

## THE CONSTITUTION AND THE COMMON LAW AGAIN

### I INTRODUCTION

In what way do rights guarantees in the Australian *Constitution*, most notably the implied freedom of political communication on governmental matters, effect change in the common law? Recently Jeffrey Goldsworthy has argued that '[a] comprehensive theory of the subordination of the common law to the *Constitution* has yet to be clearly articulated'.<sup>1</sup> I have pointed to a modified version of the method followed in Canada and Germany — the latter being 'perhaps the jurisdiction with the most sophisticated and developed doctrine of horizontal effect'<sup>2</sup> of basic rights on the private law — as both most suitable to the Australian context and in tune with what the High Court of Australia has actually held, but Goldsworthy finds this theory 'difficult to understand'.<sup>3</sup> Unfortunately he did not attempt to enrich his understanding by reference to explanations offered by anyone besides me, for

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<sup>1</sup> Jeffrey Goldsworthy, 'The Constitution and its Common Law Background' (2014) 25(4) *Public Law Review* 265, 270.

<sup>2</sup> Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *Modern Law Review* 878, 884. As this article went to press the Federal Constitutional Court of Germany provided another excellent example of its doctrine by publishing its reasons in a case involving the far-right politician Udo Voigt. His wife had booked a room for the couple at the Hotel Esplanade Resort & Spa in Bad Saarow near Berlin but the hotel cancelled the booking and he was officially banned from entering the property when the hotel proprietors realised who the booking was for. A three-judge panel of the Court, referring to earlier case law, upheld the ban on entering the property and held that the general right to equality in art 3(1) of the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] and art 3(3)'s specific prohibition on political viewpoint discrimination simply did not apply in this situation: there were numerous other hotels Mr Voigt could use and constitutional anti-discrimination rights did not generally apply among non-state actors; limited exceptions to that principle did exist, for example for important public events that are put on by private bodies such as football associations, but the case in hand did not fall under them. *Bundesverfassungsgericht* [German Constitutional Court], 1 BvR 879/12, 27 August 2019. (Ordinary sub-constitutional anti-discrimination law in Germany was of no use to Mr Voigt, because it does not protect against discrimination on the basis of political opinion, at least partly owing to anxieties about the far right.)

<sup>3</sup> Goldsworthy (n 1) 270.

example in other jurisdictions that actually apply the method advocated; there is a large international literature and vigorous debate on this topic.<sup>4</sup> Cheryl Saunders has also declared that ‘[t]he question of how to characterise the relationship between the *Constitution* and the common law remains unanswered’.<sup>5</sup> A renewed attempt is therefore in order.

In short, the position is that change in the common law can be mandated by the *Constitution*, but this change occurs indirectly. The *Constitution* may well say by implication that a pre-existing rule of the common law is not tenable. But it does not provide an alternative rule. Developing an alternative, constitutionally compliant rule is still a question for the common law and there remains a choice among various possible solutions — a choice which is to be made according to the time-honoured methods of the common law, not one determined by the *Constitution*. The *Constitution* thus allows a variety of solutions to the requirement for change it creates and does not dictate the final answer.

## II DOES THIS QUESTION MATTER?

According to Leslie Zines, getting the relationship between the *Constitution* and the common law right involves ‘no difference in result and only a superficial difference in method’.<sup>6</sup> As I have pointed out elsewhere,<sup>7</sup> however, this question matters not merely because we need to get the interpretation of the *Constitution* right — does it, or does it not, contain rules of defamation law? — but also because it is about the legislative capacity of Parliament. If a private law rule is dictated by the *Constitution*, Parliament cannot change it — even if it turns out that a solution that seemed logical and appealed to the judicial interpreters of the *Constitution* as a deduction

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<sup>4</sup> See, eg, Dawn Oliver and Jorg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007); Verica Trstenjak and Petra Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (Springer International Publishing, 2016): this is a collection of essays on this topic in the law of 17 countries and Quebec based upon presentations to the 19<sup>th</sup> International Congress of Comparative Law in Vienna in 2014. A legal philosopher has also recently turned her attention to this field, with results that repay reading and form the background to some of what is said here but cannot adequately be summarised in this article: Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015).

<sup>5</sup> Cheryl Saunders, ‘Constitutional Rights and the Common Law’ in Andras Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing, 2005) 215.

