

MALAYSIA

Court Backlog and Delay Reduction Program

A Progress Report

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Acronyms and Abbreviations

AGC	Attorney General's Chambers
B/F	Balance Forward (pending cases transferred from one year to the next)
C	Civil (abbreviation for tables)
CD	Compact Disc
CLE	Continuing Legal Education
CJ	Chief Justice
CMIS	Court Management Information System
CMS	Case Management System
CMU	Case Management Unit
COA	Court of Appeal
Cr	Criminal (abbreviation for tables)
CRT	Court Recording and Transcription
DfID	Department for International Development
DNAA	Discharged not Amounting to Acquittal
DPP	Deputy Public Prosecutor
GOM	Government of Malaysia
ICT	Information and Communication Technology
IEG	Independent Evaluation Group
IT	Information Technology
JL Service	Judicial and Legal Service
KL	Kuala Lumpur
L/A	Leave to Appeal (abbreviation for tables)
MJU	Managing Judge Unit
MIS	Management Information System
NCC	New Commercial Court
NCvC	New Civil Court
NEAC	National Economic Advisory Council
NKRA	National Key Results Areas
PEMANDU	Performance Management and Delivery Unit
RM	Malaysian Ringgit
ROL	Rule of Law
USAID	United States Agency for International Development
USD	United States Dollar

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Table of Contents

EXECUTIVE SUMMARY	i
INTRODUCTION	1
CHAPTER I: BACKGROUND ON MALAYSIA, ITS LEGAL SYSTEM AND JUDICIAL ORGANIZATION	2
Country Background.....	2
Judicial Organization, Staffing, and Resource Allocations	3
CHAPTER II: THE REFORM PROGRAM: 2008 TO PRESENT	15
Reform History and Overview of Objectives	15
Strategy	17
Reform Components	19
Next Steps	36
Additional Reform Elements outside the Court Program	37
Corruption	42
CHAPTER III: ACHIEVEMENTS OF THE 2008-2011 REFORM	43
Key Indicators of Results as Used Internationally and as Adapted to the Malaysian Program	44
Other Findings	56
Further Recommendations as Regards Further Data Collection and Statistical Reports	59
CHAPTER IV: LOOKING AHEAD	61
Areas Already Targeted to Complete the First Phase Reforms and for Work on the Proposed Second Phase	61
Areas Suggested for Immediate Attention or for Inclusion in Future Programs	64
Suggestions for Additional In-Depth Studies and Assessments	70
Administrative Tribunals (and Other Non-Judicial Dispute Resolution Forums)	74
Conclusions on Next Steps	75
CHAPTER V: IN CONCLUSION	77
REFERENCES	80

List of Figures

Figure 1: Basic Structure of Federal Judiciary	5
Figure 2: Comparison of Disposal of A-Track Cases, High Court Civil Division, KL	53
Figure 3: Comparison of Disposal of T-Track Cases, High Court, Civil Division, KL	53
Figure 4: Modes of Disposal for KL NCC Cases, September-December, 2009	57
Figure 5: Percentage of Postponements by Parties, Criminal Cases, Kuala Lumpur, Sessions Court, July 2010	58
Figure 6: Percentage of Postponements by Parties, Civil Cases, Kuala Lumpur, Sessions Court, July 2010	58

List of Tables

Table 1: Judicial Positions, Authorized and Filled, as of 2011	6
Table 2: Comparison of Judges-to-Population Ratio, Selected Countries	7
Table 3: Budgets for Judiciary, 2008-2011, in RM	12
Table 4: Comparison of PEMANDU Backlog Reduction Targets for 2010 and Court Backlog Statistics (Violent Crimes Only)	41
Table 5: Backlogged Pending Cases for All Courts, End of 2009 and 2010; Numbers of “Backlogged” Cases (those filed before 2009) Still in Courtroom Files	46
Table 6: Ageing Lists by Year – All Trial Courts, Civil Cases, 2009-April 2011	47
Table 7: End of Year Ageing Lists - All Trial Courts, Criminal Cases, 2009-April 2011	48
Table 8: Clearance Rates for Courts by Instance, for 2007-2010	49
Table 9: Comparison of Carryover, New Filings, and Dispositions – All Courts, 2009-April 2011	50
Table 10: Monthly Pending Cases - New Commercial Court, Kuala Lumpur, September 2009-April 2011	55
Table 11: Monthly Pending Cases - New Civil Court Kuala Lumpur, October 2010-April 2011	56



EXECUTIVE SUMMARY

Introduction

1. This study reviews the initial results of efforts by the Federal Court of Malaysia to improve judicial performance, especially in the areas of backlog and delay reduction. It was written at the request of the Court and was intended to evaluate progress to date, suggest how the program might be improved, and provide recommendations on further actions in a proposed second phase reform. The work is based on documents and statistics made available by the Court, two weeks of fieldwork (January 2011) in Putrajaya (the Federal Government Administrative Center and seat of the Federal Court and Court of Appeal) and the High Courts in the two largest court complexes, Kuala Lumpur and Shah Alam, and a follow-up visit in May 2011 to discuss the preliminary conclusions with the Judiciary and also to update material on this rapidly moving program. While intended as an external review of the Malaysian Judiciary's recent reform efforts, the study describes a model and lessons applicable to court systems elsewhere that are facing similar problems or wishing to improve other aspects of their performance.

Background

2. Malaysia is a middle-income country of roughly 28 million inhabitants, located in Southeast Asia and comprising West Malaysia (on the Malay Peninsula) and East Malaysia (the northern portion of the island of Borneo). It is a federation of 13 states, of which only two (Sabah and Sarawak) are in East Malaysia. It is a constitutional monarchy and parliamentary democracy following the Westminster model and is federally organized. The Federal Constitution is the supreme law of the land, but each state has its own constitution. The Malaysian King (Yang di-Pertuan Agong) is the head of state, and is elected for a 5-year term from among the nine Malaysian states with Rulers by this same group. The King is technically responsible for appointing the highest level government officials (including superior court judges), but in doing so has traditionally followed the advice of the Prime Minister, pursuant to the latter's consultations with other groups, as defined in the Federal Constitution.

3. Malaysia's courts have a unitary, not federal organization. There are also state courts that use Syariah and traditional law and are regulated by state law. Within the formal (Federal) court system, there is one Federal Court, one Court of Appeal, and two High Courts, one for West Malaysia and one for East Malaysia. Their members constitute the superior court judges, who after 2009 are nominated by a Judicial Appointments Commission, introduced in that year to address complaints about the insufficient transparency and politicization of the former process. A second, larger group of subordinate court judges comprises those assigned to magistrate and sessions courts. They are drawn from a government-wide Judicial and Legal Service, whose members may be assigned to legal positions in any of the three branches of government, and traditionally rotated among them. This inter-branch rotation is less common today, but within the courts, JL Service members are typically rotated between administrative and judicial positions, often beginning as a senior assistant registrar, then moving to a position as a magistrate, deputy registrar or a purely administrative job (e.g in the Statistics Unit) and then back to an assignment as a judge. Members of this group do not automatically rise to the superior courts and in fact must resign from the JL Service in order to be considered for a position there. This two-part career system does pose certain problems, including most recently, the Federal Court's ability to negotiate substantially higher salaries only for the superior court judges. Staff belonging to the JL Service was not affected as their remunerations are regulated by government-wide policies.



4. Court organization and procedures follow common law practices, and cases in all but the Federal Court and Court of Appeal are usually heard by a single judge. Appeals from the subordinate courts are heard by the High Courts, in addition to their normal workload of original jurisdiction cases, while those from the High Court go to the Court of Appeal, which like the Federal Court does operate in panels. The total number of judges is unusually low, even for a common law country, but Judicial and Legal Services staff assigned to courtroom positions also does some processing of cases. When this group is included, the judge-to-population level rises from 1.5 to 2.4 per 100,000 inhabitants. Moreover the state courts (Syariah and traditional) as well as a system of administrative tribunals take up some demand. In any event, judicial caseloads, while substantial, are not large enough to explain delays and backlogs, and the reform described herein has thus worked on addressing other factors accounting for them.

5. Aside from problems with the low starting salaries of Judicial and Legal Staff, the Judiciary seems well funded, and until a government-wide budget tightening exercise in 2011, usually received its requested allocation of funds. Judicial administrative offices handle allocations for “emoluments” (salaries, benefits, and allowances) and operating expenses, but not development (investment) expenditures. Since 2003, the courts’ development budget is managed by the Legal Affairs Division of the Prime Minister’s Department, a situation the Judiciary finds inconvenient largely because it has little say in the design, placement, and construction of court infrastructure, the traditional use of these funds. Certain problems encountered in the recent IT contracts may also be attributed to this practice, although it is hard to say whether the Judiciary would have done better. If the Judiciary obtains control of its development budget, it will have to staff up for this purpose. The courts also generate substantial income for the Treasury in the form of fines and fees, but the suggestion that they retain all or a part of this merits further study.

The Reform

6. Since the late 1980s, Malaysia’s Judiciary faced nearly two difficult decades in which its reputation for probity and speedy delivery of decisions declined dramatically. In late 2008, with the appointment of a new Chief Justice, it began a reform program aimed in particular at the second problem, through a delay and backlog reduction exercise, and indirectly, at the first, by more careful monitoring of

judges’ productivity. Although the Chief Justice and the heads of the Appeal and High Courts can recommend that a judge be removed, the approach taken was to up the pressure for productivity in the hopes that this would drive out the less committed. While corruption does not appear to be the major complaint of court users, the reform program also worked to target and eliminate what does occur.

7. The program drew on some less successful experiences attempted earlier in the decade, and was further shaped by individual judges’ exposure to successful programs in other common law countries. The reform team (the Chief Justice, the President of the Court of Appeal, Chief Judges heading the two High Courts and other members of the Federal Court) focused their efforts on a few of the most congested judicial centers, and especially on the Civil High Court Divisions in Kuala Lumpur and Shah Alam. Over the period from late 2008 to the present, the program was gradually expanded to other High Courts in West Malaysia. East Malaysia had its own program, which was coordinated to a large extent with the West Malaysia effort.

8. The program’s basic components were the following:

- (a) An inventory of cases held in courtroom files throughout the country (not just limited to the targeted courts) and the creation of improved physical filing systems so as not to lose this information or to allow courts to again lose track of their caseloads.
- (b) The purging of “closed cases” and the separation of inactive (“hibernating”) cases for rapid closure or further processing (depending on the interest of the parties). Targets were set for the elimination of older cases. The initial goal was the termination of all cases over a year old by end of 2011 (currently revised to mid-2012) for High Courts in target districts, and guidelines to this effect for other courts at all instances and districts.
- (c) Introduction of “case management” (pre-trial processing of cases). This was accompanied by the reorganization of High Court judges and staff in the target centers and the designation of “Managing Judges” to oversee the exercise.¹ The initial reorganization took staff (deputy and senior assistant

¹ Managing judges were selected from among the core reform group, but as they still had to perform their normal duties (on the courts to which they were assigned) they delegated day-to-day oversight to other officials who in turn reported to them.

registrars) out of the courtrooms to which they had been assigned and put them into a Managing Judge Unit (MJU) for each High Court Division where they handled preliminary matters and also closed cases parties were no longer interested in pursuing.

- (d) Introduction of a “tracking system” to facilitate the closure of older cases. This involved separation of cases or issues that could be resolved on the basis of affidavits (the A Track) and those that required full trials (the T Track). Judges were assigned to one or the other track and were given weekly quotas of cases by the MJU.
- (e) Introduction of Court Recording and Transcription (CRT) equipment for most of the courts in West Malaysia; this is still underway but began as soon as the IT contract was awarded (mid 2009).
- (f) Development of an automated Case Management System (CMS) which automated some manual processes, provided courts and court complexes with registries of case filings and events, and introduced modules to handle e-filing, programming of hearings, and the like. This was done, along with other ICT elements, under a contract with a single vendor for West Malaysia. East Malaysia which had started earlier with automation, used another vendor to develop a similar software.
- (g) Installation of the CMS (henceforth, CMIS²) in the target judicial centers (partially installed by end January, 2011, with full installation scheduled for end June, 2011).
- (h) Creation, most notably in Kuala Lumpur, of High Court Commercial Divisions to handle more specialized matters (Intellectual Property, Islamic Banking, and Admiralty). The first two had been created prior to the reform, but they, like the new Admiralty Court, were also given targets for speedier processing of cases.
- (i) In target centers, creation of “new” courts (specialized High Court divisions in Civil and Commercial Law, called the NCvC and NCC, respectively) to handle recent cases and their reorganization, eliminating the two tracks (not needed any longer) and the external

Managing Judge Unit (JMU), but leaving judges with targets for productivity and delay reduction. Once the backlog is eliminated, all courts will follow the new organization and procedures.

9. There are many other elements in the program, some of which have advanced more than others. They include an effort to encourage mediation of civil cases (so far only partly successful, but it usually takes a while for such practices to gain traction with lawyers and their clients); the development of an automated queuing system under the IT contract in West Malaysia whose purpose is to improve scheduling of hearings and reduce time wasted by lawyers in awaiting hearings that never occur; an e-filing system (which came on line for Kuala Lumpur in March and by May had been installed in Penang and Shah Alam) which should also save time for lawyers who will no longer have to take documents to courts; and efforts (so far impeded by budgetary limitations) to develop a better judicial training program.

10. Despite the emphasis on IT, and the two large contracts with vendors (totaling USD 43 million), most of the documented progress to date had depended on manual methods. Except for monies expended on state-of-the-art manual filing cabinets and the CRT program, the reform relied on inducing more and different efforts from staff. Critical to the latter have been the setting and resetting of productivity targets, the use of manually collected statistics to measure progress, and their constant vetting by the senior members of the reform team led by the Chief Justice.³

11. If both of the IT contracts fully deliver on what they have promised, the new procedures and reporting practices that the Judiciary introduced at the start of the reform will be completely automated, thereby reducing the tedium and probable delays caused by manual processing of records. For example, programming of hearings which courtroom administrative staff often does using large paper calendars will now be nearly automatic. The CRT equipment should speed up hearings, and while the queuing system and e-filing largely benefit lawyers, both also eliminate a certain amount of back office processing and its potential for generating delays and errors. At the courtroom and court complex level, the installed CMIS includes a historical registry for each case,

² The various uses of CMS are a little confusing. It is applied to pre-trial processing of cases as practiced by the MJUs, to the type of software developed by the two firms, and has been adopted by the contractor Formis as the name for its own version. For this reason, the term CMIS (Court Management Information System) will be used below to refer to the *type of system* being developed by the two software firms, Formis and SAINS.

³ Other members involved include the two Chief Judges and —Managing Judges.



which is used to generate the basic reports sent to the center, as well as the daily reports supplied by each judge on case movement.⁴ By the end of the current IT contracts, the courtroom level registries should pick up nearly 75 percent of all cases filed because of the focus on the most congested districts, and if not under the vendors' current scopes of work, then in a future contract, they could be used to create a global integrated database (to accompany the global centralized library – accessible to all authorized court staff – of all electronic case files). When the database is developed, the current registries should be modified to eliminate their surfeit of text entries (as opposed to coded ones). This will facilitate analysis of its contents.

12. Whatever the next steps, the Court's Statistics Unit will have to be strengthened and less reliance placed on the Judicial and Legal Service staff temporarily assigned there. It is also likely, given the short timeframe in which the overall contracts are to be completed, that the contractors and the courts will have to spend at least a year (and probably more) working out the inevitable problems in the system. Better configuration management⁵ might have avoided some problems, but even under ideal conditions new software systems always require considerable post-installation readjustment

Results

13. The aims of the first stage program were to reduce backlog and delay in processing cases. Owing to the lack of an automated database and, in the beginning, of much automation beyond word processing, the Court monitored progress with its own variations on the usual court efficiency indicators. For backlog reduction the Court used two measures:

- (a) End-of-year comparisons of cases carried over to the next year, starting with a baseline for the end of 2008; a decline in the number of cases carried over indicates a decline in "backlog."
- (b) An ageing list, tracking the years of filing for cases remaining in the inventory of each court. The goal is to eliminate older cases so that any carryover (and

carryover is inevitable even in the most efficient courts) would only be recently filed cases.

14. In combination, the two measures provide ample evidence that the efforts have been successful in advancing their goals. The initial inventories (based on statistics already kept by the Court) indicated a carryover from 2008 to 2009

of 422,645 cases in the High, Sessions, and Magistrates courts; by May 2011, the carryover (to the next month) was only 162,615 or roughly 38 percent of the initial figure. Since the initial carryover was probably underestimated and was unaudited unlike the more recent figures, the percentage of the actual reduction may be still greater. In some sense, the Court undercut its own measure of success by counting older cases discovered in subsequent inventories as "new entries" rather than as backlog. However, this only affects the percentage of backlog reduction, not the total of cases disposed or carried over to later years.

15. Ageing lists also show a substantial reduction (varying by court) in the older pending cases, thus indicating that the carryover is largely new cases (as would be expected if the program is working). The ageing lists are important in demonstrating that the courts have been eliminating older cases (the backlog) at a significant rate, rather than simply, as probably happened before, only processing the easy new filings. The data shows that the total number of cases filed in 2009 or earlier still being processed in the High, Sessions and Magistrates Courts (country-wide) had dropped from 192,569 in December 2009 to 15,497 in May 2011. As of the latter date, among the country's 429 sessions and magistrates' courts, 120 were completely current – processing only cases filed in 2010 and 2011.

16. Delay reduction is more difficult to measure without an automated database (and sometimes even with one). Lacking this tool, the Court's strategy has been to set targets for courts – the processing of all new cases within a given time (usually 9 to 12 months depending on the court and material) – and monitor compliance. Results indicate the program is working, especially in the new courts (NCC and NCvC) where monitoring is facilitated by the process used to distribute cases. Once a new court is set up in either the commercial or the civil area, it receives all new cases filed during the next four months. After this, another court is created (with judges transferred from the old commercial or civil courts, as they run out of work) to receive the next round of cases, while the first court processes what entered

⁴ This could be the basis for the creation of a global registry and an automated database derived from it.

⁵ Configuration control or management is the process whereby the client and the contractor develop a basic agreement on the contents of a system and thereby avoid adding subsequent details or even functionalities that conflict with the initial specifications. Such additions, unless minor, are best left for a later version.

earlier.⁶ The Judiciary now tracks and produces reports and tables to check whether each court is meeting its target of processing all its allotment within nine months of the cut-off date. Data presented in Chapter III demonstrate both the progress and the monitoring mechanism. Since neither the manual nor computerized system tracks the duration of each disposition, the target is a sort of average. Some cases may take a year and others six months, but so long as 90 percent of them are closed in 9 months, the performance is deemed satisfactory. Since their creation the NCCs and NCvCs have been reducing their caseloads at a fully adequate pace and in fact are ahead of the schedule. The growing number of courts that are fully current (i.e., no longer handling cases entered before 2010) also indicates (logically) that their disposition times have improved as well.

17. The program has also been successful in discouraging some of the usual causes of delays – and especially the frequent adjournments of hearings. Adjournments are not systematically monitored, although they are included in the daily reports. However, the pressure on judges to meet their quotas appears to be sufficient incentive for them to be firm on hearing and trial dates.

Additional Reforms

18. Three of these, not undertaken by the Judiciary, deserve consideration by either the Court or by the government. The first involves greater attention to legal assistance, which until now has been entirely inadequate in its coverage. For capital cases, the government contracts lawyers to represent defendants. Its Public Defense program offers assistance to indigent clients in civil (largely family) cases. While it is not legally necessary to have a lawyer represent one in court either as a complainant or a defendant, Malaysia's legal system is too complex for a lay person to navigate easily. The major concern at the moment is the large number of criminal defendants who go unrepresented, even in cases carrying long prison terms if they are convicted. The Malaysia Bar Association (which covers lawyers on the Peninsula) has provided additional services with a combination of pro bono work

⁶ The process can be stopped after the creation of four courts, with the reception period being cut back to 3 months. This would allow a rotation whereby a court spends three months receiving cases, and spends 9 months processing them. This is a pretty unusual approach and it probably would not work well in other jurisdictions. It is not clear whether it was invented with the monitoring issue already in mind, or whether monitoring has simply been adapted to this format. In any event for the NCC and NCvC it has worked well.

for actual defense and the creation and operation of 14 legal aid clinics (whose administrative costs are subsidized through bar members' fees). However, the head of the Bar Commission (the executive board of the Association) estimates that 80 percent of those on remand and 95 percent of those actually tried still lack representation. The Prime Minister recently agreed to finance a program whereby the Association would set up an independent fund to expand the services. This funding would still not cover the entire demand, and the plan is to focus on persons in police and prison remand as those most likely to suffer unnecessary abuse.⁷ The Foundation, the National Legal Aid Foundation, was launched by the Prime Minister in March and has begun its work.

19. A second program, operating out of the Prime Minister's Department as part of the Performance Management and Delivery Unit (PEMANDU), focuses on a multi-institutional approach to crime prevention. Most of its activities and successes (especially in reducing reported petty street crime) involve the police, but the courts are also included in its planning group, and committed to reducing backlog in criminal cases over 2010. The courts met the PEMANDU target of processing 2,000 violent crimes cases during 2010, and made headway in meeting an "internal target" of reducing backlogged violent crimes cases by 90 percent.⁸ As the PEMANDU background study makes clear, reducing crime levels in Malaysia (not very high to start, but nonetheless a popular concern) will require actions by a series of institutions, and is probably less a problem of the courts than of certain deficiencies in the organization, deployment and operations of the police and prosecution. Some of these have been resolved; others will require far more work.

20. A third additional reform that merits consideration coincides with PEMANDU's other undertaking which involves a multi-institutional program to reduce corruption of various types at all levels of government. In support of the PEMANDU efforts, the Judiciary created 14 sessions courts to specialize in this area. The Chief Justice also set targets for these judges—all cases resolved in under a year. Results in this program have not been reported as the first year (2010) was devoted to setting up various new mechanism and practices.

⁷ No information was available on the Sarawak and Sabah bar associations and any similar plan they might have forwarded or be funding.

⁸ The "internal target" was suggested by PEMANDU, but dropped in favor of the 2,000 violent crimes processed.



Looking Ahead: Recommendations to Improve the First Phase of the Judicial Program, Advance the Second Stage, and Provide Better Information for Improved Planning

22. Areas Targeted by the Courts to Complete the First Phase Program: These include several pending tasks the Judiciary already has on its radar.

- (a) *Expansion of measures already undertaken to the rest of the courts:* The reform's initial focus was on the busiest court centers and on their High Courts in particular. High Courts in other districts and subordinate courts throughout the country have received some attention, but not as systematically. A plan is now needed to make them full-fledged participants in the program and, not incidentally, to expand the various IT elements to them.
- (b) *Integration of the mainland program with those in Sabah and Sarawak:* There are two separate issues here. The most obvious is ensuring an adequate interface between the two CMIS so that the data from both can be used to create comparable reports and analysis. The second is further coordinating the two reform strategies, which seem to have somewhat different contents, although the mainland reform (that originating with the Federal Court) appears to have been adopted in large part in Eastern Malaysia.
- (c) *Further development of the CMIS as a fully functioning MIS:* The CMIS as it will be developed by the end of the existing Formis contract still lacks a centralized registry of all case movements and an accompanying global data base (incorporating the kinds of raw data now managed by individual courts).⁹ Even at the courtroom or court complex level, the Formis registry still has too many text entries and also does not capture some information (gender and other characteristics of parties, amount claimed, and so on) that will be relevant to future analysis. This is normal, and in fact recommended as a first step, and as the Judiciary begins to use the system, it may itself request additions. However, to accelerate the process, it is recommended that additional international advice be sought, from countries that have created global databases and actively use them to analyze court performance. In constructing a database, courts (or other government agencies for that matter) often

consider only the information they always received manually; recognizing that an automated, web-based system can do much more, can take considerable time, and sometimes never happens.

- (d) *Creation of a centralized database in the Court's Statistics Unit and incorporation of inputs from both CMIS and non-CMIS courts:* One surprising finding was that the Statistics Unit was still receiving and processing statistics manually, even as late as the end of May 2011. However, the vendor insisted it would provide software by the time the contract ends, which would allow the Unit to receive and process statistical reports from the CMIS courts automatically. This is still not the type of database needed (with raw data as contents), but it would be a step in that direction. Until all courts have the CMIS, some manual processing will still be required, and the Unit will have to work out its own methodologies for inputting and harmonizing the statistics provided by the non-CMIS courts.
- (e) *Standardization of the Statistical Indicators Used to Monitor Performance:* One of the problems encountered in preparing overview tables for this report was a tendency for individual reporting units (courts and court divisions) to organize data differently. This is not unusual when performance monitoring begins, and seems to be on its way to resolution. However, greater uniformity among the indicators allowing more precise comparisons across the system and over time would be a decided plus for the Judiciary's self management and for its ability to report its results to others. Except for the initial short count in the first inventory, the problem has never been inaccuracy, but rather lack of comparability of reports.
- (f) *Further procedural change:* As a common law system, Malaysia has been able to rely extensively on the Judiciary's ability to alter practices through modifications to its own rules and additional directives. However, some proposed changes will require modifications to existing laws, in addition to those already under consideration by the Government.
- (g) *Training:* This is a high priority item for the Judiciary's second stage program and the discussion in its report on the initial reforms (Federal Court of Malaysia, 2011) mentions several variations, including a program for judges and an Institute for all legal professionals (the Malayan Academy of Law). Training is important, but often involves investing large amounts of funds on activities with little or no impact

⁹ The system constructed in Eastern Malaysia by another firm (SAINS) could not be observed and thus the comments here may or may not apply to it.

on performance because of inadequate design and delivery (and not because training is not needed). It is thus recommended that before seeking funds, the Judiciary and other proponents do a thorough study of training needs (see below) and also investigate the funding implications of any specific proposal.

