

Submission by JUSTICE on
Affiliations of Judges

Independence of the Judiciary

1. The starting-point and the ending point of all debate and discussion on the issue of affiliations of judges, including political affiliations, must be the maintenance of the substantive independence of the judiciary. The appearance of independence is meaningless if the substance is not there.
2. So important is the independence of the judiciary that Article 19 of the Basic Law expressly underlines it by providing that the HKSAR shall be vested with independent judicial power. Article 85 provides that the courts of the HKSAR shall exercise judicial power independently, free from any interference.
3. The independence of the judiciary is not an end in itself but a means of ensuring a fair trial for all citizens by "*an independent and impartial tribunal*" which is an absolute right that may suffer no exception.

"Even though a person's right to a fair trial may be respected in a particular case when a judge is independent, a State would be in breach of its international obligation if the judiciary were not an independent

branch of power. Therefore, in this context, independence refers both to the individual judge as well as to the judiciary as a whole".¹

4. The 1st Principle of U.N. Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly in 1985 sets out that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. This includes the Legislature.

The Principle of Separation of Powers

5. *"According to this principle [of legality], the executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere."²*

Thus, judges do not [and should not] legislate nor is it for the legislature to dictate to the Judiciary how best to ensure that judicial proceedings are conducted fairly. This is apparent from the 6th Principle which is as follows:

"The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of parties are respected".

¹ Extract from "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors", Practitioner's Guide published by the ICJ.

² Extract from the Practitioner's Guide citing the Inter-American Democratic Charter adopted by the OAS General Assembly on 11.9.01.

Judges' Rights

6. Judges have the same rights as other citizens. The 8th Principle recognises that

"In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

This is further underlined by the 10th Principle which includes the following:

"In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status ..."

7. This emphasizes that in the selection process the only relevant criteria should be integrity, ability and professional qualifications. The selection process is rightly blind to all other considerations and treats the personal opinions and beliefs of the individual candidates as of no relevance whatsoever. The principle applies equally to candidates for part-time appointments as full-time appointments.

8. Of course, as human beings, judges can be expected to have opinions and views on any number of subjects. Judges may have strong religious convictions or political moral or ethical beliefs. How this is dealt with by an independent judiciary is considered below.

How the Judiciary ensures independence and impartiality

9. Persons who are selected to be full or part-time judges are selected on the basis of integrity. They all take the judicial oath before serving. It is illogical to place trust in the selection system and then to impugn the results without basis. The person of integrity can be expected to adhere to his or her judicial oath to administer justice without fear or favour i.e. impartially.
10. Further, the Judiciary here, as in many other jurisdictions, has a Code or Guidance for Judges in matters of conduct, both on and off the bench. This is prescribed by the Judiciary itself. It is not a matter for the Executive nor for the Legislature. In line with the above principles and for the reasons above stated, it is for the Judiciary above to decide. That is why in England and Wales, the Guide to Judicial Conduct is produced by the judges themselves in the Judges' Council. Similarly, in Hong Kong and in line with the above principles and for the reasons above stated, the Guide to Judicial Conduct has also been drafted and produced by the Judiciary itself.

11. This Guide comprehensively and extensively deals with "*Matters Concerning Disqualification*", "*Professional Activities Outside Court*" and "*Non-Judicial Activities*". Members of this Panel are referred in particular to Part D "*Matters Concerning Disqualification*". There is no reason to single out political affiliation or beliefs as giving rise to any greater problem than any other kind of affiliation (including commercial, social or familial) or belief (religious or moral).

12. It is axiomatic that the matter of listing i.e. which judge or judges is or are assigned to hear any particular case is a matter for the judiciary and the judiciary alone. The 14th Principle is as follows:

"The assignment of cases to judges within the court to which they belong is an internal mater of judicial administration."

13. An examination of the daily cause lists will demonstrate that the number of politically sensitive cases is miniscule and usually confined to judicial reviews which are not handled by deputy judges or recorders. Those who are temporarily appointed are given specific guidelines for avoiding conflicts of interests. These include the Deputy Judge or Recorder supplying the Judiciary Administration a list of all current work in hand where he or she is in active practice. They will and do advise those responsible for listing of other possible conflicts of interest as well. With such safeguards in place, it is irrational, illogical and insulting to the Judiciary to insist on more. Hong Kong's is probably one of the most comprehensive systems for avoiding conflicts of interest.

The issue before the Panel

14. It is possible that outsiders including legislators and members of the public may have different views as to the content of the Guide to Judicial Conduct. Some may regard it as overly prescriptive, too conservative or cautious and incompatible with the basic rights and freedoms of judges as citizens. Others may disagree. There is nothing wrong with expressing such views provided that this does not escalate into a campaign by one branch of government to impose its view on the judiciary.

15. It can be seen that the Hong Kong Judiciary has adopted the most stringent standards both for full time and part-time judges to ensure the fair administration of justice. Likewise, the legislative and the executive bodies in Hong Kong must respect those standards and themselves exercise restraint in matters within the sphere of the Hong Kong Judiciary and not make statements which give rise to a perception that pressure is being exerted on the Judiciary or individual Judges to modify their beliefs and personal views. Subject to the tests for judicial impartiality summarized in the Guide to Judicial Conduct, a judge's own lawful personal beliefs and politics are not relevant and should not be the subject of continued inquiry let alone demands by legislators. The continued independence of the Hong Kong Judiciary is uniquely important as a safeguard in a situation where the safeguard from democratic politics is absent.

16. This Panel should resist overstepping the mark and becoming a vehicle for interference with the independence of the judiciary in breach of the above principles. The unfortunate timing of the issuing of additional

Guidelines in relation to part-time Judges and participation in political activities has already given rise to a perception that political pressure has been brought to bear on the Judiciary and that the Judiciary has succumbed to such pressure. Now that the additional Guidelines have been issued, the matter is closed.

22 June 2006