

Speech Given at the Opening of the Legal Year, 13 January 2020
by the Chairman of the Hong Kong Bar Association
Philip J. Dykes SC

[Chief Justice, Judges and Magistrates, Secretary for Justice, President of the Law Society, Distinguished Guests from Overseas Law Societies and Bar Associations, Ladies and Gentlemen.]

1. You do not need me to tell you what an extraordinary year has just ended.
2. A fair number of you will have participated in one or more of the mass demonstrations to show discontent with the Hong Kong Government. Even more of you will have seen these protests on television screens or social media.
3. All of you will, I hope, have despaired when you saw serious violence breaking out, which saw some people attacking and injuring others whilst others committed acts of criminal damage. Such activities cannot come within the exercise of the right of peaceful protest.
4. There will be a reckoning later this year for some people. The police have arrested several thousand people coming from all walks of life. The arrested persons are predominantly young. Some are just school children. Many more are university students. However, many were ordinary workers and others had stopped work long ago and entered retirement.
5. Some of these people now face serious charges which carry substantial terms of imprisonment. Many though have been charged with lesser public order offences, not involving violence or extreme vandalism. They are all of them, in the main, of good character. They are representative of a large section of Hong Kong society.
6. It is not for me to advise the Secretary for Justice about who she should prosecute and for what offences. Article 63 of the Basic Law says that the Department of Justice controls criminal prosecutions 'free from any interference'.
7. However, the Prosecution Code published by the Department of Justice reminds us that a decision to prosecute is not made just because the police have enough evidence to go to court and secure a conviction. Public interest plays a part in the decision-making process too so that individuals or some classes of cases will not end up in court, even though there is a strong case against them.

8. To some people a decision not to prosecute when there is evidence that would secure a conviction may appear odd and at variance with the rule of law which some think calls for a prosecution whenever the law appears to have been breached. That is an incorrect understanding.
9. The prosecutor's looking beyond the four corners of a charge sheet to other matters, both personal to the person charged and to other matters, is a part of the rule of law. In 2006 the Court of Appeal described this prosecutorial independence and the ability to look at the overall merits of a case before deciding as constituting 'a linchpin of the rule of law' (In Re C (A Bankrupt) [2006] 4 HKC 582.)
10. I believe that there will surely be a winnowing of cases going forward to prosecution. There will still be many hundreds of cases, if not thousands. They will have to be processed through the courts by judges and magistrates with lawyers from the Department of Justice, the Bar and the Law Society playing a necessary part as either prosecutors or defence representatives.
11. It will be a formidable task. I would hope that the new Bar Council will look to ways in which it can help in encouraging members to provide their services in future trials. That may mean reminding some members who have not practised criminal law in a long time that they should brush up their skills and be prepared to help out in court so that fair trial rights which apply to both the prosecution and defence may not be jeopardised.
12. At this stage, I should pay tribute to the barristers who, working together with members of the Law Society, have provided legal assistance at police stations and magistrates' courts to persons arrested for public order and other offences.
13. One day would see scores of arrests and people taken into police custody and the next day would be the same. Police stations often could not accommodate the detainees, and their subsequent dispersal to other police stations and detention facilities presented members with significant challenges to track down their clients and see them. Later on, these barristers would be in court with the arrested persons, in some cases waiting until eight or nine o'clock at night before their clients' cases came on.
14. Only by the brilliant organisation of some, and the enthusiasm and hard work of all concerned, could the arrested persons' constitutional right to see a lawyer and be represented be made safe.
15. When, later on, these cases arrive in court for trial, there will be decisions that are bound to please or disappoint the participants, as well as persons following the cases. Sometimes stronger emotions are aroused.
16. We have seen judges abused and vilified only recently. This reaction has been because a verdict or sentencing decision had not met the expectations of people outside the judicial process who have a view on what should be the 'correct' disposal of a case.

17. The Chief Justice has said it before now, but it needs repeating: Judges do not try people differently because of the defendant's political or other beliefs. If they did that, they would not be true to their oaths of office which bind them to do justice without fear or favour, self-interest or deceit.
18. I wish that the words of US Supreme Court Justice Samuel Alito were more widely known and, more importantly, accepted which are: "*A judge can't have any preferred outcome in any particular case. The judge's only obligation - and it's a solemn obligation - is to the rule of law.*"
19. Similarly, barristers are not allowed to let personal prejudices get in the way of providing representation to persons seeking to use their services. We have a rule in our Code of Conduct that we call the 'Cab Rank Rule'. It requires barristers to act in any case in the area of law in which they practice in return for the usual fee. They must act irrespective of what they make of the client's character or their beliefs.
20. The Cab Rank Rule is, regrettably a rule that, like most regulations, dull to read but an English barrister from the Eighteenth Century, Thomas Erskine, stated the essence of the rule in a scintillating speech when he defended Thomas Paine in 1792.
21. Thomas Paine was a radical. He wrote a book which suggested that it was lawful for a people to overthrow a government which failed to protect their natural legal rights, such as freedom of thought, assembly and speech. The Attorney-General charged him with sedition. That is to say with exciting disaffection and hostility against the Government of the day.
22. Other barristers attempted to persuade Erskine not to take up the case because Paine was poison to the Government. Defending him would blight his chances to do Government work because he would be forever associated with Paine and his politics.
23. Erskine later told the jury about the pressure he came under from his fellow lawyers not to defend Paine.
24. "From the moment that any advocate can be permitted to say that he *will* or *will not* stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."
25. Erskine lost the case, but his stubborn and principled defence of Paine so enhanced his reputation as a barrister who championed independence that 14 years later, he became the Lord Chancellor.
26. The principle encapsulated in that part of Erskine's speech holds good today here and now. Barristers will continue to defend unpopular clients and causes not because they necessarily want to but because it is their professional duty to do so.

27. I should not like the Bar have to comment again on any other incidents like the one which occurred last September when a crowd hounded a prosecutor in the High Court building for doing his job in opposing a bail application made by a young person arrested during the protests.
28. In 1990 the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a document called 'Basic Principles on the Role of Lawyers'. Paragraph 18 states that ' Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.' That principle needs to be understood and accepted too.
29. These are some of my misgivings for the year to come. I hope that they do not come to pass. If they do, I believe I can assure the Chief Justice that the Bar will, as always, assist in helping the Judiciary discharge its solemn responsibilities under the Basic Law.
30. I wish you all better fortune in the Year of the Rat.

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