22. *Areas Suggested for Immediate Attention or for Inclusion in Future Programs*

- (a) *Build up IT capacity to attend hardware and develop software:* The Judiciary currently has roughly 30 IT personnel, all located in Putrajaya and at least half of whom are qualified to repair hardware but not to do software development. Whatever happens from now on, it needs more people simply to do basic equipment maintenance, and should think about a decentralization plan. Further changes will hinge on how the courts intend to do additional software development. At present the vendors own the source codes, which give them the upper hand in any future negotiations. The Judiciary has three basic options here, each with their own implications for personnel needs: maintain the current situation (and thus only add personnel to repair hardware); negotiate a transfer of the source codes and build up its IT personnel to manage further development; or build up its IT personnel so they can, in the next few years, “retro-engineer” the program and develop software the Judiciary owns and can continue to develop on its own. Although cost seems to be a lesser consideration in Malaysia, it would be well to cost out the options over time and option two in particular would be best advanced on this basis.
- (b) *Move toward a central database comprising raw data on case filings and movements, increase and codify the data captured, develop policies on access to the CMIS databases, improve the virtual archives, and update internal procedures accordingly:* If, as was reported in the second visit, the CMIS will not include a centralized database, the Judiciary may need to let a second contract for its development, and in the process, spend more time reviewing the types of data that should be included (and codified). It is assumed that the contactors have provided adequate backup and anti-virus protection, but there will be still more need for decisions regarding access to the database and the protection of information not only from manipulation but from those who might use it to undesirable ends. It appears there is still little

consideration of these issues. Moreover, a shift to e-filing and electronic case files will require modifying back office procedures to facilitate handling.

- (c) *Develop a judicial planning capacity and review current administrative arrangements:* Whether or not it is successful in regaining control of its investment budget, and certainly if it does, Malaysia’s Judiciary is ready to move beyond the old administration as house-keeping model to more proactive forms of judicial management. The reform already represents steps in this direction, but the further need is to reorient its administrative offices accordingly, and especially to ensure a much tighter coordination among planning, budgeting, personnel and statistics.
- (d) *Consider alternatives to the Judicial and Legal Service that would give the Judiciary (and prosecution) its own specialized personnel:* This is already under discussion internally, but it would help to analyze and raise the issues more explicitly. This would be a first move toward a single judicial career, incorporating all judges from the magistrate level to at least the High Courts and possibly beyond. It could also help resolve the salary problem of the lower-level judges and administrators and allow a more strategic approach to designing career paths.
- (e) *Consider development of court administration as a separate judicial career:* This is a follow-on suggestion to the prior point and stresses the importance of ending reliance on generalist staff to carry out what should be increasingly specialized work. Judicial and Legal Service staff serving in administrative positions (within courts and in the general administration) appeared to be hard workers but especially as the Judiciary moves into more modern and proactive management modes, it will need personnel who hone their expertise over decades (and not just a few years).

23. **Suggestions for Additional In-Depth Studies and Assessments: Not all of these would be done by the courts, but those that would not are suggested because of the broader range of problems already being attacked in the overall sector.**

- (a) *Study on training needs and alternatives for meeting them:* The Judiciary desires to do more training and even to develop its own institute to this end. However, based on lessons learned from decades of donor support for courses that seem to do little good, it is recommended that a first step be a thorough study of

current training needs – not in terms of what people would like to learn, but rather in terms of areas where it appears that significant problems are created by insufficient knowledge and skills. Moreover, in terms of problem solution, no training should be done until a list of additional mechanisms to ensure its application is developed. The results may indicate that at present time, a major training effort is not needed, or perhaps that if it is, it should be coordinated with other on-going programs (for example with what the Judicial and Legal Service currently provides in its own Institute).

- (b) *Study on the situation of the legal profession and its possible liberalization:* Liberalization has been suggested as a solution to at least two problems (poor quality of local lawyers and low salaries paid) neither of which is adequately documented. Moreover the term “liberalization” has at least two meanings in this context – allowing non-lawyers to perform legal work and facilitating the performance of legal work by non-Malaysian lawyers. Both proposals could be beneficial, but before any solution is advanced, it is always a good idea to define the problem. It is thus recommended that research be conducted (probably by some other institution than the Court itself as this is not really a court responsibility) to explore the hypothesized issues as well as several others. Once the problems are defined, then liberalization or some other solution can be applied.
- (c) *Analysis of the organization, distribution, and working methods of the public prosecution (DPPs):* The PEMANDU background study and observations by other interviewees recognize weaknesses in the public prosecution. Not all crime reduction will be a result of improved prosecutorial methods or even better prosecutorial coordination with police (another problem mentioned), but it certainly would be helped, and as with other topics, any solution would require a more systematic analysis of the problems and their causes.
- (d) *Study on unmet dispute resolution needs:* This could be done by the Judiciary (in line with its proposed second phase emphasis on improving quality of performance) or by some other entity. Courts and other dispute resolution forums do not seem overtaxed with demand, but this may only be because they do not respond to people’s real dispute resolution needs. The concern is that unmet needs could result in escalating conflicts and people using less desirable mechanisms to deal with them (e.g. taking the law into their own hands). There was no indication that

this is an imminent threat in Malaysia, but it might be in more restricted areas, and in any case, if not urgent, this kind of study (for which there are well developed protocols) might thus be considered.

- (e) *Study on administrative tribunals (and other non-judicial dispute resolution mechanisms):* Here the question is what kinds of conflicts these alternative mechanisms attract, how well they deal with them, and whether they have their own issues of delay, congestion, or inadequate responses. A justice system involves more than the courts, and these alternative services can either reduce the burden on the latter by providing satisfactory resolution of conflicts or increase it, by aggravating disputes, sending those that can go there to the courts for resolution, and otherwise performing inadequately. There is nothing to indicate that these are urgent issues, but if the government is interested in finding out how citizens’ disputes are handled, if at all, it should put this on its list of items to investigate.

Lessons Learned from the Malaysian Experience

24. The Malaysian Judiciary’s recent program offers an interesting model for other countries attempting a backlog and delay reduction program, and in fact for those pursuing other goals in their reforms. The Malaysian model is not radical in its content so much as in its ability to follow best practices, something which few countries in its position manage to do. Some of the key lessons include the following:

- (a) A reform’s success is largely conditioned by the ability of its leaders to identify problems and define concrete, measurable goals for resolving them. A reform that simply aims at “improving performance” without defining specific targets is less likely to accomplish anything. Quantification is important, no matter how objectives are further defined.
- (b) Increasing efficiency is a good start, representing a sort of “low-hanging fruit” in the goal hierarchy.
- (c) The reform implementation followed logical steps. One preliminary step usually recommended, a thorough assessment or diagnostic of the judiciary’s situation, was skipped in Malaysia. However, the Court’s working hypothesis, that there was delay and backlog that could be eliminated rather quickly, was based on prior, if less systematic, observation by the reform leaders (and especially the Chief Justice). Besides, the way the reform was organized

(the sequence) meant that the early steps served to verify the hypothesis. Had the inventories discovered, contrary to expectations, that all pending cases were recent ones and moreover active, the program would have needed modification. Furthermore, there was constant monitoring of progress which inter alia allowed the identification and resolution of additional problems along the way. Thus, for the reform's immediate purposes a further diagnostic was probably not needed (it would only have added delays and possibly weakened the initial consensus), but others contemplating similar programs should not assume this applies equally to them.

- (d) A first, essential step in any reform is to put order to what is there and establish a system for monitoring performance. Neither one requires automation, although the monitoring system can certainly be improved once ICT is introduced. Without order and without information, it will be very difficult to plan, implement and measure the effects of any further reform efforts. While seemingly simple minded, an inventory of cases and an improved filing system are essential parts of the "putting in order" phase. On the basis of both these steps, courts, or for that matter any agency, can most probably substantially reduce existing workloads and so facilitate further reform.
- (e) A tracking system is a recommended means for further reducing backlog, although this does not necessarily have to be identical to what Malaysia has introduced. The logic behind any such system is to separate cases by the level of effort required for their resolution – in the future a similar logic can be applied to more sophisticated forms of differential case management.
- (f) Once the low-hanging fruits have been harvested, the next challenge is to define the further directions of reform. Although Malaysia can still spend several years perfecting the first stage, it is well-advised to consider where it will go next and how it will get there.
- (g) Courts are only one part of a justice system, and as the PEMANDU study clarifies in the case of crime reduction, many other actors are involved. Much the same is true of more ordinary dispute resolution as discussed in the prior section on additional studies. When attention is not paid to these other agencies, and comparable reform programs established, the impact of even the best court reform will be limited.
- (h) It is easier to carry this all out with substantial funding, but the Malaysian experience shows massive funding is not always necessary to make significant improvements. Many of the measures introduced by the Court were accomplished with few additional funds.

25. Committed leadership is essential, and it is also important to ensure such leadership persists over the longer run. Broadening the reform team (to include the President of the Court of Appeal and the two Chief Judges as well as other members of the Federal Court) as was done in Malaysia is thus a recommended strategy. Elsewhere reforms have progressed with only one high level leader, but they are easier to reverse when one person is the only major source of their momentum.



INTRODUCTION

1. This study, commissioned by the Government of Malaysia (GOM) and its Judiciary, comes at a propitious moment in the evolution of judicial reform programs worldwide. Following over two decades of concerted donor and country financed judicial reforms in low- and middle-income countries, there is a disturbing tendency to conclude that such efforts are rarely worth the funds and labor invested in them.¹⁰ This reaction is most pronounced within the donor community, many of whose members seem to be turning to other, related activities (e.g. “citizen security projects” of one type or another). But there is also evidence of citizens and their governments’ increasing doubts as to what the much vaunted reforms have accomplished. More systematic studies financed by donors to review their own projects and worldwide trends give slight reason for contradicting these perceptions. A recent World Bank review of advances made by middle income countries over the past decade finds them least notable in the area of “governance” including judicial reforms (World Bank, IEG, 2007). A USAID sponsored review of its own projects’ advances in “Democracy and Governance” found Rule of Law to be the area where impacts were nearly invisible (Finkel et al, 2008).¹¹

2. The present study reviews a reform designed and implemented by the Malaysian Judiciary during the period from late 2008 to early 2011. Although conducted over a very short period, this reform has been able to produce results rarely reached even in programs lasting two or three times as long. It thus provides a counter-example to contemporary pessimism about the possibility of the judiciary improving its own performance. Moreover it did so in a country which faces many of the usual contextual obstacles said to have inhibited reform elsewhere. There are other examples of reform “successes” but they either involve very targeted, and often territorially limited experiments (see Walsh, 2010) or if accomplished on a broader scale were aided by circumstances not likely to be replicated elsewhere.¹²

3. The report is divided into five sections. A first chapter gives introductory background on Malaysia, its legal tradition and its court system. It is intended for readers not familiar with these topics. A second chapter discusses the reform, its development, objectives, components, and likely future directions as well as some additional related activities undertaken by other government agencies. A third chapter reviews the achievements of the First Phase Reform, and a fourth discusses some gaps still to be covered, examines a series of broader policy alternatives the courts and the government as a whole might consider, and identifies areas where further analytic work might be done. A final very short chapter reviews the lessons learned that may be useful to other countries contemplating a similar type of reform.

¹⁰ High Income Countries face their own crises here, but it has less to do with the potential for making improvements to ordinary performance than with questions dealing with the role of national judiciaries in the “new normal” post global societies.

¹¹ The authors did note however that the methodology used and the emphasis on human rights as a proxy for ROL may have been inadequate to capture change in this area in particular.

¹² Walsh’s work commissioned by the World Bank and DfID identified examples of successful “activities” in several African countries, but none of these could be considered a full reform, and most present conditions of fairly precarious sustainability. Other country examples (Chile, Singapore; see Prillaman, 2002 and Duce, 2010 on the former and Malik, 2008 on the latter) must be regarded as fairly *sui generis*, took more time, and, despite the characterization offered by Malik, are difficult to consider “judicially led.”

CHAPTER I

Background on Malaysia, Its Legal System and Judicial Organization

Country Background

4. Malaysia is a country of roughly 28 million inhabitants, located in Southeast Asia, and comprising West Malaysia (on the Malay peninsula between Thailand to the North and Singapore to the South) and East Malaysia (the northern portion of the island of Borneo with parts of Indonesia to the south and Brunei to the East) Although East Malaysia is larger in territory (200,000 as opposed to 120,000 square kilometers), roughly 79 percent of the population resides in West Malaysia. Malaysia is a federation of 13 states: 11 states and 2 territories (the cities of Kuala Lumpur and Putrajaya, the old and new capitals, respectively) in West Malaysia and 2 states (Sabah and Sarawak) and one territory in East Malaysia. It is a former British colony. As a prelude to independence, the Federation of Malaya (in effect present day Western Malaysia) was formed in the aftermath of World War II. The Federation achieved independence in 1957, and with the 1963 addition of Sarawak, Sabah, and Singapore, was renamed Malaysia. Singapore subsequently withdrew in 1965.

5. Present-day Malaysia is a solidly middle income country, with an estimated per capita income of roughly US\$7,000. It is a multi-ethnic, multi-cultural, multi-linguistic nation. Malays constitute about 58 percent of the population, Chinese 28 percent, Indians 7 percent, and aboriginal groups, about 2 percent. Malaysia is a constitutional monarchy and parliamentary democracy, following the Westminster model. Unlike Great Britain (but like India whose constitution influenced Malaysia) it has a written federal constitution which is the supreme law of the land. The constitution establishes Islam as the official religion but also guarantees freedom of religion, as well as stipulating such other rights as liberty of the person, to be informed of the reasons for arrest, access to legal counsel, release from detention without unreasonable delay, protection against retrospective criminal laws and double jeopardy, equality before and equal protection of the law, freedom of movement, speech, assembly, and association, and the right not to be deprived of property without adequate compensation. The death penalty is applicable for such offenses as murder, drug trafficking, possession of unlicensed firearms in a security area; and the discharge of a firearm in the commission of an offense with intent to cause death or personal injury. Individual states have their own constitutions which must contain certain provisions as required by the federal document.

6. The Malaysian King or Yang di-Pertuan Agong is the Head of State. He is elected by the Rulers of the nine Malay states with Rulers from among their own members; these elections are held every five years, meaning that the office rotates among the nine Rulers. The nine Rulers and the Governors (Yang di-Pertua Negeri) of the other four states form a Conference of Rulers which serves as a high-level link between the states and the federal government. While the Yang di-Pertuan Agong “rules but does not govern,” he officially appoints the highest level government officials, including the heads and members of the Federal and Appeals Court. However, in these cases he is to follow the advice of the Prime Minister, pursuant to the latter’s consultation with the Chief Justice, and since its foundation in 2009 (see below), the Judicial Appointments Commission. Constitutionally that advice is mandatory. Similar conditions apply to the King’s naming of all other judges.

Judicial Organization, Staffing, and Resource Allocations

Legal Tradition and Multiple Sources of Law

7. The courts to be reviewed here follow common law procedures. The four main sources of law are written law, common law, Islamic or Syariah law, and customary law. While practiced during the colonial period (and thus for over 200 years), English common law and rules of equity were formally adopted under the Civil Law Act of 1956. Both have been further developed by the Malaysian courts in accord with local circumstances. While ahead of the English in already abandoning some of their quaint traditions (both wigs and some honorific titles such as his lordship or her ladyship to refer to judges), the Malaysians have held on to the writ system much of which the English eliminated with the Woolf reforms of 1999.¹³ While legal representation is not required for a court appearance, this makes it advisable to use an attorney as only those trained in the law can easily make their way through the existing rules and terminology. Higher court judges are apparently well read in English and other common law country case law, and often reference it in their decisions (Chan, 2007).

8. Although the majority of the population is Muslim and Syariah is recognized as a source of law, it is applied only in “personal matters” to followers of the faith who choose to use the Syariah courts. In Western Malaysia customary law has multiple origins – Malay customary law, Hindu law, and Syariah law. In Eastern Malaysia customary law includes Malay customary law, native customary law, and Chinese and Hindu customary law.

¹³ Within common law, a writ is a judicial order to perform a specified action or allow it to be done. Under a writ system, plaintiffs have to begin most court actions by petitioning for the appropriate form of “original writ,” of which there is an ever expanding variety. With the 1999 Woolf Reforms, the English system was greatly simplified and most civil actions now begin with a “Claim Form,” thereby reducing the danger of having a claim rejected because of petitioning for the wrong form of writ. This is also far easier for the lay person to understand. The U.S. abandoned writ pleading as the norm far earlier, and reserves writs for extraordinary actions (e.g. a writ of certiorari, whereby, at the request of the party, an appellate court agrees to hear an appeal, and thus orders the lower level court to “certify the record” and send it to the higher court which will review it). Although in Malaysian courts, most civil cases begin with only one of four types of writs (and usually with a “writ of summons”), “it is important to use the appropriate mode because the court has discretion to set aside, in part, the proceedings commenced by the wrong mode” (Wan Arfah Hamzah, 2009; 307).

General Organization

9. Although Malaysia is a federation, its federal courts are organized as a single unitary system. The Federal Court (originally Supreme Court) and the Court of Appeal are seated in the Federal Government Administrative Center, Putrajaya, but operate nationally – with panels of Court of Appeal judges traveling to Sabah and Sarawak to hear cases. There are two High Courts –one for Western Malaysia and the other for Sabah and Sarawak – each with its own Chief Judge. Collectively this group is referred to as the superior courts, and its judges are appointed by mechanisms different from those for the subordinate courts. Both processes are discussed below. High Court judges hear cases individually; other superior courts sit in panels.

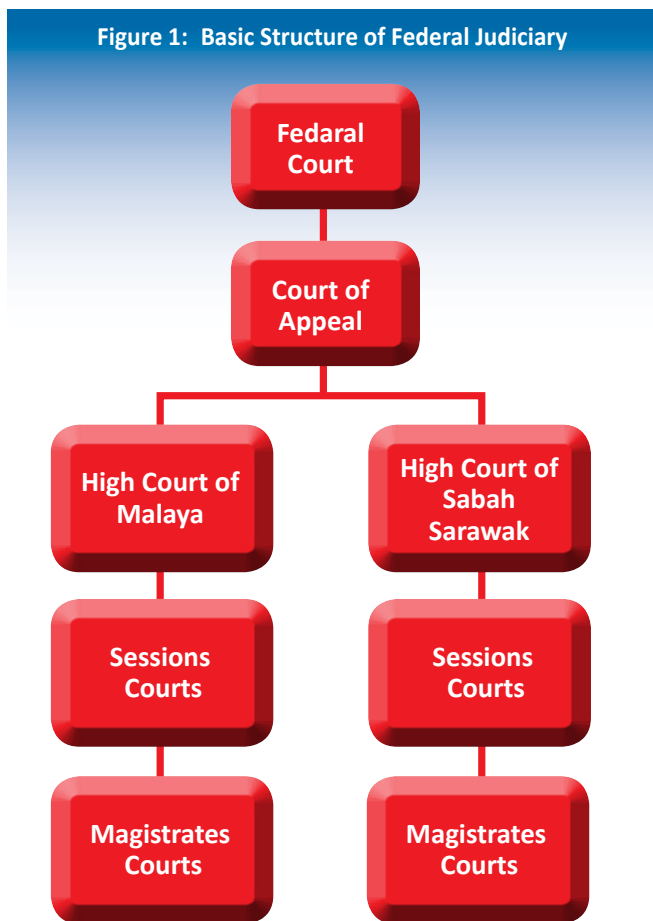
10. The subordinate courts (staffed by “magistrates” but for the purposes of this report also called judges), are organized into sessions courts and the lower level magistrates courts. Their judges are drawn from a pool of legal officers, the Judicial and Legal Service, whose members staff legal positions throughout the three branches of government. In the Judiciary these individuals also hold administrative and quasi-administrative positions (registrars¹⁴ of various kinds and other related jobs) and in theory are subject to periodic rotations to legal positions elsewhere in the government. More details are given in the section below on staffing, but it deserves mention here that the Judicial and Legal Service career does not extend to superior court judgeships and that to be considered for one of these positions, the candidate must resign from the Judicial and Legal Service.

11. Following conventional practices, the jurisdictions of each set of courts are set by the Constitution and secondary law. They hinge both on subject matter and severity of the offense or size of civil claim. High Courts were traditionally divided into Criminal and Civil Divisions, but recently there has been a trend to greater specialization, especially through the creation of civil “Sub-Divisions.” Individual sessions and magistrates courts may also specialize at least by criminal and civil jurisdictions, although in outlying regions they tend to hear both kinds of cases. All instances

¹⁴ The term “registrar” is used for a variety of positions, ranging from that of the Chief Registrar (Chief Administrative Officer for the courts) through the registrars who serve a court administrator-like function for court centers and divisions to deputy and senior assistant registrars who handle pre-trial matters and also adjudicate simple cases.

have some original jurisdiction, but most of the work of the Court of Appeal regards appeals from the High Court decisions. The High Court work involves both original jurisdiction cases (e.g., criminal cases involving the death penalty) and appeals of session as well as magistrate court decisions, rulings of administrative tribunals and other non-judicial bodies. The figure 1 below illustrates the general organization of the federal system.

12. There are also state courts outside this system—Syariah and traditional courts – and a series of administrative tribunals. Decisions of administrative tribunals may be appealed (as special powers cases) to the ordinary courts only on the bases of due process and other procedural irregularities. The Judiciary normally does not review the substantive content of their decisions. Ordinary court involvement in Syariah and traditional court decisions is still more limited, largely related to issues of jurisdiction. Neither the administrative nor the state courts are covered in this report as they were not affected by the judicial reform program. The details of state court operations and composition are for the most part dictated by state, not federal law.



Staffing

13. For its geographic size and population, Malaysia has a relatively modest number of judges. There are currently 120 superior court positions, of which 91 are occupied by tenured judges. Their number is supplemented by 42 temporarily appointed judicial commissioners who may eventually be appointed to permanent positions once the latter become available. Maximum numbers of superior court judges are set by the Constitution (Articles 122, 122A, and 122AA), but the use of judicial commissioners to fill additional slots is not. The numbers of “subordinate court” judges are not constitutionally limited. They are set by secondary law and they currently include 132 sessions court judges (157 authorized positions) and 152 magistrates (193 positions). These numbers are augmented by some 260 Judicial and Legal Officers who work in courts at all levels as deputy or senior assistant registrars, usually after having first served as a magistrate.

Table 1: Judicial Positions, Authorized and Filled, as of 2011

Judges	Authorized Positions	Filled Positions
Federal Court (includes CJ, President of COA and 2 Chief Judges)	15	11
Court of Appeal	32	25
High Court	73	55
Judicial Commissioners	NA	42
Sessions Courts	157	117
Magistrates Courts	193	165
Other Judicial and Legal Services	343	266
Total	813	681

Source: Figures provided by Chief Registrar’s Office.

14. Measured against its population of roughly 28 million, this gives a ratio of judges to population of between 1.48 and 2.42 “judges” per 100,000 inhabitants, depending on whether members of the Judicial and Legal Service assigned to the courts, but not to the bench, are included. Since most, but not all of them perform judicial duties (pre-trial case management, administrative closures of cases, some decisions on affidavit cases) they probably should be counted, but even then the ratio is very low as compared to countries at a comparable level of development within

and outside the region.¹⁵ Malaysia's "state courts" take up some of the slack as do the administrative tribunals, but only for disputes that naturally fall into their jurisdictions, as nearly all crimes and a majority of civil disputes do not. For comparison's sake the following table shows the judge per population ratio for a number of civil and common law countries.¹⁶ The ratio solely aims at tapping into one dimension of the efficiency of human resource use. Moreover, the ratio alone gives no indication of whether there are "enough" judges for the workload they handle.

Table 2: Comparison of Judges-to-Population Ratio Selected Countries

Country	Judge per 100,000 inhabitants
Argentina	11.2
Australia	4.4
Colombia	9.2
England and Wales	*3.5
Ethiopia	3.1
France	9.1
Germany	23
Malaysia	1.5 – 2.4
Russian Federation	24.2
Spain	10.7
Thailand	6.8

Sources: for Argentina, Unidos por la Justicia, 2006 (data from 2005); for Australia, Walsh (2008; 2006); for Colombia, CEJA, (2010) (data from 2009); for Ethiopia, World Bank, (2010) (data from 2009); for Europe, CEPEJ (2010) (data from 2008) except for Germany (CEPEJ 2008); for Thailand, www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm/

*Not counting roughly 30,000 lay justices of the peace

15. Although it has been argued (Walsh, 2008) that civil law countries tend to have more judges because more of them sit in panels, the panel mode is less common for the Latin American countries shown (Argentina and Colombia)

¹⁵ Singapore appears to have only a slightly higher ratio, but its population is compressed into a very small area, roughly 3.5 times the size of Washington D.C; Malik, 2007; 5

¹⁶ This is the most important distinction among legal traditions, separating much of Europe (and its former colonies) from the "less common" common law tradition with its roots in English law.

where most cases are heard by a single judge.¹⁷ Moreover, although up-to-date figures could not be located, two Asian countries commonly counted as in the civil law tradition, South Korea and Japan, also have relatively low ratios – 2.7 and 2.3 per 100,000 in 1995 and 1999, respectively (Galanter and Krishnan, 2003; 99). However, a third Asian country, with a civil law tradition, Thailand, currently (2009) has a ratio of 6.8.¹⁸ In short, the judge-to-population ratios do not appear to be closely correlated with either legal tradition or region.¹⁹

16. The table demonstrates the range of variations in the judge-to-population ratios in several countries, but it bears emphasizing that there is no magic formula as to the right number of judges – if judges can handle the cases assigned in a reasonably efficient fashion (as they now appear to be doing in Malaysia), the number would seem to be adequate. Many countries with much higher ratios and much lower individual caseloads than in Malaysia cannot keep up with their work, suggesting that much depends on internal organization, procedures, willingness to counter lawyers' dilatory practices, and how caseloads are filtered.²⁰ Also as Galanter and Krishnan (2003; 97) note, litigation rates (which should be linked to the number of judges needed) tend to be lower in countries with younger populations (e.g. India). In the table, the two court systems, both with common law proceedings, with ratios nearly as low as that of Malaysia (England and Wales, and Ethiopia) seem to have an adequate number of judges to keep abreast of demand. However, for England and Wales the explanation lies in the additional 30,000 justices of the peace who currently decide nearly 95 percent of criminal cases as well as handling some family and juvenile matters and processing more serious criminal cases before transfer to the professional judges (Grove, 2002; also CEPEJ, 2010; 122). In Ethiopia, because of the country's low level of development (and probably

¹⁷ This is also true of many Western European countries, where paneled judges are reserved for more serious criminal and higher value civil cases – the equivalent of those heard by single judges in Malaysia's High Court.

