right. The earlier *Blinkfüer* case also translated the Civil Code into constitutional terms, finding that the freedom of the press (Article 5 Section 1) supported claims under the aforementioned clause 823(1) of the Civil Code. In this case, the leftist magazine *Blinkfüer* won against the freedom of expression of a conservative publisher calling for a political boycott of the magazine.[91] Moreover, in the 1973 *Soraya* case, the Constitutional Court leveraged the constitutional right to personality in order to compel a remedy corresponding to the Civil Code's protection of personality

[88] 30 BVerfGE 173 (1971); see also Quint, "Free Speech and Private Law," 291, fn. 147.
[89] Mathews, *Extending Rights' Reach*, 60.
[90] Quint, "Free Speech and Private Law," 297.
[91] Although both *Lüth* and *Blinkfüer* concerned the freedom of speech, the Constitutional Court distinguished their facts and, consequently, the balancing of rights in each respective case. Specifically, the Court argued that the calls for a boycott in *Blinkfüer* extended beyond the realm of speech to involve the leveraging of one big publisher's economic power against a smaller newspaper. This, the Court determined, allowed the latter's freedom of the press to prevail against what, at first blush, might have seemed to be simply the freedom of speech of the former (interview with Justice Dieter Grimm, Berlin, December 4, 2019).

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rights. On the one hand, some argue this step constitutes a rewriting of the Civil Code to align it with the Basic Law, insofar as the Code expressly states that "intangible and nonpecuniary harms" could *not* be rewarded for damages.[92] However, with the introduction of horizontal application, even its indirect form, we would expect that constitutional values bear on private law in such ways. What is unique in the German jurisprudence, and what we see in such cases as *Blinkfüer*, is the way the Civil Code maintains a certain stature in argumentation and is put into dialogue with the Basic Law, in spite of the primacy and "radiating effect" of the latter.[93] That this maintenance of traditional structures is not universal will come into sharper relief in Chapter 6's discussion of the common law of South Africa, which, after some institutional and doctrinal struggles, is more completely beholden to the South African Constitution and which, importantly, falls entirely within the jurisdiction of the South African Constitutional Court to uphold or modify.

Initial Limits and Persisting Tensions in Horizontality

The tensions that accompanied the move toward horizontality continued not only in institutional and legal divisions between the private law and public law but also arguably in understandings of the Basic Law itself. As the previous section explained, the Basic Law's commitment to such values as human dignity revised more traditional understandings of rights, the public–private distinction, and other liberal values. Still, Jorg Fedtke interprets the catalog of rights in the Basic Law as having continuity with prior understandings and as basically "classical-liberal in character."[94] Following human dignity as the foundational value come "an extensive range of individual freedoms," including,

> the right to life and physical integrity, religious freedom, free speech and freedom of the press and the media, protection of marriage and the family, freedom of assembly and association, privacy of correspondence and telecommunications, freedom of movement within the federal territory, the protection of economic activity, inviolability of the home, and the protection of property.[95]

[92] Mathews, *Extending Rights' Reach*, 64.
[93] Ibid., 140.
[94] Fedtke, "*Drittwirkung* in Germany," 137.
[95] Ibid.

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In addition to these enumerated rights, the right to "free development of personality" has since been interpreted by the Constitutional Court as a kind of "catch-all right," protecting a vast range of liberty interests so as to make the Bill of Rights essentially comprehensive.[96] After a couple of decades, the priority of these rights seems to have settled into the popular imagination. Jud Mathews explains that 1959–1974 constituted "the high phase of liberalization in Germany."[97] Mathews cites as evidence a series of public opinion polls conducted in Germany between 1949 and 1963 that asked respondents to rank different rights in order of importance. In 1949, 35 percent of respondents identified freedom from want as most important, in contrast with 26 percent who selected freedom of expression. By 1963, in contrast, only 15 percent of respondents selected freedom from want, while 56 percent identified freedom of expression as most important. Moreover, in a 1964 poll, German voters ranked freedom as a more important value than either order or prosperity.[98]

This apparent surge in liberal values also tracks the sorts of rights that tended to be applied horizontally, in this particular era and in general. The aforementioned cases illustrate the prevalence of such rights as freedom of expression, freedom of the press, and free development of personality in Germany's earliest and most foundational horizontality cases.[99] It was in this rights context and larger milieu that horizontality developed and came to be accepted in German legal practice. The "objective system of values," propagated with horizontality, engendered discourses among constitutional actors concerning the need for parity across spheres of life. As the above cases illustrate, however, such arguments for parity remained tied to a particular catalog of rights and liberties and yielded to separate systems of law and courts. And so, it was in this context that the civil courts also adopted the practice of horizontality, particularly after a few cycles of judges had the chance to complete clerkships at the Constitutional Court and return home to their primary court appointments in the ensuing years.[100] Moreover, with the

[96] Barak, "Human Dignity in German Constitutional Law," 231.
[97] Mathews, *Extending Rights' Reach*, 53.
[98] Ibid., 53, fn. 10. Perhaps these trends in understandings of rights and freedom also bear connection to developments related to the Cold War.
[99] For a more comprehensive list that further illustrates this point, see Gert Bruggemeier, Aurelia Colombi Ciacchi, and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Volume 1* (Cambridge, UK: Cambridge University Press, 2010), 277–279; see also Ackermann, *Human Dignity*, 328.
[100] Interview with Justice Dieter Grimm, Berlin, December 4, 2019.

