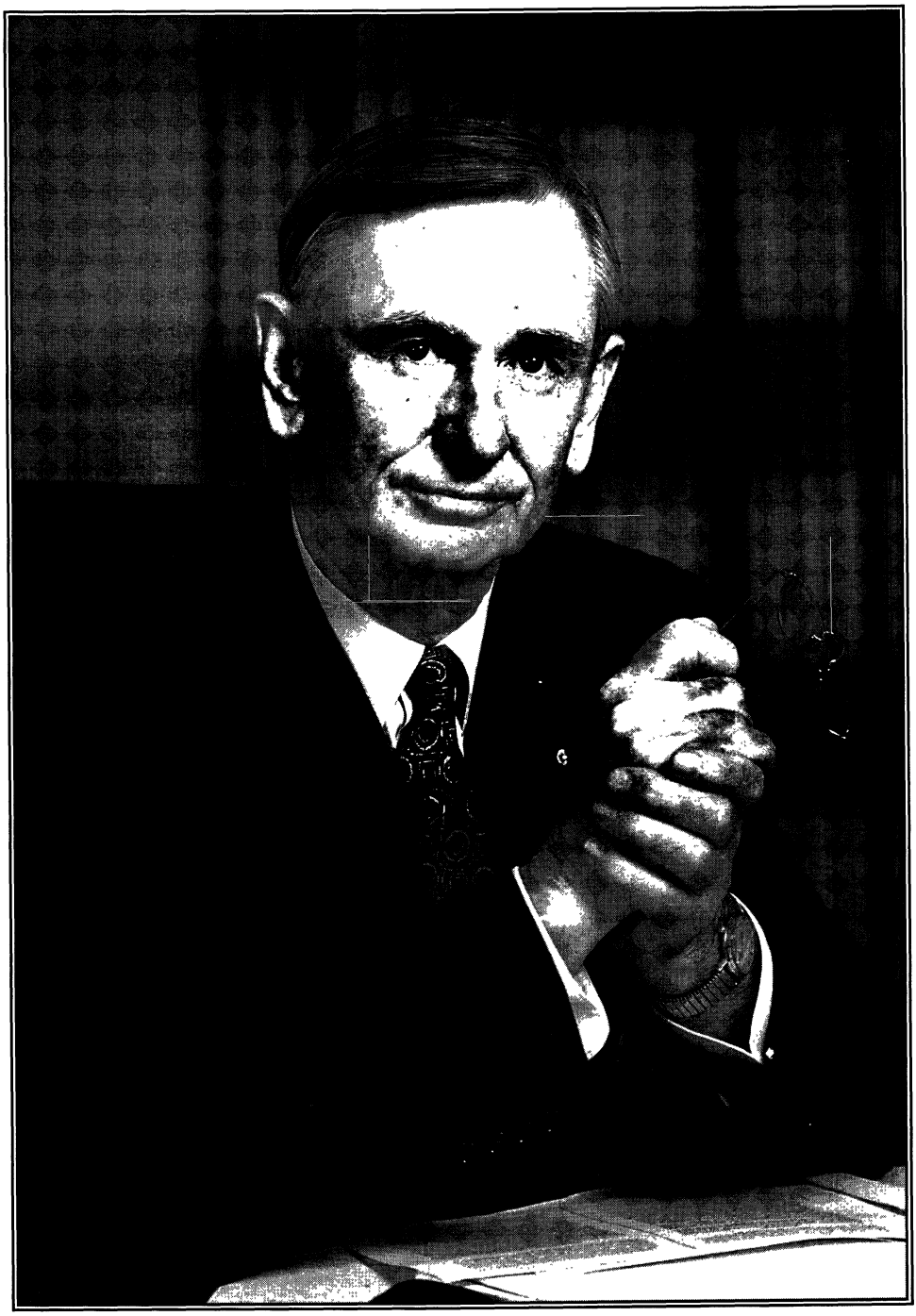

The Hon Sir Daryl Dawson, AC, KBE, CB,
Justice, High Court of Australia 1982-1997.