<sup>6</sup> Leslie Zines, ‘The Common Law in Australia: its Nature and Constitutional Significance’ (2004) 32(3) *Federal Law Review* 337, 355. In relation to Germany, a similar view is expressed by Matthias Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7(4) *German Law Journal* 341, 352.

<sup>7</sup> Greg Taylor, ‘The Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common-Law Jurisdictions’ (2002) 13(2) *King’s College Law Journal* 187, 192–195 (‘The Horizontal Effect of Human Rights Provisions’).

from its express terms later turns out to cause unforeseeable difficulties in practice.<sup>8</sup> On the other hand, if, as I say, the *Constitution* merely rules out certain answers as constitutionally impermissible but otherwise leaves the matter to the common law, it also leaves Parliament a free hand to adjust the law within a range of constitutionally permissible solutions, given that the common law can always be changed by the legislature. This means that experience, different ideological perspectives and changes over time (such as with the constant development of the Internet and associated technologies and opportunities for expression) can all be reflected in the law. ‘There are serious competing visions of freedom of speech’<sup>9</sup> as a constitutional and legal construct and the *Constitution* is agnostic about some of them.<sup>10</sup>

### III FIRST PRINCIPLES

Now the *Constitution* could, of course, contain a rule of the private law and directly effect a change to the common law. All law, judge-made as well as statutory, is subject to ‘the nation’s supreme law’.<sup>11</sup> According to Adrienne Stone, I have overlooked this extremely basic proposition. In cases such as *Lange v Australian Broadcasting Corporation*:<sup>12</sup>

the High Court has, in effect, subjected the common law to the requirements of the *Constitution*, something that [the] indirect account does not allow. Thus, Taylor’s analysis falls at the first hurdle: it does not adequately describe the Court’s actual doctrine.<sup>13</sup>

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<sup>8</sup> For examples see; Taylor, ‘The Horizontal Effect of Human Rights Provisions’ (n 7) 193.

<sup>9</sup> Adrienne Stone, ‘Freedom of Political Communication, the Constitution and the Common Law’ (1998) 26(2) *Federal Law Review* 219, 235. See also Kathleen Foley, ‘The Australian Constitution’s Influence on the Common Law’ (2003) 31(1) *Federal Law Review* 131, 140; Graeme Hill and Adrienne Stone, ‘The Constitutionalisation of the Common Law’ (2004) 25(1) *Adelaide Law Review* 67, 97. In Canada especially, the well-known concept of a dialogue between Parliament and the courts can be mobilised under this heading; such a dialogue is only possible if the *Constitution* (in reality the Courts) does not insist upon the last and final word by imposing an unalterable rule supposedly found in the *Constitution*: Mattias Kumm and Victor Ferreres Comella, ‘What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect’ in Sajo and Uitz (n 5) 262.

<sup>10</sup> Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28(3) *University of New South Wales Law Journal* 842, 850.

<sup>11</sup> *Roberts v Bass* (2002) 212 CLR 1, 51 [130] (Kirby J) (*‘Roberts’*).

<sup>12</sup> (1997) 189 CLR 520 (*‘Lange’*).

<sup>13</sup> Adrienne Stone, ‘The Common Law and the Constitution: A Reply’ (2002) 26(3) *Melbourne University Law Review* 646, 647.

Jeffrey Goldsworthy makes a similar point, pointing to the Court's statement that 'the common law must conform with the *Constitution*'<sup>14</sup> as evidence that '[t]he *Constitution* therefore exerts a direct controlling force over the common law'.<sup>15</sup>

Now, it is not merely logically possible for constitutions to do so: there are some constitutions which actually do state that some or all of the rights in them are directly applicable in disputes between private persons and thus create private law rules,<sup>16</sup> although on closer examination one often finds the constitution itself (via an escape clause),<sup>17</sup> the courts and/or the commentators recoiling from the odd results caused by this choice, such as constitutionally based human rights litigation when a person is injured by a defective drink.<sup>18</sup> Nevertheless in principle it is possible for a constitution, as the supreme law of the land, to do anything to the private law — and this point does not depend, as Graeme Hill and Adrienne Stone claim,<sup>19</sup> on accepting a version of realism as the true description of the judicial method and characterising

<sup>14</sup> *Lange* (n 12) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>15</sup> Goldsworthy (n 1) 269.

