Court reform programmes: the Malaysian experience

by Justice Azahar bin Mohamed

In this article I shall give a brief account of our experience in Malaysia of transforming our judicial landscape with the introduction of new measures to tackle a massive backlog of cases and unacceptable delay in the litigation process. The article will focus on the key initiatives aimed at strengthening judicial systems and procedures, including efforts to address court management systems, procedural rules, and jurisdictional limits of courts and implementation of alternative dispute resolution. Some of the accomplishments and the resulting outcomes of the reforms will be highlighted, and the article will conclude by setting some future directions which the court should take.

I became involved with the implementation of court reforms when I was appointed as the Managing Judge of the Civil Division of the Kuala Lumpur High Courts in 2012. My administrative duty as a Managing Judge required me, among others, to assist the Chief Justice of Malaysia and the Chief Judge of Malaya to help set bench marks for efficient and equitable management of cases. This involved maintaining a constant focus on how we could improve what we are doing by making the necessary changes to processes and procedures.

During my time at the IALS as an Inns of Court Fellow I have had the opportunity to discuss with some senior judges how they go about their business in various divisions of the High Court. I have also had several conversations with judges and members of the Bar on how cases are dealt with efficiently, speedily and above all justly, matters which are very close to my heart.

More than ever, there are now few public institutions which are subject to more public scrutiny than the judiciary. As an institution established to resolve disputes on issues that embrace economic, social, moral and political questions, a major challenge facing the judiciary is the ever-increasing public demand for judicial accountability. There is a continuous call for a more expeditious system of delivery of justice, effective and efficient resolution of increasingly complex disputes, and transparency in the appointment of judges, as well as appropriate judicial standards of competence and ethical conduct. This is very important because the right of access to justice is a fundamental right and is enshrined in the liberty clauses of our Federal Constitution. Public access to courts will not count for much if the efficiency of the system of justice does not hold up.

The year 2009 features as an important year for the Malaysian judiciary and the administration of the justice system as a whole. It was when, under the dynamic and visionary leadership of the then Chief Justice Zaki Azmi and his team (comprising the current Chief Justice, the President Court of Appeal, the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak), multiple initiatives and reforms were embarked upon with the common goal of a higher standard of justice.

Prior to the reforms introduced in 2009, measures and changes introduced were few and not sweeping in nature. The 2009 reforms were extensive and wide-ranging and can be divided into two broad categories: first, a diverse range of measures intended to promote and facilitate a more transparent, efficient and expeditious delivery system; and second, initiatives aimed at enhancing judicial skills in order to enhance judicial performance.

THE MALAYSIAN LEGAL SYSTEM: AN OVERVIEW

Before turning to explain the nature of some of the 2009 reforms, I will provide by way of introduction an overview of our judicial system.

A significant event in Malaysian judicial history occurred in 1786 when Penang was ceded to the English East India Company. This was followed by what could be said to be the watershed of our judicial history – the granting of a Royal Charter to Penang in 1807. Upon the authority of the Charter a Supreme Court, presided over by a recorder, was established in 1808 where the first appointed Recorder of the Court of Judicature of Prince of Wales Island (Penang) was Sir Edmond Stanley. Ever since then British rule has had a most profound impact on the legal development of our country with the

introduction of common law well as the British judicial system. Malaysia's present day judicial setting in term of structure and hierarchy as well as court procedures is very much influenced by the British model.

The written Malaysian Federal Constitution as the supreme law of the land stipulates the separation of powers among the executive, legislative and judicial branches of the government. Though a federation, our judiciary is organised principally under a single unitary federal system, which I shall refer to as the civil courts. The Federal Constitution gives judicial power exclusively to the civil courts

Our civil court structure is pyramid-shaped. The hierarchy of the courts runs from the Magistrates' Court, Sessions Court, High Court, Court of Appeal to finally the Federal Court, which is the final appellate court. The High Court, the Court of Appeal and Federal Court are also commonly referred to as the superior courts, and the Magistrates' Court and the Sessions Court as the subordinate courts.

The huge bulk of cases are dealt with in the subordinate courts, and very few of them ever reach the superior courts. At this point I should clarify that references to "court" in this context refer to the civil courts.

A parallel sharia court system exists alongside the civil courts. The sharia courts exercise jurisdiction over Islamic law and personal laws of persons professing the religion of Islam. Sharia courts which come within the purview of each of the states in the federation are quite separate from the civil court. They have their own system and their own rules of evidence and procedure which in some respects are quite different from those applicable to the civil courts.

This is a somewhat unique and complicated arrangement because two different but unequal levels of government administer the two systems separately. As Malaysia continues to modernise and operate in a more secular environment, practical difficulties and jurisdictional conflicts have arisen over the years regarding the dual system.