¹⁸ www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm/

¹⁹ Galanter and Krishnan (2003) also show a 10.4 ratio for the U.S in 1998, roughly the average for Western European civil law countries.

²⁰ This is true, for example, of Colombia, where current average caseloads are 500-600 new entries per judge and where accumulating backlog remains a problem (Interviews and CEJA, 2010). Data available from CEJA's biennial reports also indicates that in much of Central America (except Costa Rica) and the Andean region of South America (except Chile) new filings per judge are at that level or lower, with accumulating backlogs because judges cannot keep up.

its young population), court use is limited and a majority of the population relies on traditional mechanisms. But the Ethiopian federal and regional courts have also conducted a recent reform to ensure what does reach them is processed rapidly (World Bank, 2010).

17. A further interesting detail on staffing is the reason given for the gap between “allocated” positions and those actually filled. According to the heads of the judicial Financial and Personnel Departments, the difference is not a result of the explanations often encountered elsewhere – funding shortages or lack of qualified candidates – but rather a reflection of the Judiciary’s own personnel policies. New subordinate courts (and thus judgeships) may be created by the legislature (in response to the Judiciary’s requests) prior to actual need, as a sort of cushion, but the Judiciary only staffs them as required by real demand. Between 2009 and April 2011, the Federal Court in fact closed 9 High, 4 Sessions, and 23 Magistrates courtrooms, transferring judges to other jurisdictions (where the “courtroom” was the court) or positions. Where demand is very low, it may also have one judge cover two or more courts in different locations.²¹

18. **Superior Court Judges:** Officially “judges” are only those on the bench of the superior courts and thus holding one of the following positions:

- Chief Justice of the Federal Court
- President of the Court of Appeal
- Chief Judge of the High Court in Malaya
- Chief Judge of the High Court in Sabah and Sarawak
- Judges of the Federal Court
- Judges of the Court of Appeal
- Judges of the High Court (including Judicial Commissioners)

19. Under Article 123 of the Federal Constitution, the basic qualifications for appointment to any of the three superior courts are being a citizen of Malaysia and for the ten years preceding the appointment having been an advocate before any (or all) of those courts or a member of the Judicial and Legal Service of the Federation or of the Legal Service of one of the states, or some combination of the above. The process by which judges are appointed

remains in flux. The creation of a Judicial Appointments Commission in 2009 following years of complaints about a lack of transparency in the appointment process should change the appointment process substantially. Although the Yang Dii-Pertuan Agong made the official appointment, and the Constitution and secondary law laid out a complex process of consultations, it was generally believed that most of the decision lay with the Prime Minister and that in times past, political considerations had weighed in too heavily, leading to a series of complaints about the quality of the bench and a rapid turnover in Chief Justices since 1996.

20. The Judicial Appointments Commission’s members include the Chief Justice as chairman, the President of the Court of Appeal, the Chief Judges of the High Courts of Malaya and Sabah Sarawak, a Federal Court judge (appointed by the Prime Minister) and “four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies” (Judicial Appointments Act, II:5:1, a.). As the Commission is very new, it is too early to determine whether it has met the expectations. However all those interviewed for this study agreed that it represented a decisive improvement in the system for nominating judges.

21. Once appointed, judges hold office until the age of retirement – currently sixty-six years – with a possibility of a six-month extension upon approval by the Yang di-Pertuan Agong. Judges may resign voluntarily at any time or may be dismissed for breach of the code of ethics (following its passage in 1994 and subsequent amendment in 2009) or for “inability... to discharge the functions of his office” (Article 125 (3)).²² This decision is based on the findings of a special tribunal convened for this purpose, and composed of “not less than five persons who hold or have held office as a judge of the superior courts” (Article 125 of the Constitution). Procedurally, dismissals are by the Yang Dii-Pertuan Agong pursuant to the request of the Prime Minister or Chief Justice (in consultation with

²¹ Both the heads of the personnel and finance departments concurred that the government would make available funds as authorized positions were filled.

²² The provision cited applies to members of the Federal Court (which includes the President of the Court of Appeal and the Chief Judges of the two High Courts). It is also applicable to other superior court judges, except that consultations with the relevant head of their court (President of Court of Appeal or Chief Judge) are also required.

the former. However, dismissal of judges on the basis of ethics violations appears rare to non-existent – no cases were mentioned in the interviews and it appears that the major criticism of some judges appointed during the crisis period has more to do with their insufficient dedication to their work.

22. *Judicial and Legal Service:*²³ Subordinate Court judges and many administrative and quasi administrative officials are drawn from the Judicial and Legal Service, a government-wide pool of qualified lawyers who may serve not only in the judiciary but also in the Attorney General's Chambers (and thus most commonly as Deputy Public Prosecutors, DPPs), as legal advisors in the executive and as legislative draftsmen. Entrance is managed by the Judicial and Legal Service Commission.²⁴ Once admitted, an officer may in theory be placed in any of these positions, and will be subject to frequent rotations. In recent years, there has been a tendency for members to stay in one agency, but to be rotated among positions there.

23. Within the Judiciary there seems to be an informal but predictable "career path" for Service members which involves alternating positions on the bench with administrative or quasi-administrative duties. Most first time entrants are typically named as a senior assistant registrar, then moving to a position as a magistrate, deputy registrar or a purely administrative role (e.g. in the Statistics Unit) and then back to assignment as a session court judge. It bears noting that many of the high level administrators of the Judiciary (for example the Chief Registrar, in effect the Chief Administrative Officer) are members of the Judicial and Legal Service. While membership in the Judicial and Legal Service constitutes one means of fulfilling the requirements for appointment as a superior court judge, this is hardly automatic and many Judicial and Legal Service officers end their careers without joining the superior court bench.

²³ While the law refers to state JL Services, representatives of the Federal JL Service said they did not exist.

²⁴ The commission was briefly eliminated in 1960 but since 1963 has functioned to control entry to the Service. The Service is another English inheritance and comparable bodies are found in other commonwealth nations. However, the creation of a single pool of qualified lawyers for all branches of government seems to be less common now, and this, plus the implications for judicial independence given the inclusion of Executive Branch members, has inspired calls for change in Malaysia.

24. The concept of rotation among judicial positions is favored by members of the Service and apparently by the Judiciary as a whole. However, there have been numerous suggestions that the Judiciary's Service be exclusive to that entity (i.e. no rotation to other government agencies) and possibly be linked to a single judicial career. This might also facilitate the solution of another problem – the extremely low salaries for those at the bottom of the scale. Currently, when benefits and allowances, which add another RM 800, are not considered the RM 1,984 (roughly US \$661) earned monthly would make them eligible for legal aid! After three years the emoluments (salaries plus benefits and allowances) rise to RM 4,400 (US\$1,467), and at the upper levels reach RM 25,000 (US \$8,333), but some of those interviewed believed that the initial amounts may discourage good candidates and moreover could increase vulnerability to bribe taking.²⁵ In any event, because this is a nation-wide service, when the current Chief Justice obtained a 40 percent increase for the superior court bench, he could do nothing about the rest of the judicial and administrative employees. As a result initial monthly emoluments for superior court judge are now RM 29,700 (US \$ 10,000), or ten times the initial JL Service level, and rise to RM 55,000 (US \$18,300).

25. Initial appointments of JL Service members to positions within the Judiciary and their subsequent transfers to other judicial positions follow their own process, which is not entirely transparent. Formally, session court judges are appointed by the Yang Dii-Pertuan Agong on the recommendations of the Chief Judge of the relevant High Court. Magistrates in territories are appointed by the Yang Dii-Pertuan Agong, and in states by the respective Rulers or Governors on the recommendation of the Chief Judge. In practice, a series of interviews (both with the Commission for initial entry and with the affected agency, and in the case of the Judiciary, the Chief Registrar, for placement) play a major role. It was also reported that several agencies, most commonly the AGC, first contract individuals, who subsequently may seek entry to the Service and from there pass back to the contracting agency. In theory any subordinate court judge could be dismissed by the Yang Dii-Pertuan Agong for any or no reason, but these decisions, like those on appointments and transfers doubtless depend largely or entirely on the relevant judicial authority's discretion.

²⁵ Nonetheless, it was reported that applications for admission to the Service are on the rise.

26. Whoever participates (and conceivably this varies across the system) the larger question regards the criteria on which these decisions are made. There were indications that neither the affected individual nor their immediate superior weighed in that much; there were, for example, some complaints from office heads about losing valued employees because of transfers. The employees themselves did not indicate that they had any part in the decisions. Clearly a bit more transparency, and possibly a different set of criteria might be used, but that might be difficult to introduce so long as the Judicial and Legal Services is a government-wide organization. Should the Judiciary be able to carve out its own career service, it would be better able to establish a consistent and transparent set of rules for movement up the career ladder, one consistent both with the interests of the employees and with the needs of the organization. Still, with the exception of the office heads who suddenly lost a valued employee, no one among the potentially affected interviewees had any complaints.

27. **Other Staff:** According to the Court’s Office of Personnel, apart from the superior court judges, total staffing is 5,123 persons (with 5,561 positions authorized). Of this number, roughly 4,446 hold administrative and support positions outside the Judicial and Legal Services. They include largely clerks, interpreters, and IT personnel. The staff-to-judge ratio remains fairly modest – 1 to 6.6.²⁶ Typical courtroom staffing is relatively limited – ranging from two to five professional or semi-professional assistants (deputy and senior assistant registrars, interpreters, and a clerk) plus one nonprofessional employee to do routine tasks. The reform measures temporarily transferred some courtroom staff to the central case management area, but it appears that future plans will return them to the judges. Given the generally high quality and good preparation of the staff, the current ratios do not seem to be a problem. Regions (e.g. Latin America) with far higher ratios rarely seem to get as much out of their relatively less prepared but far more numerous staff.²⁷

²⁶ It should be remembered that we are including Judicial and Legal Service personnel as judges, a fact which reduces the ratio considerably.

²⁷ Based on data for Paraguay (World Bank, 2005a) and Mexico (Hammergren et al, 2009).

Financial and Other Administration

28. The Judicial Budget is divided into three parts, two of them managed by the Judiciary itself. The development budget (largely for construction, but also IT contracts) is handled by the Legal Affairs Division within the Prime Minister’s Office.

29. Expenditures for emoluments (salaries and allowances) for superior court judges are charged directly to the Federal Consolidated Fund. The requested allocation (part of the Charge Vote) is not subject to debate by Parliament. However, actual disbursements and expenditures may be less than what is authorized as the latter is based on the number of seated judges as well as those whose hiring is anticipated. An apparently overly ambitious estimate of new appointments caused real expenditures in 2008 to be only 68 percent of allocations. Similarly in 2010, expenditures were 74 percent of the amount authorized. Again, the reason is that the anticipated appointments were delayed and for this reason the expenditures were less than what was requested.

30. All other recurrent costs including emoluments for subordinate court judges are issued through the annual Supply Bill, and are reviewed by the legislature. Emoluments are always authorized and paid (even when as in 2008, expenditures are slightly more than the allocation), but other parts of the request may be cut, as they were for 2011, as part of an across-the-board belt tightening measure. Over the four years of budgets reviewed (2008-2011, the latter only for allocations), the percentage accounted for by salaries and allowances in the Supply Vote portion has risen from 47 to 57 percent. When the Charge Vote (superior court judges’ emoluments) is added, the percentage going to personnel ranges from 55 (2008) to 68 percent (2011). Given that expenditures on infrastructure and IT contracts are not included, this is a relatively modest percentage as compared to CEPEJ (2010; 25) figures from Europe which include both and showed salaries as accounting for 25 percent (Ireland) to over 90 percent (Greece) of total expenditures, with most countries in the 60-80 percent range. As noted, Malaysia’s Judiciary currently has more allocated positions than it has managed to fill, and the 10 percent cut in its 2011 Supply Vote budget may strengthen its apparent resolve not to add employees who may not be needed. As it is, the cut represents some drastic reductions in other line items, and puts a damper on plans to increase its training activities, for example.

Table 3: Budgets for Judiciary, 2008-2011, in RM

Budget	2008 (expended)	2009 (expended)	2010 (expended)	2011 (allocation)
“Judicial”	48,057,607	69,618,937	80,188,525	100,000,000
Operating	275,808,037	318,463,936	315,862,662	285,000,000
Development	108,843,714	130,679,343	239,866,000	Not Available

Source: For Judicial and Operating budget, figures provided by the Chief Registrar’s Office; for Development Budget, Federal Court of Malaysia (2011).

31. It also should be noted, in line with comments made in the Judiciary’s recent publication on its reforms (Federal Court of Malaysia, 2011; 177-178), that its use of its operating budget is somewhat constrained by the fact that the Controlling Officer for these expenditures is the Chief Secretary to the Federal Government. This means that the latter, and the Treasury, must approve many specific expenditures for items beyond salaries, rentals and allowances, a requirement which the Chief Registrar’s Office describes as onerous and the cause of many delays.

32. The Development Budget is no longer managed by the Judiciary, but since 2003 has been handled by the Legal Affairs Division in the Prime Minister’s Department. Amounts allocated rose substantially between 2008 and 2010, as shown in the table below. Part of the increase is accounted for by the two large IT contracts (totaling RM 130,000,000 or roughly US \$43.3 million) which the Division also managed for the Judiciary, in a role described by both parties as “project manager.”

33. Typically, however, the major portion of the Development Budget has gone into new infrastructure, with 60 buildings scheduled for construction between 2005 and 2010. The Division has since been asked to use a two-year planning period and there are other signs that it may have to cut back on its former ambitious plans. Except for their role in developing the IT contracts, the Judiciary and its Chief Registrar’s Office have very little input to these plans, and as they note, “no direct role in the planning, implementation, architectural design, and even timing of the Courts’ development and infrastructural projects” (Federal Court of Malaysia, 2011; 106). This does not appear to be a desirable situation, especially as some of the infrastructure projects seem to be decidedly “overbuilt” for local needs. In fact it was reported that the courts are now renting out space in some of the

underutilized buildings to other government agencies (including the AGC’s DPPs²⁸).

34. It also bears mentioning that the Judiciary generates substantial income for the Public Treasury in amounts falling not far short of allocations for its operating budget. According to Court sources, in 2008, revenues from fines, penalties and administrative and court fees totaled RM 216,767,600. For 2009 they were RM 251,984,023, and the estimated amount for 2010 was 257,541,586. These monies are not retained by the courts but are credited to the Federal Consolidated Fund. Although this is not the case in Malaysia, some courts in other countries have argued that they should retain all these funds, in addition to their normal budgetary allocations. Among donors this is sometimes seen favorably as a way to make the courts “self-financing.” However, before any one jumps to the conclusion that the practice should be adopted in Malaysia, it is worth a short discussion of the pros and cons.

35. First and foremost, when courts make this argument (as they do in many countries) they seem to forget that they are not the only public agencies generating funds. If they deserve to keep what they take in, would one want to make the same argument for the tax and customs agencies, for prosecutors and police going after stolen assets or confiscating properties and bank accounts belonging to convicted white collar criminals? In some cases, in the form of an incentive, these other agencies (especially investigative police, as at the U.S federal level)

²⁸ A potential downside of this arrangement is the risk of collusion, or at least the appearance of lack of sufficient independence, between the prosecutors and the judiciary. However, it also has the advantage of placing several criminal justice institutions in one spot (a goal sought in other countries, especially in Latin America). The more certain problem is that the buildings for whatever reason exceed current needs and thus that funds might be better invested in other activities.

are allowed to retain a part of what they recuperate (often to cover investments to improve their work), but the incentive argument works better there as it applies to their principal functions. Collecting fines and fees can hardly be regarded in the same fashion for the courts, although admittedly for courts that are very careless about collections, this might be a means of encouraging them to be less so.²⁹

36. Second, even as an incentive, there are several downsides to this practice. It can create perverse behavior and a distortion of work practices, leading members to be overly aggressive in their work, or alternatively exceedingly permissive, as is the case when courts can charge by the action and thus might permit unnecessary motions and appeals simply because they generate more funds. In the case of fees there are also access issues – and policies would be needed to ensure they did not exclude those unable to pay. Finally, letting agencies keep their “own funds” complicates rational budgeting both for the benefitted agency (which may tend to regard this as a windfall) and for the government as a whole. In short, for courts (and conceivably for other agencies) the practice is of questionable value, even if, as the Judiciary has proposed, the retained funds are only a portion of the total and moreover are targeted for a specific use (in this case training). What is important is that the government recognize that courts do generate revenue and that this is thus one more reason to ensure they have sufficient budgets to do their work well, and so attract more users.

37. Until the budget cuts of 2011, the Malaysian Judiciary appeared to have ample funding to carry out its normal activities. Whether the subsequent cutbacks in some line items will present problems remains to be seen. Arguably it might be able to do better programming of the non-fixed items, but the real issue is the Development Budget and its nearly non-existent coordination with the courts’ own plans. Were it again be given control this budget, as the Judiciary would like, the Court would have to do its own staffing up to ensure adequate planning and supervision of implementation. An intermediate solution might be to let Legal Affairs continue to manage the infrastructure projects, but have the Court plan them. This, however, would still require some staffing up as the Judiciary does not have the engineers or architects needed for this

purpose. On the other hand, if, as the Judiciary appears to believe, the infrastructure investments are excessive, allowing the Judiciary to have a say over the use of the Development Budget could free up moneys for other needs, including for the training program it would like to introduce. In parallel, the Judiciary would be advised to strengthen its own planning capacity. It currently seems to do quite well in transferring, adding and subtracting personnel to meet short-term needs, but as it moves into a second stage reform, it will require more sophisticated approaches taking into account more variables than short-term growth in demand and developing a series of alternative scenarios based on differing medium-term forecasts and goals.

²⁹ This is because their primary function is resolving disputes by applying the law – collection of legal fees and fines in many countries is not even done by the courts.

CHAPTER II

The Reform Program: 2008 to Present

Reform History and Overview of Objectives

38. Historically Malaysia's Judiciary, often trained in England and accustomed to the traditional British manner of operations, was always conservative in outlook, but until the late 1980s was generally regarded as relatively honest and reasonably independent. That judges did not rule contrary to government preferences when such issues arose was largely a matter of shared values, not of political compliance. According to some sources, Malaysian judges did exercise a conscious amount of "judicial restraint," preferring not to second guess executive agencies or the Federal and State legislatures in the exercise of their constitutionally defined functions (Chan, 2007). However, this is also very much in line with the English tradition, whereby judicial review of executive actions, policies, and laws was similarly constrained.

39. It is generally agreed that since the late 1980s, the Judiciary as a whole went through nearly two decades of declining performance and decreasing public confidence. Cases commonly took unpredictable lengths of time to resolve, depending on the disposition of the judge and the actions exercised by the lawyers. Each judge operated in relative isolation, leading to considerable variation even in how cases were processed, and an often disorganized management of internal administration. For example, when the current Chief Justice and his team visited a series of courtrooms in late 2008, they found the files in complete disarray, piled everywhere inside and outside the courtroom.

40. The litany of common complaints is not that dissimilar from those found in many other countries and regions: politicization of appointments and decisions, corruption, inefficiency, delays, disorganization, inadequate and usually unreliable performance statistics or even counts of pending cases, arbitrary and often unpredictable decisions as well as handling of filings (which might be returned because the admitting officer did not like the way a name was spelled), disorganized filing "systems", and a generally poor public image. These complaints had been building over the 20 years following the "judicial crisis" in part in response to concerns about external interference and in part as a result of the growing demand for quicker and better quality responses.

41. Prior to 2008, there had been some attempts to reverse this situation, but they did not prosper. There were a few important legal changes, such as the 2000 introduction of pre-trial case management into the Rules of the High Court. This move was intended to take control of the progress of a case out of the hands of the attorneys and give it to the court, thereby reducing a good deal of unnecessary delay. Unfortunately, it appeared not to have had much immediate impact.

42. The minimal impact was not for lack of trying. During the period between 2002 and 2005, the courts made a first stab at improving their efficiency. Reportedly, the proponents were largely High Court judges, and the series of Chief Justices were not actively involved. There was thus less a reform program than a series of pilot efforts, many of them based on practices the judges had seen in other countries during visits and international seminars. They included a first effort at automation beyond the use of computers as simple word processors. In Sabah and Sarawak, a firm was hired with local funds to design an automated case management system, which after being applied in 11 pilot courtrooms was abandoned as a "failure." The experience is not unusual in court automation and it is likely that the failure was as much the result of minimal support from the Judiciary itself as of any flaws in the system. In any event, the software continues to be used in some courts to this day pending installation of that developed under one of the two (Formis and SAINS) contracts now in force for Western and Eastern Malaysia, respectively.

43. Additionally, a practice which would be adopted in the current reforms – the designation of "managing judges" to oversee the work of their colleagues -- was tried out. Those involved in the experiment report that these managing judges often had difficulty establishing management authority over the other judges because they were usually selected

from among judges at the same level. The major obstacle, it is generally agreed, was the lack of support from top management because they simply had no interest.

44. Thus, while the current reform program was not without precedents, it was only in October 2008, when the current Chief Justice, Tun Zaki Tun Azmi, was appointed, that those within the courts who wanted reform finally found their champion. The Chief Justice was unusual in having come from outside the court system (with 22 years in private practice or working as a government lawyer), and experiencing a rapid rise to the top. Appointed to the Federal Court in September 2007, within two months, he was designated President of the Court of Appeal where he began an internal reform, aimed at organizing the Court's archives and eliminating dead pending cases or "backlog" as the Court prefers to call them.³⁰ Using techniques (an inventory of pending cases, reorganization of the filing system, and targets for closing or processing the oldest files) which would later be applied system-wide, the number of pending cases over two years old fell from 8,000 to about 1,600 within the first 11 months of the Chief Justice's tenure.

45. In October 2008, inspired by his success in the Court of Appeals and motivated by his experience on the other side of the bench, Chief Justice Zaki met with other superior court members, and especially his colleagues on the Federal Court, to discuss a reform program. Events moved rapidly, and by late 2008, he had convinced the Prime Minister to put money into the effort, securing RM 69 million (US\$ 23 million) for an automation program.³¹ While a contract was let in mid 2009, the Chief Justice and his team had already gone ahead with some early steps – undertaking a manual inventory of the largest mainland High Courts, reorganizing their files, and beginning a backlog reduction program. This would mean that by the time automation came on line, the number of pending cases to be dealt with was much reduced and the courts finally had an accurate manual registry of all their caseloads.

³⁰ Technically speaking it would be more correct to call this "pending caseload carried over from one year to the next," as backlog really refers only to that portion that have exceeded the legal time limits for their processing. Since no such limits exist in Malaysia, real "backlog" doesn't exist either. However, that is too fine a point to make, and in any event, the time limits imposed less formally through court directives can serve that purpose as well.

³¹ The amount was subsequently increased to RM 100 million, or US \$ 33 million, with another RM30 million or US \$10 million for the separate Sabah and Sarawak contract.

Strategy

46. In the following sections the individual reform components are discussed but a brief review of the overall strategy is provided first. The initial goal of the reform was to reduce backlog and accelerate processing of new cases. It was decided to focus on the High Courts in the court centers receiving most cases. The centers selected varied over time, and now include Kuala Lumpur, Shah Alam (the capital of an adjoining state), Selangor, and in some sense a part of metropolitan KL, but which also was known as the "black hole" because of the notorious levels of disorganization and delay), Penang, Johor Bahru, and Ipoh. Putrajaya, the seat of the Federal and Appellate courts, was also included, and over time a few other districts have been added. Sabah and Sarawak started a little earlier (the current Chief Judge was appointed in 2006 and a contract with another firm was used for automation).

47. Although there was an early interest in automation, the necessary delays in letting a tender, choosing a firm and allowing the contractor to develop a product meant that for the first year much of the work was done through manual processes. Whether or not this was also a strategy (or just necessity) it was an excellent way to begin. With allowances for some overlap of phases (and the understanding that the main project was applied to Western Malaysia with Sabah and Sarawak following similar processes but with their own timetable), the steps, roughly in the sequence they occurred, were as follows:

- (a) An inventory of cases held in courtroom files throughout the country (not just limited to the targeted courts).
- (b) The purging of "closed cases" and the separation of inactive ("hibernating") cases for rapid closure or further processing (depending on the interest of the parties). Targets were set for the elimination of older cases. The initial goal was the termination of all cases over a year old by end of 2011 (currently revised to mid 2012) for High Courts in target districts, and guidelines to this effect for other courts at all instances. This is explained in detail below.
- (c) Introduction of "case management" (pre-trial processing of cases) and a tracking system to advance the backlog reduction process. This was accompanied by the reorganization of High Court judges and staff in the target districts and the designation of "Managing Judges" to oversee the exercise.