<sup>16</sup> Even the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], generally thought to represent the classic case for indirect effect of rights on the private law, exerts a direct effect on the private law in one provision, art 9(3), which nullifies agreements restricting the right to form labour unions. Any constitution may do this sort of thing to a greater or lesser extent, in one, some or all areas of private law, depending upon its provisions.

<sup>17</sup> See, eg, *Constitution of the Republic of South Africa Act 1996* (South Africa) s 8(2): 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' As a result of the out-clause in the second half of this sentence and other escape methods, it has been said that the *Constitution* provides for direct effect in theory but in practice this has been largely reduced to indirect effect: Oliver and Fedtke (n 4) 483.

<sup>18</sup> Such recoiling merely reflects 'the common opinion of constitutional lawyers worldwide': Ulrich Preuß, 'The German *Drittwirkung* Doctrine and its Socio-Political Background' in Sajo and Uitz (n 5) 25. The example with the defective drink occurred in Kenya: see Brian Sang, 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence' (2018) 26(1) *African Journal of International and Comparative Law* 1, 13. See also the amusingly sudden back-peddalling in Dickson, 'The Horizontal Application of Human Rights Law' in Angela Hegarty and Siobhan Leonard, *Human Rights: An Agenda for the Twenty-First Century* (Cavendish, 1999) 72. Sonu Bedi, 'The Absence of Horizontal Effect in Human Rights Law: Domestic Violence and the Intimate Sphere' in Tom Campbell and Kylie Bourne (eds), *Political and Legal Approaches to Human Rights* (Routledge, 2017) 198, does not appreciate that if we make domestic violence a matter for direct enforcement of human rights on the ground that bodily integrity is a right that all democracies must ensure, there is no reason to stop there: every assault, whether inside or outside the home, would be a constitutional matter!

<sup>19</sup> Taylor, 'The Horizontal Effect of Human Rights Provisions' (n 7) 86. The point I make in the text is indeed made by the authors in Hill and Stone (n 9) 101.

judicial action as a form of governmental action.<sup>20</sup> It depends simply upon the status of the *Constitution* as the supreme law: it can tell anyone to do anything and change any law in any way and is unconstrained by classifications of actions as governmental or not.<sup>21</sup> This is a very basic point and I have not overlooked it, and nor have the

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<sup>20</sup> This is a complete red herring imported from the American ‘state action’ doctrine. It may be that the *United States Constitution* applies only to state action. But that is its contingent choice; other constitutions, including ours, may do more or less than apply to all cases of governmental action but no other action. Our starting point is always what the *Constitution* requires, expressly or impliedly, and nothing else. At any rate the ‘state action’ doctrine is becoming increasingly discredited; see, eg, Eric Barendt, ‘The United States and Canada: State Action, Constitutional Rights and Private Actors’ in Oliver and Fedtke (eds) (n 4) 415; Gardbaum, ‘The “Horizontal Effect” of Human Rights’ (2003) 102(3) *Michigan Law Review* 387, 412–22; Oliver and Fedtke (n 4) 495; Thomas (n 4) 22. The judgment of Thomas J in *McKee v Cosby* 139 S Ct 675 (2019) can be read as an attack on the doctrine from an originalist standpoint.

<sup>21</sup> Nowadays, indeed, it is possible to express pretty much any claim in the private law in the language of human rights. However, if we invent new-fangled constitutional remedies where long-standing common law ones already exist, we should either duplicate existing remedies or, if we make a totally new start, needlessly cast aside many centuries of work in refining the private law. This is what Kumm (n 6) 362, does not consider: it is certainly true that, if we express and enforce private law claims as human and/or constitutional rights, we can take account of the value of private autonomy, as he suggests, so that we do not force private actors to act with the level of neutrality among opinions, races or religions that we expect from the state. There is not and never can be a legal remedy of any sort against a private person who refuses to associate with vegetarians, Serbians or Muslims, while human rights law demands that the state should treat them like everyone else. But private autonomy is not some amazing recent discovery on the part of constitutionalists or human rights lawyers. The private law has long known of it too, perhaps using different concepts, and tailored its doctrines accordingly both in statute law and in common law rules — such as the distinction between complete testamentary freedom to discriminate and the inability of a common innkeeper to refuse accommodation on the basis of race (*Constantine v Imperial Hotels* [1944] 1 KB 693; but compare the German case, involving political opinion rather than race but also a hotel, referred to above (n 2) which illustrates the greater freedom available to non-state actors to discriminate in accordance with personal opinion under that country’s law). The private law’s centuries of work in adjusting rights among private parties deserve respect, not dismissal by public lawyers who think they know everything because they have learnt a few simple principles. Cf Aharon Barak, ‘Constitutional Human Rights and Private Law’ in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart, 2001) 22; Stone (n 9) 242–5; Thomas (n 4) 35.