ORATION*

*Cheryl Saunders***

SIR DARYL DAWSON

I was honoured and somewhat overwhelmed when Deborah Cass asked whether I would make some remarks to commemorate Sir Daryl's retirement this evening. I was even more overwhelmed when the remarks turned into an oration in the conference brochure. But I began to become seriously worried after a function which was held in honour of Daryl at the Victorian Bar two weeks ago tonight. It was a very happy, almost family occasion, attended by many people who had studied with Daryl and appeared with and against him at the Bar since very junior days. They had known him for a long time and were appropriately equipped with anecdotes, scurrilous and otherwise. I could not hope to compete with their very personal tribute to Daryl and I do not propose to try.

I have known Daryl since he became Solicitor-General for Victoria in 1974. I had just started teaching law. I had also had the great good fortune to be asked by John Finemore to assist with the Australian Constitutional Convention and I was in and out of the Victorian Crown Law offices for that and other research purposes. The Crown Law Office was a friendly and collegiate place of which the Solicitor-General was very much part.

I have two particular memories of Daryl from those times. The first was his involvement as a guest in our Master of Laws subject, Federal Law and Government, in 1974-75. The lecturer in charge was an extremely exuberant Gareth Evans, speculating enthusiastically about how far Commonwealth power would extend as its limits were pushed, with his

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* Delivered to the Sir Daryl Dawson Commemorative Dinner, Friday 7 November 1997.

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help. I took Daryl's participation for granted at the time, but with hindsight I suspect he found it somewhat trying.

My second early memory of Daryl is linked to the *AAP Case*.[1] Daryl argued the case for Victoria (with Ken Hayne as his junior), the year after his appointment as Solicitor-General. William Deane QC and Ronald Wilson QC appeared respectively for New South Wales and Western Australia. My first knowledge of the result came from a note which a less-than-pleased Solicitor-General had left on John Finemore's desk, casting aspersions on Sir Ninian Stephen's judgment (in both senses of the word). You may recall that Sir Ninian had decided that the State of Victoria lacked standing, causing the action narrowly to fail and contributing to doubt about the scope of the spending power which has persisted ever since.

Seven years later, in 1982, Daryl was appointed to the High Court to fill the vacancy caused by the resignation of Sir Ninian on his appointment as Governor-General.

Daryl's time as Justice of the High Court was bounded, literally, by duties of excise. Shortly after his appointment, in September 1982, the Court heard argument in the *Hematite Case*.[2] Daryl did not sit on the case because he had advised on the challenged legislation as Solicitor-General. The legislation was invalidated by the Court and the in substance approach to the identification of duties of excise affirmed, containing the seeds of destruction of business franchise schemes unless the definition of excise itself were altered.

Just before Daryl's retirement from the Bench came the end of this particular story. In *Ha v New South Wales*[3] the Court reaffirmed the broad definition of excise by a 4-3 majority, invalidated the New South Wales tobacco fee and effectively rendered franchise schemes useless to the States as revenue-raising measures. Dawson, Toohey and Gaudron JJ constituted a valiant minority, as they had done before, but this time with a difference. The argument about excise was over.

From *Hematite* to *Ha* was a tortuous journey. In the process, however, the dialogue between the majority and minority on the High Court probed more deeply than before the purposes which s90 might serve in the Constitution and offered two distinct visions of the economic structure of the federation. As in so many other areas, the intellectual by-product of disagreement in the Court was valuable. It can and should stimulate more profound reflection on the nature of the Australian federation.

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1 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338.
2 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.
3 (1997) 189 CLR 465.

Daryl Dawson's fifteen years on the Bench coincided with an important time in the history of Australia, which had inevitable echoes in the work of the Court, through the matters brought before it. For example:

• The final severance of Australia's legal links with Britain and of appeals to the Privy Council was preceded by jockeying over the meaning of the *Statute of Westminster*[4] and was followed, inevitably, by speculation about the source of authority for Australia's Constitution under these new conditions.[5]

• Concern about Australia's national economic performance and international competitiveness coincided with a series of cases on aspects of economic union. The most notable consequence was the revision of s92[6] and the revitalisation of s117,[7] but the *Incorporation Case* falls into this category as well.[8]

• A national tendency toward disapproval of special privileges for government (or anyone) manifested itself in cases about the position of government under statute[9] and the immunity of governments from each other's laws,[10] culminating most recently, and cleverly, in *Henderson*.[11]