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adoption of the additional feature of the individual constitutional complaint, by which individual citizens could directly raise claims of constitutional violations, horizontal application became part of the "daily job" of the Federal Constitutional Court.[101]

Even still, the civil courts dispute how the Constitutional Court applies constitutional values to private law in certain instances, sometimes questioning the definitions of such terms as "property," "takings," and "freedom of contract" as employed in constitutional law.[102] Admittedly, any objections now come in the context of discrete cases rather than as wholesale challenges to horizontal application as a practice.[103] That horizontal application has largely been accepted, though, is not to minimize the changes it brought to German civil law. For the first time, private lawyers had public lawyers telling them they interpreted the law incorrectly, and these private lawyers initially feared that the public lawyers would remake private orderings in the image of public law.[104] In this book's terms, their worries reflect how the Basic Law and, more specifically, the mechanism of horizontal application would bring a new parity across German systems of law and spheres of life. Meanwhile, the traditional, largely liberal ethos historically associated with private law lived on in such people as Werner Flume, a towering figure in German private law who emphasized freedom of contract throughout his decades-long career. Flume and others like him went so far as to argue that German constitutional law had become nothing less than an instrument by which "to objectify the private liberal free coordination of subjects through contract."[105]

While Flume's perspective was continually present, it remained a mere strand of German legal thought, as horizontal application was increasingly embedded in legal practice. Of course, the nature of the rights applied horizontally in early cases did not typically call for a deep change in German society or in the behavior of individual private actors. A kind of rights-centricity could coexist alongside the language of this new

[101] Ibid. Although a vast majority of the thousands of cases heard by the Constitutional Court each year are the result of individual complaints, Justice Grimm estimated that violations are found only in 2 percent of cases. This small number corroborates the contention that the whole system of courts has come to apply horizontality, and in a way the Constitutional Court generally deems acceptable.

[102] Interview with Christoph Möllers, Berlin, December 4, 2019.

[103] Interview with Justice Dieter Grimm, Berlin, December 4, 2019.

[104] Ibid.

[105] Interview with Christoph Möllers, Berlin, December 9, 2019.

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constitutional morality in discourses surrounding horizontal application. One might describe those duties with which private actors were charged as growing out of accepted orthodoxy and already part of the societal status quo. In contrast, when the conversation eventually turned to the horizontal application of equality rights and antidiscrimination, the tenor of the discourse shifted. Old anxieties seemed to be resurrected and new anxieties born as certain constitutional and private actors expressed concern over the impact of new applications of horizontality on individual liberty and autonomy. In the arguments and events of ensuing years, sectors of both the juristic and general populations seemed to treat these developments as a turn to ensconce certain constitutional rights as ends in themselves and to do so at greater expense to other rights than had previously characterized horizontality.

Equality in the Private Sphere

While the early questions surrounding horizontality largely subsided, constitutional actors rarely applied Article 3's right to equality horizontally until recently. It seems to have taken the outside force of the EU to initiate such an expansion, when the European Council directed Member States to implement antidiscrimination measures in 2000.[106] Only after these developments did the German Constitutional Court depart from its conservative approach to Article 3's equality provisions to consider the possibility of their horizontal application.[107] Scholars explain how the Court previously considered equality cases under the lower standard of "arbitrariness review as opposed to a more intensive proportionality review."[108] Laurie Ackermann, former justice of the South African Constitutional Court, tells a similar story of German constitutionalism:

[106] The exception to this delay is the way in which parliament largely rewrote Book 4 of the Civil Code, governing family law, in the decades following the Basic Law's adoption to conform to Article 3 of the Basic Law, and conform to contemporary views about the equal status of mothers and fathers (Mathews, *Extending Rights' Reach*, 67–68). Such revisions came almost entirely through parliament, however, rather than through the courts. Moreover, this was the only part of the Civil Code that was so overhauled as a result of the adoption of the Basic Law.

[107] *Stadium Ban*, 1 BvR, 2080/09, April 11, 2018.