- (d) Introduction of Court Recording and Transcription (CRT) equipment for most of the courts in West Malaysia; this is still underway but began as soon as the contract was awarded (mid 2009).
- (e) Development of an automated Case Management System (CMS), including a principal module and module for e-filing.
- (f) Installation of the CMS (henceforth, CMIS³²) in the target districts (partially installed by end January, 2011, with full installation scheduled for end June).
- (g) Creation, most notably in Kuala Lumpur, of High Court divisions to handle more specialized matters (Admiralty, Intellectual Property and Islamic Banking). The first two had been created prior to the reform, but they, like the new Islamic Banking Division, were also given targets for speedier processing of cases.
- (h) In target districts, creation of “new” courts (specialized High Court divisions) to handle recent cases and their reorganization, eliminating the two tracks (not needed any longer) and the external case-processing unit, but leaving judges with targets for productivity and delay reduction. Again this is explained in detail below.

48. When told this was a “textbook case” of how to conduct a program to reduce judicial backlog and delay, the Chief Justice accurately pointed out that “there is no textbook” which the Court could rely on to guide its reform planning. However, although this was admittedly a trial and error process, the Court drew on experiences it had seen elsewhere in refining its homegrown reform strategy.³³ Thus, in a period of slightly more than 2 years, the Malayan Judiciary has designed and conducted a model program and one that merits study by those contemplating any reform. There have certainly been a few minor missteps, and these have already been corrected. The Judiciary has also adopted a series of additional innovative practices, only a sample of which can be covered here.

³² The various uses of the acronym CMS creates some confusion. It is applied to pre-trial processing of cases as practiced by the MJUs, to the type of software developed by the two firms, and has been adopted by Formis as the name for its own version. For this reason, the term CMIS (Court Management Information System) will be used below to refer to the *type of system* being developed by Formis and Solsis.

³³ Singapore’s earlier and more slowly implemented reform (Malik, 2007) was obviously an example (and a challenge inasmuch as Malaysia seems to see Singapore as an obvious competitor), but visits to other common law countries also proved useful.

49. There are three remaining questions, but none of them detracts from the progress made. They are also addressed in more detail in later sections:

- (a) How will the program be extended through the rest of West Malaysia? This is largely a question of timing (and funding) but as the initial program focused on the most congested court districts first, its complete replication is not so urgent.
- (b) How will the Sabah and Sarawak program (and especially its IT system) be joined to the Western Malaysia model?³⁴
- (c) What will be the next stage? The first phase (“the reform”) laid an excellent base for some sort of second phase program, but so far there has been no time to focus on it in any detail. In any event, finishing and making necessary readjustments to the first phase will probably take several more years, giving the courts time to reflect on the aims and content of their second phase program. These readjustments might include strengthening the Judiciary’s own IT Department.

Reform Components

50. The Malaysian reform was so fast-moving and so well-integrated that it is difficult to separate the components. The discussion below thus does not quite match the steps listed above, but still attempts a chronological ordering.

Case Inventory (File room audit) and Improved Filing System

51. Based on his successful experience in the Court of Appeal, the first step undertaken by the Chief Justice was to call for an inventory of all cases held in courtrooms and the establishment of a better filing system in each. Courts were provided with new file cabinets, but otherwise this was a no-cost process depending on the efforts of existing staff. In doing the audit and the reorganization, cases were divided into three categories – those that were effectively closed, those that were “hibernating” (inactive and thus potentially subject to closure), and the active cases. The latter category was divided by years and put into the newly organized archives with a manual system for ensuring that the removal of files for whatever purpose would be recorded – thus making it easier to retrieve them and

³⁴ Lack of time has precluded fully addressing this question in this report.

also avoiding intentional or unintentional file loss. Closed cases were sent to the permanent archives (or destroyed) and inactive or hibernating cases were separated for their own follow-up. They were also divided by year as the target was to eliminate the older cases first.

52. The process was, as all participants admit, far from perfect, and when subsequent inventories were done later in 2009 and 2010, it often developed that many cases had been missed. Thus the number of pending cases in any court might suddenly increase by substantial amounts. This is not unusual, especially when courtroom storage of files is very disorderly (and it certainly was as documented in the before-and-after photos kept by the Court). Judges or staff may have taken files home, stored them in their desks or under papers, or placed them in other unlikely locations.³⁵ Additionally, as a result of the audit, files might be transferred from one court to another and thus not captured by the receiving court in its initial count. Despite such setbacks, the initial exercise significantly decreased the number of cases held within courtrooms and gave judges and staffs a far better idea of their real workload.

53. The inventory is an absolutely essential first step in any delay and backlog reduction program, and it is also critical for any other reform goal. However, because it is boring, time consuming, and does not feature advanced technology, it is often resisted. It also is often postponed on the mistaken assumption that it can only be done following the introduction of automated systems. This belief is not only erroneous, but can also lead to perverse results. If an inventory and the subsequent ordering and initial purging of cases are not done first, automation becomes much more difficult. This is first because any type of automated registry will have to include cases that should have been closed already, and second, because the information collected during the inventory on caseload composition and procedures and practices that cause unnecessary bottlenecks will not be available to guide system design.

³⁵ In one such inventory conducted by an outside firm in a Central American district court, once the firm thought it had finished, someone opened a backroom only to find hundreds of additional files.

54. Equally critical is the immediate introduction of an improved courtroom filing system so that things do not revert to their prior state.³⁶ Again this can first be done manually, as it was in Malaysia, by using cards and check-out lists to ensure files removed from the storage room can be readily located. Although the overall reform focused on a smaller number of court districts and courts within them, the inventory and improved storage systems were introduced nationally, and all courts received modern file cabinets to ensure cases could be stored properly.

Case Management and Tracking system

55. Initial purging focused on removing closed files, but a better system was needed to handle the inactive cases. This combined a more systematic approach to case management (here understood as the preparation of cases for the judge who would decide them) with the introduction of a “tracking system.”

56. ***The Tracking System:*** Contrary to ordinary usage, in the context of judicial reform programs, case tracking does not mean “following cases” but rather dividing them into categories for separate treatment. This is usually based on the anticipated amount of work or type of treatment they will require. It is also called differential case management although that term often involves more sophisticated differentiations than what was first introduced in Malaysia.

57. The tracking system drew on a series of observations made by the Chief Justice and others in his reform group (essentially a majority of Federal Court justices as well as the President of the Court of Appeal and the Chief Judges of the two High Courts). Judges handling civil matters in particular commonly have two types of cases – those requiring the presentation of oral evidence, and thus full trials, and those involving only the revision of documents (trial by affidavit). The latter category includes both principal cases and interlocutory motions and appeals connected to another case (which may have had or will eventually require a full oral hearing or trial). Because affidavit cases can be handled more quickly, judges faced with a quantity of both types tended to focus on

³⁶ In several donor-sponsored reforms, stand-alone inventories (no follow-up) have been conducted, but this implies that the “snapshot view” of caseloads will be outdated as soon as it is completed. If one is going to take the time to do an inventory, it only makes sense to introduce an improved filing and case registry system immediately, and neither one requires automation.

the affidavit cases, postponing those involving full trials. Although also affecting affidavit cases (as regards both document submission and the final short hearings), the practice of leaving full-trial cases for later was encouraged by the tendency of lawyers to request postponements – because they were not ready, because their witnesses had not appeared, because of scheduling conflicts and so on.

58. Thus, in continuing with the backlog reduction program (beyond what could be done by eliminating closed cases), the reformers decided to divide judges and cases into two “tracks” – the A track (affidavit cases) and the T track (cases requiring an oral trial).³⁷ The principal tracking system (A and T tracks) was introduced gradually over 2009 and 2010 for civil and commercial divisions of High and some Subordinate Courts:

- Kuala Lumpur High Court (Civil and Commercial Divisions) February 3, 2010
- Shah Alam High Court, July 1, 2009
- Georgetown High Court, October 1, 2009
- Georgetown and Butterworth Subordinate Court, October 15, 2009
- Johor Bahru High Court, November 2, 2009
- Johor Bahru Subordinate Court, November 16, 2009
- Malacca, Seremban and Muar Courts, January 1, 2010
- Ipoh High Court and Subordinate Court, January 15, 2010
- Alor Star High Court and Subordinate Court, March 1, 2010

59. **Case Management:** The tracking system not only involved dividing the judges; it also required a reorganization of staff. Deputy and senior assistant registrars who had been assigned to individual judges were put into a Managing Judge Unit (MJU), usually one for each Division. Performance in each district (state) was supervised by a Managing Judge. Most of the latter came from the Federal Court, but Appeal Court Judges

³⁷ There was also a third M (for miscellaneous) track covering applications involving oral and affidavit evidence for appeals and FLJC (family, land, judicial review, and company winding up) cases. Its use was limited to Shah Alam, as an innovation of the Managing Judge overseeing that complex, who found this the most practical way of dealing with that center’s less complex organization, as compared to Kuala Lumpur, and the fact that these areas tended to be handled by only one judge (thus making dual tracking – the A and T system – less feasible.).

Use of Court Rules to Enforce Faster Case Processing

Like other common law systems, Malaysia relies on Court rules (in its case developed by a Rules Committee, pursuant to Section 17 of the Courts of Judicature Act) to define many details (including timing of case events) usually set out in procedural codes (which require legislative enactment) in civil law countries. In many common law developing countries, the Rules may exist but are not enforced. In Malaysia, the Court took full benefit of their presence in its reform, and also used a series of directives (for example those setting targets for new case processing times) to supplement them. Among other details Malaysia’s High Court Rules set deadlines for dates of hearings and also give the “court” the ability to decide on adjournments. These two items have been critical for speeding up processing of new cases. This is a matter of discipline, not law (as Court Rules in other common law countries often include similar provisions), and both judges and lawyers have simply had to toe the line.

and the High Court Chief Judges were also assigned to this role. Since the Managing Judge (who also performed his other duties in whichever court on which he normally sat) was not always present, a designated “managing deputy registrar” or in one case an “organizing judge,” selected from among the High Court judges, supervised day-to-day operations for each MJU and the courts it served. The latter officers “fixed” cases (assigned them to judges), scheduled hearings and trials, and generally tracked performance. The MJUs report directly to the Chief Judge.

60. In the MJU, staff prepared cases for handling by judges in either of the two tracks (or in the third M Track where it existed), ensuring that the parties had submitted the necessary documentation, lists of witnesses, and arranged for summonses for the latter. They could also close cases administratively (for lack of action or expiration of the time limits), encourage settlement, and make basic decisions on pre-trial matters (although these decisions might be resubmitted by the parties to the relevant judge). It is well to remember that as members of the Judicial and Legal Service, the deputy and senior assistant registrars usually had worked as magistrates previously. This process, nearly entirely effected through Court Rules and Federal Court directives and circulars, was resisted by some judges because it took pre-trial matters out of

their hands, and by many lawyers, because it imposed strict deadlines and usually kept them in the dark about which judge would hear the case until after the pre-trial management when the case was finally fixed. However, it proved extraordinarily effective in moving ahead both old and new cases.

61. **Further Court Reorganization:** Tracked cases initially included both pending cases and new entries, but as there was a further emphasis on eliminating the older cases, this could have created delays in processing new filings. While two sets of goals were established – one relating to the gradual elimination of older cases in batches (first those entered before 2005, then before 2008 and so on) and the other to resolving all new cases within fixed time limits (always under a year for full trial cases and less for affidavit cases), it was apparently the first that got priority. Ageing lists thus only went by year of entry and did not “age” new cases by months. However, any such problem was soon eliminated by a still newer policy, adopted first in Kuala Lumpur and then in Shah Alam. This entailed the creation of New Commercial Courts (NCC) and then New Civil Courts (NCvC) which were to receive only cases filed after their creation. As the backlog was reduced, judges from the two other tracks were transferred to these new courts (physically located in the same buildings – this was a change of nomenclatures and also of working rules, not of location) along with the deputy and senior assistant registrars no longer needed in such quantities in the Managing Judge Unit. The new model will thus return to the former courtroom organization, allowing each judge to handle both A and T track cases and having case management done by their own staff rather than by a separate unit. This is not quite full circle as judges will now have targets for case resolution times. In the NCC and NCvC, the overall goal is to resolve all cases in 9 months or less. As discussed in Chapter III, this goal has been met.

62. This entire process (tracking and reorganization) was most fully developed in the Commercial and Civil Divisions of the High Courts in the five target centers. Only a few session courts adopted the tracking model, and it apparently was not taken to the remaining court centers for any level court. However, if in a slightly diluted form, the practices were imitated, and moreover the same targets applied across the court system – reduction of backlog so that by mid 2012, there would be no pending cases more than a year old, and speedier processing (with the target durations reduced over the course of the reform) for civil and commercial cases in particular.

63. **Application to Criminal Cases:** As discussed in a later section on the separate crime reduction program, efforts to apply these goals to the criminal caseload have been somewhat less successful. Backlog has been reduced if not as dramatically, and there are instructions for limiting adjournments and setting time limits for preparatory activities. However, the Judiciary as a whole feels it cannot be as strict with these measures in criminal matters because of the values involved. These include both an interest in facilitating prosecution and in giving the defendant an opportunity to organize his/her defense; both parties commonly encounter problems in getting their witnesses to court, and the latter’s absence is a common justification for adjournments. Moreover, except for interlocutory motions and appeals, criminal cases are not decided on affidavits but rather require full trials. When the recently enacted plea bargaining measure is implemented, the length of trials could be substantially reduced and many of the factors contributing to their duration (failure of witnesses to appear for example) eliminated.³⁸

64. As regards criminal justice a few additional comments are in order. First while there are some very old cases in the backlog, they are few in number and the major complaint about criminal justice is not delay but rather the very low number of crimes successfully investigated and adjudicated. The analysis provided by the Prime Minister’s Performance Management and Delivery Unit (PEMANDU) (2010) indicates that of the 2.5 million crimes reported in 2009, less than 10 percent resulted in the charging of a suspect and only 5.6 percent reached a verdict. Figures for the 40,738 violent crimes reported were 13.7 percent resulting in a charge and 8.1 percent reaching a verdict. Verdicts included not only convictions and acquittals but also DNAA (discharged not amounting to an acquittal) which is to say the case was closed without a verdict, but might be reopened later. However, most of this is not a problem of the courts but rather of the police and the prosecutors. The courts only get involved once a suspect is charged. The larger problem, in the eyes of the public, is the ineffectiveness of the police and the prosecution which results in only few of the crimes actually reaching the courts. The same analysis did note that judges were responsible for 23 percent of the adjournments (adding to delays and probably the chances of an eventual

³⁸ The law has been enacted, but its implementation has been delayed because of concern about some details.

DNAA) but also recognized that the courts had already made significant strides in ending that practice. Statistics supplied by the Court indicate that by mid-July (six months into the program), judge-caused postponements were at 18 percent.³⁹

65. Second, as regards the entire criminal justice system, there are ample criticisms, not necessarily shared by the wider public, of its hard-on-crime approach, especially as regards the severity of penalties, the inadequate supply of legal assistance, and of course the large number of death penalty cases (roughly 30 a month heard). However, this approach is based on law, not judicial preference (although judges seemed convinced of its necessity). Finally, criminal cases represent only a fraction of overall workload. This could change if some of the additional crime reduction measures are successful (see section below on the PEMANDU program), but until it does, any effort to reduce court backlog will logically emphasize the non-criminal cases, first because they are a majority and second because the complaints about delay are focused there.

66. **Additional Variations:** The process described above is based on observations and interviews in the main court complexes in Kuala Lumpur and Shah Alam. These are the largest and most organizationally complex judicial centers, and they feature multiple Sub-Divisions for their Civil High Court as well as greater specialization of their sessions courts. Since some of these specialized Sub-Divisions or courts included only one judge, it was impossible to create two judicial tracks to handle their cases. This was one of the reasons for the introduction of the M Track for the so-called FLJC (Family, Land, Judicial Review and Company Winding-up) cases in the Shah Alam courts. Nonetheless the results have been positive and the single-judge High Court Division handling family matters in Kuala Lumpur, for example, was resolving nearly 2,000 affidavit and full-trial cases a year and had kept the carry-over from one year to the next at a constant and reasonable 500 cases.

67. This was also true of the three additional Divisions located in Kuala Lumpur – Admiralty, Intellectual Property, and Islamic Banking – as well as the Special

Powers Division of the High Court. The latter (RKK) is a multi-judge Division. It hears civil appeals from the Kuala Lumpur subordinate courts, issues relating to the Legal Profession Act, and judicial review applications against administrative decisions. In January 2009, its backlog was described as “alarming” and moreover affected the final disposition of cases in the subordinate courts awaiting its decisions. Rather than dividing cases into tracks (which made little sense as these were largely affidavit cases), its judges were each assigned a daily quota of cases, working hours were extended to Saturdays, and adjournments were strictly monitored. By September 2010, the number of pending cases had been reduced by two-thirds, from 3,759 to 1,228.

68. It is likely, but would have to be verified through site visits, that other districts had their own variations, but all shared the same goals of reducing backlog and so improving the ageing list (over time fewer and fewer cases from prior years) and accelerating the handling of new cases. . It was reported, however, that a so-called “Blitz” was exercised in many targeted centers (e.g. Shah Alam and Penang). This entailed sending judges from other divisions to assist judges doing criminal appeals from the subordinate courts to clear all the pending cases.⁴⁰

An Alternative and Less Successful Approach to Backlog Reduction

In two Latin American countries with problematic civil backlogs (Peru and Colombia), the Judiciaries chose to create special, single-judge courts to handle older cases, transferring them from the most congested regular courts. No initial inventory was done, no targets were set, and the results have not been carefully monitored making it difficult to evaluate their success. However, anecdotal evidence suggests it has been limited. Among other reasons this is because, as a Peruvian observer noted, the judges transferring their cases now have less reason to work faster, and the temporary judges in the new courts, interested in keeping their jobs, have little incentive to process their caseloads rapidly. Both countries already had considerably more judges than Malaysia (although Peru has about the same size population) and individual workloads, to the extent they can be estimated were at (Peru) or below (Colombia) the Malaysian levels at the start. Both countries use panels of judges for more complex cases, but most of the congestion arises in single-judge “courts.”

³⁹ “Judge caused adjournments” are often a result of a judge being ill or on maternity leave and the failure to appoint a substitute. The Judiciary has addressed this issue by sending a senior assistant registrar or deputy registrar as a substitute. In other countries (World Bank, 2010 on Ethiopia) it also covers instances where a judge declares an adjournment because of not being prepared or for another, non-specified reason.

⁴⁰ A World Bank study (2004) reported a similar exercise in Brazil.

69. The Court of Appeal and the Federal Court were not excluded from the process. Within the former, four special panels were set up to facilitate early disposal of pending civil and criminal cases. The fourth and last panel hears appeals from the New Commercial Courts to ensure that the rapid processing in the High Court is not defeated by a slow appellate process. Although cases are fixed to panels earlier on, the members of the panels rotate and are not assigned till the case is ready to be heard. This practice is intended to reduce any effort by lawyers to influence their decisions or to withdraw the case so they can get a “better panel.” Late “fixing” of cases for multi-judge High Court divisions is practiced for the same purpose.

70. **Results:** More specific information and statistics on the results of this and the prior exercise are given in the chapter on achievements. By the end of April, 2011, pending cases in all courts had been reduced by roughly 66 percent (see next chapter for details). The courts have continued to reduce the amounts carried over and moreover have maintained a clearance rate of 100 percent or higher. Monitoring of caseloads and disposition rates has been further refined, although still having to be done manually for the most part.

71. This has, however, affected the workloads of the Court of Appeal and most probably will have a similar effect on the Federal Court because as more cases are decided, more appeals are entered. Thus, whereas appeals filed at the Court of Appeal in 2006 totaled 2,368, in 2009, they reached 5,045 and in 2010, totaled 6,412. Leave-to-appeal filings have likewise increased dramatically – 1,052 entries in 2009 and 1,711 in 2010. Consequently, the number of pending civil and criminal appeals in the Court of Appeal, after an initial reduction, had reached 10,209 by the end of April 2011 – as compared to the 9,714 pending at the end of 2008. Nonetheless most of the COA’s pending cases as of April 2011 were from 2009 and 2010. Pending civil appeals as of the end of 2010 included only 204 civil and 72 criminal cases from 2007 or earlier.

72. As compared to backlog reduction programs conducted in other countries (see box), and usually depending on the creation of special “backlog reduction courts” and the addition of more judges, Malaysia’s results have been far more positive and are also monitored and documented (something often lacking in other backlog reduction programs, although see World Bank 2010 and Walsh 2010 on a comparable experience in Ethiopia).

Additional Personnel Policies

73. The reform did not hinge on the usual “first step,” adding judges, but it soon became obvious that more would be needed. For the High Courts this posed a problem as they already had the maximum number of judges stipulated by the Constitution. This problem was resolved by the use of short-term Judicial Commissioners. These individuals were not assigned to special courts (as in the Latin American cases), but rather to ordinary duties, usually in authorized but unfilled High Court positions. Their performance is also monitored and over time, the best performers are given permanent tenure, thus allowing for the promotion of some existing High Court judges to the Court of Appeal (where the numbers are still under the constitutional limit and moreover, caseload has increased). As numbers of subordinate judges are not similarly limited, some additions were made here. However, additions are based on an analysis of caseloads and at least eleven subordinate courts have also been closed for lack of demand. Thus, despite the addition of judicial commissioners (many of them only intended as temporary appointments) the reform has relied more on increasing efficiency than increasing personnel to meet its goals.

74. The emphasis on increasing efficiency meant that the incentive structures had to be modified, as there was no guarantee that judges and registrars would simply leap to the challenge. One way of doing this was through the requirement for daily and monthly reports on caseload movement. The daily reports from each judge go directly to the Chief Justice who monitors a certain portion of them as they come in and communicates the problems to the respective Managing Judge as they are noted. The monthly reports are published (no longer with names on them, but judges can still see where they stand comparatively). Managing Judges make periodic visits to courts to do surprise checks, and all judges are also given a series of targets, all of which were discussed in periodic judiciary-wide conferences. Common targets include those for reducing backlogs and for the resolution of new cases within fixed time limits. Additionally, as the program has gone on, judges in the track system are allocated specified numbers of cases on a weekly basis, based on estimates as to reasonable amounts. There has also been a more recent attempt to weight cases (based on relative complexity) so as to ensure more uniformity in the composition of caseloads. In the new civil and commercial courts, the practice has been to introduce the courts two

at a time and let the registrar assign all incoming cases arriving during a four-month period to one or the other, using the weighting system as well.

Use of Specialized Courts

75. In contrast to practices in other common law countries (the U.S, England), Malaysia seems to have a preference for specialized courts and this is reflected in the overall reform program. The Commercial and Civil High Court Divisions were already standard and Civil Courts in Kuala Lumpur also has a Family Division. In Kuala Lumpur there were already additional Divisions for Intellectual Property and Islamic Banking matters. A new Admiralty Division was created in 2010. The addition of the New Commercial Courts (NCC) and New Civil Courts (NCvC), while temporary (as over the longer run they will be the only Commercial and Civil Divisions), follows on the tradition if for slightly different reasons. Specialization is most pronounced in the High Courts in the most congested districts, and there even subordinate courts are further specialized – for example in Kuala Lumpur, in corruption, money laundering, immigration, narcotics, intellectual property, various banking offenses, and claims in tort. Elsewhere, magistrates, sessions and even High Courts may hear all manner of cases, as they are too few to make specialization feasible.

76. One further note on specialized courts merits attention. The Malaysian system of rotating judges and especially those in the subordinate courts seems to emphasize specialized courts but generalist judges. This in some sense may contradict the principal argument for specialization – the development of expertise on the topic – since a judge who sits in the criminal division of a High Court one year may serve in a family division the next. The same is true of staff who also rotate. There are doubtless other organizational and logistical advantages to maintaining specialized jurisdictions (e.g. the greater ease of tracking cases when there is less variety in the issues and basic procedures). However, it would be hard to argue that these have to do with judges or staff spending years honing their expertise. This apparent contradiction merits more attention. Except in matters like admiralty law, intellectual property, Islamic banking or complex white collar crime, it is doubtful that the majority of cases require any special kind of knowledge. Judges, however, seem to like the system, reporting (in interviews) that it gives them a good overview of all kinds of cases.

Other Measures to Improve Performance and Eliminate Some Traditional Vices

77. Some of the most important measures here have been the tightening up, through the issuance of court directives of timeframes for lawyers' provision of documents essential to decisions on both affidavit and full trial cases. This has been the crux of the case management process and the effort to prepare cases for their hearing by judges. Additionally, courts, through their managing judge units have taken a more systematic approach to 1) assigning cases to judges; 2) scheduling hearings and other events (which lawyers ignore at the risk of a case being struck out or suffering a default judgment); and 3) setting and tracking performance targets. It bears emphasizing that until now most of this has been done manually as the relevant automated modules are still not in place. Only performance monitoring now uses the automated system (and only at the courtroom or MJU level⁴¹), but case assignments and scheduling must still be done with manual

Setting Targets for Case Processing

In addition to the targets for backlog reduction, the courts have been given targets for processing new cases. These are moving targets – changed (and often pushed up) on the basis of experience. Among those applied to the New Commercial Courts (NCC) in late 2009 were the following:

- *Processing of documents on day of filing*
- *Return date within 3 months for writ summons*
- *Hearing date for Winding up petitions within 2 months of filing*
- *For other cases, case management within 2 weeks of filing*
- *Hearing date for A Track cases before Judge within 2 months of filing*
- *Full trial (T Track cases) scheduled and completed within 9 months of filing.*

Other, more recent targets for other jurisdictions include:

- *Termination of corruption cases within one year*
- *Termination of uncontested divorces within 2 weeks.*

These targets affect both judges and lawyers, and judges' compliance with them is closely monitored.

⁴¹ While the Judiciary has a Case Management Unit (CMU) attached to its Statistical Office, it relies on the manual compilation of statistics supplied by individual judges or the MJUs. Contrary to what its name suggests, the CMU does no "managing" but rather helps the Court get an overview of overall system progress.

tools. This complicates life for the Managing Judge Units (MJUs) and especially for the managing deputy registrars, but the results demonstrate that it is indeed possible and thus a further lesson for courts who claim nothing can be done “until the machines and software arrive.”