PRE 2009 ISSUES

A plethora of issues dogged the civil courts prior to 2009. As in many jurisdictions, Malaysia was burdened with a massive backlog of cases, unacceptable delays in the litigation process, and declining delivery of judicial decisions. The courts struggled with a mounting workload. Matters such as efficiency, quality, transparency and accountability become major issues.

There were long waiting times for trials and parties often had to wait four to five years or even longer for a trial date. The time taken to dispose of cases was too long, resulting in delays and consequential distress and anxiety for the litigants. In criminal cases, accused persons, even those on remand, had to wait for long periods for proceedings to be brought to court. All this led to delayed justice and frustrated litigants. Delay may itself defeat justice.

It was also apparent that the public perceived the court litigation process as being lengthy and expensive. Such perception gave rise to a negative connotation that access to justice was a hurdle rather than an enforceable right.

In 2009, for example, there were 6,490 commercial cases pending in the Kuala Lumpur High Court. Most of these cases had been delayed for more than five years, and some were 10 to 12 years old. During that period, the Malaysian Government established a special task force to facilitate business, address the urgent need for closer collaborations between the public and private sectors, and enhance the public service delivery with the hope of improving Malaysia's business environment. A representation was made by the task force to the judiciary on the need to clear the backlog of commercial cases.

During that period, court processes were carried out manually to a very large extent. Computers were used, but in a very limited way. Cases were registered and processed at the counter, where physical case files were maintained and recorded into a register book. Courts stored information manually, using paper and filing cabinets. This system served its purpose for many years, but over time its limitations became apparent. There was improper organisation of court files. The sheer volume of documents made retrieval of information difficult and time consuming. Hard copy files occupied a lot of space, and could be mislaid unless properly recorded because they moved from table to table. It was discovered that thousands of files were in fact "effectively closed", but the record was not updated and still languished on the courts' docket. This resulted in inaccurate reporting.

During that time, judges were writing notes of proceedings in longhand, which of course slowed down trials. Judges spent laborious hours taking down notes of evidence, and secretaries would spend many miserable hours trying to decipher judges' handwriting. There was no way in which the system could continue; that was the state of affairs before modern technology was introduced.

Judges' work load increased without the availability of comprehensive modern technology to alleviate it. There was pressure for a shift in the judicial mindset to reflect modern approaches in tandem with global and economic changes, and a perception of the urgent need for process and procedure to be simplified in order bring in much-needed efficiency to the system.

At the same time, the public was more informed, and with the advancement of education levels public expectations of the quality of justice and efficiency also increased. By then there was an urgent necessity for an efficient and effective judiciary

to support both economic growth and the needs of the public at large.

Against this backdrop, and set against these concerns, in 2009 the judiciary introduced a painful but a much-needed framework programme for transformation of the judicial landscape which covered a wide range of structural changes and reforms at all levels of the Malaysian courts. The basic and declared aim of the reforms was to allow for better access to justice to the public at large, as well as to expedite the judicial work in a fair and impartial manner.

Reform could only be achieved with the full support of all those engaged in the administration of justice. Indeed, for the justice system to work effectively, it required close working between the courts, members of the Bar, the Attorney-General's Chambers and a host of external agencies engaged in the system.

STRUCTURAL ADJUSTMENTS

I will now focus on the method and approach undertaken at the outset of the reforms in 2009. The first phase embarked on restructuring the court system at the main centre, Kuala Lumpur. A decision was made that different types of cases should be dealt with through varying procedures. Key changes were made to implement this. The focus was to centralise the management of all cases. Prior to the 2009 reforms, High Court judges were in charge of their own registries and were thus responsible for the management of all cases registered in their individual courts until final disposal. There was no uniformity in the administration of cases between one court and another in the same division.

The fundamental step was taken to rationalise the objective of case management. This had two prongs – first to be used as a tool to eradicate the backlog of cases, and second to ensure the simultaneous speedy disposal of current cases. The key to the changes was the division of cases into those filed before and after a certain date (the cut-off date). For commercial and civil cases filed before September 1, 2009 and October 1, 2010 respectively (backlog cases), they were dealt with by judges designated as judges in the old civil/commercial courts. These judges were tasked to hear all backlog cases until final disposal. For new cases filed after the cut-off date, a new commercial court (NCC) and new civil court (NVNC) were created.

THE OLD COMMERCIAL AND CIVIL COURTS

I will explain in a bit more detail how the judges in the old commercial and civil courts dealt with the backlog of cases. It was realised that a judge has to deal with both interlocutory matters as well as conduct full trials, and so those two types of work were isolated. Each was handled by a different set of judges. The objective was to allow judges hearing full trials to focus on the disposal of cases fixed for trial before them, and not to be burdened by interlocutory matters. Those would be dealt with by another set of judges, who would deal only with interlocutory matters without having to deal with the hearing of any case proper.

