Transformation
How Far Does the Constitution Apply Horizontally?

Chapters 3 and 4 have examined debates in the United States and India over the simple question of whether constitutional rights can be applied horizontally. Both nations have faced the decision of whether equality rights may be enforced in privately owned spaces such as public accommodations and housing. In the *Civil Rights Cases*, the US Supreme Court roundly rejected Congress's efforts to give horizontal application to equality. Against Justice Harlan's admonitions that such protections were requisite to republican citizenship, Justice Bradley and the rest of the Court argued that relegating the reach of this right to state actors only was necessary if the country was to avoid "another kind of slavery." Meanwhile, state constitutions have generally had more latitude to apply rights horizontally, even if they have not always done so. Moreover, horizontal interpretations of constitutional rights have emerged in popular understandings and discourses in such moments as the Civil Rights Movement. Expressly concerned with cultivating fraternity among citizens, on the other hand, the Indian framers, provided for the application of equality rights against private actors in Article 15 of the Constitution. While this right to equality has taken time to be activated in private spaces as a practical matter, observers of Indian constitutional politics perceive further development of horizontal application in line with these early foundations. Nevertheless, this is far from an established practice in Indian constitutional law and politics, and so the question of how horizontal application grows out of the Constitution remains a live one.

Chapters 5 and 6 center on the slightly different question of the *extent* to which the constitution applies horizontally in new contexts, again examining how republican-inflected discourses emerge in debates. In both Germany and South Africa, the question of whether the constitution applied horizontally was answered early on and can be taken as granted. Therefore, rather than ask whether horizontality had any role in the constitutional plan, debates in these contexts have been more

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concerned with the *extent* and *limits* of horizontal application – to what rights, to what actors, and under what circumstances.

The debates these chapters recount also tend to treat horizontal application as a mechanism to transform private spaces, as the Constitutions of both Germany and South Africa were drafted in pursuit of immense societal transformation.[1] Confronting histories of systemic injustice and genocide, constitutional actors in both countries enshrined values such as human dignity with power to govern across public and private spheres and even to establish duties for both public and private actors. From drafters to judges, constitutional actors pointed toward a need for parity in the way these values governed across spheres, establishing a common standard or, in republican terms, a kind of common good for a wider scope of the polity. The practice of horizontality was treated as not merely another tool to protect rights, but one that could facilitate transformative ends. What specifically this would mean for private actors' duties, however, remained a question.

Early on, each country departed from the conventional liberal logic that rights only created obligations for the state. The German Federal Constitutional Court introduced indirect horizontal effect, or *Drittwirkung,* soon after its institution in the *Lüth* case. Moreover, South African constitutional framers explicitly provided for horizontal application in the Final Constitution. The constitutional discourses that unfolded after each country's founding moment reveal aspirations among some to create a new kind of society. German scholar Georg Sommeregger describes horizontality in terms of promoting a kind of constitutional morality or introducing "society's common moral yardstick" into private spaces.[2] Moreover, he characterizes the later expansion of horizontal application to equality rights as part of a process of "enlarging the circle of members of the polis."[3] Similarly, Nick Friedman argues how South Africa's doctrine of horizontal application was part and parcel of the Constitution's transformative project.[4]

In both contexts, however, horizontal application was also contested from the beginning. Academics and jurists alike debated the virtues and

[1] Jacobsohn and Roznai, *Constitutional Revolution*, 111–112.

[2] 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), 53.

[3] Ibid., 49.

[4] Nick Friedman, "The South African Common Law and the Constitution: Revisiting Horizontality," *South African Journal on Human Rights* 30:1 (2014), 67.

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vices of this new legal-constitutional mechanism. Would accepting the Basic Law as a standard for Germany's entire legal system threaten its time-honored civil law and specialized courts? Would horizontal application usurp the function of the South African legislature to decide political questions and such matters as appropriations? What would become of individual autonomy if private actors were now also responsible for protecting and promoting constitutional rights? As Frank Michelman puts it, the "ghosts" of the conventional liberal wisdom persisted in constitutional discourse in different ways,[5] even as both constitutions committed to real and thoroughgoing transformation. Most obviously, courts in both Germany and South Africa have predominantly practiced indirect, rather than direct, horizontal application, ostensibly creating a buffer in the way public values come to bear on private actors. Perhaps the German courts had particular incentive to tread lightly as no national high court had previously claimed the ability to apply constitutional rights horizontally in the 1950s.[6]