[108] Mathews, *Extending Rights' Reach*, 80; Stone Sweet and Stranz, "Rights Adjudication and Constitutional Pluralism in Germany and Europe," 100.

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> As point of departure the Basic Law, by "upgrading" ("*Aufwertung*") the freedom "flowing from human worth" and by making a primary choice in favour of personal freedom, places it beyond doubt that thereby freedom is also sanctioned as between equals, as against demands of equality.[109]

Günter Dürig offers a coinciding account, seeing freedom under the Basic Law as "the primary manifestation" of human dignity[110] and, moreover, that "a preference for freedom as against equality has been established."[111]

The few times that equality was applied horizontally before the EU introduced its directives occurred in the Labor Court, consistent with that court's approach to horizontal effect since the 1950s.[112] The Labor Court has been quicker to rely on the constitutional commitment to equality in adjudicating fair relations between employer and employee.[113] Insofar as the labor courts' jurisdiction is circumscribed to labor law, the German legal community generally acknowledges that their area warrants more searching consideration of social power and even the continued application of *direct* horizontal effect.[114] In light of this tendency of the labor courts to give more weight to equality, it is not surprising that they largely allied with the European Court of Justice (ECJ) after the issuance of the 2000 antidiscrimination directives. The High Labor Court even asked the ECJ for preliminary references about the requirements of

[109] Ackermann, *Human Dignity*, 326. Interestingly, Ackermann thinks that South Africa ought to heed Germany's example in limiting the extent to which the Basic Law's right to equality applies to private law (327). Stephen Ellmann calls for similar limits in his article "A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors," *New York Law School Law Review* 45 (2001), 21–75. As the next chapter demonstrates, however, the South African Constitution lays groundwork for a more progressive practice of horizontality, which often, albeit not always, is manifested in the Constitutional Court's judgments.

[110] Ackermann, *Human Dignity*, 326.

[111] Ibid., 327.

[112] Ibid., 328.

[113] Stone Sweet and Stranz explain that the Labor Court has even employed its own invented "General Clause on Equality" to this end ("Rights Adjudication and Constitutional Pluralism in Germany and Europe," *Journal of European Public Policy* 19:1 [2012], 98).

[114] The Labor Court continued to employ direct horizontal effect through the 1980s without much resistance. Indeed, some even reason that "the one-sided relations of social power" that tend to characterize employment cases justify a higher accountability to constitutional standards than is necessary for other private relationships (Quint, "Free Speech and Private Law," 265, fn. 66).

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these new policies, while the Constitutional Court instead followed along only to the extent that was required.

Although equality was certainly present in the Basic Law, it did not feature prominently in the context of private relations, a fact arguably consistent with the emphasis on *Privatautonomie* in certain sectors of German law discussed earlier. While German politics long possessed a strong welfarist streak, the value of equality did not extend further, for example, to include principles of antidiscrimination vis-à-vis gender, race, national identity, and the like. It may be the case that provisions for social welfare were understood as the functional equivalent of these protections, rendering the latter superfluous. Indeed, people from various sectors of civil society argued that such protections against discrimination would amount only to costly "red tape" and higher burdens of proof for private actors.[115] Ultimately, the external force of the EU shifted this status quo and pushed for the stronger horizontal presence of equality principles in the form of antidiscrimination legislation. The two directives that the European Council required in national law included Council Directive 2000/43/EC (the Racial Equality Directive) and Council Directive 2000/78/EC (the Employment Equality Framework Directive). The former aimed to bring all public and private law into line with EU equality norms, specifically concerning racial and ethnic discrimination. The latter directive, in contrast, aimed only to influence employment law, but required equal treatment across a range of classifications, including "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[116] The German Parliament first attempted to implement these directives in the Anti-Discrimination Act (ADG) of 2001.[117] The Act generated much controversy from all sectors

[115] Interview with Alexander Tischbirek, Berlin, December 9, 2019. Tischbirek explained that police unions were particularly concerned about the higher burden of proof they would have to satisfy.

[116] Sommeregger, "Horizontalization of Equality," 36; Mathews, *Extending Rights' Reach*, 79.

[117] Georg Sommeregger summarizes the changes the Act proposed:

> It would have regulated the conclusion, termination, content, and execution of contracts whose objects are goods and services offered in a market situation, (i.e., publicly), and in particular, contracts of purchase or sale, rent, credit, and insurance. Both direct and indirect discrimination would have been prohibited, and, new for German law, so would harassment. A striking feature of the rules of evidence was the intended reversal of the burden of proof in favor of the plaintiff. The defendant would, in other words, be called to adequately and convincingly prove his/her lack of

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of German society, as politicians, jurists, and many others in civil society argued the Act "would go too far in curtailing the principle of private autonomy."[118] Others argued that it was in fact necessary not to exempt "predominant sectors of social life from scrutinization" in order to take nondiscrimination seriously.[119]