78. The Judiciary has also sought to overcome minor, but irritating delays caused by the different requirements placed by judges and their staff as regards ordinary filings. Lawyers not familiar with the quirks of a judge or his/her staff might find their papers returned for corrections. Standardized forms have been introduced, and agreements reached (and recorded in a database) as to how judges’ names will be entered. This became necessary because of the many honorific titles used and differing preferences as to where they would be placed. Finally, there have been attempts to encourage judges to write shorter opinions; this is a perennial problem for many courts, and is usually hard to combat because judges feel it interferes with their independence. Results were not reported, but several of those interviewed noted that setting of the targets for processing cases may be a sufficient incentive on its own, as writing overly long opinions clearly takes more time.

Procedural Changes

79. The reform to date has not relied on extensive changes to laws regulating procedures. One of the most important, the introduction of case management, had been adopted in 2000 as noted above although its effective implementation only began with the current reform and its extension to pre-trial matters for criminal cases was a recent addition. Pre-trial “case management” did exist for civil cases, but it was subject to the same delays the reform has targeted for elimination. Court publications and interviewees mentioned cases that had been “managed” 20 or 50 times without getting to trial. As part of the reform, the courts have, either by modification of their Rules or the issuance of circulars, tightened up some of the timeframes for lawyers’ submission of documents and taking of other actions in the pre-trial (case management) stage and have otherwise worked to ensure that pre-trial preparation moves rapidly and that lawyers do not arrive on the day of a pre-trial audience, hearing or trial with another request for more time. For example, the witness statement is now used in civil cases as a substitute for a lengthy examination-in-chief. Among the further changes to be implemented, some of which are still under consideration, are the following:

- (a) Adoption of plea bargaining for criminal cases;
- (b) Simplification of introduction of evidence for criminal cases – in essence the admissibility of written documents for the evidence-in-chief (initial witness testimony) as already allowed in civil cases/
- (c) Further simplification of the High Court and Subordinate Court Rules to increase efficiency and make for a new “friendlier” court procedure; and
- (d) Increase in the jurisdiction of the session and magistrates courts to reduce case volume in the High Courts.

80. The lack of reliance on extensive legal change, along with the decision to move ahead with backlog and delay reduction programs before the ICT systems were developed, is an important aspect of the Malaysian reform. Courts that have chosen the contrary path often spend unproductive years waiting for the right laws and the right system to be installed. Procedural changes (requiring legislative enactment) can help, but as Malaysia’s experience amply demonstrates, it is far more practical to attempt targeted, as opposed to holistic, change, to make what changes are possible through less formal rules and directives, and to base whatever changes are formally adopted on ample information on real performance and if possible piloted testing.

Mediation

81. One immediate result of the greater emphasis on moving cases ahead and setting firm dates for submission of documents, other pre-trial matters, and full hearings and trials has been a tendency of lawyers to see the benefits of out-of court-settlement or court-annexed mediation. Mediation has been widely used in road accident claims at the session courts. On several occasions judges commented that when firm dates are set and the parties and their lawyers know they will be respected, “their palms begin to sweat” and they start to see the advantages of taking the less complicated route. This sometimes means withdrawing the complaint or going for a settlement with the other party. However to facilitate matters, in April 2010, the Judiciary introduced the possibility of court-annexed mediation for commercial, family, and other civil cases. As the concerned stakeholders are still debating a new mediation law, advances to date have been through less formal arrangements, making the services available and encouraging lawyers and unrepresented parties to use them. The Court’s reading on this is that inasmuch as mediation depends on a decision by the parties, a

law, while helpful, is not required for it to be used.⁴² The practice is new, but given Malaysia's apparently highly practical approach to such issues it seems unlikely it will be challenged legally. Of course parties can always decide not to comply with a mediated agreement, but that is also true of a more formal judgment. In court-annexed mediation, any settlement would in fact constitute a court order and would be enforceable as such. Whether this will put compliance rates at the same level of those for judgments remains to be explored.

82. In Malaysia, court-annexed mediation is done by a judge, although usually not the judge who would hear the case. The one exception was the Family High Court in Kuala Lumpur, but only because it has only one judge. However, should disputants in that court desire another arrangement, mediation can be transferred to another judge. Global statistics on mediated cases were not reported, but numbers of those formally mediated (as opposed to informal settlements) still appear to be low although the system does work to the extent of reaching an agreement for those who choose it. The Commercial Division of the Kuala Lumpur High Court reported a 50 percent success rate (agreements reached) for the one month covered. The Family High Court Judge for Kuala Lumpur claimed that her success rate was about 75 percent; the number of cases mediated was not provided. Formal mediation remains a fairly new concept in Malaysia and it is thus not surprising that use rates remain low. There is also the issue of whether parties to the agreements reached through mediation will understand they are as much court orders as a formal judgment.

83. The courts have conducted training on mediation and if they continue to promote it, the numbers of mediations conducted should increase substantially over time. In many countries, fee-based and free mediation centers are used more extensively, often to head off cases before they get to court, or soon after filing. Some countries even make this a mandatory pre-condition for further consideration by the court, although this practice has many critics.⁴³ In Malaysia, it appears that the courts will urge mediation only after the pre-trial case management. This takes advantage of the so called "sweaty palms syndrome" but earlier mediation whether court-annexed or not might also be considered.

⁴² The Judiciary is considering introducing plea bargaining in criminal cases in the same way, while the new law remains under review.

⁴³ This is because compulsory mediation can become simply another obstacle to justice, especially when one or both parties do not want to use it.

Creating a Specialized Resource Center (Training)⁴⁴

84. The Judiciary has attempted to make improvements here, but budgetary constraints have been a problem. The roughly RM 400,000 (US \$133,300) made available annually for training has allowed the holding of workshops and short courses, but has not permitted the development of a permanent training program. Fortunately, poorly prepared judges do not appear to be an issue in Malaysia and courses have thus been able to focus on exposing judges to skills and concepts critical to the reforms. As discussed in a later section, the Judiciary has proposed setting up a permanent program, but this will require further analysis of needs and certain decisions as to career trajectories.⁴⁵

Expanding Use of Information and Communications Technology (ICT) to Support Case Management, Facilitate Filings, and in Court Hearings

85. Most of the following discussion is restricted to activities conducted in West Malaysia. The program conducted in Sabah and Sarawak was not reviewed. As noted it has its own IT contract with the firm SAINS, and started slightly earlier. It shares the same goals as the West Malaysia program and appears to have made similar progress, perhaps due to its far less congested courts and consequently lesser problems with backlog. In fact its courts may be still more up-to-date at present, because there was less to update when they began.

86. ***Court Recording and Transcription System (CRT)***: The total being spent on ICT under the two main contracts (with Formis and SAINS) is RM 130 million or roughly US\$43 million. Of this RM 100 million is for Formis and RM 30 million for SAINS. Both contracts cover the creation of a Case Management System (CMS or perhaps more appropriately CMIS, Court Management Information System⁴⁶) but in West Malaysia, the Formis contract also includes moneys for the creation of a Court Recording

⁴⁴ When asked, none of the likely parties had any idea what was meant by a "specialized resource center." It was thus surmised that this referred to training.

⁴⁵ The Judicial and Legal Service has its own training institute, but it does not have a program for superior court judges. The Institute offers an obligatory orientation course for new JL Service members, and also offers roughly 25 short courses a year aimed at JL Service members working in the courts. Its programs are also open to contracted court staff even before they apply for the service.

⁴⁶ As noted above, the term CMIS has been substituted for CMS to reduce some sources of confusion.

and Transcription System (CRT). This part was done first and will result in the delivery of audiovisual systems for recording hearings to 387 courtrooms – as of early 2011, 300 had already received the equipment. The rationale behind this activity was the delay caused by judges having to take notes on proceedings which would become the official record of their content. This created considerable delay and also did not produce entirely accurate records. An earlier experiment with real-time transcriptions by court reporters did not work in West Malaysia because of language difficulties – proceedings are conducted in English, a language in which those doing the transcriptions were not always completely fluent. East Malaysia has fewer problems with this arrangement and it apparently continues to use court reporters' transcripts. This has advantages for criminal cases where the law still requires the courts to provide written transcripts to the attorneys (meaning that the audio-video recordings must later be transcribed by court staff). However, this is not required for civil cases, although the lawyers do object that they need this service to be able to review the court record quickly and so comply with the 14 day deadline for filing an appeal.

87. The audiovisual equipment is stand alone, meaning that at present, the recorded transcript (a CD) is still stored in the equipment installed in each courtroom with copies being made and delivered to the attorneys at the end of the trial or hearing.⁴⁷ Eventually, a central storage mechanism will be needed, but so far the collection of recorded transcripts (the CDs) does not exceed the capacity of the courtroom facilities. Judges interviewed in Kuala Lumpur, Shah Alam and Putrajaya were quite pleased with the arrangements, although some of them seemed not fully familiar with all of the functional possibilities – for example their ability to type notes into the audio-visual recording for their own future reference. Notes would not be visible in the copies supplied to the attorneys. The recording system is nearly fully automatic, using 4 cameras and focusing in its video portion on the person speaking. It is thus operated by ordinary courtroom staff and does not need a special technician. No problems with equipment were reported and the judges concurred that it allowed them to conduct hearings and trials much more rapidly.

⁴⁷ It bears noting that judges in Malaysia do not share courtrooms so there is no problem with mixing CDs from one judges' hearings with those from another.

88. Courts are also experimenting with other audio visual tools. Because of the large distances in Sabah Sarawak, some hearings and witnesses' testimony are done by video conferencing. In West Malaysia, there are on-going experiments with teleconferencing to handle some pre-trial matters. This avoids having parties and their attorneys go to the courts for relatively simple hearings. Most of this is not covered under the IT contracts but rather is a separate initiative of the courts.

89. **Queuing System:** A second element, introduced in the larger court complexes in Western Malaysia is the electronic queuing system, intended to facilitate holding of hearings by registering the arrival of attorneys, on the day the event is scheduled and letting them know where they stand in the queue. Once registered at the court, they can also leave and call in using SMS or texting from their mobile phones to verify the time they must return for the hearing. Attorneys arriving for a case management or chambers matter register at the court building, and when both parties have checked in, the hearing is placed in the next slot in the queue. If one lawyer arrives and the other does not, the former can seek out the registrar to determine how to proceed. Hearings are scheduled for

A Further Note on Unique Numbers, E-files and E-archives

As anyone who has searched their paper and e-files for a document knows, both processes can be equally frustrating. As paper files are converted to electronic format, there will be a need to develop a good e-archiving system. This is one of the reasons the unique number becomes important, as it should allow the case to be retrieved wherever it is located. However, judges, courts, and the entire court system will need to ensure their e-archiving system is as easy to use as the current physical files. Paper files have one advantage here – they are easy to see, and as was done in the physical backlog reduction program, can be moved into piles, or even separate rooms to facilitate processing. In a virtual filing system, this is also possible, but software must be modified for this purpose. Since none of those interviewed mentioned the virtual archives, it is a good bet these will need more work. The front-end of the process (e-filing) has received most attention, but now the back-end should get still more emphasis so that the courts are not swamped with millions of electronic files with inadequate means of navigating through them.

the morning, but previously there was no way of knowing when or whether a hearing would be held owing to the absence of one or both attorneys. This problem has now been resolved. Attorneys interviewed in Kuala Lumpur were not sure how much time this saved them, but did appreciate the transition from the former chaos and the opportunity to do other work while waiting. Although less necessary in smaller courts, the system will be gradually expanded to them, because of the benefits for both staff and lawyers. It eventually can be used for trials as well (where the presence not only of the lawyers, but also of other parties is required). Similar mechanisms are used in other judicial systems and are often part of a reform program. However, the Malaysian version is especially sophisticated because of the combination of electronic scheduling with the attorney's registry of their presence. This avoids the problem of "definitive" scheduling of a hearing which will be postponed because one of the lawyers has not appeared.

90. **Automated CMIS and E-Filing:** The most complex part of the ICT contract, and one still under development in West Malaysia, is the creation of an automated case management information system with its various modules. A first module, already installed but still handled partly manually, registers the initial civil filing, enters the pertinent information into an electronic database, assigns a case number, and adds scanned copies of the accompanying documents. It also calculates fees and once these are paid (in the same building), issues a writ of summons for delivery by the attorney (or if s/he wishes by the court for an additional fee). There is also a comparable model for criminal cases, but it was not examined for this assessment. The initial version, which required manual transfer of the relevant data to the court database, is already being replaced with "internet filing" which provides forms to the filer from which data can be extracted automatically. It was reported that 40 firms were already using this method, although it was introduced between the initial fieldwork in January and the follow-up visit in May and requires several additional steps to be taken by any potential user (e.g. registration of digital signature).

91. One of the few problems observed is that the CMIS will continue to use the older method for assigning case numbers, meaning that cases do not receive a unique number (which is to say one not shared by any other case ever registered anywhere in the court system). Currently, numbers are unique to each intake center but not system

wide.⁴⁸ The situation could be remedied by changing the formula for creating a number (and thus adding a code for the intake center or court where it enters) or by waiting until the system goes fully on line, in which case, the sequential number would incorporate the universe of filings. Given that all courts will not go on line for some time, the former solution is most practical (and in fact has reportedly been partially adopted as an "invisible" numerical addition to the basic case number).⁴⁹ Unique numbers are essential for tracking a case in its trajectory, however convoluted, through the entire court system; they should thus be retained even when a case is transferred to another court or instance for whatever reason (although the second court or instance may assign an additional number for its own bureaucratic purposes). However, such thorough tracking is really only possible with a fleshed-out CMIS, for which reason its importance was probably not recognized in the latter's initial design.⁵⁰

92. Until now the entire process of admitting and registering a case had been done manually, and although the admitting clerks are extremely efficient, additional data had to be recorded manually and all documents went into a physical file. It is the intent of the Court and the system designers that by the end of the contract (June 30, 2011), most of these steps will be automated and for those who chose to e-file, all documentation will be entered directly into an electronic file with no need for paper copies. For those preferring to bring their filings directly to the court, the process will still be more agile, but data will have to be entered and documents scanned by the court staff. E-filers will also be able to pay their fees by internet using a credit card. Whether e-filed or physically delivered to the courts, the case file will be electronic and paper copies of documents will no longer be retained. Currently bar codes are placed on written submissions for their easier location

⁴⁸ The current system involves three numbers – one for the year, one for the issue (e.g. violent crime, uncontested divorce, civil interlocutory appeal), and a sequential number apparently corresponding only to the year (not the second issue-specific figure). A better, but no more complicated system would feature the year, the court or intake office, and the sequential number, based on both. A fourth figure, corresponding to the general matter (Civil, Family, Commercial, Criminal, etc) could be added, but unless incorporated in the numerical sequence, is really not necessary. It might, however, help in organizing the e-archive.

⁴⁹ Why the number remains "invisible" could not be explained, but may have been easier for the vendor to add.

⁵⁰ The "invisible" number was also added after the first field work, possibly in reaction to the lengthy discussions about its importance.

in the files although this obviously will not be needed once files are completely automated. The perceived advantage of this system, aside from saving space (and trees) is that the file will be accessible to many users simultaneously, thus saving the time of circulating it among them, or only of locating it for transmission to the immediate user. However (see box), for this to happen, the virtual archive may require further organization.

93. It is the e-filing and electronic case files that have captured most attention, but another very important aspect of the CMIS should be the creation of an electronic database recording key information and major events for each case (another reason for emphasizing the unique number). This is different from the electronic case files and registries although its contents would be based on data entered there. The files will include scanned documents and eventually may be linked to the CD recordings of hearings. The current registries kept at the courtroom and court complex levels are largely records of case events (scheduling and minutes of hearings, basic information taken when the case is filed, and so on). Because of the large quantity of text entries, they do not permit much quantitative analysis, but can be used to generate preprogrammed reports. The database should comprise largely coded (not text) entries, replicating what is in the registries, but also allowing free-form analysis at the local and central levels (where analysts can focus on system-wide performance trends). It is thus a vital tool in courtroom and system management. The web-based design would allow considerable additional analysis for those with access to it. Access policies will of course have to be developed, not only to protect the data entered but also the privacy of parties. Since the Court tracks performance through reports generated at the courtroom or Division level, using statistics generated there, it is not apparent that it has much interest in a global database or understands its future uses; those interviewed were not sure the database in fact formed part of the initial contract. The Chief Justice has asked the IT Department to compile its own Excel database using the daily reports from each judge, but this measure is really not a substitute and it is unclear how it will be used – possibly to limit the manual compilation of global statistics which inevitably produces errors.

94. Further Use and Limitations of the Existing CMIS Database: In courts with the CMIS already installed, staff in the courtroom and in the respective Managing Judge Units and Registrar's offices use its database, though still

in rudimentary form, to generate the required daily and monthly reports on caseload movement and to otherwise monitor how cases are progressing. Unfortunately, as of May 2011, the central Statistics Unit did not have its own version of the database and thus still received reports in written form and then had to enter data and calculate the global statistics manually. However, the Formis representatives reported that the Unit would have its own database application by June and thus could receive data from CMIS courts electronically. If this is done, it means that the Statistics Unit could generate reports automatically without having to do manual compilations. For non-CMIS courts, data will still be processed and entered manually.

95. It now seems unlikely that even with web-based connections to the CMIS courts, what the contractor is offering (based on the initial contract) constitutes a global database installed in the Statistics Unit. Instead the Unit will still be working with aggregate data even from CMIS courts. Ideally, its database would codify information managed at the courtroom level and thus offer an enormous potential for doing further analysis, no longer limited to the reports now created. This would certainly help with the sporadic requests the Unit gets for analysis not already contemplated. Depending on the codified elements of the database, a good deal more analysis would be possible. Beyond this, the Unit would be able to conduct data mining, a less directed crossing of variables to see what patterns emerge. All of this could and should be closely coordinated with the budgetary, planning, and personnel offices because of the potential impact on future development plans. However, even with what now appears to be a database comprising aggregate statistics, its full utilization will require several additional steps, as discussed in more detail in later sections. The most important of these involves upgrading of the Statistics Unit. Most of the staff is currently involved in manual entry of data and calculation of basic statistics. This will only be required in the future for non-CMIS courts. Instead staff will now need a stronger background in statistical analysis as applied to judicial matters – although that application will have to be developed on the job.

96. If not in the current contract, then in a future one, the Judiciary is advised to begin work on the construction of a real global database integrating the partial ones installed within each court or judicial complex. This would constitute an extremely potent instrument for monitoring and analyzing performance as well as for doing future

planning. The current program has functioned well on the basis of the existing approach and the manual (but soon to be automatic) compilation of global statistics, but further reforms would be much aided by the addition of a global database which really should be the core of any CMIS. Possibly using additional technical assistance for its design, the following steps should be incorporated:

- (a) Expansion of the information included in the decentralized registries and databases to incorporate more details and characteristics of interest and to enter as much as possible in codified form.
- (b) Improved auditing of data entries. Entries are already audited but this will become still more critical as additional uses are found for the contents.
- (c) Movement beyond the traditional reports developed when this kind of analysis was not possible. This is always a problem when databases are created as the usual tendency is to think in terms of the reports that were formerly developed manually. It usually takes a while for users to recognize that they can now do much finer analysis – for example, reports on average numbers and lengths of adjournments, globally, by district and by judge. This process can be accelerated by bringing in experts who have done this work with other systems.

97. *Future Adjustments to the Entire ICT Package:*

Finally, it should be recognized that the CMIS and other ICT elements as delivered at the end of contract will require further adjustments. The automated component was developed extremely rapidly and there are many details requiring attention (e.g. storage of CRT audio-visual transcripts or CDs, improvements to the virtual archive, access policy for the CMIS database, gradual phase-out of certain elements added over the short run that many no longer be required with the movement to a fully electronic system. Two items here are the bar codes used to identify documents and the entire physical filing system, including the space it currently occupies). Moreover, almost inevitably some aspects of the system will require more work, either because they do not function as intended or because the intentions were misguided. System development has been complicated by the absence of adequate configuration control, either because neither party understood its importance, or because the contractor was willing to be more flexible in accepting constant changes and additions than is normally the case.

98. Configuration control or management simply means imposing a cut-off point on system requirements – “we are building Word 6, and anything beyond that goes into the next version, Word 7.”⁵¹ As of late January 2011, two months before the contract was to end (and before a subsequent no-cost extension), there were still on-going discussions, for example, on what information would be automatically exchanged with other agencies (police, prosecution, prisons, and the bar). Apart from last minute crises (e.g., the report that the police had decided not to participate in the exchange), the issue here is that constant revisions to basic functionalities or the details of their design can produce their own contradictions. All of this will need to be sorted out in the follow-on contract, and the parties should really try, during the first year, to dedicate their efforts to that, system maintenance, training, and expansion of the system as is to other jurisdictions. Adding more functional elements or enhancements during that early period will only complicate the production of a system that works. Future contracts to develop additional applications or anyone else contemplating a new system should thus take configuration management more seriously – this is fairer to the contractor, but it also can shorten the time needed to make readjustments later.

99. Except for the absence of a global database, what has been accomplished and what is promised by the end of the contract constitute the basic elements of a good management information and electronic processing system. Although the price seems high, this may be warranted by the speed with which the product was to be delivered. Moreover, the winning contractor was selected not only on the basis of the quality of its system (developed during a three month trial period in which four firms participated) but also its price, which was the lowest offered.⁵² Those attempting to replicate the Malaysian experience could doubtless negotiate a better deal, especially if they are not so concerned with delivery within only two years, but given the availability of funds and the urgency of completing the project, there is little to criticize here. The Court could have demanded the source code for the CMIS, and more will be said about this later. However, its non inclusion (always the preference of the

⁵¹ Anyone interested in knowing more about configuration control can access a number of documents by simply searching for “configuration control” on the internet. The concept was developed for engineering products (including systems design) but it is probably applicable to any type of contract.

⁵² In fact the highest bid was twice that of Formis.

contractor for obvious reasons) appears to be the decision, not of the Court, but of the Legal Affairs Division of the Prime Minister's Office which handled the negotiations.

Next Steps

100. Ensuring continuity in the reform vision and approach is critical in sustaining and deepening the reform's accomplishment so far. Since the reform has been implemented by a team, most of whom will remain in the Federal Court even after the Chief Justice's retirement (September 2011), it seems unlikely that his exit will result in a sudden loss of reform momentum. But reforms do not sustain themselves. They require continued leadership and management. As the current team is aware, there are three critical steps required to keep advancing and cement the changes already made. There is also a fourth step, not currently contemplated, that should be explored. These actions probably should be pursued simultaneously so as not to lose momentum.

- (a) Further expansion of the program elements (and especially the electronic systems) to courts not already covered. This is already contemplated although there may be a need for a more specific timeline and sequencing of the expansion of coverage. Both this and the next step are expected to be covered under a second contract or contracts with the firms hired to do the automation.
- (b) Readjustments to and further development of the new instruments and processes. This involves both organizational changes (use of managing judges, creation of the new civil and commercial courts and the anticipated elimination of the tracking system as currently organized) and the new automated instruments. The latter, along with ordinary system maintenance, is apparently contemplated under the second contract or contracts. The connection of the two CMIS will also be needed. Without that step, developing global performance statistics will remain very complicated – the Judiciary may want to bring in some outside experts for advice on this process as neither SAINS nor Formis has a long experience with judicial automation, and both they and the courts may thus overlook some important aspects. This is standard procedure and should not be regarded as a threat by either of the principal contractors. The goal is not to turn their contracts over to someone else,

but simply to ensure that what is done next is what is most needed.⁵³

- (c) Development of a longer term plan for improving court performance. While members of the core team (Chief Justice and others) have forwarded ideas as to a second phase (Federal Court of Malaysia, 2011; 168-179), they do not as yet constitute a medium-term strategic plan. This step will be inherently more difficult than the first stage because of potential disagreements among other stakeholders, if not within the team, as to priorities and the potential loss of one enormous advantage enjoyed in the first stage – a consensus on measurable objectives which nearly everyone agreed were critical. The proposed new emphasis on “quality” does not lend itself easily to the identification of benchmarks and targets, except as regards the delivery of inputs (legal change, the development of one or more training institutes, and so on). Nor does it address specific recognizable problems of interest to those outside the court system. Thus, it will be important for those involved to give more thought to the specific service problems they propose to resolve and couch their plans in these terms. Of course they may negotiate funds for some of these inputs anyway, but their arguments would be much stronger, and their longer-term impacts much greater if they could base their requests on goals as concrete as those used in the first phase program.
- (d) Creation of a real CMIS database integrating and improving the databases already managed at the courtroom, Division, or court complex level. This is not on the Judiciary's agenda, but as noted, it is really the core of a complete CMIS and furthermore will be essential in planning the next stage program.

Additional Reform Elements outside the Court Program

101. Unlike reforms attempted in other countries, usually with more limited results, the Malaysian judicial program limited its early efforts to a single goal – backlog and delay reduction. This is, as suggested above, hardly the limits of its vision, but this single-minded focus over the shorter run is arguably a part of the explanation of its success.

⁵³ In any event, an outside firm that made recommendations for the purpose of capturing the contract would be committing an act of gross conflict of interest.

Backlog, the primary target, has clearly been reduced, and delay reduction efforts focused on the targeted High Courts (the most congested ones) appear to be working as well. The much touted “holistic” reforms with multi-year programs aimed at a much broader series of goals rarely advance any of them significantly, and as the reform community is beginning to admit, it may well be wiser to proceed by parts.⁵⁴ Certainly the Malaysian experience argues for that approach.