It is also certainly true that privatisation, the increasing prominence of supranational agreements and changes in the way we communicate (eg social media) have made the distinction between public and private actors less sharp than it used to be; today, being banned on Twitter or Facebook is much more of a hindrance to free discussion than the mere non-publication of a letter to the editor in a newspaper: cf Murray Hunt, ‘Human Rights Review and the Public-Private Distinction’ in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart, 2002) 73, 84; Oliver and Fedtke (n 4) 16–23. There is a good case

courts of Germany and Canada, to whose jurisprudence our own doctrine, as I try to explicate it, is closest.

But any constitution, ours included, says only what it says (including by implication). It is also not compulsory for constitutions to lay down rules of private law in every or indeed any field.<sup>22</sup> The fact that it is logically possible for the *Constitution* to change the private law by implication, as Jeffrey Goldsworthy points out, does not mean that it actually does so in any particular case.<sup>23</sup>

To say that all laws regulating relations between private actors are subject to the *Constitution* is not, of course, to say which laws of this sort violate it. This, the only genuine constitutional issue in every case, is a matter of substantive constitutional law.<sup>24</sup>

What does the *Constitution* say, expressly or impliedly? That is the question. At first blush, it would be surprising if our *Constitution* laid down private law rules to any considerable extent, given that in 1901 there already were well-developed private law principles. Furthermore, as with the United Kingdom's *Human Rights Act 1998*, it may truly be said of our *Constitution*, 'a terse and extraordinarily uninteresting document that does not hold any great truths to be self-evident'<sup>25</sup> in the words of Donald Horne, that 'no provisions deal explicitly with the application of the rights to private law, while the common law goes wholly unmentioned'.<sup>26</sup>

Our *Constitution* certainly does rule out certain types or effects of legislation, while leaving Parliament's hands free to adopt any other legislation it chooses. For example, s 116 prohibits certain sorts of legislation on the topic of religion, while leaving Parliament otherwise free to enact legislation which has an effect upon religion. The *Constitution* does not enact a code of law on the topic of religion, or indeed any positive rules about religion at all — although it could do if desired<sup>27</sup> — but merely withdraws certain powers from Parliament and stops there. There are therefore many

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for treating certain private companies as public spaces and subject to the full force of some human rights at least. Cases such as *Constantine* show that the common law was not wholly ignorant of the possibility that a private form may mask a public reality. Another example of the application of rights to private actors is that employment law usually prevents any employer from discriminating on the basis of race already. However, there remain millions and millions of ordinary individuals who are not bound to live their lives according to human rights principles that do bind the state and perhaps should bind other quasi-public actors.

<sup>22</sup> Cf Saunders (n 5) 190 (on the law of Canada and South Africa).

<sup>23</sup> Goldsworthy (n 1) 270.

<sup>24</sup> Gardbaum (n 20) 392, 415, 418, 447.

<sup>25</sup> Donald Horne, *The Lucky Country* (Penguin, 3<sup>rd</sup> ed, 1984) 155.

<sup>26</sup> Phillipson and Williams (n 2) 880.

<sup>27</sup> For example, the *Federal Constitution* (Malaysia) art 3(1) declares Islam to be the religion of the country, and art 3(5) provides for the King to be the head of the Islamic religion in certain parts of that nation.

choices remaining for Parliament. For example, both the existence and the non-existence of an evidential privilege for religious confessions is permissible under s 116, as are any number of half way houses (such as privilege only for certain offences or, conversely, no privilege for some offences).<sup>28</sup> The *Constitution* allows many states of affairs on this point; there is no express statement or implication on the topic in it, although it would be logically possible for such a thing to exist. It is up to the legislature, or, in the absence of any decision by it, it is up to the common law to make the choice among an endless variety of constitutionally permissible alternatives. Pointing these facts out is not to suggest that such choices are somehow outside or above the *Constitution*. All it means is that the *Constitution* has chosen a light touch in regulating this field and merely proscribes rather than fully prescribes.