To demarcate this, cases involving the taking of oral evidence by the judge were classified as "T-Track" cases. Since T-Track cases required more time to dispose of, and usually after a full trial, they were assigned to a group of "T-Track judges". These judges did not hear any interlocutory matters, and their sole duty was to dispose of T-Track cases which formed the bulk of the backlog.

Interlocutory matters or applications generally slow down the hearing of the case proper, but as they were still relevant and necessary, they were classified as "A-Track" matters. Most of those matters were decided on affidavit evidence without the need for the taking of oral evidence. As they could be disposed of fairly quickly, an "A-Track judge" could deal with a few each day since he was not engaged in conducting full trials.

Before any case or matter was fixed before an A-Track or a T-Track judge, the case was managed by the registrars of the court, legally qualified officers attached to the judiciary trained to do the following:

T-Track cases

a) ensure that the pleading was closed and the plaintiff's lawyer had filed a bundle of pleadings within a specified time;

b) ensure that the parties agreed on a bundle of documents and that this was filed by a certain date;

c) ensure that witness statements used in examination-in-chief by all witnesses called to testify (other than those subpoenaed) were prepared and filed;

d) ensure that the parties agreed to a statement of agreed facts;

e) ensure that the parties prepared a statement containing all the issue or issues of the case.

Once the above were satisfied, the registrar fixed the case for trial before a T-Track judge. The registrar also decided on the estimated time required for the trial of the case after consulting with the lawyers involved.

A-Track cases

a) ensure that the exchange of affidavits between the parties was completed;

b) ensure that there are written submissions from both parties; and

c) once these are fulfilled, fix the matter before an A-Track judge.

THE NEW COMMERCIAL AND CIVIL COURTS

As previously mentioned, for cases filed after the cut-off date the new commercial and new civil courts were created. All cases filed after the cut-off date were handled by a different set of judges to those filed prior to that date. For these new courts, a new regime of case management was introduced along with much stricter timetabling of cases by which different stages of litigation should be completed. The target set for them to finish the new cases filed after the cut-off date was nine months from date of filing.

The two sets of courts operating two different systems simultaneously have produced encouraging results in the disposal of cases. Judges dealing with current cases adopted an aggressive and proactive style of case management and were able to fix cases for disposal by way of hearing within a very short time. The introduction of this system provided an efficient and economical means of clearing the backlog of cases.

Judges handling old cases filed prior to the cut-off date discovered that without new and fresh cases adding to their load, they experienced a surge of energy and determination to finish what they had as quickly as possible.

MANAGING JUDGES

To monitor the implementation of the scheme, the Chief Justice appointed a number of "Managing Judges" from the judges of the Federal Court and the Court of Appeal. Their responsibilities were purely administrative in nature. They were assigned to look after a certain area and micro-manage the courts throughout the country. They monitored the progress of the judges in that location by conducting periodical visits and continuous supervision to assess their performance. The time different types and categories of cases take, the time that passes from the date of filing to the date of hearing, the number of interlocutory hearings, the workload of individual judges and the time taken to deliver decisions and written judgments were monitored meticulously.

There was also the E-daily reporting system, an electronic daily report on cases fixed in all courts across the country. The daily feedback enabled Managing Judges to oversee the performance of courts throughout the country. This feedback was useful for planning purposes. With this supervision of the Managing Judges there was uniformity in the implementation of the scheme and any weakness detected was immediately corrected. Problems were identified and solutions were immediately enacted with the assistance of the Bar, the Attorney General's Chambers and all other stakeholders.

CULTURE AND MINDSET OF JUDGES AND LAWYERS

It was recognised from the outset that if the reforms were to work, they would require a change not just in the structure of the court but also in the culture and mindset of judges as well as lawyers. There was a period when last minute applications for adjournment of hearing were often readily entertained by the court on flimsy grounds. Those applications helped to waste judicial time and delay the disposal of cases. Unless a judge was strict in refusing postponement and committed to disposing of the case or matter before him expeditiously, the system of case management aimed at eradicating the backlog of cases would fail.

Under the new regime courts were more rigorous over the granting of adjournments and cases were managed to proceed to completion in a single sitting where possible. When this was strictly enforced, members of the Bar were quick to protest. Much was said about the injudicious exercise of discretion by the court on one hand and flimsy applications for adjournment by members of the Bar on the other. In the end, both parties understood that for a proper functioning of the system, adjournment of cases should only be granted very sparingly.

Practice Directions were issued by the Chief Justice, the President of Court of Appeal, the Chief Judge of Malaysia and by the Chief Judge of Sabah and Sarawak to regulate the handling of cases and fixing the time. This in turn has brought about in some changes of the mindset of both judges and counsel on the issue of adjournment. But even today the problem of delay caused by the never-ending adjournment of cases has not completely gone away. Judges and members of the Bar must do all they can to bring about the required change in culture to overcome this problematic issue.