In his contemporaneous analysis of the arguments surrounding the ADG, Georg Sommeregger recounts some scholars' worries about the proposed legislation:

> The introduction of equality in the private sphere by doctrines of horizontality is in substance mandated virtue imposed by the state on the individual. As Karl-Heinz Ladeur put it, "In a liberal society there should be a difference between prosecution of public discrimination against citizens and public invasion of privacy in order to impose 'correct' views on citizens." In this criticism the state appears as a missionary that tries to make citizens morally "good."[120]

While preserving a private sphere permits diversity of views, abolishing the public–private divide, as the new legislation was understood to do, would entail "subjecting private action to the same moral yardstick (or values) as are valid for public agents."[121] The argument continues that this would result in "crushing ... the possibility of private choice by 'public virtue.'"[122] The prospect of bringing the value of equality to bear on private spaces thus yielded strong reactions for the very reason that it would require individuals in the private sphere to adhere to a public formulation of a kind of common good. Sommeregger stipulates, however, that this parity (what he calls "value monism") was only required in select areas and with respect to particular categories. The legislation did

> intent to discriminate. Another new item was the right of associations to take legal action (*Verbandsklagerecht)* on behalf of the victim of the alleged discrimination. Associations could even have proceeded without the consent of the victim.
>
> ("Horizontalization of Equality," 39)

[118] Sommeregger, "Horizontalization of Equality," 37–39; Mathews, *Extending Rights' Reach*, 81; Fedtke, "*Drittwirkung* in Germany," 154. Sabine Berghahn also describes the reactions of churches and other religious organizations in Ben Knight, "European Court of Justice Tells German Churches to Respect EU Discrimination Law," *Deutsche Welle*, September 11, 2017, accessed July 9, 2019, https://p.dw.com/p/2nMsu.

[119] Sommeregger, "Horizontalization of Equality," 44.

[120] Ibid.

[121] Ibid.

[122] Ibid.

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not entail a blanket requirement that all private choice conform to public standards, but only that some private choices conform. On this basis, he concludes that the legislation "did not introduce a new paradigm but shifted the line between uncensored and censored private behavior (too far for some), with the result that the private sphere is decimated without being liquidated conceptually."[123] The appropriateness of such shifting of the public moral yardstick into private spaces ultimately amounts to a political question, the answer to which likely depends on a given country's particular history, commitments, and public opinion.

In many ways, these fears about the consequences for autonomy echo those same fears articulated in the run-up to the *Lüth* case in the 1950s. Nevertheless, the antidiscrimination legislation stirring up those fears is different from the initial move to horizontality in *Lüth* in a couple of ways. First, the content of the rights in question is qualitatively different from those that had been given horizontal effect in prior decades.[124] Sommeregger explains, "In the horizontalization of other fundamental rights the fundamental tension between liberty and equality is in the background, whereas in the case of the antidiscrimination legislation it comes to the fore because of the fact that equality itself is the object of

[123] Ibid., 48.

[124] Rather than depend entirely on a distinction between liberty and equality, Sommeregger goes further to explain this as a difference between two concepts of equality. This distinction is analytically useful and achieves a level of nuance, often lost in similar discussions, insofar as classical liberalism consistently counts equality among its foundational principles. He states:

> In the public sphere, equality equals the principle of non-discrimination- . . . In the private sphere, equality refers to the equal standing or equal autonomy, of the individuals relative to each other, i.e., the lack of hierarchy, or "natural" equality . . . The passing of anti-discrimination legislation means the transferal of the logic of equality in the public field (constitutional law field) to private law/private relationships. The introduction of the logic of equality-non-discrimination into private law, which hitherto functioned on the logic of equality-as-autonomy, means that in the private sphere, the "state" element of the public formula (i.e. the relationship state v. individual) is transferred to the "individual" element of the private formula (relationship individual v. individual). The result of the substitution is that the individual (now in the place of the state) has a duty not to discriminate (on the grounds spelled out by the law), but can no longer oppose its own rights to autonomous choice. The space formerly filled autonomously and arbitrarily by individuals is now filled by the state, and filled with the common standard of the community.
>
> ("Horizontalization of Equality," 46–47)

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horizontalization."[125] This book's argument presumes that horizontal effect *always* entails parity, insofar as it always brings public values to bear in private spaces. Thus, even when more negative, classical rights are at issue in a case, one of the parties will still be required to conform to those attendant values of the Constitution – for example, the freedom to develop human personality in *Mephisto*, or the freedom of the press in *Blinkfüer*. To this extent, the EU directives and subsequent legislation of the German Parliament were not different, but simply added new rights to the catalog of those that would in some way be applied horizontally.