So it is with the law of defamation: the *Constitution* rules out, by implication, certain solutions as inconsistent with the free speech required for the functioning of the polity, including some solutions previously adopted by the common law, but otherwise contains no rules of defamation law, neither expressly (this is obvious and beyond serious argument) nor by implication — ‘what is inherent in the text and structure of the *Constitution*’.<sup>29</sup> Rules of defamation law therefore continue to be provided by statutes and the common law, the latter being developed to avoid rules that would clash with the prohibitions enacted by the nation’s supreme law just as statutes are invalidated if they overstep the same mark. Various forces have always shaped the development of the common law, and the need to avoid clashing with the *Constitution* is just another one of the many forces at work in its development. In this sense Adrienne Stone is right to say that ‘the *Constitution*’s effect on the common law, though mandatory, is *partial*’.<sup>30</sup>

#### IV CONFORMITY TO THE CONSTITUTION ... AND THE PRECEDENTS

It is in this sense, then, that the common law is made to ‘conform with the *Constitution*’, as *Lange*<sup>31</sup> requires and as Jeffrey Goldsworthy emphasises: the common law selects a rule that is not ‘precluded’ by the *Constitution* as the previous rule was, and

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<sup>28</sup> This question has in fact been considered recently by Anthony Gray, ‘Is the Seal of the Confessional Protected by Constitutional or Common Law?’ (2018) 44(1) *Monash University Law Review* 112. My answer to the question posed in the title of that article is apparent from the text; this is not the place to elaborate on the reasons for it. If my view on that point turns out to be wrong, the main point still holds: s 116 only rules things out; it does not provide what might be called positive rules.

<sup>29</sup> *Lange* (n 12) 567. Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (n 10) 845 agrees with this; see also Adrienne Stone, ‘“Insult and Emotion, Calumny and Invective”: Twenty Years of Freedom of Political Communication’ (2011) 30(1) *University of Queensland Law Journal* 79, 90.

<sup>30</sup> Stone, ‘The Common Law and the Constitution: A Reply’ (n 13) 653 (emphasis in original).

<sup>31</sup> (1997) 189 CLR 520, 566.

that is all the *Constitution* requires.<sup>32</sup> It is thus true beyond doubt that ‘the common law must give way’ to the supreme law, but to what new rule does it give way?<sup>33</sup> The *Constitution* does not say. In this respect the commands of the *Constitution* are the same towards legislation as towards the common law: what is unconstitutional must be avoided — here there is no choice — but otherwise the field is open.

Perhaps the *Constitution* can be likened to a parking inspector who tells people where they are not allowed to park. Where they actually do park is up to them; that is not the inspector’s concern; the inspector simply enforces negative prohibitions and does not mandate where among the available spaces one finds an appealing spot. To change the simile,

Parliament could modify the common law by providing even *more* protection to political communication. Accordingly, in circumstances like these, the *Constitution* operate[s] like a boundary or a fence around an aspect of the common law, preventing movement beyond the boundary but allowing movement within it. It precludes certain common law rules without determining the precise content of the new common law rule.<sup>34</sup>

If it did do that, of course, no legislative changes at all would be permitted; the legislature cannot change rules found in the *Constitution*. As Kirby J stated in *Roberts v Bass*,

fidelity to the *Constitution*, consistency in its application, and conformity to the Court’s authority in *Lange* and in other cases, deny the co-existence of inconsistent principles once the circumstances attract the operation of the *Constitution*. Then, it is only possible to have one legal rule. That is the rule of the common law adapted to the *Constitution*.

If the common law, in this case the law of qualified privilege in defamation as it has hitherto been understood, would otherwise impair the constitutionally protected freedom, it must be developed in order to make it consistent with the constitutional implication. It cannot be incompatible with that implication. *Lange* clarified the approach that must be taken in order to determine any inconsistency. That approach asks two questions: (1) does the law burden the freedom of communication about governmental or political matters; and (2) if so, is the law ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of ... government’.<sup>35</sup>

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<sup>32</sup> *Lange* (n 12) 556.

<sup>33</sup> *Saunders* (n 5) 215.