102. Nonetheless the country does face other problems with its justice sector, and fortunately, the government in coordination with other agencies has been able to address some of them. Noteworthy here are three areas: legal assistance (access to justice); crime control, and anti-corruption. Progress in all of these areas will affect court operations, and to the extent its cooperation has been called on, the Judiciary has been involved. However, as regards its own direct promotion of these and other objectives, it has left them, wisely it would appear, for later stages of reform.

Legal Aid and Access to Justice

103. Malaysia does have a legal aid program, but it comes nowhere near covering the need for such services.⁵⁵ Until very recently (March 2011), the State only provided free legal assistance (by contracting independent attorneys) to defendants in capital cases who cannot provide their own and through its Public Defense Office to some parties in civil (family) cases. This is supplemented by pro-bono work by members of the Malaysian Bar (one of the three bodies of legal practitioners in Malaysia but only covering those practicing on the mainland; the other two are the Sabah Bar or Sabah Bar Association and the Sarawak Bar or Advocates Association of Sarawak⁵⁶). With annual contributions of about \$25 from each of its members, the Bar Council (the governing body for the Malaysian Bar) finances 14 legal aid centers, paying staff and operating

expenses from this fund, but depending on pro bono work by bar members for actual legal services. Despite these advances the potential demand is far greater. The Bar Council President notes that 35,000 people had already benefited from the program but that 80 percent of those on remand and 95 percent of those going to trial still were not represented.⁵⁷

104. The Government and the Prime Minister in particular are now taking steps to resolve this situation by funding a program proposed by the Bar Council to set up a private foundation to attend to some of the needs. This new entity, the National Legal Aid Foundation, was created in March 2011 and is now functioning. Current funding is the equivalent of US \$2–3 million, which the Bar Council President estimates can be used to attend to two issues in particular, police detainees and those on remand (in pre-trial detention). The Council believes these are the two most urgent problems but that over time more funds can be obtained to widen the program’s reach.

105. It merits mention that the PEMANDU program on crime reduction (see next section) also emphasizes the need to provide more legal counsel to defendants in criminal cases. Consistent with this thinking, the Chief Justice has also lobbied with the Prime Minister to increase the fees paid to lawyers contracted by the government for this purpose. It is generally agreed that one of the reasons for the small size of the criminal defense bar is that this is not a very lucrative profession. Hence paying contracted attorneys more might both attract more candidates and also entice better qualified ones. The Judiciary has also taken its own steps to ease things for unrepresented defendants, including the issuance of appointment cards to those not held on remand, showing the data for the next hearing along with “a strict warning on postponements in Malay, English, Chinese, and Tamil” (Zaki Azmi, 2010;28). It might want to consider some sort of information service for unrepresented defendants, or parties to any case, although there the issue always is making it clear to users where the service stops (does not extend to providing representation, although it does give information on alternative sources).

⁵⁴ See USAID (2010) for a discussion of its strategic framework for ROL programming which repeatedly refers to the need for a holistic vision. Since all donors (the World Bank and USAID included) develop programs for a time frame of at maximum five years, the advice about being holistic presumably refers to this period. In any event, it is a common criticism of donor-driven (and some country-driven) reforms that they try to do too much in too little time.

⁵⁵ For a comparison of the situations in Singapore and Malaysia and of judicial views on the same, see Chan, 2007.

⁵⁶ Since representatives of the other two associations were not interviewed, it is not known what kind of pro bono work they support.

⁵⁷ At a sessions court, a defendant, who, while out on bail, was facing a 14-year prison sentence if found guilty of charges of robbery. He had no attorney and seemingly lacked the means to hire one.

Crime Prevention

106. Compared to worldwide trends, Malaysia's crime rates are quite low. Homicide rates are about 2.3 per 100,000 (2010), below the East and Southeast Asian regional average of 2.8 per 100,000 and the worldwide figure (unfortunately only updated to 2004) of 7.6 per 100,000.⁵⁸ It bears mentioning that East and Southeast Asia is one of the least violent regions in the world – this may make it a better comparator than say Central or South America (for 2004, 29.3 and 25.9 respectively; the Central American figure has increased since then as the region has some of the world's most violent countries).⁵⁹ Homicide rates are usually considered the best standard for comparison as homicides are more likely to be recorded by the police than say, petty street crimes. They and other violent crimes (armed robbery, rape, and so on) are also most likely to attract public attention and thus a demand for government attention although increases in non-violent street crime can also contribute to the feeling of insecurity

107. These facts aside, there is no doubt that the Malaysian population regards crime and a perceived (and to some extent real) increase in its incidence as problematic. A survey funded by the government in 2009 found that citizens considered crime second only to the economic situation as a source of concern (PEMANDU, 2010). A fairly recent independent academic study of crime trends, covering the period from 1980 to 2004 (Amar Singh Sidhu, 2005) does find that on a per capita basis "Index Crime,"⁶⁰ a concept also used by PEMANDU,

⁵⁸ These and other figures on crime, unless otherwise indicated, are taken from Wikipedia ("List of Countries by Homicide Rates," based on a variety of official sources) as they appear to be most recent and also cover the last decade. Moreover they track well with the less recent UNODC figures (only to 2007-2008) found at www.unodc.org/unodc/en/data-and-analysis/homicides.

⁵⁹ Use of regional neighbors is recommended for comparison for two reasons. Citizens are more likely to be aware of trends in neighboring countries than of those halfway around the world. Furthermore, there are various regionally-specific factors (history, culture, socio-economic characteristics, cross-border migration) that are likely to influence crime levels. It is no accident that even Central America's low crime countries (Nicaragua, Costa Rica) have homicide levels higher than Southeast Asia.

⁶⁰ As the author notes, this is a term adopted by the international police community to facilitate comparisons. "Index crimes" constitute all crime that occurs on a regular basis and has significant impacts. Inasmuch as regular and significant are determined by crime patterns in each country, there is some country-to-country variation as to the specific crimes included.

did increase, from 510 to 612 per 100,000 over the 24 years, and that violent crime, while still representing only 15 percent of the total, had increased more rapidly than property crime. The trajectory of property crimes was more erratic, and they showed peaks during the economic crisis. Violent crime on the other hand seems to show a steady, if not dramatic, increase over the period. As opposed to property crime, its growth rate is also higher than that of the population. However, the increases are all within the range where they might be explained only by better reporting systems, something that is always a problem in interpreting these statistics.

108. Because of its effect on citizen well-being, and also on the economy (for example on tourism, costs of doing business, and so on), crime reduction was thus included as one of the 6 National Key Results Areas (or NKRA) in the Government Transformation Program. The PEMANDU is responsible for planning and tracking the six NKRA's, set out a crime reduction strategy and targets for this program in 2009. The baseline figures correspond to 2009, but the program was conducted in 2010 with results reported in early 2011. Targets were set by a working group which included members of the Judiciary.

109. According to PEMANDU reports, nearly all of the targets were met, some of them at far higher levels than projected. The most impressive achievements were the reduction of reported street crimes (35 as opposed to the targeted 20 percent) and Index Crimes (15 as opposed to 5 percent) and the increase in citizen confidence in the police (55.8 as opposed to the target of 35.8 percent). Consistent with the requirements of crime prevention, the program incorporated several agencies, and much of its work (and its most significant successes) involved activities with the police (targeting of hotspots, placement of more police on the street, enlistment of civilian volunteers to accompany police on patrols, tracking of police performance at the station level with rewards for those with the best results, and so on). The program also involved community prevention policies (better lighting, for example) which were somewhat inhibited by political conflicts within and with municipalities, and efforts to improve police-prosecutor coordination (reportedly still facing problems).

110. As regards the courts, efforts mirrored and in some sense were preceded by judicial programs to reduce backlog and speed up processing of cases. However, they also extended to activities the Judiciary could not undertake on

Table 4: Comparison of PEMANDU Backlog Reduction Targets for 2010 and Court Backlog Statistics (Violent Crimes Only)

Court	Initial Backlog as defined by PEMANDU	PEMANDU Target for end of 2010 ¹	Real Backlog (Court statistics but using PEMANDU definition) by Dec. 2010
High Court	204	20	136
Sessions Courts	1233	123	486
Magistrates Courts	1383	138	233

Sources: PEMANDU 2010 for initial backlog and target; Judicial Statistical Units for achievements by end December, 2010.

its own – for example, suggestions (not yet adopted) as to how to ensure witnesses arrive for hearings and trials, efforts to prevent double-scheduling of defense attorneys and to increase the number of attorneys available, amendment of the Criminal Procedures Code to allow plea bargaining (under consideration), and escorting of defendants to hearings by prison staff, not police. In all there were 28 recommendations, some of which had already been adopted by the courts (e.g. earlier starting hours), some of which appear not to be in conformity with the Judiciary's own reforms (e.g., recommendations as to increases in the number of judges in specific areas), and a majority of which really depended on actions by other parties (the police, prisons, prosecutors, defense, and witnesses)

111. The specific target set for the courts (once again with participation of judicial actors) was the processing (bringing to trial) of 2,000 violent crime cases in 2010. The Judiciary met this goal by trying 2001 cases. An additional “internal target” was the reduction of the backlogged violent crime cases (estimated at 2,820 in 2009) by 90 percent in the same period.⁶¹ The data source on NKRA achievements in 2010 (PEMANDU, 2011) unfortunately did not include a report on progress on the courts' backlog reduction targets, but again this was a less formal goal.

112. The Judiciary's own statistics (provided by the Statistics Unit and, up to September 2010, reported in Federal Court of Malaysia, 2011) indicate that the High Courts, sessions courts, and magistrates courts all achieved a clearance rate of 100 percent or more for criminal cases during 2010, but show a reduction in pending cases (anything carried over to the next year) only in the sessions courts (1,700 cases) and the magistrates courts (14,083).

⁶¹ The target for backlog reduction varies from a final figure of 1,000 to 278 to 180 within the same presentation, but the 278 number coincides with the totals set for individual courts.

Ageing reports (showing pending cases by year of filing) for 2010 do indicate movement toward the “internal” PEMANDU target, although not full achievement. The target considered as “backlog” any case entered before January 2009, which by the end of 2010 would thus be over two years old. The ageing lists still include a few very old cases, but for violent crimes little before 2006. The following chart compares actual achievements with the status quo ante and the PEMANDU targets. It was compiled on the basis of the PEMANDU projections and statistics provided by the Judiciary's Statistical Unit.

113. The figures above should be considered as approximations as the Judiciary's statistics do not always separate what PEMANDU has categorized as violent crimes. According to judges interviewed, reducing backlog and accelerating processing of criminal cases has proved especially difficult given the tendency of both prosecutors and defense counsel to request adjournments (generally because their witnesses have not shown up), and the judges' unwillingness to refuse their requests and either decide on the basis of partial evidence (in effect default judgments) or dismiss cases as DNAA (discharged not amounting to acquittal), an objective the PEMANDU plan also shares.

114. As the extensive analysis underlying the PEMANDU recommendations (based on judicial statistics and a workshop with judicial, prosecutorial and police personal) indicates and the further 28 recommendations suggest, the problem is very complex. The targets set for the one year period may thus not have been realistic. While eliminating older cases is a goal shared by the courts, the additional target of trying “2,000 more violent crime cases” is not necessarily consistent with it, as an increase in violent crimes or in indictments for these cases might allow it to be met by focusing only on new entries. In fact the sessions courts registered more violent crimes entering in 2010 than the total amount of “backlog.” In



any event, although the courts' focus has been more on civil cases, they have done what they could to reduce criminal case backlog and speed up processing, and their achievements here, if not quite as significant as in the non-criminal jurisdiction, are nonetheless noteworthy.

115. As regards the overall anti-crime strategy it is generally consistent with the usual recommendations. The only exception might be the use of civilian volunteers to assist police which would doubtless raise questions about vigilantism in some quarters. However, the test is really what resulted in Malaysia and so far there are no complaints registered. Putting 50 times the number of police in Bukit Bintang (an area of Kuala Lumpur with many five-star hotels and shopping centers, frequented by tourists) may well have reduced street crime there, but it seems to be a bit of overkill. Also the reported reduction in street crimes in particular is so large as to raise questions about the police possibly manipulating data (or alternatively those outside Bukit Bintang no longer having police to whom to report crime). Finally, the preventive measures do not include efforts to work with groups, and especially youth at risk, something that might be contemplated in a subsequent stage. While the more usual criticism of contemporary crime prevention programs is that they are too heavy on similar soft measures, the Malaysian variation might err on the size of its police component. The emerging consensus among experts in the material (Fruhling, 2009; Berman and Fox 2010) is that both measures work best together.

Corruption

116. Corruption is a second NKRA that also involves the courts. It has not progressed as far as the crime reduction program, but the Judiciary has done its part by creating four High Court Sub-Divisions and 14 sessions courts specializing in corruption cases. Amendments were also made to the criminal procedures code to help accelerate corruption trials and the Chief Justice issued a circular to the judges setting a target for all corruption cases being processed in a year or less. Other actions (a whistleblower protection act which went into force in December 2010, a public database on offenders, an electronic procurement "portal," strengthening of compliance units within other agencies) do not involve the courts. So far the most concrete results are Transparency International's finding of more public confidence in government anti-corruption efforts. The PEMANDU presentation (2011b) on achievements to date did not include specific targets beyond the setting up of the various facilitating mechanisms.

CHAPTER III

Achievements of the 2008-2011 Reform

117. In this chapter, the reform's progress in advancing its principal goals is evaluated through statistics made available by the Court's Statistics Unit. From the start, the program has used such statistics both as a tool to encourage judges and their staff to improve their work processes so as to reduce backlog and delay and to monitor performance. The reliance on statistics for these purposes is actually not a usual approach in many reforms. Courts often speak of reducing delay or backlog as their principal objectives, but as they have no way to measure either the point from which they are starting or how far they have progressed, and often make no effort to develop one, it is little surprise that their reforms are often considered failures – which they may or may not be, but there is no way of knowing. Measuring progress with numbers is really a sign of seriousness of intent, and thus the Malaysian approach is highly commendable, especially because until present day most of the statistical reports had to be generated manually.⁶² This is still the situation for the Statistics Unit although the courts with CMIS can now use the software to produce their own reports and to track their own performance. Their ability to do so should generate far fewer errors both in their own records and in what they submit to the center. This is an advance in itself.

118. The Judiciary has devoted considerable effort to documenting its advances in reducing backlogs and more recently, in accelerating treatment of new cases. The early results are already available in several of its own publications and presentations (See for example, Federal Court of Malaysia, 2011; Zaki Azmi, 2010). Internal reports are updated constantly not only to reflect but also to reconfirm their accuracy.⁶³ For the present work, the Statistics Unit provided consolidated data through April 2011. Because a central database still does not exist, there are limitations as to the type of analysis that can be done. But for present purposes, the statistics provided (the same ones the Judiciary uses) are quite adequate to capture overall trends as well as some details. There is no reason to question their accuracy, and in its own reports, the Court consistently calls attention to the few (early) figures it believes may be in doubt.

119. It does bear mentioning that the Court's use of statistics to demonstrate advances as opposed to producing them is a work in progress and still remains the less important of the two applications. The issue is essentially the following: the Court has focused on the use of data and statistical monitoring to establish targets and ensure judges are meeting them. As indicated by the global reports, now compiled monthly, and the daily, monthly, and annual reports from individual courts and even judges, this method has had an enormous positive impact. Nonetheless, the reports from individual units in particular are less adequate as a means of tracking overall improvements, and in their current form, do not lend themselves easily to this purpose. The Court's own publication on the reform (Federal Court of Malaysia, 2011) is filled with such tables, but for any but the most avid consumer of judicial statistics, they are a very indirect means of grasping the overall story. This fact did not detract from the reform's progress. It is only a problem as one wishes to demonstrate that progress in a global fashion. Some recommendations are made at the end of this chapter as to how the Judiciary can serve both ends simultaneously. The global view is less important for nudging judges ahead, but it is important for overall planning and furthermore for presenting the Judiciary's results to a broader public. This is one of the reasons, although a less important one, for the insistence in the prior chapter on the creation of a global database.

⁶² This is another excuse offered by courts that choose not to set hard targets or develop means of measuring them. They claim they cannot do so without computers and once they get the computers and software it often results that this is not a part of the software's functionalities.

⁶³ It should be recognized that not all changes to past data represent corrections of past errors. Case status is a moving target, and if a case considered closed is reopened or sent to a higher court on appeal, then its status changes from "disposed" to active. This is true of all countries that keep statistics and can be very frustrating especially when it means that a court that was current now has an older active case. See World Bank (2010) for a discussion of similar issues raised in Ethiopia.

Key Indicators of Results as Used Internationally and as Adapted to the Malaysian Program

120. Conventionally, several indicators are used to assess judicial performance and thus to monitor backlog and delay reduction programs of the type undertaken in Malaysia as well as other trends. Any evaluation of performance typically uses several of them as each provides only a partial view of what is occurring (National Center for State Courts, 2007).

- (a) Judicial productivity – caseloads per judge or case dispositions per judge, annually or for shorter periods. Comparisons across systems are difficult because many factors determine a “reasonable” caseload, but in any given system, increases in per judge caseloads and especially number of dispositions would be a positive sign
- (b) Clearance rates – cases disposed (by whatever means) over new filings for each year
- (c) Average disposition times for cases closed – cases can be grouped by categories for greater detail
- (d) Ageing lists – showing age of active caseload, often by grouping cases into categories (e.g. less than 30 days since filing, 30-60 days and so on)
- (e) Number of cases pending with a duration of more than two years.

Sometimes the size of backlog or annual carryover is tracked as well, especially in the early stages where it may be quite large.

121. The Malaysian Judiciary uses a slightly different set of indicators based on its own experience and goals:

- (a) Pending caseload carried over from one period to the next, sometimes differentiated by age of cases—this was especially important for the goal of reducing backlog and thus cases filed in earlier years.
- (b) Ageing lists – tracking absolute number of cases still active by year of filing. This is an indirect measure of delay as well, especially if categories are refined to the month rather than the year of filing.
- (c) For the new courts (NCC and NCvC), progress in disposing of new caseloads within the targeted time limits. This is a proxy for disposition times. It is tracked but not as systematically for other courts. It is facilitated by the way the new courts are organized which in itself is unusual and is further explained in a later section.

122. As regards the conventional indicators, the Malaysian Judiciary uses neither clearance rates nor judicial productivity. It also does not use time to disposition. However, the indicators it has selected manage to capture these concepts less directly. The exclusion of the more conventional performance indicators is most probably explained by the fact that the interest since 2008 has been in tracking reform progress, not in assessing overall performance. Otherwise it is hard to explain why clearance rates and productivity (time to disposition is another, more difficult matter) are not monitored as they are the easiest indicators to calculate. In fact, the table on clearance rates presented below was calculated by the author using the data supplied by the Statistics Unit. Average disposition times cannot be calculated but at least for the new courts, the Judiciary’s proxy indicator is adequate for now. Moreover, the Court’s tracking of the age of the active caseload for all judges does give a good idea of how current they are on their work (and thus whether they are gradually decreasing the likely time to resolution). Up to the present the Judiciary’s indicators have served it well, first for motivating judges and second, for monitoring progress towards its goals. However, as it achieves its initial targets, it may want to consider modifying some of them and perhaps adding others. For example, ageing lists by year of filing will become less useful as older cases disappear in the initial cleanup. After that, it will be necessary to introduce some finer categories, either by month of filing, or by percentage of cases falling within certain time limits (1 month, 1 to 2 months and so on). The use of clearance rates might also be considered, first because they are easily calculated and second because they can indicate where problems are developing. However, these are lesser details, and the Judiciary itself is already modifying and adding indicators for better reform monitoring. Without a professional judicial statistician to help, the Malaysian reformers have developed a good set of indicators for measuring their own progress and as they add new goals they should be able to do the same as well. Over time, however, they might want consider adopting some of the more conventional performance measures especially because some of their indicators were developed to evaluate targets that are close to being met.

Program Results Measured Against the Results Indicators

123. Ageing lists were not systematically compiled by the Judiciary until late 2009. Prior to that date, the backlog reduction targets worked with cut-off dates,

Table 5: Backlogged Pending Cases for All Courts, End of 2009 and 2010; Numbers of “Backlogged” Cases (those filed before 2009) Still in Courtroom Files

Court	Cases	As of 12/2009	As of 12/2010
Federal Court	Civil	39	14
	Criminal	36	18
	Leave application	42	28
Court of Appeal (pre 2008 cases only)	Civil	2,888	204
	Criminal	260	72
High Court	Civil	44,873	9,738
	Criminal	3,514	542
Sessions Courts	Civil	61,659	10,947
	Criminal	9,377	2,984
Magistrates Courts	Civil	71,681	1,173
	Criminal	53,087	8,243

Source: Data provided by Statistics Unit of Federal Court

first for the rapid closure of all cases filed before 2005 and more recently before 2009. Thus, the following table uses the previous format, monitoring decreases in the numbers of active cases filed before the 2009 cut-off date. This information is now collected on a monthly basis. It bears noting that the cases tracked are those that were defined as backlog at the beginning of 2009 – and thus those that were at least a year old then and would be two or more years old in 2010. As the backlog reduction program proceeds, the target would have to be reset, but this methodology is really an artifact of the early reform days, and quite likely will be abandoned in favor of real ageing lists. In this and all the tables and figures shown below, East Malaysia is included as well. This suggests that whatever differences there may be in the way East and West Malaysia record data, the basic statistics are common to both.

124. As the above table demonstrates, the program to dispose older cases has been extremely successful. This becomes especially apparent with the adoption of real ageing lists which track all active cases by year of filing. The courts now track and produce monthly reports on these statistics since the older cut-off date methodology is no longer as useful and becomes less so as the older cases disappear. The following two composite ageing tables for trial courts were thus kindly assembled by the Statistics for this report. Because the Judiciary’s movement toward its goal (of no cases more than a year old) accelerates month by month, court staff insisted that three periods be shown

– end of 2009, end of 2010, and end of April 2011. The unconventional addition of a quarter year turned out to be important as even within that time period, there were significant reductions in the number of older cases. Tables 6 and 7, covering the same period, make it clearer how the purging of old cases is occurring.

125. As the two tables show, even within this 27 month period, the Judiciary has attacked the backlog systematically, starting with the closure of the oldest cases and moving up to the more recent ones: Table 5 demonstrates much the same thing, but without this level of detail. As a consequence many courts are now completely current – as of April 2011, 120 of the 429 sessions and magistrates’ courts were only processing cases filed in 2010 and after. This has been easiest in the civil jurisdiction because judges can be stricter about disallowing adjournments and stretching deadlines, the perennial requests of lawyers. In the criminal jurisdiction as explained in Chapter II, they tend to be more lenient out of a wish to give both prosecution and defense adequate opportunity to present their cases. However, even with this said, it is evident that all three levels of trial courts have been successful in clearing out nearly all the very old cases and are gradually working their way to the less exaggeratedly old ones – the goal being to have no active cases over a year old by mid-2012. A further note is due on the scattering of very old cases, especially in the civil jurisdiction. These are usually cases the parties have reopened, or where they have submitted multiple

Table 6: Ageing Lists by Year – All Trial Courts, Civil Cases, 2009-April 2011

Year of Filing	HIGH COURT			SESSIONS COURT			MAGISTRATE'S COURT		
	2009	2010	April 2011	2009	2010	April 2011	2009	2010	April 2011
PRE 1990	10	6	6						
1991	8	3	3						
1992	2	7	1	2					
1993	4	1		1					
1994	9	8	7	1			1		
1995	14	3	1	1					
1996	25	9	7	4					
1997	29	6	7	4					
1998	50	13	10	12	1		1		
1999	66	26	20	10	1	1	1	1	
2000	256	35	20	68	6	1	3		
2001	343	87	52	128	14	8	3		
2002	604	144	73	332	23	6	12		
2003	972	261	152	577	29	5	47		
2004	1503	401	197	1060	39	19	109	3	
2005	2179	480	285	2120	126	28	249	8	
2006	3016	738	475	3339	237	58	511	21	3
2007	4710	1117	826	5870	577	172	1251	41	6
2008	8673	2354	1711	11995	2500	747	4169	201	128
2009	22400	4039	2789	36135	7394	2935	65324	898	245
TOTAL	44,873	9,738	6,642	61,659	10,947	3,980	71,681	1,173	382
2010		23901	9931		36894	15588		65618	5447
2011			11681			26978			48369
TOTAL			28,254			46,546			54,198

Source: Statistics Unit of Federal Court

interlocutory or final appeals. As noted above any of these occurrences can change an apparently disposed case to an active one, thereby frustrating the efforts at eliminating older cases entirely from the active list. There are by now very few of these cases, but they are the ones that seem destined to stay there forever. However, a backlog reduction program should not be evaluated by these few odd cases (unless of course they are much more common than shown here). What is important is that the bulk of the older cases have now been permanently disposed and

that even in the three months of 2011, the numbers have gone down even further.

126. Clearance rates could also be calculated from available statistics for all superior and subordinate courts through December 2010. The calculation is simple – Cases Out/Cases In during any given period. Where there is significant backlog it should be over 100 percent if the backlog is to be reduced.