• A national and international focus on the relations between individuals and governments and between indigenous and non-indigenous people had the most profound effect on the cases which came before the Court. Results included some constitutional protection for political communication,[12] legal recognition of native title, albeit in limited circumstances,[13] renewed interest in the few express constitutional provisions from which individuals can benefit directly,[14] a foray into the possibility that the Commonwealth might

4 *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351.
5 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
6 *Cole v Whitfield* (1988) 165 CLR 360.
7 *Street v Queensland Bar Association* (1989) 168 CLR 461.
8 *New South Wales v Commonwealth* (1990) 169 CLR 482.
9 *Bropho v Western Australia* (1990) 171 CLR 1; *Jacobsen v Rogers* (1995) 182 CLR 572.
10 *Evans Deakin Industries v Commonwealth* (1986) 161 CLR 254; *Dao v Australian Postal Commission* (1987) 162 CLR 317.
11 *Re the Residential Tenancies Tribunal of New South Wales & Henderson; Ex parte the Defence Housing Authority* (1997) 146 ALR 495.
12 *Davis v Commonwealth* (1988) 166 CLR 79; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.
14 *Kingswell v R* (1985) 159 CLR 264; *Brown v R* (1986) 160 CLR 171; *Cheatle v R* (1993) 177 CLR 541 (trial by jury); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Georgiadis v*

be obliged to abide by standards of equality in exercising Commonwealth powers,[15] and the emergence of new applications for the separation of judicial power.[16]

• Changes in political and parliamentary practice produced actions of other kinds, refining the definitions of "taxation"[17] and of "imposition of taxation"[18] and giving greater substance to the separation of legislative and executive power.[19] There is likely to be more of this genre, as the distinction between taxation and other forms of revenue-raising blurs and greater reliance is placed on executive power.

• Escalation of the range and extent of international law-making, which ultimately affected both parliamentary and intergovernmental practices,[20] manifested themselves even earlier in the Court with cases on the scope of the external affairs power in its application to emergent areas of international activity, including human rights and the environment.[21] Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights also was significant in this regard.[22]

• Concerns about the operation of Australian federalism, in some respects consequential on other developments, led to a more considered examination of the limits of the authority of the respective governments to impinge upon the actions of each other[23] than has been found in the decisions of earlier Courts, charges to the contrary notwithstanding. These same considerations encouraged a genial jurisprudence about the constitutionality of co-operative schemes.[24]

Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297 (acquisition of property).

15 *Leeth v Commonwealth* (1992) 174 CLR 455.

16 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

17 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

18 *Mutual Pools and Staff v Commissioner of Taxation* (1992) 173 CLR 450.

19 *Brown v West* (1990) 169 CLR 195.

20 Williams, "Treaties and the Parliamentary Process" (1996) 7 *PLR* 199; Comment, "Principles and Procedures for Commonwealth-State Consultation on Treaties" (1997) 8 *PLR* 116.

21 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 was decided just before Sir Daryl was appointed to the court.

22 Charlesworth (ed), *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (Centre for Comparative Constitutional Studies, 1992).

23 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Lee; Ex parte Harper* (1986) 160 CLR 430; *Queensland v Commonwealth (First Fringe Benefits Tax Case)* (1987) 162 CLR 74; *Re Australian Education Union; Ex parte Victoria* (1996) 184 CLR 188.

24 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340; *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140.

Justice Dawson had a reputation for being in dissent to which, I suspect, he himself subscribed. Sometimes he was, of course; and more often in recent years. But his reputation in this regard relies largely on a relatively small range of high profile cases, on duties of excise,[25] external affairs,[26] native title[27] and implied rights.[28] It is possible to exaggerate its extent and, for that matter, to exaggerate the divisions in the Court overall. In preparation for this address I made a quick and inevitably rough count of reported constitutional decisions between 1982 and 1997 which came to a little over one hundred. In half of these the Court, including Dawson J, was in broad agreement. In another thirty or so, Dawson J was with the majority. He was in dissent in only about twenty constitutional cases over a period of fifteen years in which his arguments were put, characteristically, with clarity and vigour.