<sup>34</sup> *Hill and Stone* (n 9) 71–2 (emphasis in original), 81 (where a similar point is made); *Foley* (n 9) 144.

<sup>35</sup> *Roberts* (n 11) 59–60. The plurality made a similar point at 26.

If an inconsistency is identified using this methodology, then it is up to the common law to reform itself by selecting a rule that is not inconsistent with the *Constitution*, including its implications — there will be quite a few possible rules that are consistent with the *Constitution*, and the *Constitution* allows all of them.<sup>36</sup>

The common law would certainly conform with the *Constitution* if a rule of the common law were directly amended by the *Constitution*, expressly or impliedly, which seems to be what Jeffrey Goldsworthy is looking for. But the *Lange* doctrine ‘confers no rights on individuals’, not even constitutional rights let alone private law ones, and conformity need not be achieved by dictation.<sup>37</sup> It can also be achieved by stating a negative proposition about what is not in conformity and leaving the person or institution affected to make another choice within the boundaries of what is permissible. To employ another metaphor: the enrolments office may tell the student that it is not permissible to study two particular subjects together. That selection is not permitted. The student may, however, select any other combination of subjects. There may be good or bad selections from all sorts of points of view, but any other selection will be consistent with the rules of the university and it is up to the student to make the choice.

Nor is this mere theory. In defamation law a choice must be made, and was actually and very plainly made by the Court in *Lange*, between a common law rule providing some protection to those holding public office, and the extreme position previously advocated by Deane J, depriving public figures of all protection in defamation. The Court chose the former solution and gave its reasons in the usual common law form: people in public life deserved protection from knowingly false statements and such protection also enhanced the operation of the political system.<sup>38</sup> Then the Court considered at some length the choice between a requirement of reasonableness only in the newly extended area of qualified privilege, across the board or not at all, and for the reasons it gave — again using classic common law reasoning — it chose the first option.<sup>39</sup> In both cases all solutions considered were consistent with the *Constitution*; choosing any of them would have removed all inconsistency between the common law and the *Constitution*. Thus, the common law’s traditional lines of reasoning were employed to come to a solution on these common law questions.<sup>40</sup> The fact that the same people, the Justices of the High Court of Australia, were

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<sup>36</sup> As modified in *Coleman v Power* (2004) 220 CLR 1 and further clarified in *McCloy v New South Wales* (2015) 257 CLR 178. It is not necessary to follow this rabbit down its burrow in the present context; it suffices to note that the *Constitution* imposes certain requirements.

<sup>37</sup> *Roberts* (n 11) 26; *Lange* (n 12) 567; *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11 [8], [356]; *Comcare v Banerji* [2019] HCA 23 [20], [135], [164].

<sup>38</sup> *Lange* (n 12) 568.

<sup>39</sup> *Ibid* 572–4. As can be seen there, a statute of one state was also influential in reaching this conclusion. The point holds: it was not the *Constitution*.

<sup>40</sup> It is true that, in a few cases, only one solution to an issue may be compatible with the *Constitution*, just as, in administrative law, it is not for the courts to make administrative decisions — yet it nevertheless rarely occurs in serious litigation (it is doubtless

involved both in determining the constitutional limitations and selecting the new common law rule must not blind us to the fact that their method and the outcome were different in each field. If we had a separate constitutional tribunal and supreme ordinary court, the point would perhaps be clearer; but in the one field, the Court is, so to speak, acting as our constitutional tribunal, and in the other as our supreme appellate court.

The Court held that ‘[t]he common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters’.<sup>41</sup> Thus it expanded the common law test for qualified privilege set out in 1834 — ‘the common convenience and welfare of society’ — to remove the clash between the common law and the *Constitution*.<sup>42</sup> The *Constitution* had told us, by implication, that the previous common law was not in accordance with it and had to change. But clearly the change selected used the pre-existing categories of the common law and was not found, expressly or impliedly, in the *Constitution*. As the court noted in *Lange*,

[o]nly in exceptional cases has the common law recognised an interest or duty to publish defamatory matter to the general public. However, the common law doctrine as expounded in Australia must now be seen as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which ‘the common convenience and welfare of society’ now requires. Equally, the system of government prescribed by the *Constitution* would be impaired if a wider freedom for

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more frequent in practice) that there is only one decision that could possibly be lawful. The only possible example I know of is found in *Roberts* (n 11) 70, when Kirby J stated

[a] rule of the common law that held [defendants] liable in damages for untrue defamatory statements in electoral material simply because those publishing such materials had no affirmative belief in their truth would be one that imposed an impermissible burden on electoral communication. Such a burden would be incompatible with the constitutionally protected freedom of political communication. Even if the general common law otherwise made a positive belief in the truth of a statement a condition of the defence of qualified privilege (a question I do not need to decide in these appeals) it would be inconsistent with the *Constitution* to require that a publisher must have such a belief in an electoral context such as the present.

