

The following is the full text of the speech delivered by the Hon Chief Justice Mr Andrew Kwok-nang Li at the Ceremonial Opening of the Legal Year 2009 today (January 12):

Secretary for Justice, Mr Chairman, Mr President, Distinguished Guests, Ladies and Gentlemen,

On behalf of all my colleagues in the Judiciary, I would like to welcome all of you warmly to this Opening of the Legal Year. I thank you sincerely for your support by your presence. We are honoured by the presence of representatives of legal professional bodies from a number of jurisdictions.

Judicial independence and high professional standards

Judicial independence is absolutely necessary to enable judges to perform their constitutional duty of adjudicating disputes, whether between citizens or between citizen and government, impartially without fear or favour. And in discharging their duty, judges must perform in accordance with high professional standards. This is essential for the maintenance of public confidence in the administration of justice.

Judges must resolve disputes fairly, competently and efficiently. All three qualities are required for the proper operation of the judicial process and they are complementary to each other. There can be no question of fairness or competence being compromised in the name of efficiency. And efficiency should be entirely consistent with maintaining the quality of justice. Judges must exercise their case management powers in both civil and criminal cases to ensure fair, competent and efficient adjudication.

Having regard to the purpose which litigation serves and the stress which it can involve, it is important for cases to be resolved within a reasonable time. Where the hearing has concluded, the judge has a duty to ensure that judgment is delivered within a reasonable time. In a collegiate court, the duty rests not only on the presiding judge but also on its other members. Where appropriate, a judge would be allowed time off from other judicial work to clear outstanding judgments. Each Court Leader has the responsibility to operate the mechanism for monitoring outstanding judgments to seek to ensure that they are given within a reasonable time. Where necessary, the Court Leader will inform the Chief Justice who can deal with the matter where appropriate.

All judges at all levels of court are no doubt conscious that day in and day out, their performance is judged in the court of public opinion. The judges are well aware that the collective reputation of the Judiciary depends on the maintenance of high professional standards by each and every judge.

Economic downturn

With the economic downturn, the caseload of the courts can be expected to increase. The Judiciary will be keeping a close eye on developments and if necessary, will seek further resources from the Administration and the Legislature. The Judiciary will strive to cope within the resources which are made available to it. I wish to emphasise that in difficult economic times as at all times, it is of fundamental importance that the quality of justice must not be compromised.

Civil Justice Reform

The long journey to the reform of our civil justice system to improve its effectiveness began nearly nine years ago with the establishment of the Working Party in February 2000. At every stage of the process, all stakeholders have been involved and consulted. All concerned, including judges and the legal profession, have had ample time to prepare and will be ready for the reform. We are firmly on target for implementation on 2 April 2009.

I am grateful to the Chief Judge of the High Court and judges and support staff working with him for capably steering and carrying out the work on implementation. I must also thank all concerned for their work and support. The drafting and legal work of the members of the Department of Justice was invaluable. Both the Bar and the Law Society have given constructive suggestions during the process. I would like to pay tribute to and thank the Honourable Ms Margaret Ng for her able chairmanship of the LegCo committees which scrutinized the proposed primary and subsidiary legislation.

With such a major reform, it is likely that there will be teething problems. I have therefore established a Committee to monitor the working of the reformed system and to make suggestions to ensure its effective operation. It will be chaired by the Chief Judge of the High Court and will comprise judges, a barrister, a solicitor, a member of the Department of Justice and the Legal Aid Department and an experienced mediator.

Mediation

An objective of the reformed system is to facilitate the settlement of disputes and the court has the duty as part of active case management to further that objective by encouraging and facilitating the use of an alternative resolution procedure, such as mediation, if the court considers that appropriate. The parties and their legal representatives have the duty of assisting the court in this regard. In exercising its discretion on costs, the court will take into account all circumstances, including any unreasonable failure of a party to engage in mediation.

In this connection, it should be noted that as from 1 October 2008, the Solicitor's Guide to Professional Conduct imposes a duty on a litigation solicitor to consider and if appropriate, advise his client on alternative dispute resolution procedures such as mediation. This is of course part of a solicitor's duty to consider and act in the best interests of his client. It is also significant to note that the Legal Aid Department has taken the position that under the reformed system, legal aid is available to fund the costs of mediation of a legally aided party as costs incidental to the legal proceedings.

Following revision which takes into account the concerns of the Law Society, the draft practice direction on mediation has been accepted by the Bar and the Law Society. The Law Society has requested more time to enable solicitors to prepare for its implementation. I have acceded to this request. This practice direction will be promulgated at the same time as the other practice directions but its effective date will be 1 January 2010 instead of 2 April 2009 which is the effective date of the others.