Meanwhile, it was also necessary to determine a reasonable number of cases or matters for each judge to handle. One of the most notable features of the reforms was that performance indicators and measurable bench marks were set so as to meet the need for timely access to justice. Judicial accountability has been, and continues to be, addressed by the introduction of performance indicators. Goals have been implemented to measure the time taken for the disposal of a matter from the date of filing to its completion. The time taken for the delivery of reserved judgments has and is specifically limited and monitored.

The Chief Justice called a meeting of the judges, and by a common consensus it was agreed that for T-Track cases there should be an average disposal of four cases per month per judge. For A-Track, it was fixed at a maximum of six matters per day. A chart was designed showing a comparative study of the case disposals of each judge per month. On completion of the first quarter of implementing this scheme all judges achieved their

respective targets. With subsequent review, the number of cases or matters set for each judge to complete was increased.

The introduction of a system of active case management by judges represented a significant change in the litigation culture. Under the old regime, the litigation process operated along traditional adversarial principles and left the control of litigation entirely to the parties. They took a passive role in the trial and pre-trial process. Judges generally saw their job as that of a neutral umpire whose procedural role was largely restricted to resolving disputes between the parties. Most of the issues arising which related to pre-trial preparation and handling of the case at trial were left to the lawyers.

Under the reforms judges were encouraged to be involved in the decision-making process from the moment the claim was filed, and were expected to spend a much greater of their time reading and preparing for cases. The aim was to encourage the parties to settle, make use of alternative dispute resolution, and identify the real issues involved.

MODERN INFORMATION TECHNOLOGY

Once the structure of the court was reorganised, computer systems were upgraded through the installation and application of modern court information and communication technology to improve efficiency, access and speed. It was inevitable that the judiciary invested in modern technology in order to adopt a more business-like approach.

The initial priority was to strengthen the infrastructure so as to create a system that was fast, efficient, modern and secure. This was achieved by ensuring adequate provision of hardware for all courts throughout the country in the form of laptops, personal computers and printers for all judicial officers and supporting staff.

Bold use of technology is essential as the judiciary focuses on improving the operation and quality of its service and meeting the growing expectations of transparency. Presently, the technology being utilised is the E-Court system comprising four main components.

The case management system (CMS)

This is the main component of the E-Court system, a software programme specially designed for the Malaysian courts which enables them to record and track the progress of cases. It features a computer network which allows access to information on the network at a click of mouse. CMS provides an integrated system for managing the cases that allows for computerising file tracking, scheduling or trials, retrieving of statistics, managing reports and monitoring the cases.

As already described, previously all cases were registered manually at the registration counter and were recorded in a "cause book". CMS creates a detailed record of a case, doing away with the manual process. The information is retrievable at any time, and the CMS system offers the following benefits:

- complete automation of court case management and related operations;
- electronic information of case progression at all stages;
- document management in electronic formats;
- court session planning and scheduling fully automated;
- comprehensive reporting;
- creation of any necessary documentation through a template system;
- workflow optimisation and acceleration for court supporting staff;
- comprehensive case registration;
- automatic allocation of case according to predefined orders and policies;
- reduction of routine, repetitive operations;
- reduction of errors caused by the human factor;
- increase of court operation transparency and accessibility to the public;
- robust security and access control.

Court recording and transcription (CRT)

Court proceedings used to be recorded manually in handwritten form. The CRT system, installed in all courts, electronically records the entire proceedings in an audio-visual format through five cameras installed at strategic locations in the courtroom to focus on the person who is speaking. It automatically edits the visual record and assists the person who subsequently transcribes it into print by identifying the speaker.

The video recording of the court proceedings may be converted into various forms, such as CDR, DVD or in a thumb drive. The sight of a judge laboriously taking written notes is already disappearing – they can sit back, listen, observe, contemplate, deliberate and decide. No hearing can be more well-organised and efficient than that.

The CRT system offers the following benefits:

- judges and lawyers are no longer distracted with the ongoing written transcription and are able to concentrate on the hearing;
- if need be, the note of proceedings can be prepared

instantly or on the same day;

- trial time is considerably shortened because judges are relieved from the tedious task of recording the evidence in writing.

E-Filing System

This system files documents electronically, thus taking up very little physical storage space, and provides an avenue for lawyers to file their court documents through the internet via the E-Filing portal. A service bureau for lawyers and litigants is provided to bring in the hard copy of their documents for scanning into the court computer server.

In order to start E-Filing, each legal firm must have an organisation certificate purchased from a designated company for digital verification of the electronic filing of court documents. Each legal firm also has to purchase at least one individual roaming certificate in the name of the owner/partner/counsel in charge of litigation of the legal firm for digital signature.