At the same time, the nature of the duties incurred is somewhat different in comparing negative classical rights with equality rights horizontally applied. The difference in duties is even more apparent in the potential positive duties of private actors considered in the context of South Africa in Chapter 6. Presumably, this heightened potential for the constitutional duties of private actors might be felt all the more in some corners given certain regnant elements of German legal history and tradition, such as the system of civil law, recounted earlier. Moreover, the consensus that such values inspired was in certain ways embodied in the liberal surge of the postwar years. In Sommeregger's terms, a kind of "value monism" with respect to these more classical rights did not give rise to controversy. When the prospect of individual duties pertaining to antidiscrimination arose, however, many expressed anxiety that the consequent new duties would touch subjects that comprised a continued "value pluralism" in German society. Put differently, regarding the ADG, some private actors expressed that the content of those rights for which private actors would be held responsible would potentially conflict with their priors.[126]

[125] Sommeregger, "Horizontalization of Equality," 45.

[126] Jud Mathews recounts some of the cases that followed the AGG (the legislation that ultimately was successful following the ADG). He states:

> A number of cases concern indirect discrimination on the basis of language: for example, the state labor court in Nuremberg ruled that a job requirement of "very good knowledge of German" in a job posting for a software specialist could be evidence of discrimination. Cases concerning unequal treatment on the basis of religion have been numerous, and their outcomes have often turned on whether equal treatment would infringe the employers' own confessional rights. A Muslim dental trainee had a right to wear a headscarf at work, according to a labor court in Berlin, but a Protestant hospital could legally forbid a Muslim nurse from wearing a headscarf, according to the state labor court in Hamm. The Federal Labor Court ruled that it could violate the AGG for an employer to fire a Muslim

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Unlike the early judicial debates that preceded *Lüth*, the shift to apply equality and, more specifically, antidiscrimination horizontally occurred through legislation, first through the European Council and then the German Parliament.[127] Whereas the practice of horizontal effect in courts applies rights obligations to private actors in single, isolated cases, the developments following the EU directives came through legislation and, therefore, amounted to a change in the very "base-line of private law."[128] Claims to autonomy, people feared, would no longer be balanced or weighed on a case-by-case basis, but would necessarily yield to equality. As Sommeregger puts it, "The moral standard (one and only) of the community trumps the individual moral standards (resting on personal choice) of the individuals in the specific fields."[129] While a common objection to horizontal application is that courts are not politically accountable in the same way as legislatures, the more typical objection to the ADG was less about the venue of decision than about "this move of public virtue into the private sphere" at all, regardless of origin.[130]

When it comes to the horizontal application of equality and the debates surrounding the ADG, the republican framework of this book amounts to more than an interpretive lens. Rather it captures and

> warehouse employee for declining on religious grounds to move alcohol, and a labor court in Stuttgart ruled that a Catholic organization could fire a teacher for entering a same-sex civil union.
>
> Courts have also considered gender discrimination claims in a number of contexts, reaching various results. A labor court in Cologne held that an airline's minimum height requirement for pilots could constitute a form of indirect discrimination, while the state labor court in Mainz held that employers may give women preferential access to parking spaces. A series of cases concerns unequal access to discos and nightclubs, on the basis of gender or race. A man won a 300 euro judgment against a dance club in Berlin that turned him and his friends away because, according to the bouncer, "you guys are too many men." A dark-skinned law student in Bremen won his claim that he was turned away from a disco on account of his race because several witnesses confirmed his account and the defendant could not prove its claim that he was in fact turned away because he was dressed unfashionably.
>
> (*Extending Rights' Reach*, 83–84)

[127] Of course, this situation raises questions about the relationship between EU and national processes. I bracket this issue here as it is the focus of Chapter 7. See also Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin: De Gruyter, 2014).

[128] Sommeregger, "Horizontalization of Equality," 48.

[129] Ibid.

[130] Ibid., 47.

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articulates how many political and private actors themselves interpreted these developments. Sommeregger's account, for example, suggests that many recognized the reach of public values into more sectors of society as establishing a kind of common good, likely to entail more extensive duties of private actors and compromise of private interests. Again, this is in contrast with the kinds of rights that had previously been applied horizontally in German constitutional practice, such as freedom of expression and freedom of the press, that did not typically require extensive positive action on the part of private actors. On some level, the Basic Law and *Lüth*'s interpretation of it were always premised on a need to build a polity on certain common values after the Second World War; however, this commonality had only extended so far into the private sphere prior to the EU's antidiscrimination directives. On this basis, perhaps it is unsurprising that the impetus to extend horizontal application further came from EU institutions, that is, sources external to Germany.