Table 7: End of Year Ageing Lists - All Trial Courts, Criminal Cases, 2009-April 2011

Year of Filing	HIGH COURT			SESSIONS COURT			MAGISTRATE'S COURT		
	2009	2010	April 2011	2009	2010	April 2011	2009	2010	April 2011
1998				1					
1999				8	4	4			
2000		1	1	11	2	1	4		
2001	1			9	2		34	7	7
2002	6	1		30	1	1	58	2	2
2003	17	1		72	4	4	170	8	3
2004	53	5	1	174	30	11	498	7	2
2005	70	9	6	325	55	14	1474	41	9
2006	125	7	9	596	91	35	2975	118	13
2007	249	27	20	1155	203	75	6363	389	94
2008	503	87	57	2182	799	365	10815	2162	601
2009	2490	404	227	4814	1793	955	30696	5509	1976
TOTAL	3514	542	321	9377	2984	1465	53,087	8243	2707
2010		2771	1679		5014	2622		20677	6116
2011			1738			2904			14059
TOTAL			3,738			6,997			22,882

Source: Statistics Unit of Federal Court

Table 8: Clearance Rates for Courts by Instance, for 2007-2010

Court	Material	2007	2008	2009	2010
Federal Court	Civil Appeals	NA	95.8	94.8	225.6
	Criminal	NA	45.6	94.0	123.4
	Leave to appeal	NA	121.7	100	90.7
Court of Appeal	Civil	75.0	91	92	99.7
	Criminal	52.0	98	63	45
High Courts	Civil	77.8	93.3	133.3	130.3
	Criminal	89.0	96.6	118.8	101.4
Sessions Courts	Civil	96.5	115.4	114.1	110.6
	Criminal	91.9	99.3	98.1	105.3
Magistrates Courts	Civil	89.4	104.5	119.9	103.6
	Criminal	98.0	98.0	110.7	118.4

Source: Calculated on the basis of data provided by Statistics Unit of Federal Court

127. Three trends merit mention here. First clearance rates have improved considerably over the period covered, in some cases reaching levels far above 100 percent. However, once the backlog reduction goals are met, they will logically drop, as without a sizable backlog it will be hard for courts to score more than 100 percent. Second, and somewhat ironically, it is the Federal Court and Court of Appeal that have had the most problematic clearance rates, although the former seems to be improving now. The Court of Appeal's figures could result from the greater number of cases being processed and thus appealed in the lower instance courts, but there may be additional problems, and a need for further organizational change as well. This merits exploration. Finally, Table 8 suggests that clearance rates were not that low in Malaysia even pre-reform, except for criminal cases in the Court of Appeal in particular. If this is a longer term pattern, backlog (pending cases carried over to the next year) was accumulating (as it would for anything under 100 percent), but not that rapidly. Historical statistics on accumulated backlog or cases carried

over from one year to the next (Table 9) support this interpretation, but it is hard to be definitive here because the pre-2009 inventory was very inaccurate. Nonetheless we will use the 2008 figures as a baseline since there is little alternative. It is likely that the carryover from 2008 to 2009 (all cases, including those filed sometime in 2008) was far higher than shown below, but as the subsequent figures are accurate (except for the fact that older cases not captured in the inventory have been entered as new filings) this means that real backlog reduction may be even higher than the baseline would show.

128. Thus, with that single exception, which affects only the baseline, Table 9 below is an accurate reflection of progress in reducing the initial carry over despite, as also shown, a tendency for new filings to increase the caseload each year. Thus judges are not only reducing backlog but also working on new cases so as not to create a new backlog of more recent entries.

Table 9: Comparison of Carryover, New Filings, and Dispositions – All Courts, 2009-April 2011

Court	Case Type	Balance Forward from 2008	Closed/ New Entries 2009	Closed/New Entries 2010	Closed/New Entries thru April 2011	Balance Forward to May 2011
Federal Court	Cv	53	55/58	79/35	24/36	57
	Cr	103	172/183	179/145	89/77	97
	L/A	154	374/375	419/462	241/179	242
Court Of Appeal	Cv	8,832	4,054/4,385	5,553/5,572	2,203/1,637	8722
	CrI	882	417/660	382/840	305/247	1487
	L/A	0	569/1,052	1,548/1,711	526/453	697
High Courts	Cv	93,523	96,168/72,148	100,425/77,053	28,858/23,000	28,254
	Cr	4,544	6,629/5,580	7,117/7,125	2,409/2,408	3,738
Sessions Courts	Cvl	94,554	160,906/141,031	176,880/159,942	58,134/53,884	46,546
	Cr	8,750	31,247/31,856	27,418/ 26,037	13,945/12,941	6,997
Magistrates Courts	Cv	156,053	367,138/306,246	338,890/327,045	113,037/100,246	54,198
	Cr	65,221	159,392/144,048	205,334/173,417	44,506/39,782	22,882
Sub-Total Trial Courts		422,645	831,480/700,909	856,064/770,619	260,889/232,261	162,615
Total		432,669	827,121/707,622	864,224/779,384	264,177/234,890	173,917

Source: Statistics Unit

129. According to these data provided by the Judiciary, total pending cases transferred from one year to the next were 422,645 in 2009, and cases entering over the next 27 months totaled 1,703,784. (To avoid double counting only trial court numbers are used – i.e., excluding the Federal and Appeal Courts).⁶⁴ This means that the originally pending caseload (422,645) was equal to roughly 57 percent of average annual filings (average new entries, or 735,764) for 2009 and 2010. Not knowing the normal timing of filings it is hard to say whether those in 2011 will be higher than the prior two years, but it seems likely. Compared to results from other countries, reducing a pending caseload representing about half of normal annual filings is not an impossible task, but it still would require an extraordinary effort to eliminate it entirely, and considerable dedication to reduce it, as happened here to 38 percent (162,615) of its former level within 27 months, especially as the carryover incorporates new filings (which appear to be increasing) as well as older cases. Since it is likely that the initial number of cases transferred forward from 2008 was even higher (and not captured in the first inventory) the results are probably an even greater reduction. This does not change what the courts disposed (although it would affect and probably improve the clearance rates⁶⁵). It only means that many of the cases disposed after 2009 should have been in the backlog rather than the new cases category.

130. We leave the tracking of delay reduction for processing of new cases to a later section as it has been done systematically only for the NCC and NCvC. However, the above discussion should make it quite clear that the 27-month program has been quite successful in reducing backlog and nearly ridding the courts of cases filed prior to the early 2000s. It should also demonstrate why it is important to use a series of indicators rather than a single one. Reduction of old backlog (tables 5, 7 and 8) could have been accomplished at the expense of a substantial portion of new cases, which might have been left sitting while the judges purged the older active ones. Hence the need for Table 9 demonstrating the quantity of new entries and the effects on overall carryover. Disposal or clearance rates

⁶⁴ Since nearly every case entering the Federal Court or Court of Appeal originates in a trial court and still figures in its count, numbers from the former two courts are not included.

⁶⁵ This is because clearance rates do not look at what is disposed, but are calculated only as cases closed over new entries. Hence, if the new entries category is suddenly expanded to include old inventory, the clearance rates would be reduced. If a correction is made, and clearance rates are calculated only against new entries, they would rise, as would likely be the case here.

(the terms tend to be used interchangeably) alone (Table 6) also give a partial picture as even a rate of 100 percent could be based only on reducing the older caseload, and especially where new filings are increasing could simply generate a “newer” backlog. Thus with this series of tables, it becomes still more clear that if not reaching its goal of total currency (not likely in so short a time and with so many older cases to be eliminated first), Malaysia’s Judiciary has managed to eliminate a large portion of aged cases, reduce its carryover from one year to the next, and for the most part maintain a clearance rate of 100 percent or higher in a period of only 27 months. Table 9 also demonstrates the size of new filings versus dispositions to give some idea of the conditions under which this has been done. Definitively, the common argument that the courts can only bring themselves up to date by closing their doors to new cases and only focusing on backlog has been disproved by Malaysia (as it probably should be for virtually every country).⁶⁶ Using strategies similar to those applied in Malaysia, courts can attend to new cases at the same time they are eliminating older ones, and they can do so to produce an overall reduction in the pending case carryover from one year to the next. Thus, the statistical results are important not only for Malaysia but for other countries with similar problems and similar goals.

131. There are several other problems in tracking overall progress as the Statistics Unit has already noted:⁶⁷

- (a) First, the baseline data (for January, 2009 and earlier) was never audited, and virtually every table displaying it adds that caveat. The first inventories did not capture all the caseload held in the courts for the reason discussed in the prior chapter. It is impossible to go back and correct the figures, but the situation is further complicated by the next point.
- (b) Second, between early 2009 and the present, courts doing follow-up inventories have discovered cases not captured in the initial exercise. In some instances

⁶⁶ No one seems to know where this myth originated, but it is found in proposals from all donors and in courts’ explanations to their governments as to why the solution must be based on new funds and new judges.

⁶⁷ Before the Statistics Unit provided most of the time series data and tables for this report, efforts to do this on the basis of the partial reports initially made available did reveal some problems, many now resolved, with the Judiciary’s earlier recordkeeping. This refers not to the accuracy of the count, but rather to what is being counted, and it became apparent that such basic constructs as “backlog,” carryover, and the like varied somewhat from report to report, even when compiled in the Statistics Unit.

(e.g. the Shah Alam High Courts), the number of “missing” cases was quite large. For lack of any easy alternative, they have simply been counted as “new filings” in the years they are discovered.⁶⁸ Thus some of the apparently dramatic increases in filings in 2009 and 2010 do not represent new cases but rather old cases not captured in the initial count.

- (c) Third, counting the “newly discovered old cases” as “new” cases artificially inflate the number of new entries. This clearly affects the clearance rates as measured for these courts, even though their actual capacity for clearing cases would be higher than the data show.
- (d) Fourth, it similarly affects the calculations of backlog (or pending caseload) reduction inasmuch as the “backlog” (cases transferred from prior years) was doubtless underestimated in the beginning. Thus, real reductions in pending caseload are probably higher than calculated here.

132. For the Court’s goal of reducing backlog, none of this really matters, and the global running accounts, and the more specific ones for individual courts, were sufficient to keep judges and staff’s noses to the grindstone. It does make it difficult to capture the overall accomplishments accurately, and as noted, undoubtedly underestimates the real amount of backlog reduction (given that the initial inventory was far from complete). This is most evident at the global level for High Courts, sessions and magistrates courts. Accounting for Federal Court and Court of Appeal cases is more accurate, and the only problems encountered there were some non-standardized reporting mechanisms – for example, the restricting of ageing lists to cases filed two years prior to the final cut-off of end 2010. For a Judiciary without statisticians, the Malaysian courts have done very well in using statistics to push their reform goals ahead.

A Closer Look at the Tracking System and its Impact on Delay Reduction and Productivity

133. Since the impact on delay, the second objective of the Malaysian program, can only be inferred from the indicators used above, it will be important to see how the

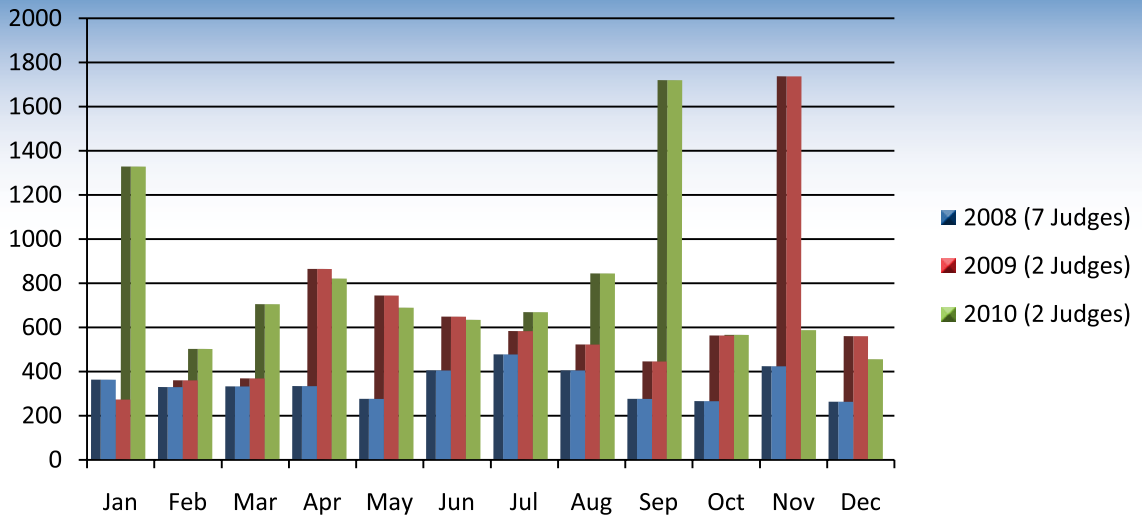
⁶⁸ There doubtless were better (but far more time consuming) means to deal with this problem, but the Judiciary’s primary interest was advancing the backlog reduction program, and for that purpose this means was as good as any. It is only in attempts, like the present one, to track overall progress, that the solution poses problems.

Judiciary has handled this. Increasing productivity was never a goal (or a problem⁶⁹) but given its addition to most performance measurement exercises we will examine it as well. The registrars and deputy registrars in Kuala Lumpur and Shah Alam High Courts have compiled an extensive set of monthly and annual reports on progress because they were the first centers to adopt the new mechanisms and because they are the most congested (and in the case of Shah Alam, formerly the most disorganized). Some of the most interesting of these reports track the progress in raising judicial productivity over time. When the two-track system was introduced, productivity (cases resolved per judge) went up, but as the two charts below indicate, it has continued to increase since then. This is the combined result of target setting and monitoring, and of the judges and staff’s ability to use the various delay reduction mechanisms more effectively. Many of these mechanisms will be carried over into the next stage, when judges, rather than a separate MJU, will be responsible for doing their own tracking and their own staff.

134. These figures require a little explanation. Both show significant increases in the absolute number of cases resolved each month but as this is occurring the number of judges assigned to each track is changing – in the A Track reduced from 7 to 2 and in the T track increased from 7 to 8. Thus the fact that overall monthly dispositions have gone up significantly in both tracks must be interpreted in light of this change since it is the per judge number that taps productivity. The most dramatic change is for the T-Track judges. Their numbers have been increased by one judge, but this hardly explains their multiplying their production and productivity over the 2008 baseline. Increases are equally, if not more, significant for the A-Track given that the number of judges decreased from 7 in 2008 to 2 in 2009 and 2010. Of course during 2008, each judge was handling both types of cases, the tracks not having been introduced yet. Separating the tracks allowed the two groups to focus only on one type of case and each judge was able to process significantly more cases under

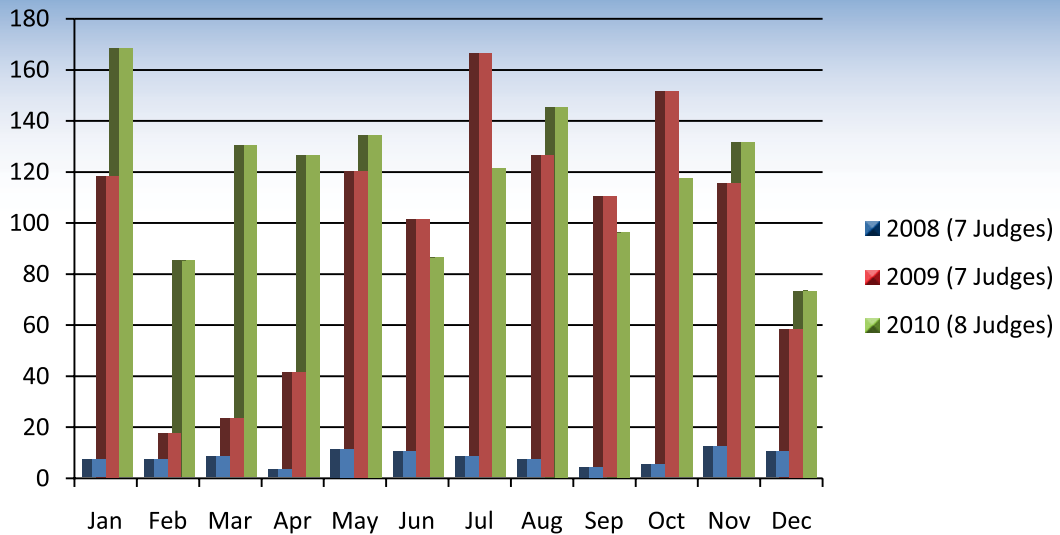
⁶⁹ It was not a problem because the average annual filings and dispositions per judge tended to be on the high side in Malaysia (apparently nearing 2,000 annually or 1,000 if all Judicial and Legal Staff is considered to be judges). The issue was only that more cases entered than were disposed, and the program aims at eliminating that gap, the cause of both congestion (backlog accumulation) and delay. However, as the following discussion indicates, the delay and congestion reduction mechanisms have also increased productivity (not entries per judge, which the court does not control, but dispositions).

Figure 2: Comparison of Disposal of A-Track Cases, High Court Civil Division, KL



Source: Statistics Unit

Figure 3: Comparison of Disposal of T-Track Cases, High Court, Civil Division, KL



Source: Statistics Unit

this system. The question and the challenge for the courts are whether, once the final model is introduced (all judges again handling both tracks), productivity can remain more or less at current levels. A slight decline might be anticipated, as many of the cases disposed in 2009 and 2010 were “inactive” and thus lent themselves to quicker resolution. In any event, for anyone doubting the benefits of tracking as a backlog reduction methodology, the two charts (and comparable ones compiled for other Divisions and districts, though not reported here) make it clear that the method has worked.

135. Productivity is an indirect way of getting at delay. It also was never an official reform objective, and in fact the two figures above were the result of someone doing some unprogrammed analysis (the equivalent of data mining had there been a database to mine). Higher productivity (more cases processed per judge within the same period of time) might imply less delay although the connection is not automatic. For example, judges might be processing more cases because they are receiving more, and thus

in terms of time to disposition, running faster to stay in the same place. In any event, the Malaysian courts have not attempted to track times to disposition, but instead have used a proxy indicator based on a system of caseload quotas and time limits for processing them, which is most developed in the new courts. The approach is facilitated by the way these courts are being set up – sequentially, with a first court (using judges from the now less burdened “old courts”) set up to receive all in-coming cases over a period of 4 months, after which it spends the rest of the year processing this caseload while a second newly created court begins receiving input over the next four months and so on. On the basis of this system, new court judges know they are expected to process their three to four months’ worth of cases within 9 months. This is relatively easy to track and Tables 10 and 11 show how it is being done and with what results. In both examples, the NCC and NCvC are in Kuala Lumpur and as the tables show, these courts are even ahead of their schedule in dispatching their new caseloads.

Table 10: Monthly Pending Cases - New Commercial Court, Kuala Lumpur, September 2009-April 2011

Year	Monthly Registration	NCC: Monthly Pending Cases																				
		Sep	Oct	Nov	Dec	Jan	Feb	Mac	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mac	Apr	
2009	Sep	289	282	252	174	114	88	76	39	26	15	4	4	4	3	2	2	1	0	0	0	0
	Oct	389		372	334	259	131	99	77	48	32	15	5	3	1	1	1	1	1	0	0	0
	Nov	328			306	277	237	103	74	53	34	12	5	3	2	2	0	0	0	0	0	0
	Dec	363				342	308	266	145	90	57	40	19	11	5	3	1	1	0	0	0	0
2010	Jan	289					285	255	168	127	105	76	62	41	31	17	10	9	8	8	6	5
	Feb	299						287	252	160	139	88	70	62	37	26	22	14	8	7	5	3
	Mac	426							412	355	273	201	161	136	87	58	41	29	13	10	9	8
	Apr	370								356	336	241	170	125	85	52	39	30	16	5	2	2
	May	367									348	308	232	168	124	84	59	40	29	21	15	14
	Jun	361										341	296	235	148	108	86	54	37	26	18	8
	July	345											327	265	199	119	90	67	50	39	29	16
	Aug	352												339	306	210	116	84	61	48	42	35
	Sep	317													288	227	127	86	51	26	13	5
	Oct	345														315	254	163	94	52	26	8
	Nov	357															327	274	148	104	71	45
	Dec	369																360	293	172	98	59
2011	Jan	336																329	259	135	78	
	Feb	222																	215	149	78	
	Mac	362																		340	234	
	Apr	315																				292
TOTAL	6801	282	624	814	992	1049	1086	1167	1215	1339	1326	1351	1392	1316	1224	1173	1213	1144	998	964	890	

Table 11: Monthly Pending Cases - New Civil Court Kuala Lumpur, October 2010-April 2011

Year	Monthly Registration		NCvC, Kuala Lumpur: Monthly Pending Cases From Oct 2010 to Apr 2011						
			Oct	Nov	Dec	Jan	Feb	Mac	Apr
2010	Oct	610	503	258	174	77	32	27	18
	Nov	515		386	235	134	88	37	27
	Dec	576			503	257	158	67	40
2011	Jan	615				461	255	125	75
	Feb	387					324	165	100
	Mac	635						536	265
	Apr	600							453
	TOTAL	3938	503	644	912	929	857	957	978

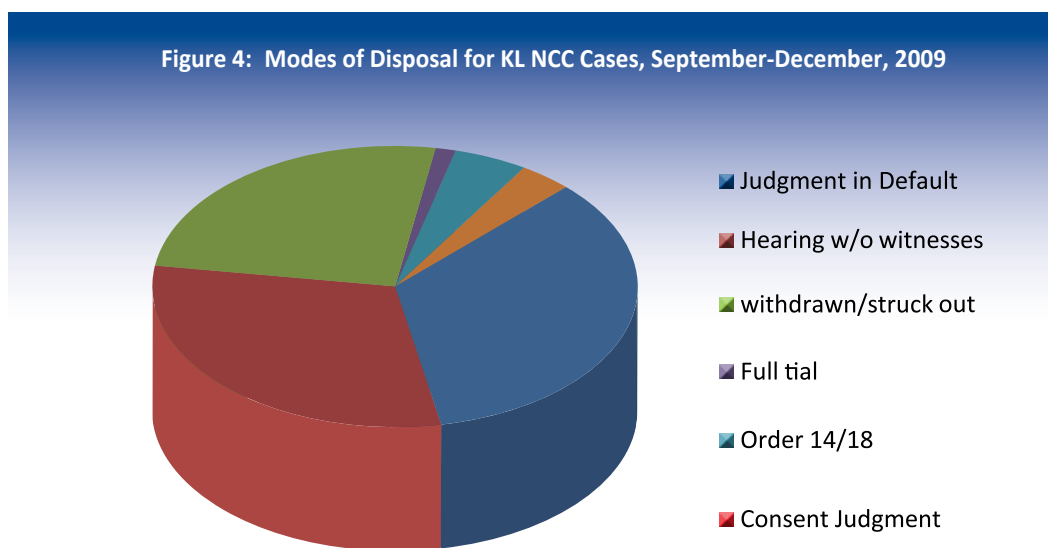
Source: Statistics Unit

136. Since only the new courts function in this fashion, tracking compliance with case-processing deadlines in other courts will be more difficult and will require monitoring disposition times because each court will receive its cases over an entire year. Given the Malaysians' creativity in designing indicators to match their objectives, they probably will be able to find one here. Still at this stage they might want to consider going back to the conventional, if only to make their process more intelligible to outsiders (either within the country or internationally). They may also want to speed up the creation of a database that would facilitate monitoring and measurement of delay. These are steps for the future, but given the speed with which the Judiciary is advancing on the first objectives, the future may not be that far away.

Other Findings

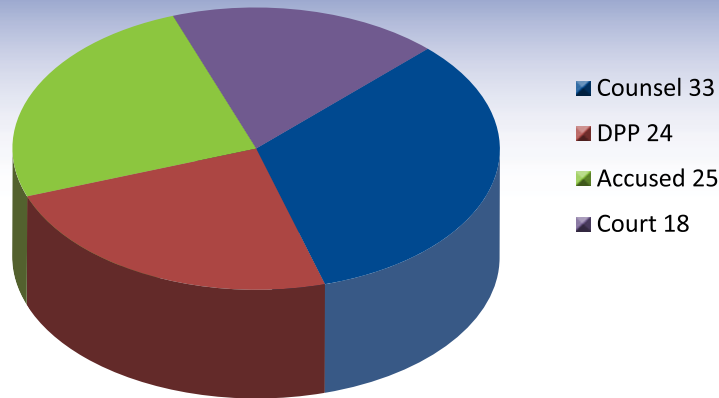
137. Although the Judiciary has largely used the data collected as an incentive for judges and their staff, there is some additional analysis which throws light on what normally happens to cases and how the backlog and delay reduction program has affected it.

138. One early finding reported in Zaki (2010) was the relatively low number of cases registered in the Kuala Lumpur New Commercial Court (NCC) that go to full trial with witnesses. Instead as shown below, while 1.3 percent go to full trial, the major form of disposition is a default judgment, followed by a judgment after a hearing without witnesses.



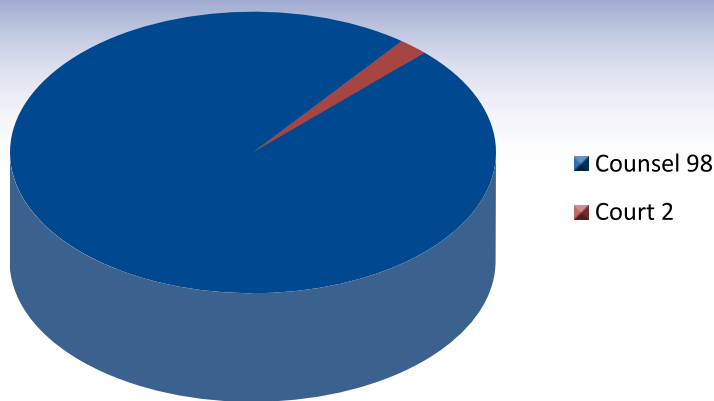
Source: Zaki Azmi, 2010; 36

Figure 5: Percentage of Postponements by Parties, Criminal Cases, Kuala Lumpur, Sessions Court, July 2010



Source: Zaki Azmi, 2010; 21

Figure 6: Percentage of Postponements by Parties, Civil Cases, Kuala Lumpur, Sessions Court, July 2010



Source: Zaki Azmi, 2010; 21

139. Since the chart shows the results in Kuala Lumpur for 2009, after the NCC was created, there is no way to tell whether similar results applied for commercial cases before then or for all civil cases more broadly. Perhaps the stringent policies on meeting case management and trial deadlines were having an effect never seen before. However, studies in other countries also suggest that few civil cases come to full trial, although it may take far longer for them to be disposed by other means. Absolute numbers are not included in the chart, but between September

and December 2009, 1,369 cases were entered and 377 were disposed. Two judges received and heard the cases. By August 2010, only 18 of the initial filings had not been disposed, a significant result in terms not only of eliminating new backlog but also reducing times to disposition.