The greatest advantage of this system is the ability to recall any document filed in court without the need for a physical file. This has substantially reduced the time taken for the disposal of a case or matter. In addition, there have not been complaints of lost files nor that files cannot be located. E-filing is designed to improve court efficiency and provides the following benefits:

- online registration of cases;
- online verification of documents;
- online submission of documents;
- allows counsel to file search online;
- payment to the court can be made online via internet banking;
- retrieval of court documents online;
- interactive alerts and online notifications of filing status;
- allow counsels to correspond online;
- eliminate incidents of missing files and documents;
- on security, the E-Filing system has a backup system;
- on authenticity, digital signatures provide "non-repudiation", the ability to identify the author and whether the document has been changed since it was digitally signed;
- documents submitted to and issued by the court will be in PDF format to eliminate editing of the original.

Queue management system (QMS)

This is designed to manage the scheduling and waiting time for cases fixed for case management before the registrars. Previously, lawyers and members of the public had to wait for their cases to be called out by court staff. Much time was wasted this way.

With the implementation of QMS, lawyers are able to record their attendance using the kiosk provided in the court premises. The kiosk will provide confirmation of whether the case is listed and information on the venue of the hearing. Lawyers have the option to also register for a short messaging system (SMS) alert, which means that they will be informed via SMS when their case is ready to be called. This system allows lawyers and parties involved in a case to attend to other matters in the meantime.

The success of the reform strategy and programme initiated in 2009 can be attributed in large part to the introduction of a cohesive modern technology which was closely matched to the judiciary's core objectives. The E-Court system has successfully enhanced the judicial delivery system and dealt with the backlog of cases. There has been a steady increase in the number of requests from foreign jurisdictions to study the E-Court system. Initiatives continue to be implemented to allow for the optimum utilisation of the system, but technology alone does not improve the workings of justice. First, much can be attributed to the dedicated and hard-working supporting staff who make the E-Court system work. Second, in tandem with the application and extensive use of modern technology in courts, the changes and reforms also span other dimensions.

REDEPLOYMENT OF CASES AWAY FROM THE HIGH COURT

One of the most notable general trends in the civil justice systems of most common law jurisdictions, including the United Kingdom, has been to redeploy cases away from the High Court. Cases which previously would have been heard by a High Court are now routinely tried by a judge of a subordinate court. Similar trends were followed in Malaysia by way of amendments to the Subordinate Courts Act 1948. The relevant amendments, which came into force on March 1, 2013, increased the jurisdiction of the subordinate courts. The civil jurisdiction of the Sessions Court was has increased to RM1 million from RM250,000. It now also has the jurisdiction to grant injunctions, declarations of specific performance and rescission of contract, all of which were previously under the exclusive jurisdiction of the High Court. The civil jurisdiction of Magistrates Court was increased to RM100,000 from RM25,000.

A reduction of more than 50 per cent in the number of writ actions filed in the High Court was recorded after the amendment. The High Court could consequently concentrate more on hearing, and disposing of, the more complex matters falling within its jurisdiction.

COURT-ANNEXED MEDIATION

Although dispensing justice in civil and criminal litigations remain the core judicial function, court-annexed mediation was introduced as an alternative to litigation in 2011 to encourage parties to settle disputes. This alternative mode has since been integrated into the court process. Mediation processes are widely practised in Malaysia and exist alongside the traditional court adjudication process. There has been an increasing emphasis on the development of alternative dispute resolution methods which avoid the time, cost and stress of a formal court hearing. The court-annexed mediation programme is free and uses judges as mediators to help disputing litigants find a solution, and to encourage settlement of disputes without trial.

A Practice Direction was issued in August 2010 by the Chief Justice of Malaysia directing all levels of courts to facilitate the settlement of disputes or matters before the courts by way of mediation. Judges may suggest mediation to the parties and encourage them to settle their disputes at the pre-trial case management stage or at any stage in the proceedings, even after a trial has commenced. It is a service provided by the judiciary as an alternative to a trial at no cost to the parties, and nothing is lost by attempting to mediate a resolution.

Through mediation, the court attempts to help the parties to reach a settlement by acting as a go-between, articulating and explaining the views of each of the parties. The court fulfils an intermediary role rather than being an active participant in the resolution process.

SPECIALISED COURTS

The specialisation of courts is another important step which has been initiated by the judiciary to tackle case backlog and to expedite the disposal of cases. Specialisation promotes speed, expertise and efficiency. Certain types of cases are heard and decided in dedicated courts such as the Intellectual Property Court, the Islamic Banking Court (Muamalat Court), the Admiralty Court, Construction Court, Environmental Court, Coroner's Court and Anti-Profiteering Court. In specialist courts cases are resolved faster than they were before.