Admittedly, a few of the cases in which I have counted Daryl with the majority or with the Court are those in which he acknowledged the precedential value of earlier majority decisions, while sometimes continuing to express his disagreement with them. This was most obviously so in cases dealing with external affairs and native title. The rapprochement in relation to the cases on freedom of speech was different, of course, with Daryl joining with the other members of the Court in an important display of judicial solidarity to confirm a limited freedom of political communication under the Constitution.[29] And, once at least, he turned the tables as well, adding to his dissenting score. Notably, this was the case in *Langer* in which, after again disavowing the then majority view on freedom of political communication, he added:

> I must confess that I am unable to see how political discussion can be confined to the mere imparting of information and why it should not extend to the furnishing of information with the intention that it should be used. Indeed, exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to me that upon the view adopted by the majority in the earlier cases, [the section] must infringe the guarantee which they discern.[30]

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25 *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561; *Ha v New South Wales* (1997) 189 CLR 465.

26 *Commonwealth v Tasmania* (1983) 158 CLR 1.

27 *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

28 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211; *Langer v Commonwealth* (1996) 186 CLR 302.

29 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

30 *Langer v Commonwealth* (1996) 186 CLR 302 at 326.

More important and much more interesting than bare statistics has been the debate in the Court over recent years about judicial method in general and in relation to constitutional interpretation in particular.

It comes as no news to any of us that judges often must make choices and that methodology, consistently applied, can help to predict and make more transparent the choices which they make. The development of an appropriate methodology, which incorporates but by definition cannot be confined to standard judicial techniques, is difficult enough. It is made more difficult still by the wide range of new types of issues now coming before courts; by new influences on Australian law; and by the breakdown of old understandings and old practices within government itself, on which traditional approaches to judging were able to rely.

Inevitably there are broad differences between judges on methodological questions. There is no perfect approach; and agreement never will be reached. It therefore is all the more important, both for better understanding of the judicial function and for the quality of judicial decision-making overall, that a range of approaches be clearly and honestly articulated, with integrity and intellectual depth. In this we have been well-served by Courts of recent times. And in this Daryl Dawson has played a most important part.

The debate on the judicial function is one Australia shares with the rest of the world, and not merely the common law world. The so-called activism of the judiciary is a phenomenon from Britain to Germany to India to the Philippines. In some places controversial decisions are accepted more gracefully than in others, as an inevitable part of the public decision-making process in increasingly complex and assertive societies. The reaction to the decision on the death penalty in South Africa is a recent example.[31]

To scholars of government and comparative government there obviously are questions about why judicial decision-making has risen to prominence at this time. The answers lie in the challenges facing traditional systems of representative democracy throughout the world, themselves still evolving towards a more perfect form. These challenges include the impact of globalisation on assumptions about what governments can do; greater demands from better-educated voters; the domination of the representative process by party machines; the growing diversity of communities and the breakdown of old loyalties, complicating consensus; changes in values and the emergence of new moral dilemmas; and the decline in respect for institutions of all kinds. The changes taking place in our systems of government lie far deeper than a sudden desire by judges to wield political power, however convenient such a diagnosis may be. On the contrary, I suspect judges often flinch at the choices which are placed before them.

31 *S v Makwanyane* (1995) 3 SA 391 (Constitutional Court).

In some respects, the Australian debate on the judicial function in constitutional matters may differ from that of other countries, which in turn contributes to making it more fraught.

In the first place it is not a debate we are accustomed to having. While plenty has been written on the judicial method in Australia, as elsewhere, where the Constitution is concerned it has tended to focus on the important detail of constitutional interpretation: characterisation, proportionality, connotation and denotation, and so on. As a generalisation, it has tended not to tackle the role of the constitutional judge from a broad theoretical perspective. I, for one, would be sorry to see Australia adopt United States' theories of adjudication indiscriminately, especially at a time when the new pragmatism is on the rise.[32] But we must move from simple myths about the potential of a literal approach, or the enlightenment of a progressive approach or the relevance of the subjective intentions of framers of the Constitution, to develop an informed constitutional dialogue of our own. The depth of the United States debate, at least, could serve as a touchstone. I look forward to a day when, for example, appropriately autochthonous emanations of Antonin Scalia and Ronald Dworkin agree on the distinction between semantic intention and the concrete expectations of law givers and move on to identify their differences over what the former implies.[33]

