

# Singapore Academy of Law Annual Lecture 2019

## Opening Remarks

Chief Justice Sundaresh Menon

Supreme Court of Singapore

26 September 2019

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1. Good evening everyone, and a very warm welcome to the 26th Singapore Academy of Law Annual Lecture. On behalf of the Academy, it is my privilege to introduce the Honourable Chief Justice Susan Kiefel of the High Court of Australia as our guest of honour who will deliver this evening's lecture.
2. Chief Justice Kiefel's career in the law can best be summed up as trail-blazing. Her Honour was appointed Queen's Counsel in 1987. She became a Justice of the Supreme Court of Queensland in 1993, and a Justice of the Federal Court of Australia in 1994. From 2004, she also held a commission as a Justice of the Supreme Court of Norfolk Island. In 2007, she was appointed as a Justice of the High Court of Australia and 10 years later, her Honour made history when in 2017, she became the first woman to be appointed as Chief Justice of that Court and of Australia. In 2011, her Honour was made a Companion in the General Division of the Order of Australia, an award recognising eminent achievement and merit of the highest degree in service to Australia or humanity at large.<sup>i</sup> We are truly honoured and fortunate to have Chief Justice Kiefel speak with us today.

3. The theme of Chief Justice Kiefel's lecture this evening is judicial review in Australia and the protection and power of the courts under the Australian Constitution. Judicial review is an area of considerable complexity and of fundamental importance to the courts and to the structure and governance of society as a whole. In Singapore, as in Australia, judicial power is constitutionally vested in the courts. A core aspect of the judicial power and function is the ability and indeed the duty of the courts to review the legality of the acts of the Legislative and the Executive branches.<sup>ii</sup> As a corollary, judicial power necessitates, as Chief Justice Kiefel highlighted at her Swearing-In Ceremony, that the courts "must sometimes declare that legislative or executive power has been exceeded", albeit in a manner that is "respectful[ and] conscious of [the court's] constitutional role and the role which the Constitution gives to the legislature and the government".<sup>iii</sup>
  
4. Questions about the role and significance of judicial review cannot be isolated from equally important questions about its limits. Various doctrines have been designed to calibrate the scope of judicial review, such as the rules on standing, and there is perhaps none more controversial than statutory ouster clauses. On this, Sir William Wade wrote that "to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power".<sup>iv</sup> Expressing a similar sentiment, the Honourable Sir Gerard Brennan, a former Chief Justice of Australia, stated extra-judicially that the law and the Constitution "must control all branches of government, else freedom is a mirage" and so "the Executive cannot be immune from judicial review".<sup>v</sup>

5. The vesting of the power of judicial review in independent national courts is a critical premise of the rule of law, and from this perspective, it is unsurprising that both the courts of Australia and Singapore have treated ouster clauses with some suspicion. In *Plaintiff S157/2002 v Commonwealth of Australia*, the High Court of Australia held unequivocally that the court’s jurisdiction in actions seeking prerogative relief against an officer of the Commonwealth “secure[] a basic element of the rule of law”, and that the “jurisdiction of the court to require officers of the Commonwealth to act within the law cannot be taken away by parliament”.<sup>vi</sup> To much the same effect, our Court of Appeal noted in its recent decision in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* that “any society that prides itself in being governed by the rule of law, as our society does, must hold steadfastly to the principle that ‘[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power’”.<sup>vii</sup> In discussing the constitutionality of an ouster clause, the court further emphasised that its “power of judicial review, which is a core aspect of the judicial power and function, would not ordinarily be capable of being excluded by ordinary legislation ... This follows inevitably from Singapore’s system of constitutional governance, where the Singapore Constitution is the supreme law of the land”.<sup>viii</sup>
  
6. As the reference to a “constitutional system of governance” suggests, for the Judiciary to be able to properly exercise its judicial power and play its role in advancing the rule of law, it cannot stop simply at a consideration of the scope and limits of the law on judicial review. It is also important to recognise and to

protect the essential structural premises of the court – or its “defining characteristics”, in the words of the Honourable Robert French AC, a former Chief Justice of Australia<sup>ix</sup> – which underlie and are indispensable to its constitutional role, such as the fact and appearance of judicial independence and an appropriate separation of governmental powers. This is a point of shared appreciation on the part of the courts in both Australia and Singapore. As Chief Justice Kiefel observed in her address at the Opening of the Australian Bar Association Biennial International Conference in Singapore just a few months ago, a fundamental commonality between the Australian and Singapore courts is our adherence to the rule of law and our earnest desire to protect it.<sup>x</sup>

7. There is no denying that Chief Justice Kiefel’s lecture today raises complex and controversial questions. Her Honour will be discussing in particular the issues of ouster clauses, separation of powers, and the court’s constitutional role. These are questions that do not make for easy answers. But these are also questions that bear serious and repeated contemplation by any member of the profession with an interest in playing his or her role in protecting and advancing the rule of law.
8. On behalf of the Academy, may I once again express my gratitude to her Honour for accepting our invitation. Ladies and gentlemen, please join me in warmly welcoming Chief Justice Kiefel to deliver her lecture.
9. Thank you.

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- i Australian Government, “Companion of the Order of Australia”, <https://www.pmc.gov.au/government/its-honour/companion-order-australia>, accessed on 6 September 2019.
- ii *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 (“*Nagaenthran*”) at [46]; *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [47].
- iii See the Swearing-in Ceremony speech delivered by Susan Mary Kiefel AC, Chief Justice of the High Court of Australia (30 January 2017) at p 5, accessible at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ31Jan2017.pdf>>.
- iv See Wade, “Constitutional Fundamentals”, *Hamlyn Lectures*, 32nd series (1980) at 83–84, as cited in the speech delivered by Gerard Brennan AC KBE at the Bond University School of Law, “The Parliament, the Executive and the Courts: Roles and Immunities” (21 February 1998) (“the Brennan Speech”), accessible at <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj\\_bond2.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_bond2.htm)>.
- v See the Brennan Speech.
- vi *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [5]; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 605 at [85]–[87].
- vii *Nagaenthran* at [73].
- viii *Nagaenthran* at [71].
- ix See the speech delivered by Robert French AC at the Supreme and Federal Court Judges Conference, “Essential and Defining Characteristics of Courts in an Age of Institutional Change” (21 January 2013), accessible at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf>>.
- x See the speech delivered by Chief Justice Susan Mary Kiefel AC at the Opening of the Australian Bar Association Biennial International Conference, “Convergence – the Courts of Singapore and Australia” (11 July 2019), accessible at <[https://austbar.asn.au/uploads/pdfs/abaconf2017/Convergence\\_Joint\\_Keynote\\_the\\_Hon\\_Susan\\_Kiefel\\_AC.pdf](https://austbar.asn.au/uploads/pdfs/abaconf2017/Convergence_Joint_Keynote_the_Hon_Susan_Kiefel_AC.pdf)>.