JUDICIAL TRAINING

Judges are conscious that justice cannot be compromised in the quest for greater efficiency and speed in the disposal of cases. This is addressed by emphasising the importance of the quality of judgments handed down at all levels of the judiciary. It is therefore vital that a judge should accept that continuing legal education is part of the job. Observing that most countries with a well-developed legal system and judiciary have judicial training institutes or colleges, Malaysia realised it was important that judges spent time learning their craft.

To this end, the Judicial Academy was set up as a training institute in 2012 with the objective of ensuring that judges acquired and developed the skill and knowledge necessary to perform their role to the highest professional standards. Teaching programmes include the teaching of substantive and procedural law, the teaching of judgment writing, the teaching of "judge craft", the teaching of legal ethics and the teaching of management and interaction skills. Each educational and training programme is designed on a need to learn basis. They are either taught in small groups or to the entire judiciary in a single session in order to cater for the judges' differing levels of judicial knowledge and experience.

The training programmes presently run by the Judicial Academy fall into the following two categories. First, there are in-house training sessions taken by senior appellate judges. In their capacity as facilitators, these appellate judges conduct face to face training on substantive and procedural law that is raised regularly, or might be raised, in court. The in-house courses are meant to be interactive and require active participation by judges. Second is a programme run by the Judicial Academy in collaboration with bodies such as the Securities Commission, Central Bank and Kuala Lumpur Regional Centre for Arbitration. Under this category of training, the Judicial Academy invites eminent local and foreign speakers who are expert in their respective fields to conduct workshops and to give talks to judges in specialised area of law.

Judicial training and education is an on-going exercise for every judge throughout his judicial career and has now become an an integral part of judicial life.

UNIFIED PROCEDURAL RULES

To improve the service to the public and stakeholders, unified and simpler procedural rules were introduced for the High Court, Sessions Court and the Magistrates' Court. The Rules of Court 2012, which came into effect on August 1, 2012, standardise the rules of procedure relating to civil cases where only one set of rules apply to both the High Court and the subordinate courts alike. By giving effect to a simplified court procedure, the new rules provide the public with an expeditious mechanism for litigation. Under the new regime, one obvious benefit for legal practitioners is that they will only need to keep one set of rules and forms in civil litigation for all courts, in either paper or electronic form.

The rules have paved the way for more judicial intervention in the court process and moved away from a system where the litigation process was controlled by lawyers. Previously there was very little judicial management, and because of that the process often degenerated into an excessively adversarial contest. With more judicial intervention at pre-trial stage, adversarial techniques are reduced by encouraging full disclosure of evidence by both sides. The rules provide the

courts with extensive powers of case management, and enable the justice system to involve mediation as part of the dispute resolution mechanism.

Amongst the important changes in the new rules are:

- streamlining procedure in both the High Court and the subordinate courts;
- reducing the modes of commencement of action from four to two, that is either by writs of summons or originating summons;
- all interlocutory applications in the High Court and the subordinate courts are standardised by replacing the summons in chambers with notice of application; and
- simplification of the language of the rules and the prescribed forms.

The simplified court process will hopefully make for easier access to justice. The new rules form one of the continuing steps undertaken by the judiciary to change the mindset and culture of dispensing justice and reflect the prevailing environment of transparency, accountability and efficiency.

THE NEW CRIMINAL JUSTICE REGIME

In 2010, the Criminal Procedure Code which governs criminal trials was substantially amended. These amendments had a significant impact on the landscape of the Malaysian criminal litigation process as well as the administration of criminal justice. The concepts of pre-trial procedure and case management are well entrenched in civil litigation, but were never heard of in the context of a criminal trial. The amendments introduced among other measures the concept of pre-trial conference and case management in the criminal litigation process for the first time.

This new criminal process provides a concept of speedy trial and speedy disposal of cases aimed at reducing the backlog. It specifies the timeline for the pre-trial conference, case management and plea bargaining for criminal cases. The new amendment introduced the process of plea bargaining involving the accused, the prosecution and the court. It allows a witness statement to be admissible without the need for the witness to be examined in court. There is a very interesting provision which brings a dramatic change with regard to proof in criminal trial by way of formal admission. These developments have introduced radical improvements to criminal procedure.

JUDICIAL APPOINTMENTS

In 2009, the government enacted the Judicial Appointment Commission Act 2009 (the 2009 Act), which established the Judicial Appointment Commission (JAC) to address the issues relating to the appointment and promotion of superior courts judges. It has been debated that the previous system of judicial appointment did not satisfy the element of transparency in the selection process.

A great deal has changed in the selection process for judges since the JAC was established. The JAC was intended to provide greater transparency in the judicial appointments. Among the functions of the JAC are to select suitably qualified persons who merit appointment as judges and to formulate and implement mechanisms for their selection and appointment. The JAC now makes recommendations to the Prime Minister for the appointment and promotion of judges.