Ultimately the ADG failed under this political opposition to public mores in the private sphere. Moreover, the ensuing controversy led parliament to change the law actually to allow more discrimination, specifically in lessening protections for workers dismissed from their jobs on the basis of age.[131] Nevertheless, EU institutions stood their ground on the issues at stake when, in the 2005 *Mangold* case, the ECJ described antidiscrimination as one of the EU's "general principles" that ran deeper than the recent directives, thereby insisting on German compliance. While the Constitutional Court, in response, might have reasserted "control over equality law in Germany," it followed the ECJ and, indeed, the German Labor Court, so as not to appear an opponent of equality.[132]

In 2006, the German Parliament managed to pass the General Equal Treatment Act (AGG) in fulfillment of the EU directives. Most decisions related to this legislation have since been issued by the civil courts and labor courts rather than the Constitutional Court.[133] Indeed, very few cases invoking the AGG have been litigated at the federal level. Scholars suggest a couple of different factors to explain this, such as the difficulty certain groups (and particularly vagrant populations) have in accessing the German courts, as well as the short, two-month timeline individuals

[131] Mathews, *Extending Rights' Reach*, 82.
[132] Ibid.
[133] Ibid., 83.

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have to file antidiscrimination suits.[134] Moreover, certain aspects of the EU directives have long remained unimplemented, specifically those areas such as education that fall under the competencies of the *Länder* (German federal states). Several states have attempted to implement these aspects of the antidiscrimination directives, but have been largely unsuccessful. Indeed, the same concerns surrounding the ADG and AGG have resurfaced in these subnational arguments.[135] Amid myriad other factors figuring into these debates, some more resistant arguments may be understood in historical terms. Specifically, antidiscrimination had not previously been emphasized in German legal culture as much as civil liberties, "having comparably weak roots in the tradition of fundamental rights (and their adjudication by the FCC) as well as in public perception."[136] In this light, the hesitance displayed in arguments from various corners of German society is not necessarily surprising.

Equality and the Future of Horizontal Effect

After the events surrounding the EU directives and the AGG, whether and when Article 3's equality provisions might apply horizontally also became the subject of much debate. The arguments surrounding these later debates offer additional insight for interpreting horizontality in a republican light. The Constitutional Court finally took up the question of the horizontal application of Article 3 in 2018 in the *Stadium Ban* case. In this case, a sixteen-year-old fan of a German football club was permanently banned from a stadium for disorderly behavior.[137] The individual filed a constitutional complaint, arguing that the ban violated his constitutional right to the free development of personality "in light of the paramount significance of football for social life and the importance attached to it by the general public and society."[138] Although the Constitutional Court agreed that the facts of the case did implicate questions of constitutional rights, they found the issue was not the youth's right of personality but his right to equality under Article 3(1)

[134] Interview with Alexander Tischbirek, Berlin, 9 December 2019.
[135] Michael Wrase, "Anti-discrimination Law and Legal Culture in Germany," in *Anti-discrimination Law in Civil Law Jurisdictions*, ed. Barbara Havelková and Mathias Möschel (Oxford: Oxford University Press, 2019); interview with Alexander Tischbirek, Berlin, 9 December 2019.
[136] Wrase, "Anti-discrimination Law," 141.
[137] *Stadium Ban*, 1 BvR, 2080/09, April 11, 2018.
[138] Ibid., para. 6

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insofar as he was treated differently from other stadium attendees. Thus, the task of the courts was to balance this protection against unequal treatment under Article 3(1) against the football club's guarantee of private property under Article 14(1).

The Court was careful to stipulate, however, that Article 3(1) "does not give rise to an objective constitutional principle," such that private actors would generally have a duty to uphold equality rights. Rather, the Court reiterated the liberal precept that "all persons have the freedom to choose – according to their own preferences – when, with whom, and under what circumstances they want to enter into contracts, and how they want to make use of their property in this context." The young fan's equality rights under Article 3(1) only applied to the football club, a private actor, in this instance because of the particular nature of the football club and the stadium. Specifically, these were institutions generally open to the public, forming a central part of social life, and maintaining a kind of monopoly over the sport of football. Even while subject to Article 3 requirements in this particular case, however, the Court determined that the football club had not acted arbitrarily in banning the young fan, but that the unequal treatment was justified by his conduct.

In many ways, the *Stadium Ban* case raised more questions than it answered. While on the one hand, it seemed equality rights might now apply horizontally, the extent to which this hinged on the particular facts of the individual case remained unclear. Legal scholars found a kind of ambivalence in the judgment and speculated that the Court may have had trouble reaching a consensus.[139] Indeed, one could simultaneously read it as preparation for more to come or as a careful attempt to cabin the outcome to this single decision. The picture would only become murkier in the following year when the Court decided two additional cases concerning Article 3(1)'s equality guarantee. The first of these was simply a preliminary injunction that the Third Way, a far-right political party, filed against Facebook after the social media platform identified some of its posts as hate speech and temporarily restricted the party's ability to post content.[140] The facts raised questions about Facebook's

[139] Interview with Christoph Möllers, Berlin, 9 December 2019.