It must be strongly emphasised that the promotion of mediation as an alternative and complementary method of dispute resolution to litigation is plainly in the public interest. Its benefits are well known; the reduction in stress, the saving of time and costs and the achievement of a satisfactory solution. Having regard to its development in many jurisdictions, it must now be regarded as an indispensable feature of a credible legal system. I understand from the Secretary for Justice that the Working Group on Mediation chaired by him is making progress in its important work. The Judiciary, the legal profession and all concerned must keep up the momentum in developing mediation.

The appointment of Judges to offices outside the Judiciary

Judges are appointed by the Administration to various offices outside the Judiciary as part of their work. They include offices where the work involved is similar in nature to judicial work such as chairing various tribunals or is concerned with persons serving sentences, or with law reform, legal education and the like or is administrative in nature. Some offices are statutory. In a few instances, the statute prescribes that only serving judges are eligible to be appointed. In many instances, the statute provides that

both serving and retired judges and, in some cases, senior legal practitioners are eligible to serve. Appointments are usually made by the Chief Executive, with the statute in some cases requiring recommendation by or after consultation with the Chief Justice.

Concern has been expressed about the appointment of judges to outside offices. The concern has focused on those which are administrative in nature. Further, it has been questioned whether the Judiciary has sufficient resources to cope with the additional work and whether judicial work has suffered as a result.

I must first dispel certain possible misconceptions. First, the Judiciary is usually provided with extra resources to deal with the additional work in the form of extra judicial posts or resources for employing deputy judges. Secondly, where a judge is asked to undertake work outside the Judiciary, his judicial work is appropriately reduced to enable him to cope adequately with both kinds of work.

In the light of the concern which has been expressed, it is appropriate to state the Judiciary's position on the appointment of judges to outside offices.

First, the Judiciary has not sought such work for itself. But where the Administration, reflecting community consensus, proposes legislation prescribing the appointment of a serving judge to a particular office, provided the Judiciary is satisfied that there is no objection in principle, it would be prepared to make a judge available upon enactment of the legislation by the Legislature. If a community consensus emerges that it is no longer necessary to call on a serving judge for such an appointment, the Judiciary would equally have no objection.

Secondly, for all offices outside the Judiciary, whether or not judicial in nature, where the relevant statute provides for serving judges and other categories of persons to be eligible for appointment, such as retired judges and senior legal practitioners, the Judiciary's approach in recent years has been to request the Administration to look for a suitable person who is not a serving judge and to agree to make a serving judge available only where no other suitable person is available. In Hong Kong, there is a growing pool of retired judges and a pool of senior legal practitioners. Pursuant to this approach, serving judges are, for example, no longer appointed to chair the Administrative Appeals Board or the Air Transport Licensing Authority. This approach also applies to any non-statutory body, where the eligible persons are not legally prescribed.

The Obscene Articles Tribunal

The Judiciary welcomes the Administration's review of the Control of Obscene and

Indecent Articles Ordinance. Such a review is long overdue. The Judiciary has submitted its response in the consultation exercise, and will be releasing its response publicly.

In essence, the Judiciary maintains firstly, that the administrative classification function should be removed from the Obscene Articles Tribunal and secondly, that the present system of adjudicators should be replaced by a jury system. The detailed reasons are set out in the response. I shall refer to them briefly.

Under the present statutory regime, the Tribunal is required to perform two distinct functions, namely the classification function which is administrative and the determination function upon referral by a court or magistrate which is judicial. Although subject to the same statutory guidance, the Tribunal is in effect operating as two different bodies, administrative and judicial, with different powers and subject to different procedures and rules of evidence when discharging the two different functions. As the Judiciary has long maintained with the Administration, this arrangement is inappropriate and unsatisfactory.

There have been suggestions that the panel of adjudicators is insufficiently representative. It is difficult to reach a consensus on how big the pool has to be. Further, the Judiciary, which exercises independent judicial power, is not in a position to operate an appropriate appointment system, where a very large number of candidates have to be identified and selected.

In its response, with the suggested removal of the administrative classification function from the Tribunal, the Judiciary has proposed for consideration that the present system of adjudicators should be replaced by a jury system to deal with judicial determination, similar to that in jury trials in criminal cases and coroner's inquests.

I of course understand that the review of the Ordinance by the Administration, including any changes to the Tribunal is a challenging subject. I believe that the Judiciary's proposals will contribute to the discussion of this important matter.

Conclusion

It remains for me to wish you on behalf of all my colleagues in the Judiciary good health and every happiness in the new year.

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The Honourable Chief Justice, Mr Andrew Kwok-nang Li, today (January 12) inspects the Guard of Honour mounted by the Hong Kong Police Force at Edinburgh Place, during the Ceremonial Opening of the Legal Year 2009.



The Honourable Chief Justice, Mr Andrew Kwok-nang Li, gives his address at the Concert Hall of the City Hall. The audience of about 840, included judges and judicial officers, members of the legal profession and other guests.