In performing its selection function, the 2009 Act expressly required the Commission to take into account, amongst others, the following criteria for candidates:

- integrity, competency and experience;
- objectivity, impartiality, fairness and good moral character;
- decisiveness, ability to make timely judgments and good legal writing skills;
- industriousness and the ability to manage cases well; and
- physical and dental health.

JUDICIAL ETHICS

The Judges' Code of Ethics 2009 renews the statement of values that the judiciary should always maintain the highest standard of probity in following the Bangalore Principles. The Code is instrumental in the maintenance and enhancement of judicial independence, competence and integrity. It requires a judge to uphold the integrity and independence of the judiciary, avoid impropriety, perform judicial duties fairly and efficiently, and minimise the risk of conflict with a judge's judicial obligations while conducting extra-judicial activities. A judge is required by the Code to declare his assets on his appointment.

RESULTS OF THE REFORMS

At the initial stage of the 2009 reforms there was the inevitable confusion and teething problems, as well as IT glitches. It will take some time for the reforms to completely settle in. Many were concerned that cases seemed to be rushed through. At the beginning, because the reforms were judge-led one of the biggest challenges was to change the mindset of the lawyers and their instinctive resistance to change. The stricter timetabling of cases by which cases should be conclusively concluded and the setting up of performance indicators and bench marks were at first greeted with much scepticism. But there is no turning back. Litigants and the lawyers have to keep pace with the changes that are taking place.

The time line for cases to be disposed has been set, be they at the High Court, Court of Appeal or the Federal Court. The system is also moving towards 100 per cent certainty on hearing dates, ie when a case is fixed, there will be no adjournment. One positive development in this regard has been the growing willingness of lawyers and judges to accept these changes.

At the beginning judges had some reservations over embracing modern technology. It was a distressing experience for some to move away from familiar paper-based case files. Most judges are very used to handling physical documents and seeing the words on paper rather than on a computer screen. But technology has no respect for legal traditions. Judges progressively adapted to handing e-documents. After some initial hesitancy, judges agreed that the use of these systems enabled them to conduct hearings and trials more rapidly and efficiently. It was a welcome change not to be overwhelmed by physical papers, and judicial attitudes have changed. The use of modern technology has now become entrenched in judicial culture.

After less than three years, the reforms have delivered positive and promising results. The judicial system's age-old affliction, the backlog of cases besetting the judiciary and the administration of justice, has finally been eliminated. As a result of all this, the system now has a bench mark or yardstick by which cases can be resolved.

Generally all new civil cases filed in the subordinate courts today will be dealt with, resolved and disposed of within six months from the date of filing (12 months for criminal cases). For the High court, all new civil cases will be disposed within nine months from the date of filing and criminal cases within 12 months. For the Court of Appeal, interlocutory matters appeals and leave applications will be heard within three months from the date of registration. Full trial civil appeals will be dealt with within six months from the date of filing. For criminal appeals, the focus is to reduce the waiting period to no more than one year.

The following timeline has been set with regard to the disposal of matters in the Federal Court: leave applications and civil appeals within six months from the date of registration; criminal appeals within three months from the date a complete record is received; and appeals on writs of habeas corpus within three months from the date of registration.

The World Bank in its August 2011 Progress Report entitled *MALAYSIA Court Backlog and Delay Reduction Program* stated that although conducted over a very short period, this reform has been able to produce results rarely reached even in programmes lasting two or three times as long. The report further stated that the reforms provided a counter to contemporary pessimism at the prospect of the judiciary improving its own performance. The World Bank noted that the changes, which are not radical in content, offer a model for other countries dealing with similar problems.

In *Asian Courts in Context,* edited by Jiunn-Rong Yeh and Wen-Chen Chang and published by Cambridge University Press, the writer has analysed the reforms introduced in 2009 and the resulting outcomes. At page 403 the writer observed:

> *Within a relatively short period of three years, Chief Justice Zaki Azmi overcame the problem of backlog of cases and has put in place a system where all new commercial and civil cases are now disposed of within nine months. Chief Justice Zaki Azmi achieved this by taking a step to understand the underlying problems and then set out to work tirelessly with his fellow judges to overcome these obstacles. The strategies adopted by Chief Justice Zaki Azmi were not by any definition radical. They were in fact very simplistic and straightforward. However, these strategies were highly effective. The success of these reforms can be attributed to the unwavering commitment and desire on the part of the Chief Justice and his fellow judges to improve the overall system.*
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> *Chief Justice Zaki Azmi did not merely address the problems that had beset the administration of justice in the country but went beyond that. He laid the groundwork to ensure that the judicial systems and procedures were up to date and on par with those in other developed nations. In the words of one commentator, he restored faith in the judicial system.*
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> *In the opinion of this author, the singular brilliance of Chief Justice Zaki Azmi lies not just in the fact of the results achieved and the system put in place but in his ability to convince the judiciary, the Bar and the public at large of the need for these reforms. This change in mindset will ensure that the reforms will not be undone in the future but instead will continue with more vigour.*