[140] 1 BvQ 42/19, 22 May 2019. In this case, Facebook acted on the basis that the hate speech violated its own community standards. However, it is worth noting that Germany's 2017 Network Enforcement Act (NetzDG) also creates obligations of communications companies, such as Facebook, to restrict hate speech. The law has faced much criticism

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obligations with respect to equal treatment and whether social networks would be subject to Article 3 obligations, as was the football club in the *Stadium Ban* case. However, the Court decided only the question of injunction, granting the Third Way's petition, rather than taking on the constitutional question at stake.[141]

A few months later, the Constitutional Court confronted the possibility of the horizontal application of equality yet again when an official of the extremist right-wing National Democratic Party of Germany made a reservation for a wellness hotel. The hotel owner notified him that he could not stay, explaining that the official's "political opinions were incompatible with the hotel's mission to ensure that each and every guest could enjoy an excellent wellness experience."[142] The Court reiterated the principle it articulated in the *Stadium Ban* case, that private actors were not subject to equality guidelines as a general principle, but only under specific circumstances. Ultimately, the Court decided that those specific circumstances simply were not present here; unlike the football club, the wellness hotel did not form a central part of social life and did not maintain a monopoly. Therefore, the party official could claim no right against which to balance the hotel owner's right to property (Article 14(1)) and freedom to conduct a business (Article 12(1)). Moreover, the Court clarified that the prior *Stadium Ban* case had only treated the General Equality Clause of Article 3(1), rather than the Anti-Discrimination Provision of Article 3(3). While the Court explicitly left open the possibility that this provision might require something of private actors, it did not follow from the ruling that they are prohibited from discriminating on the basis of political opinion. Again, as Fabian Michl explains, private

for delegating too much responsibility to private corporations. Maintaining the balance between freedom of expression and protection against hate speech, critics argue, ought to be a function of public actors. Legal scholars predicted early on that the law would come before the Constitutional Court before long (interview with Holger Greve, Berlin, December 9, 2019).

[141] The Constitutional Court has also considered, albeit in *obiter dictum*, the possibility that social media companies may be responsible for upholding other rights commitments as well. In a 2011 case (1 BvR 699/06 [22 February 2011]) the Court determined that an airport was directly bound by fundamental rights obligations as a result of the state's involvement in the airport's operations (akin to the "entanglement" exception to the state action doctrine in the United States). In para. 59 of the opinion, the Court briefly suggests that telecommunications companies may also be directly bound to fundamental rights obligations, such as the freedoms of expression and assembly, when they assume traditionally public functions (akin to the "public function" exception to the US state action doctrine).

[142] 1 BvR 879/12, August 27, 2019.

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individuals "are free to decide who they favor or disadvantage, with whom to conclude contracts and to whom to grant access to their property, their pub or their hotel."[143] In this same spirit, the Court decided for the hotel in the name of freedom, once again not even reaching the question of balancing.

Where does this sequence of cases leave the question of equality's horizontal application and, more specifically, a republican interpretation of horizontality? In many ways, the arguments of these judgments hinge on facts unique to the cases at hand – the cultural significance of football in Germany, for example, or historical experience with extreme parties. In Germany, a football stadium is not simply a sports arena but a public forum where citizens go to associate and participate in civic life. Full participation in society may be said to require admission in such a space, while the same cannot be said of the wellness hotel. Setting aside consideration of the factors that might explain the constitutional development itself, the arguments playing into these equality cases show an implicit hesitancy that is arguably relevant to a republican interpretation. Specifically, the judgments point toward a particular way of carving up the private sphere, as the Court understands certain private actors and spaces as contributing to (or detracting from) a kind of common good more than others. Insofar as certain private actors hold greater public import, they are more subject to constitutional values and accrue duties. Contextual particulars are crucial here, as football and a football stadium would not necessarily have the same meaning attached to them elsewhere and, consequently, would not be so relevant to a republican interpretation.

Rights and larger commitments related to equality in Germany thus bring to the fore discursive insights that bear on republican interpretations of horizontality. As explained previously and is true in other contexts, equality is often interpreted as requiring more of private actors than other rights commitments and, to this extent, shows the reach of a republican interpretation amid contextual particulars. Generally, discourses surrounding the horizontal application of equality have been weaker and more hesitant than, say, in the horizontal application of freedom of expression or freedom of the press in Germany. Considering the arguments that arose from the ADG/AGG saga and

[143] Fabian Michl, "Wer darf wen 'diskriminieren'? Zum Nichtannahmebeschluss in Sachen Hotelverbot (1 BvR 879/12)," *VerfBlog,* October 12, 2019, https://verfassungsblog.de/wer-darf-wen-diskriminieren.

