

Speech Given at the Opening of the Legal Year, 11 January 2021
by the Chairman of the Hong Kong Bar Association
Philip J. Dykes, S.C.

Chief Justice, Judges and Magistrates, Secretary for Justice, President of the Law Society, Distinguished Guests, Ladies and Gentlemen

1. I wish to address you on the subject of independence. Of course, I mean judicial independence under the Basic Law and sometimes overlooked lawyers' independence, which is necessary for judicial independence.
2. Both types of independence are necessary if the HKSAR is to hold itself out as a place where, in these difficult days, people can put their hands on their hearts and say that the Rule of Law is maintained.
3. What is the function of an independent judiciary? You find the answer in the Basic Law. It is the branch of government that wields the HKSAR's judicial power under Article 85.
4. When the Judiciary uses judicial power, it must do so 'independently, free from any interference'. These words mean that the Executive and Legislative branches cannot usurp the power, or share in its exercise, or suggest how the courts use the power in a particular case or class of cases.
5. Of course, the essence of judicial power is the duty to render dispositive judgments in all cases concerning legal rights and obligations, whether those concern private parties or public bodies, including the Government.
6. Subject only to the extraordinary power of interpretation vested in the SCNPC, when the Court of Final Appeal exercises judicial power, its judgements are final. Court rulings must be obeyed by all persons and bodies subject to the jurisdiction of the courts.

7. Judicial power is vested in the judges recruited, by and large, from an independent legal profession that is not beholden to the executive branch of Government in any way. Without independent-minded lawyers, you will not have independent-minded judges.
8. Independence at the Bar means being bold in defence and, where necessary, bold in aggression. It means barristers will take on unpopular causes and stick doggedly with them and not being swayed by negative opinions about them or their clients. The Bar's Code of Conduct does not merely encourage these attributes; it requires them as a matter of professional conduct.
9. The qualities that the Bar Association demands from its members are also required of it as an institution. The Bar Association is committed to the defence of the Bar's honour and upholding the Judiciary's independence. These are aims and objectives written into the Bar Association's foundation documents.
10. This requirement is the reason why the Bar speaks out when the media vilifies judges for their decisions.
11. I am not referring to harsh criticism of judges and their judgements, because sometimes that is wholly justified and can have beneficial effects if some serious shortcoming is exposed. I am talking about attacks that impute partiality or bad faith on the judges' part for no reason other than that they happened to decide a case one way rather than another. Or because the result does not fit a political or moral agenda.
12. Attacks like this are pure poison. They undermine people's confidence in the Judiciary because they set at nought the judicial oath. This oath requires judges and magistrates to *'serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.'*

13. They can sometimes constitute a contempt of court if made when a case is before the court, and the attack is made in the hope or expectation that it will affect a judge's decision.
14. Attacks on judges are, moreover, cowardly because the authors know that judges cannot answer back.
15. Although the Bar Association may protest, what it cannot do is bring to book the authors and publishers of unprincipled attacks on judicial independence. Assuring accountability in these circumstances is primarily the job of the Secretary for Justice.
16. The Secretary for Justice has an unenviable task here. She accepts, of course, that people have a right to criticise judges even if the criticisms are half-baked and couched in offensive language.
17. She knows too that judges are not shrinking violets and that the law of contempt does not exist to massage bruised judicial egos. However, there are limits to judicial forbearance.
18. The US Supreme Court Justice, Hugo Black, put it well in a 1941 case:

“The assumption that respect for the Judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. ... an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”
19. Although individual judicial sensibilities are neither here nor there, there is another legal principle in play: the integrity of the Judiciary as an institution.
20. The Judiciary is, notoriously, weaker than the other branches of Government whose functions, duties and powers are described in Chapter IV Basic Law.

21. The Judiciary commands no army or police force nor can it appeal to a sympathetic political electorate for support. It must demonstrate its worth in the constitutional order by commanding the people's respect through its commitment to the Rule of Law, which means, essentially, administering justice '*without fear or favour, self-interest or deceit.*'
22. When there is a creeping barrage of baseless criticism that supposes that judges are politically biased, incompetent or dishonest, the damage is done not so much to the judges, who have broad backs, but to the Judiciary as an institution.
23. If nothing is done about attacks, they will undermine confidence and respect for the courts and the administration of justice will slowly evaporate.
24. I can do no better than to recount the High Court of Australia's explanation in a 1983 case called *Gallagher v Durack* of why it is sometimes necessary to come down hard on speech critical of the courts or judges.

"The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority" (per Dixon J. in *R. v. Dunbabin; Ex parte Williams* (1935) 53 CLR, at p 447). The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges."

25. I was Chairman of the Bar from 2005 to 2007, in what seems a different age.
26. In my two years' service, I did not have to issue any statements censoring what appeared to be, in the words of the Australian High Court, 'baseless attacks on the integrity or impartiality of courts or judges.'

27. I end my current three-year stint as Chairman in a couple of weeks. Looking back, I find to my surprise that the Bar Council has issued about a dozen statements on the topic in that time.

28. I hope that common sense prevails and that people see that conscienceless attacks on the Judiciary do no one any good. They eat away at society's respect for the Law, which is necessary for judicial independence.

29. And without judicial independence, a pearl of great price, we might as well pack up our bags and steal away for Hong Kong is nothing without it.

30. I conclude by wishing that you enjoy better times in the coming year of the Ox.

Philip J. Dykes, S.C.
Chairman
Hong Kong Bar Association