

A judge's duties go beyond holding court

In the wake of recent criticism of the judiciary in the *South China Morning Post*, Mr Justice Mortimer makes his case for the system

THE backlog of cases waiting to be tried in the Hong Kong courts has risen and the waiting periods between cases being ready for trial and the dates when the trial can be fixed are too long.

This is not just a Hong Kong problem, it is much worse in some jurisdictions, but everyone agrees it is important to Hong Kong's international success that the problem should be mitigated soon and eventually solved.

More courts, more judges and therefore more financial resources is an obvious approach but even this is limited. Human resources, like financial ones, are scarce. There is a finite number of those with suitable ability and personality who are prepared to leave more lucrative practices to sit on the bench.

It follows that when financial and human resources are being considered in this context it is necessary to discover whether the present system is working to capacity.

How is it possible to assess whether the system is working to capacity?

Attempts to answer this question have led to controversy and the production of statistics – which like all statistics are potentially misleading if not fully explained.

If the priority is to clear the lists, let there be no doubt, that with a determined judiciary prepared to use its power, much can be achieved in both civil and criminal cases.

In civil cases the lists can be "packed" – with litigants, witnesses and lawyers waiting in the corridors for their cases to be reached. Cases are forced on to the list and experience shows many then settle. Others are dismissed if the parties are not ready.

Criminal cases can be listed "for plea only" and substantial discounts to sentences can be offered for pleas of guilty; or cases can be dropped for pleas of guilty to lesser charges. In some cases "plea bargaining" can be undertaken, as in the United States.

None of these steps are thought to be acceptable in Hong Kong. The interests of lawyers and litigants, and the public interest in the quality of the system are rated more highly.

The policy adopted for listing cases in court can be varied and under the present listing policy the system is probably working near ca-

capacity. The real question is should it be changed and, if so, to what extent?

Statistics have been kept of the average time a judge sits in court. These "sitting hours" have been wrongly assumed by some to be "working hours". A judge's work is to sit and hear cases both in court and in chambers. All cases are within the responsibility of the listing officer. A judge hearing cases in chambers cannot hear a case in court at the same time.

Cases in chambers have to be listed, tried and judged upon, in the same way as cases in court. Sometimes they are just as heavy and complicated. For these purposes any distinction between the two is invalid.

It is important to note that in civil work judges spend a substantial part of their time sitting in chambers.

But the value of such statistics is that they demonstrate whether the listing of cases is achieving the desired balance between crowded corridors of litigants waiting to be heard (paying lawyers for the privilege) and empty courts with judges available with no case.

HAVING drawn a distinction between "working hours" and "sitting hours", it should not be overlooked that a judge's purpose is to sit and try cases. To do this efficiently – and less expensively to the litigant – he must prepare himself by reading the papers so that he may know the background and identify the issues. In this way he may be able to drastically reduce the time in court. Generally speaking, the longer a judge spends in preparation the shorter the hearing – but much depends on the judge's personality and style.

Additionally, judges often need time to consider and prepare their judgments.

Apart from court related matters, judges do many other things connected with their appointment. It is necessary for them to keep abreast with the law and developments here and elsewhere; to chair legal organisations; sit on the Law Reform Commission and chair sub-committees considering references; judge student "moots"; and give papers at international legal conferences to "bang the drum" for Hong Kong.

There has been a suggestion that a disclosure of, or enquiry into, judges' "working hours", is

"unconstitutional" and is an interference with judicial independence. This is wrong. It has nothing to do with judicial independence.

Judges are entitled to complete freedom from interference or pressure in deciding and hearing cases. That is all. We are public servants. We and the legal system depend upon public money. The public is entitled to know how money is being spent.

However, judges cannot possibly keep to "office hours" by the nature of their work. Too detailed enquiry may be an undignified interference in a person's privacy.

In Hong Kong we have a sophisticated legal system but it is small. There are not sufficient judges for there to be experts in every field and there are no specialised "divisions" within the judiciary. This means that often judges must spend more time out of court researching and reading branches of the law which may not form part of their daily work. If standards are to be maintained this must be catered for.

The judiciary is taking steps to reduce the length of court hearings. This means judges making careful preparation and then becoming more "interventionist" in court, something that has not been part of the Hong Kong "tradition".

The length of time a judge takes to try a case is no guide to his ability, his efficiency or his energy – save that as a general rule the quicker a judge is, the better he is. In Britain, there was a deliberate policy of not appointing slow judges to the bench even if they were able – on the basis that neither litigants nor the public could afford them.

The nature of a judge's work means that he cannot maintain an even flow of work during "office" hours. Sometimes he will be thoroughly overworked with a series of difficult cases and at other times several cases may settle or collapse, which inevitably leaves him free of sittings until other cases can be brought forward.

This situation can easily be remedied by listing "floating" cases – but is the expense and inconvenience acceptable?

Listing expertise and policy are but one important approach to the resolution of case backlog. There are many other radical ways of trying to alleviate the problem. I note the point for completeness.