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later debates focused on Article 3, the effect of constitutional values has not radiated so decisively when it comes to equality. However, later judgments have treated some spaces and actors in a way that suggests their heightened public significance or historical meaning and, on this basis, assign constitutional duties related even to equality.

Conclusion

In *Lüth*, the Constitutional Court declared that the Basic Law engendered an objective order of values and, thus, that the constitutional project aspired to influence broader reaches of society than had prior constitutions. In this way, the Court's language signaled a transformative project for a reconstituted Germany. The idea that constitutional values should radiate beyond traditional bounds set a course for a project clearly more ambitious than traditional understandings of constitutionalism. Nevertheless, the fundamental structure of the legal system remained in place with *Lüth*, as the Court acknowledged that private law contributed to "the autonomy of the individual – and to the public good – and therefore should remain in effect ... even when confronted by the countervailing objective and public values of constitutional law."[144] The Constitutional Court thereby reaffirmed the presuppositions of the civil law system so that the Basic Law could influence the private law but not supplant it.[145] In pursuing this moderate course, the Constitutional Court in some sense nestled into the disharmony that had emerged between an enduring civil law tradition and the propagation of public values in private spaces.[146]

While horizontal application in some forms was broadly accepted and assumed into legal practice, a tension reminiscent of that latent in *Lüth* would surface in later debates surrounding the horizontal application of equality. In particular, the EU directives in 2000 aimed to add equality and antidiscrimination to the catalog of those commitments for which private actors would be responsible. As far as certain private actors and

[144] Quint, "Free Speech and Private Law," 263.

[145] Quint explains that "the fact that the action remains a private law action may have a significant limiting effect on the scope of the Constitutional Court's review" ("Free Speech and Private Law," 273). Whereas, in the United States, an actor can be held to a constitutional standard if he or she can be shown to be sufficiently entangled or serving a public function, private relationships remain private relationships in Germany and are governed as such even while being influenced by the Basic Law.

[146] Michelman, "Interplay," 289–290.

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even some constitutional actors were concerned, this step to subject private spaces to constitutional ends went too far in encroaching on individual rights. While antidiscrimination legislation growing out of the EU directives ultimately passed the German Parliament, related questions about the horizontality of equality rights continue to be adjudicated in the Constitutional Court and other fora.

Describing the German constitutional project as transformative[147] can be helpful to understand what the constitutional drafters were up to in the wake of the Second World War, how the Constitutional Court interpreted that project in the following decade, and perhaps even later efforts to give greater effect to such values as equality. A transformative constitution makes clear space for something like horizontal application, which by definition extends constitutional commitments further into society than traditional understandings of constitutionalism would admit. Indeed, the history recounted in this chapter continually raises the question of what a transformative constitution might require in general and, more specifically, require of private actors. It is at this juncture that a republican interpretation becomes helpful.

This book's republican framework does not necessarily provide normative answers to questions about what a transformative constitution should ask of private actors. Rather, it offers an interpretive lens to understand actors' arguments around these questions. On the one hand, in debates about horizontal application in Germany, we might perceive an embrace of constitutional ends as a kind of common good and, consequently, an embrace of the corresponding duties that follow citizens. On the other hand, arguments in later debates surrounding equality suggest reservation concerning particular ends and the resulting "value monism," to use Sommeregger's phrase. Indeed, an easy embrace of ends and duties is not evident in the later sequence of events or in the arguments pertaining to antidiscrimination. Instead, the discourses emerging from later debates about equality favor more conventional understandings of rights, aligned with a conception of separate spheres, separate systems of law and courts, and so on. Put differently, this book's theoretic lens evinces complexity in the German context, namely, a waning of republican-inflected language about constitutional ends or a common good and renewed emphasis on rights discourses.

[147] Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South," *American Journal of Comparative Law* 65:3 (2017), 527–565.

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In Chapter 6, similar insights emerge out of the South African context, arguably the paragon of transformative constitutionalism. Debates in both Germany and South Africa largely presuppose that public ends will bear on private spaces to some extent. Yet, how far and in what ways these public ends can reach vary across these constitutional contexts and even across institutions and individual actors within each context. Under the new dispensation in South Africa, debates have centered not so much on whether constitutional commitments may apply horizontally in one space or another but on what such commitments may require specifically of private actors, say, with respect to positive rights. As ever, factors countervailing against horizontal application also influence the debates; political interests rooted in the Apartheid era, as well as a kind of legal formalism, correlate with more traditional articulations of rights. At the same time, much of the constitutional discourse from a range of actors includes some basic admission that the South African constitutional project aims for and requires more of its citizens than other constitutional orders.

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