The Malaysian judicial system has come a long way since the process of reform began in 2009 to bring the judiciary to the level it is today. Although these judiciary-led initiatives were introduced primarily to address the problems of backlog of cases and delay in the civil litigation process, what may not be apparent is that these reforms have also had an impact on matters such as culture and mindset, efficiency, competency, transparency and technology. Modern technology promotes and facilitates accessibility to justice and transparency, and ensures expeditious processes which in turn contribute to public trust and confidence as well as judicial independence and accountability. In short, the optimum utilisation of information technology in the administration of justice contributes to the integrity of the judiciary.

However, we are mindful that litigants come to courts not only to have their cases disposed of quickly, but more importantly to be disposed of justly. Expeditious disposal of cases should never be at the expense of justice. It is very

important for our judges to work hard at this. It is all a question of balancing the need to dispose of cases expeditiously with that of fairness to prevent miscarriages of justice.

The challenge facing any justice system is where to find the balance between efficiency and justice (see "Judging civil justice", the 2008 Hamlyn Lecture delivered by Professor Dame Hazel Genn). The issue of balancing the competing interests was underlined by the Right Honourable Tun Arifin Zakaria, Chief Justice of Malaysia, in *The Malaysian Yearbook Judiciary 2013*. His Lordship described it in these words:

> *This programme to clear cases will continue unabated and will be all-encompassing if we are serious in lending credence to our guiding light that justice delayed is justice denied. As clichéd as it might seem. I might add that in our firm commitment to clear them, we must not lose sight of our guiding philosophy that justice must not be sacrifice.*
>
> *Our concern to constantly be on top so to render the best possible service to the public means that there is no respite from hard work. In this, we are conscious that enhanced judicial output would not run counter to the requisites of good, substantive judgments.*

In this regard, the writer in Asian Courts in Context said:

> *Chief Justice Arifin Zakaria succeeded Chief Justice Zaki Azmi in September 2011. Prior to his elevation to Chief Justice of Malaysia, Chief Justice Arifin Zakaria was the Chief Judge of Malaya. He had worked very closely with Chief Zaki Azmi censuring that the reforms of the Zaki court were appropriately implemented. Thus, it is to be expected that the reforms introduced by the Zaki court will continue to be pursued and not abandoned. One such example is the Judicial Academy.*
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> *During the 2013 Judges' Conference, the Chief Justice outlined the policies to be pursued by the Arifin Court. One of these concerned the issue of transparency, integrity and the public's confidence in the judiciary. Chief Justice Arifin Zakaria has been reported as saying that he will have judges declare their assets. He has also announced that all criminal and civil appeals at the Federal Court will be heard by a five-man quorum instead of a three-man panel. The Chief Justice explained that "it was better figure as all the reasoning would be applied in the judgment and would improve the judicial system." The Chief Justice has also announced the establishment of a special court to deal with matters concerning the environment. The above developments bode well for the state of the judiciary and the administration of justice in the country.*

FUTURE OF THE JUDICIARY

Today, more than ever, we are facing a more challenging legal landscape. The judiciary is faced with ever-growing complexity in the way it carries out the core business of judging. Public demand and technology are fundamentally changing the way justice is delivered and the way judges work. The administration of justice is a dynamic and constantly evolving process. The demand on the justice system grows increasingly greater as Malaysia progresses economically.

In a period of deep-rooted change, reform is inevitable and significant. Reforms must continue to improve access to justice for all levels of society that will have the effect of improving public trust and confidence in the judiciary, while having as their primary objective the goal of continued adherence to the rule of law. We must do our best to cope with and anticipate changes. In the future, as information technology spreads through the entire realm of human activity, there will be greater expectations that justice is delivered efficiently, transparently and promptly. If courts do not respond and adapt to the need to change, public confidence in the judiciary will be eroded.

The judiciary must play its leading role and intensify efforts in ensuring that justice is delivered efficiently, speedily and above all justly. The task cannot be left to others. As stated by the Right Honourable Tun Arifin Zakaria, Chief Justice of Malaysia in his speech at the opening of the legal year 2014 on January 11, 2014:

> *The primary duty of the judiciary is to dispense justice as entrusted upon us by the Federal Constitution. I, on behalf of the judiciary, wish to reaffirm our commitment to uphold the rule of law and to dispense justice without fear or favour. This pledge of ours would be meaningless if there exist excessive delay in the justice delivery system. Since however good our laws may be and however independent and impartial our judges may be, justice cannot be achieve if it takes too long or too expensive for the people to have resort to it.*

Justice Azahar bin Mohamed

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