The plurality made a similar point in *Roberts* (n 11) 40, while making it very clear that it is the common law that ‘would have to be developed to accord with the *Constitution’s* requirements’ if it contained the offending rule. It may be that in this type of situation the common law would have a choice comparable to ‘any colour that he wants so long as it is black’, as Henry Ford is supposed to have said of the colour choice offered to purchasers of his cars. Perhaps such situations are most likely to arise when there is a simple yes/no choice: should we have such a requirement as Kirby J mentions or not? It is equally probable that most choices in the development of the common law are not simple yes/no choices.

<sup>41</sup> *Lange* (n 12) 571.

<sup>42</sup> *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044, 1050 (Parke B).

members of the public to give and to receive information concerning government and political matters were not recognised. The ‘varying conditions of society’ of which Cockburn CJ spoke in *Wason v Walter* now evoke a broadening of the common law rules of qualified privilege.<sup>43</sup>

The new common law rule exists because the old one was not constitutionally valid; in that sense it owes its existence to the *Constitution*. But the change made by the supreme appellate court at the instance of the constitutional tribunal could have been to any number of new rules, such as complete immunity for statements about politicians, as Deane J advocated; such a rule would not attract the censure of the constitutional tribunal, whether a statutory or a common law rule. Thus, the need for change is dictated by the *Constitution*, but the change that is actually made is not: judicial or statutory choice is used to select the best rule from among the constitutionally available ones, and the rule selected remains a common law rule, not one derived directly from the *Constitution*.

None of this is to deny the possibility of more subtle influence on the common law by the *Constitution*. Just as the *Constitution* could directly enact a rule of private law (although the *Constitution* does not do that) or require the common law to abandon a rule, which our *Constitution* does do according to *Lange*, the *Constitution* is also part of the general legal environment against which the common law goes about its usual process of development. The development of the common law is a values-based enterprise, and a legal order’s supreme law is likely to contain quite a few values. ‘In the past, common law human rights infiltrated private law by means of private law value terms. Now constitutional human rights do the same.’<sup>44</sup> Such a phenomenon occurred in *Lange*, for, as we have seen, the extreme position adopted by Deane J was rejected in part owing to the deleterious effect it would have had upon the operation of the constitutionally prescribed system of government.<sup>45</sup> Yet there was no constitutional compulsion about this: if the common law or a statute chose such a solution, it might be unwise but it would not infringe any constitutional requirements. But the clearest example of such an influence of the common law on the *Constitution* is the new rule for interstate conflicts of laws adopted in *John Pfeiffer v Rogerson*.<sup>46</sup> As this point has been made at length elsewhere by myself and others, I say no more about it here.<sup>47</sup>

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<sup>43</sup> *Lange* (n 12) 570.

<sup>44</sup> Barak (n 21) 22.

<sup>45</sup> See discussion above (n 36).

<sup>46</sup> (2000) 203 CLR 503.

<sup>47</sup> See, eg, Gary Davis, ‘Case Note: John Pfeiffer v Rogerson’ (2000) 24(3) *Melbourne University Law Review* 982, 995; Foley (n 9) 145–54; Saunders (n 5) 212; Stone, ‘Freedom of Political Communication, the Constitution and the Common Law’ (n 9) 72–82; Greg Taylor, ‘The Effect of the Constitution on the Common Law as Revealed by John Pfeiffer v Rogerson’ (2002) 30(1) *Federal Law Review* 69.