Consideration of the role of the constitutional judge in Australia is further affected by attitudes towards theories of government. Ours is a system of government which we use because it has worked. It has evolved from different beginnings without much of a theoretical base, in social and economic conditions which have not presented serious challenges to it. In this respect we are very much the product of our British roots. In Britain, as Richard Crossman has said:

> Political thought ... is always part of a controversy, and therefore it is only intelligible in the context of conflict which gives rise to it. Even our most academic theorists and our speculative thinkers have elaborated their theories to meet a given situation. We do not dislike theory as such, but we do suspect any theory which has no relation to immediate practical objectives.[34]

This approach has strengths and appeals instinctively to many of us. That is, after all, how we have been trained. But it has weaknesses as well. It makes us resistant to constitutional standards, particularly where they affect that part of the constitutional system derived from the British model. It leaves us suspicious of new concepts with a

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32 Posner, "Legal Reasoning from the Top Down and from the Bottom Up" in Posner, *Overcoming Law* (Harvard University Press, Cambridge 1995) p171.

33 Scalia, *A Matter of Interpretation* (Princeton University Press, Princeton 1997) p144.

34 Crossman, "English Distrust of Theory" in Lively & Lively (eds), *Democracy in Britain* (Blackwell, Oxford 1994) p5.

philosophical ring to them because we are ill-equipped to analyse their implications. Hence, I suspect, in part the reaction to the prospect, otherwise unexceptional, that the Constitution might be based on popular sovereignty. And it hinders our ability to respond comprehensively to new situations which arise. Nowhere is this better illustrated than in the Australian transition from colony to independence, which was achieved in typically pragmatic fashion, through highly technical Acts of Parliament, with little recognition of the implications of the change for the Australian polity and for governance in general. The pattern is now being repeated again, in the current debate on an Australian republic, in which there is almost no serious reflection on the deeper significance of removal of the formal sovereignty of the Crown for Australia's constituent power.

A third difference in the Australian debate may lie in the nature of the Constitution itself. Australian federation was a remarkable achievement and the Constitution is a principal manifestation of that success. It has proved an extraordinarily flexible document, evidenced, for example, in its capacity to provide the framework for government of both colonial and independent Australia. But flexibility has necessarily been achieved with the assistance of the Court, presenting further challenges to it and choices for it. The saga over the power to enter into and to implement treaties is part of that story. At a micro-level, the meaning of "subject of the Queen" in s117 is another.

The preoccupations of the framers of the Constitution and Australia's status at the time the Constitution was drafted also affected the democratic framework for which the Constitution expressly provides. To modern eyes, there are inconsistencies which stem from the undoubted vision of delegates to the original Conventions on some matters, jarring with other responses to exigencies of the moment. One of the most obvious is the potential for conflict between the absence of a right to vote and the requirement for the House of Representatives to be "chosen by the people". Another is the requirement for strict proportionality between the numbers of people in the respective States and the number of representatives from each State (subject to the possibility that some might not be counted on racial grounds under s25) and the absence of any requirement of proportionality for the division of States into electoral districts.

Given the weight which the Australian constitutional system places on representative government and, as always, with the benefit of hindsight, it is not surprising that questions about the security of democratic rights finally have come to the fore. But as Sir Daryl pointed out in *McGinty*, the provision for representative government which the Constitution makes "*is of a minimal kind*".[35] The reaction was the obvious one: to ask the Court to draw implications from the text and structure of Chapter One of the Constitution in broadly the same way as federal immunities and the separation of judicial power were derived from other parts of the Constitution in earlier times. The results were controversial, at least in part because they were unusual. Controversy has been stilled for

35 *McGinty v Western Australia* (1996) 186 CLR 140 at 188 (emphasis added).

the moment by the compromise in *Lange*.[36] But the tension in the Constitution is still there. Eventually, the Court will need to deal with it again.