Actors argued for further limits to horizontal application based on their interpretations of the constitutional projects. For example, certain corners of the German legal world have long valued autonomy (*Privatautonomie*). While this value has certainly undergone transformation in legal discourse since the reframing of the Civil Code in the nineteenth century, constitutional drafters recommitted to such individual rights in the wake of the Second World War. Likewise, elements of a conventional liberal wisdom have lived on in constitutional discourses, including in ways that touch on horizontal application. This translates to the way constitutional actors have treated claims of equality and nondiscrimination differently from other rights. For example, equality and nondiscrimination were long adjudicated according to the lower standard of reasonableness review, while most enumerated freedoms in the German Basic Law enjoyed more robust proportionality review.[7]

[5] Frank Michelman, "Constitutions and the Public/Private Divide," in *Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 304.

[6] Alec Stone Sweet and Kathleen Stranz, "Rights Adjudication and Constitutional Pluralism in Germany and Europe," *Journal of European Public Policy* 19:1 (2012), 92–108. Some exceptions are the treatment of speech in the Weimar Constitution and in new state constitutions before the adoption of the Basic Law. See Peter Quint, "Free Speech and Private Law in German Constitutional Theory," *Maryland Law Review* 48:2 (1989), 258.

[7] Stone Sweet and Stranz, "Rights Adjudication," 100. This early treatment of equality is often attributed to the law professor and justice of the Constitutional Court Gerhard

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Moreover, the few times that rights related to equality were applied in private spaces occurred through the Federal Labor Court rather than the Constitutional Court, or directives of the European Council requiring heightened antidiscrimination policies in Member States. Only recently has the Constitutional Court itself taken up this question, most notably in the 2018 *Stadium Ban* case.[8] While horizontality itself has long been accepted in Germany, its application to equality rights continues to be a subject of debate, frequently treated as running up against private autonomy.[9] Indeed, unlike the state, private 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."[10]

On the other hand, equality has featured more prominently in South African constitutional experience and discourse, enjoying pride of place alongside dignity and freedom. According to former Justice of the Constitutional Court Laurie Ackermann, these three values are impossible to separate from one another and even define one another in the South African constitutional project.[11] The South African Court has still argued for limits to horizontal application, for example, applying rights to private actors indirectly by way of common law and statutory law. However, the Court has not set apart any one area of rights as a limit on horizontal application, as has been true of equality in Germany. Indeed, the end of realizing equality across spheres has characterized much of South African constitutional discourse, such that even definitions of autonomy are suffused with a concern for equality.[12] Although South Africa's Constitution is comparatively young, there has been much discussion of horizontal application as the practice has developed, from *Du Plessis v. De Klerk* in 1996 (which showed some signs of Michelman's liberal ghosts) to later cases such as *Daniels v. Scribante* in 2017 (which

Leibholz. His formulations of equality amounted to a different standard of review until around the 1980s and 1990s, as well as a narrower focus on political and gender equality (interview with Christoph Möllers, Berlin, 9 December 2019).

[8] 1 BvR, 2080/09, April 11, 2018.

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

[10] 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.

[11] See generally Ackermann, *Human Dignity*.

[12] Some scholars have understood the relationship between autonomy and equality in similar ways in the Indian context. See, for example, Tarunabh Khaitan, "Reading *Swaraj* into Article 15: A New Deal for All Minorities," *NUJS Law Review* 2:3 (2009), 420–432.

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suggests that private actors potentially have duties with respect to their fellow citizens' socioeconomic rights). Even as many have argued for limiting horizontal application in South Africa, constitutional actors largely embrace this practice as a constitutional requirement, including the parity and duties that horizontal application activates across a range of values.

Perhaps unsurprising given these countries' transformative aspirations, scholars often identify German and South African constitutionalism as archetypes for horizontal application. In fact, Germany's experience with horizontal application influenced members of the South African Constitutional Assembly, and both countries have explicitly debated horizontality in academic as well as juristic fora. Considering these constitutional discourses alongside each other offers promising ground to carry out this book's project of examining debates through the lens of republican concepts.

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