## V CONCLUSION

We can now understand why the Court appears to vacillate in *Lange* between the language of choice and the language of compulsion, as Cheryl Saunders has acutely pointed out:<sup>48</sup> there was a constitutional need for change identified by the supreme constitutional tribunal. But the precise details of the change were a matter for choice by the highest common law court and not constitutionally dictated, beyond obviously the need to avoid selecting another constitutionally invalid solution but rather to choose among the numerous constitutionally valid ones. Let us read in full the statement of the Court in *Lange* which Jeffrey Goldsworthy thinks I have failed to take account of:

Of necessity, the common law must conform with the *Constitution*. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the *Constitution* cannot be at odds. The common law of libel and slander could not be developed inconsistently with the *Constitution*, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the *Constitution*.<sup>49</sup>

It should be obvious now that my theory completely reflects every word in this statement. It is all there in plain English in *Lange*, if only people will read what it says rather than try to impose their preconceived ideas upon it.<sup>50</sup> Needing a label to describe this state of affairs compendiously, I borrow from abroad the word 'indirect', given that the common law rule is not one directly derived from the *Constitution* and the Court in *Lange* stated, in its orders no less, that a defence based directly upon the *Constitution* was bad in law; only the common law defence was good because the rule remains a common law rule:<sup>51</sup>

Broadly speaking, the effect of human rights protections in the private sphere will be 'direct' if parties can rely explicitly on human rights protections in their litigation; it will be 'indirect' if they may not do so, but may press the Courts to interpret, apply or develop the rest of the law so as to protect the interests in question in the light of constitutional rights and values.<sup>52</sup>

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<sup>48</sup> Saunders (n 5) 212. See also Davis (n 47) 995; Stone, 'The Common Law and the Constitution: A Reply' (n 13) 651.

<sup>49</sup> *Lange* (n 12) 566.

<sup>50</sup> Most obviously the 'state action' doctrine from the United States: see discussion above (n 20).

<sup>51</sup> Order of Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in *Lange* (n 12) 577.

<sup>52</sup> Oliver and Fedtke (n 4) 14.

Like many single-word labels, it is only a partial truth.<sup>53</sup> In the case of *Lange*, the need for change was imposed directly by the *Constitution*. But the change that actually results, the new rule of the common law, is not. ‘The Court [has] thus remodelled the common law to make it consistent with the implied constitutional freedom.’<sup>54</sup>

I close with one final point. In an earlier exchange of views on this topic I was told that my theory does not take account of the insights of realism.<sup>55</sup> Realism should not be a shibboleth, particularly not if it is an unsophisticated version of realism that takes no account of the obvious differences between judicial change of the law and changing it by legislation.<sup>56</sup> But it can now be seen, above all, that this criticism is misplaced. My account of what the Court did in *Lange* and other cases does not merely permit or acknowledge judicial creativity and choice in developing the common law: it positively requires it! When a rule of the private law is inconsistent with the *Constitution* and is set out in the judge made common law, the judges must ‘amend’<sup>57</sup> the common law and choose another rule, as we saw them doing repeatedly in *Lange* itself. Furthermore, I equate legislation and the judicial development of the common law in one important respect — by postulating that both are subject to negative prohibitions in the *Constitution* and both legislature and judiciary, in choosing rules of law, are in the same boat of having, constitutionally, a free choice among possible rules that do not infringe such prohibitions.

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<sup>53</sup> Taylor, ‘The Horizontal Effect of Human Rights Provisions’ (n 7) 188. See further Gardbaum (n 20) 404, who has another, equally valid way of expressing the point: it is the indirectness of the effect on private actors, not on the private law (which may be directly affected) that provides the label. In Germany the equivalent labels are *mittelbar* and *unmittelbar*, literally ‘mediate’ (for indirect) and ‘immediate’ (for direct) effect. In English of course ‘immediate’, while comprehensible in this context if juxtaposed with ‘mediate’, would be an even more unfortunate choice for reasons which do not apply in German. Nevertheless, of the German labels Christoph Starck in Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz: Kommentar* (CH Beck, 7<sup>th</sup> ed, 2018), says, at 152, that they are *wenig geeignet* (little suited).

<sup>54</sup> Zines (n 6) 355.

<sup>55</sup> Stone, ‘The Common Law and the Constitution: a Reply’ 660. The exchange perhaps revealed a greater measure of agreement on some points than disagreement, and it seems to me that Stone’s later publications have closed the gap still further; see discussion above (n 33).

<sup>56</sup> See, eg, Phillipson and Williams (n 2) 883, 889.

<sup>57</sup> *Roberts* (n 11) 29 [72] (Gaudron, McHugh and Gummow JJ).