The suggestion occasionally is made that the role of the Court complements the referendum process, in the sense that, given the relative rarity of constitutional change, change through judicial review has become correspondingly more important. Sometimes the suggestion is made approvingly. Sometimes it is made disapprovingly, or with the inference that the Court deliberately compensates for referendum failure. From whatever perspective, the suggestion seems plainly wrong, even as a generalisation. It may reflect a misapprehension of statements which have been made by successive Courts since Federation about the need for expansive interpretation of a document deliberately written to endure, and often expressed in general terms.[37] In any event, however, there is no simple correspondence between judicial review and constitutional change. And while there is an area in which the two potentially overlap, for the most part they serve quite different purposes.

I might add, because I cannot resist it, that suggestions that judicial decisions on constitutional issues usurp the role of the Australian people involve a severe oversimplification of the referendum process as well. The Australian people play a passive role in constitutional change and vote only on the questions put to them. The government and the Parliament with whom the initiative lies generally are reluctant to initiate the process, and most unlikely to do so outside a narrow range of questions. In the area of overlap to which I have referred I have no doubt that governments would prefer the Court to anticipate and meet constitutional difficulties as long, at least, as they agree with the outcome. More often than not, however, the Court seems not to respond, as the cases on ex-nuptial children,[38] the incorporation of trading and financial corporations[39] and dual citizenship of candidates for the Federal Parliament[40] suggest.

There is, however, a complementary relationship of a different kind between judicial review and constitutional alteration, which we may not yet take seriously enough. Judicial decisions can prompt thought about important constitutional themes. Popular sovereignty, representative democracy, and federal economic union are major examples of recent years. The Court can be a catalyst for public debate, if anyone is listening. At a more practical

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36 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

37 For example, *The Jumbunna Coal Mine NL v The Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-68 per O'Connor J; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 332-33 per Dixon J; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-6; *Worthing v Rowell & Muston Pty Ltd* (1970) 123 CLR 89 at 96 per Barwick CJ; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314.

38 *In the Marriage of Cormick* (1984) 156 CLR 170; *R v Cook; Ex parte C* (1985) 156 CLR 249.

39 *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.

40 *Sykes v Cleary* (1992) 176 CLR 77.

level, judicial decisions and the individual judgments explain what the Constitution does and does not do in ways which may suggest a need for change, or at least consideration of change. Some of Sir Daryl's judgments in particular have that effect - at least on me. I have no idea what he thinks that Chapter One of the Constitution should include in an ideal world, but in *McGinty* and elsewhere he sets out remorselessly what it presently includes and does not include, and why. After that, he seems to suggest, it is up to us.

This is a difficult time in the history of the Court. Sir Daryl Dawson is no longer a member of it but I have no doubt that he finds the intemperate character of some of the current debate as painful as do others. One product has been a focus on the office of Attorney-General and the extent to which the incumbent can and should defend the Court against the other branches of government. The Court has limited capacity to do so itself. I doubt the effectiveness of the Judicial Conference, if only because its defence will be interpreted as self-serving.

As our constitutional system presently stands, the only institution with a clear historical responsibility to speak in defence of the Court is that of Attorney-General. But this institution, like so many others, has changed its function and capacities, if not its outward form. The Attorney-General is an elected member of a government in the highly adversarial political culture which seems to be Australia's lot. There are limits to the extent to which he or she can now act independently, at least in areas where the government may have a contrary view. Recognition of the reality of these limits may have implications beyond the courts, for other aspects of our legal system as well.

If this is correct, the function of explaining the judicial role generally and the meaning of individual judicial decisions must fall to others. Constitutional lawyers, individually and collectively, can play an important role in this regard. Of course they will be critical of individual decisions from time to time, or of the Court's overall approach, or of the methodology of particular justices, or of the practical or theoretical effects of judicial doctrine. But their criticism will be grounded in knowledge of the complexity of the issues which reach the High Court and informed by an understanding of how the Australian constitutional system works. If they can help to ensure that public and political discussion similarly is informed, they will have made a useful contribution indeed.

Daryl Dawson's humanity, relentless logic and tenacious adherence to views carefully and thoughtfully formed are a loss to the High Court and to official Australian public life. But now that he has left the Court, in a sense he is one of us. For those who live in the same city, that is a particular pleasure. Daryl has always been generous with the time he has given to law teachers and to law students. My hope is that he and Lady Dawson will have an extraordinarily satisfying and stimulating retirement. To the extent that he is willing and able to allow it, however, I hope will we see even more of him now.