140. Another finding from this early period regards the effectiveness of the policy on limiting adjournments, especially those caused by judges themselves.

141. By July, 2010, the courts had already improved on their 23 percent judicially-caused adjournment rate for criminal cases as reported in the PEMANDU baseline study, and by late 2010, they were doing still better. In civil cases, judge-caused adjournment has nearly disappeared, but postponements of all types remain a problem for criminal cases in particular. Since adjournments remain a general concern for both types of cases, systematic monitoring probably should be done on several bases:

- (a) Overall number of adjournments within each reporting period by material (at least criminal and civil), judge, court, district and system-wide
- (b) Average number of adjournments per case, disaggregated in the same manner.
- (c) Average length of postponements disaggregated as above.

142. All of these additional studies had to be done through sampling. With a real database these and other studies could be conducted directly off it by an enhanced Statistics Unit. This is already occurring in other countries, including some far less advanced than Malaysia. (See World Bank, 2010 on the creation and use of an integrated database on case events in Ethiopia). It may be difficult to do, at least in this great detail, until the CMIS is installed, but if the latter does not include information on adjournments, this should be one of the first additions in the new version. The Chief Justice does receive information on adjournments in the daily reports submitted by each judge, but it appears that this information is not fully recorded in any general database.

143. Further Recommendations as Regards Further Data Collection and Statistical Reports

144. There is little to criticize about the way the Judiciary went about organizing and tracking its reform. Its use of statistics to set and monitor targets is exemplary in the judicial world and explains a good part of the success in reducing backlog, eliminating very old cases, and as the examples from the NCC and NCvC demonstrate, reducing delays for new entries. Inasmuch as the author's initial efforts to produce global summary statistics for the present report replicated many of the problems currently faced by the Statistics Unit (e.g., need to convert a series of partial aggregate statistics into a single global summary; lack of a database and thus the need to do calculations by hand), this experience has inspired a series of short, medium and long term recommendations.

- (a) First, all aggregate statistics submitted to the Statistics Unit should be entered into its own database (or even an Excel sheet) so that further calculations can be done more easily. So far as possible, the Statistics Unit should avoid having to do these with hand-held calculators as that only increases the chance of errors.
- (b) Second, there is apparently still some lack of clarity as regards a few basic concepts – most importantly, what the ageing lists contain. Some of those initially made available for this report only captured cases filed one or two years before. Others included all cases filed in the prior year even if they are not carried over to the next. Whatever was done before, at this stage in the process, it would make most sense to include in the lists all cases carried over, even those from the year immediately prior, so long as the year of filing is noted.
- (c) Third, there is not much sense in going back to recalculate old statistics (and thus try to get a better figure of the initial – 2008 or end of 2008 – backlog). However, from 2011 onward, all the basic statistics mentioned above should be registered as accurately as possible, and “quick and dirty” solutions like counting “discovered” cases as new entries, strictly avoided.
- (d) Finally, until now the Judiciary's use of statistics has focused on two applications: setting targets and monitoring compliance. In both cases indicators have been tailored to track reform goals. As these goals are met, the Court will have to readjust the measures (e.g. introducing more detailed ageing lists) and may want to add new ones, but it should also consider two further uses of statistics: to detect and analyze additional performance problems (e.g. the Court of Appeal's apparent difficulty in keeping up with its caseload as reflected in its lower clearance rates) and to facilitate budgeting, planning, and the design of the second stage reforms. For these two additional applications, movement toward a real global database will be essential.

145. These suggestions are a natural follow-on to the Judiciary's initial success and a means of ensuring it will be equally successful in maintaining the improvements already made, especially as it moves into a second stage of reform. Global reports were not a necessary aspect of monitoring the first phase. In the future, however, global as well as courtroom statistics will be the Judiciary's core tool in taking its program forward. For that purpose, it will need to ensure that results tracking is pursued in a consistent form from one year to the next. It is thus essential, as expanded in the following chapter, that it strengthen its Statistics Unit and add personnel with a stronger background in the material.

CHAPTER IV

Looking Ahead

146. This has been an extraordinarily rapid reform program, and as the Judiciary is well aware, what has been done to date does not represent the end of the process. However, the Court is already looking ahead. In recognition of the Judiciary's current thinking of the next steps, the following discussion of gaps and additional measures is divided into two sections:

- (a) What the Judiciary already proposes to complete the first stage and move into Phase two of the reform
- (b) Additional actions it might want to consider for future work

147. A third and final section reviews additional studies and research that might be done in support of the program or of initiatives suggested by other actors.

Areas Already Targeted to Complete the First Phase Reforms and for Work on the Proposed Second Phase

Expansion of Measures Already Undertaken to the Rest of the Courts

148. The Judiciary designed the reform to focus first on the busiest court centers, Kuala Lumpur, Shah Alam, Penang, Johor Bahru, and Ipoh, as well as Putrajaya, the seat of the Federal and the Appellate Courts. The initial emphasis was on the High Courts in the first five areas (Putrajaya has none) and the priority areas have been gradually expanded to their subordinate – sessions and magistrates—courts. This is a reasonable strategy even in its lesser attention to the large number of subordinate and magistrate's courts located elsewhere in the five states, as well as the High, sessions, and magistrates' courts in the remaining states. As discussed below, Sabah Sarawak constitutes a special case.

149. All of these other courts have been incorporated in the program to the extent that their caseloads and disposition rates are also supervised and they are encouraged to follow the same guidelines. However, with the exception of the Case Recording and Transcription (CRT) System, they have not been included in the automation program, nor are they being as systematically monitored. Thus the next stage of the reform will require expansion of its full content to the remaining courts, but as their share of the caseload is far smaller, this is not as urgent as were the areas targeted in the first stage.

150. Expansion will require a second contract with the initial vendor in Western Malaysia (presumably the vendor covering Sabah and Sarawak is already committed to covering its courts). This will be a difficult contract to negotiate as the initial one (not including the source code) in effect gives the vendor an enormous advantage – the company owns the CMIS software, and if the Judiciary wants to expand its installation it presumably will be on the vendor's terms. Much the same is true of a second or possibly joined contract for maintenance and further development of the system over the next two to three years. Afterwards the Court will have to decide how it will proceed.

Integration of Mainland Programs with Those in Sabah and Sarawak

151. East Malaysia and its Chief Judge (who was appointed in 2006) introduced its own automation program (developed by a different firm, SAINS) and backlog reduction efforts before the Federal Court. Although coverage of the reform efforts in Sabah and Sarawak was beyond the scope of this report, there are a few innovations in Sabah and Sarawak worth noting, and required or allowed by its special characteristics – use of mobile courts and video conferencing to provide services to far removed areas, and an early adoption of a written transcriptions system (although CRT equipment has also been provided) made possible (as it was not elsewhere) because staff hired for this purpose was more fluent in

English. Courts in East Malaysia were never as congested as in the West and thus started the process with less backlog. Most of them are now completely current (i.e. their oldest cases were filed in 2010).

152. As regards the first phase program, the only real issue is how the Sabah and Sarawak CMIS will be merged with that developed under the larger Formis contract. This could be a concern in terms of report generation and the eventual creation of a global database allowing data mining and other unprogrammed analysis. But it should be resolvable so long as those in charge recognize that these three functionalities are critical.

Further Development of the CMIS as a Full MIS

153. The CMIS, as it will be developed by the end of the Formis contract, constitutes a good basic courtroom or court complex-level registry on case actions. Although not contemplated under the current contract, it should not be technically difficult, especially given web connections, to integrate the individual registries into a single global version and use this to create a global database at the central level.⁷⁰ However, each existing registry contains a significant measure of text entries (not suitable for analysis), and also does not record some case characteristics that will be important for further analysis of possible problems such as gender of parties, differentiation of types of organizational parties (aside from what can be surmised from the type of case or court), amount requested and awarded, whether or not the party has legal representation and so on. Starting with relatively simpler data capture is actually a recommended path for reform implementation. Attempts to start with the capture of more detailed information often run into problems of poor data entry or an inadequate identification of what is needed. They also can lead to endless discussions over categorization of variables.⁷¹ Therefore, it is recommended that such efforts start less ambitiously and grow over time.

⁷⁰ The database is separate from the registry but if the registry is correctly done (using codes, not text) the creation of the database should be virtually automatic.

⁷¹ This was apparently the case in Brazil. When the World Bank research team ended its fieldwork in mid 2004, the Federal Judicial Council (the executive secretariat of the Federal Judiciary) had been engaged for over a year in meetings with representatives of the five regions to try to reach consensus on a single classification scheme for recording criminal and civil issues. In retrospect it would have been better to develop a single set of categories and then let the five regions discuss them.

154. As the Judiciary begins to use the CMIS database(s), not only to track individual cases, but also to identify problems through more sophisticated analysis, it will need to add information to that which is already entered and to modify entry so as to develop a greater number of coded variables (those which can be manipulated statistically). According to the contractor interviewed for this review, this is not a technical challenge although it will require the Judiciary's deciding what it wants added and how it wants it code.⁷² It is not fully apparent that the Judiciary recognizes this need and potential. So far its notion of which data should be registered tends to be shaped by the statistical reports formerly collected manually. Obviously, an eventual global, web-based system allows for much more and it would be important to raise awareness of this possibility and the advantages of acting on it. It is thus recommended that international experts be brought in to discuss the issues with court leadership.

Creation of Centralized Database in the Statistical Unit and Incorporation of Data from CMIS and non-CMIS Courts

155. One of the surprising findings of the fieldwork was that the central Statistical Unit still receives all data in hard copy and enters them manually, making many calculations with hand held calculators. Although courts with the CMIS installed can generate all of the required reports automatically, composite reports must be created manually at the center. According to the vendor (Formis) the situation will change soon, and the central Statistical Unit will have a global database comprising the statistics (but not the raw data) managed by the individual CMIS courts. For courts without CMIS, data will continue to be entered manually and also in aggregate form. At present there are no other differences, but if, under the present or a separate contract, a global database comprising raw data from the automated courts is constructed, it will allow the following:

- (a) Data provided by CMIS courts (a set of entries for every case) could be analyzed independently at both the courtroom and central levels, to provide, for example, average times to resolution by court, by type of case, by type of party and so on.

⁷² Unless the contractor has done something very odd with the program, there is no reason to believe this could not be done. In fact, a gradual expansion of the items registered (and coded) is usually recommended to avoid spending enormous time up front in developing an exhaustive list.

- (b) This same type of analysis cannot be done by or for the non-CMIS courts as they will only manage aggregate statistics. What they don't calculate themselves cannot be calculated at the center.
- (c) Data mining – random analysis of disaggregated data to identify significant patterns and relationships – will only be possible for data provided by the CMIS courts. However, it should be started nonetheless as these data still represent a significant portion of all cases and to some extent represent a special universe – the most congested courts.⁷³

156. Until the integration of the local databases can be accomplished, as does not appear to be the short-term plan, the Statistical Unit will be managing two sets of aggregate statistics, one entered manually and the other automatically. This will at least allow it to produce global reports without the use of manual calculators, but otherwise offers few advantages. Once a database receiving raw data from the CMIS courts is installed, it will have to manage two types of data, raw data from the CMIS courts and aggregate statistics from the courts without the installed system. However, since the CMIS courts have the highest caseload, the advantage will be the ability to do more sophisticated types of analysis of the data they supply. Data from the Sabah and Sarawak CMIS will also have to be incorporated, and to the extent possible, harmonized with the contents of the central database.

Further procedural change

157. The Judiciary has a list of targeted changes it is promoting and those not already approved appear to be on the way to enactment by the legislature. However, over time, it is likely to find still more legal changes that will be needed. It appears that conducting such modifications to basic laws is not that difficult in Malaysia and moreover that there is a potential for trying out the changes on a pilot basis. This is usually recommended, but often not possible, as even the best analysis may still not capture all the potential consequences, some of which may prove more disruptive than the legal provision they sought to override.

⁷³ It was estimated for example that Kuala Lumpur alone captures about 28 percent of all cases, more than Sabah Sarawak.

Training

158. This is a high priority item for the Judiciary's second stage program and the discussion in its report on the initial reforms (Federal Court of Malaysia, 2011) mentions several variations, including a program for judges and an Institute for all legal professionals (the Malaysia Academy of Law). Training is important, but as discussed in the section on needed studies, it often involves investing large amounts of funds on activities that have little or no impact on improving performance. Moreover, there is a long and not very illustrious history of countries or donors funding mammoth training institutes that cannot be sustained over the longer run. It is thus recommended that before seeking funds, the Judiciary and other proponents do a thorough study of training needs (see below) and also investigate the funding implications of any specific proposal. Since the Court is thinking beyond judicial training, the suggested study on the legal profession should also be relevant.

Areas Suggested for Immediate Attention or for Inclusion in Future Programs

159. The following ideas are currently not contemplated by the Court but are suggested here as desirable measures for the Judiciary's longer-term institutional development. Some of these, such as those related to the IT issues, may be critical to completion of the first phase program, whereas others are intended to strengthen the Judiciary's own capacity for internal management.

Build up IT Capacity, Attend Hardware and Develop Software

160. As opposed to the following items, this one deserves urgent attention. It should not wait for a second phase program. According to the estimates of the IT department, the Judiciary has roughly 30 IT staff, half of them technicians (largely responsible for maintaining hardware) and the rest doing training, programming and systems analysis to some unknown degree. They are all located in Putrajaya. Moreover, they are subject to transfer anywhere in the public sector (belonging, like the Judicial and Legal staff, to a general civil service career). This situation needs review and serious modification.

161. First, 30 technicians located in the central office are insufficient even for ordinary hard and software maintenance. Admittedly, with good internet connections,

a certain amount of assistance can be provided at a distance, but the Court will still need to decentralize this service given the current and probable future levels of automation. Moreover, local staff can be trained to do ordinary repairs, but even in a country “where no location is more than five hours away” from the capital, there will be times when the insufficiencies of trained generalists and the travel delays will cause productivity problems. Certainly more technicians will be needed and they probably should be decentralized, though determination of their exact numbers and locations requires a more detailed analysis than possible in this assessment. Building up IT capacity clearly should be a priority of the Judiciary, and if need be, negotiated quickly with the legislature and executive.

162. Second, while technicians are probably interchangeable (so that one who fixed computers, scanners or video equipment in an executive office should have little problem in fixing them in the courts), programmers and system analysts may be another matter, especially as the courts begin to develop their own applications (or find a way to buy the source codes of the two companies developing CMIS – more on that below). The policy of transferring staff from one agency or even one branch of government to another needs revisiting – and in the case of IT this is especially important as agencies develop or have developed their own specialized (proprietary) software. Court automation may use the same languages and platforms as those in other sectors, but the underlying logic of their organization is different.⁷⁴ The quantity of staff needed hinges on a third issue as elaborated in the next paragraphs.

163. Third, the IT contracts for developing the CMIS did not involve transfer of the source codes, necessary to make any changes to the applications. This is often the preference of the firms contracted as it virtually guarantees them steady income for the foreseeable future. Anytime anyone wants a modification, they need to pay the company to do it.⁷⁵ The usual vendor argument that the CMIS is the company’s “intellectual property” rests

⁷⁴ This arguably has contributed to problems with court automation in Mexico (Hammergren et al. 2009) and the author also observed a court CMIS developed in Ecuador by experts with prior experience in banking. Unfortunately, the needs of banks (all transactions reported immediately to the center and the center’s assignment of a single account number) are not those required by judiciaries.

⁷⁵ It also means the company can sell a modified version of the system to judiciaries in other countries.

on very shaky ground. When an application (or for that matter a report, like the present one) is developed under a contract, generally ownership rights are transferred to the contracting agency, who will of course pay accordingly). In the Latin American region, where the experience with automation began twenty years ago, this was not the initial practice, but over time, competition has driven most vendors to include the source code in their deliverables. Without the source code, the need for a large judicial IT department decreases, but with it (or with its anticipated handover) a larger and more highly technical department will be necessary. A third option, also requiring a strong IT department, is for the latter to “retro-engineer the program,” which is to say that after a certain amount of experience with the company product, the Judiciary’s IT staff develops their own version, with any improvements seen as necessary. This has been a frequent development in Latin America, in part because of perceived economies, and in part because of longer term dissatisfaction with the initial product.

164. Given the existing weakness of the Judiciary’s IT department, not having the source code at the moment is arguably not a problem. However, the Court should begin to consider its future strategy, based on three options:

- (a) Continue present practices – let the company(ies) keep the source code(s) and rely on them for any future modifications. This implies a continuation of the existing contracts (for system maintenance and further adjustments) and only a modest expansion of the Judiciary’s own IT department, largely to meet the needs of equipment maintenance.
- (b) Negotiate a transfer of the source code/s while at the same time building up its IT department to ensure it can manage it/them
- (c) Consider the current contracts as acceptable for the time being, but enhance its own IT capacity so as to be able to develop its own applications, or in a later phase, work with a second generation of contracted software, this time with the delivery of the source code included in the contract. Depending on the skills of the new additions, they may be able to advance the needed integration of the local databases something apparently not included in the Formis contract.

165. The real issue here is not whether the initial contract should have included the source codes but how the Court wants to manage its IT development in the

future. Given the country's financial situation, costs may be the least important consideration although costing out the options over the next ten years would not be a bad idea, and would also allow it to bargain more effectively with the vendors. It is well to remember that the life of any specific software program is hardly infinite and that many judiciaries, as well as other agencies, have changed companies, software, or both in less than a decade. Software may last somewhat longer than computers, but in IT, change is the only constant.

Further Development of Policies on Access to the CMIS Database and Improvement to the Virtual Archive

166. In terms of system security, entry to the system (to enter data or on a read-only basis) is already regulated by user identity and passwords. However, considerably more may be required.⁷⁶ The other concerns have more to do with protecting party privacy, especially, but not exclusively in cases involving sensitive matters. Each country needs to develop and implement its own policy here as what is regarded as "sensitive" is culturally determined in part. Over the longer run, it would be desirable to make the database (or as in the present version, databases) available to outside researchers, but this may require cleaning it of any information that could be used to identify parties. Researchers in any event are usually not interested in who sued whom, but rather in larger categories of cases (e.g., banks versus individuals; individuals versus government agencies). This is not an urgent consideration but over time should be taken into account. It bears mentioning here that Costa Rica, which has an excellent database and makes it widely available, is now discovering that much of the information made available constitutes an invasion of privacy. In other countries the names of employees involved in labor disputes have been downloaded robotically to create lists of workers one "should never hire."

167. The issue of the virtual archive was explained above along with the need to introduce unique numbers for all cases. It appears neither one is getting sufficient attention at present. If they are not included in the current IT contracts, both should be incorporated in any amendment. Alternatively a separate contract could be

let to develop the virtual archive, although with vendor's retention of the source code this may not be feasible. Formis is creating a centralized archive of electronic case files and may have added the "invisible number" referred to above once it realized the confusion that would be generated because the "visible" numbering system will include duplicate numbers. However, there was no further indication of the creation of tools to allow easy navigation of the contents.

Development of a Planning Capacity and Its Impacts on the Current Administrative Arrangements

168. As noted above, the Judiciary's current administrative arrangements appear sufficient for its present needs. However as it moves to the next stages of reform, it will require a more sophisticated approach to identifying and proposing alternative solutions for future developments. This is especially important as beyond the expansion and refinement of the current reform (which could easily take three to five years) the future directions are not at all clear.

169. The Court has a new "Planning Office," but it appears to focus largely on training needs. The Judiciary's Statistical Unit is charged with collecting statistical data and reports from individual courts and producing the basic reports on court operations. Once the CMIS is fully operational, much of this can be done automatically and the staff assigned to do the manual keying and report production will be redundant. The two offices are mentioned together because a real planning office will need statistics to do its work, and thus may either be merged with the statistical office or be a primary consumer of what it produces (not only reports but also various kinds of analysis). The two offices currently do not coordinate with each other or with financial or personnel administration offices and neither of the latter appears to do much forward planning. Moreover the Judiciary's development budget is largely out of its hands, managed by the Division of Legal Assistance within the Prime Minister's Office. Within the court system, most of the key administrative positions are held by Judicial and Legal Services Officers or alternatively, by members of a government-wide administrative service – interviews suggested, for example, that for those at the apex of the administrative officers, any further promotions would require changing to another agency. The Court reported that it had changed IT directors several times over the last few years.

⁷⁶ No information was supplied (or requested) on additional security measures – although one assumes that both those and adequate off-site backup are taken care of.

170. For a court system with no reform aspirations, the current arrangements may well work. But they are evidently incompatible with a more dynamic approach to organizational development. It is thus recommended that the courts seek a way to do one or more of the following, requiring both structural changes and alterations in the career paths of those in key positions:

- (a) Create a Planning Office staffed by individuals trained in planning techniques (use of statistics to make projections, development of alternative scenarios for resource deployment, multi-year budgeting and so on).
- (b) Reconfigure the Statistical Unit and staff it with individuals trained in basic statistical analysis. PhDs in statistics will not be needed (and in fact may not be desirable) but those who can do policy-oriented analysis will be a decided plus. This is probably not a job for Judicial and Legal Service Officers, especially if they rotate in and out with the typical frequency. However, assigning a judge or two to the unit, or creating an advisory board composed of judges might be considered.
- (c) Strengthen the coordination among the Planning, Statistical, Financial Management and Human Resources Units so that they can collectively determine short, medium and long-term scenarios for resource needs and deployment.
- (d) Regain control of its Development Budget, or at least the ability to program it. If the Legal Affairs Division (of the Prime Minister's Office) wants to continue as a "project implementer," that may work, but it should not do the Judiciary's planning for it.
- (e) In the case of all administrative units, find a way to keep key staff and give them promotions or raises in place rather than losing them to the current career trajectory. End dependence on Judicial and Legal Service staff for these positions, which by rights should be judicial-administrative careers on their own.

171. This is an ambitious program, and unlikely to be accomplished in one fell swoop. The difficulty of the undertakings (and their removal from judicial control) increases as one reads down the list. The last two items in particular will require changes in government policy, but even the first three will be less successful if these changes cannot be leveraged.

Alternatives to the Judicial and Legal Service That Would Give the Judiciary (and Prosecution) Its Own Specialized Personnel

172. The quality of the Judicial and Legal Service staff and their ability to carry out a number of non-judicial functions appear to be quite high. Staff defended the current system, which over the course of their careers, may assign them not only to judicial and administrative posts within the courts, but also to a position as a DPP (prosecution), in other government agencies or even the legislature, as a good way of:

- Getting an overview of the entire justice area;
- Letting them learn a number of functions and skills; and
- Providing judicially knowledgeable people to perform administrative roles in the courts.

173. Their only complaints were the low starting salaries. Since this is a national service, the Judiciary has no control over the salaries, explaining why, when the Chief Justice successfully lobbied for a 40 percent increase in the salaries of superior court judges, the subordinate court judges and other Judicial and Legal personnel assigned to the courts could not be included. Certainly compensation for this group should be reconsidered, especially at the lower end, and if it is easier to do this by separating those assigned to the judiciary from the general pool, that alone could be a sufficient reason for doing so.

174. Apart from the salary issue, there are additional reasons for seeking this separation. For the time being, the system (government-wide reach, frequent rotations within and among agencies) seems to work well, but over the longer run there are clearly costs to encouraging people to jump from one position to another so that whatever expertise they develop in the first position they may never use again. Moreover that same expertise is lost when a new person occupies the post. For example, the Judicial and Legal Service officer who heads the Statistical Unit clearly had or has developed an appreciation for the use of statistics, but when she leaves, her replacement will have to redevelop those skills to function as effectively. In addition, the practice clearly sets a limit on how expert any one person can become. The Court has already recognized that they need statisticians in the statistical unit and is making plans to hire one, but this one example seems to be repeated in other, non-administrative areas as well.

175. For example it was mentioned that the sometimes-difficult relations between police and prosecutors are probably aggravated by the fact that the police have much more experience in investigating a case than would a prosecutor, even one at a high JS level, who spent the earlier part of her career in the judiciary or as a parliamentary drafting officer. Good prosecutors, like good police, are not formed in a few years, but rather over a much longer period.

176. The use of specialized courts and the argument for their creation – that a judge becomes familiarized with the topic and can decide more wisely and rapidly as a result – seems to fall apart in the face of the preference for generalist judges, who might spend a few years in one specialized court, and then move on to another. The virtues of broad exposure (although never so broad as in Malaysia where the JS may serve in all branches of government, albeit not so frequently now as formerly) has been recognized in other judicial systems (e.g. France and Germany) and in other agencies (US foreign service) by rotating a new recruit through several positions, but then having them choose the career path they will follow. In several European countries, very junior judicial recruits, or those in a training program, may work as assistants to prosecutors, judges or even public defenders, but then are channeled into one career stream or the other. Malaysia may want to consider this example as an alternative to the present system although since the Judicial and Legal Service is a government-wide program, the decision will not correspond only to the courts. However, other agencies may find themselves in the same predicament, limited as to the degree of specialized expertise their personnel can develop.

Development of Court Administration as a Separate Judicial Career

177. The other area still more affected by the practice is the administrative offices of the courts. In the US, Canada, Australia and England and Wales and increasingly in other countries, court administration is a specialized career, combining knowledge of judicial practices (but not necessarily a law degree) with a strong formation in management. Practitioners of this career, and of its various sub-specialties, are increasingly graduates of specialized university degree or certificate programs, and moreover are expected to sharpen their skills on the job. A court administrator responsible for overseeing an entire judicial system will normally have come up through the

ranks, having entered, post university training, at a lower level, possibly working in a local court, or handling only financial or personnel matters. True, many of those now holding the highest positions may never have studied the specific topic in the university (absent any such programs when they started) but they often had degrees or training in more generic management, finance, or personnel management. They are rarely ex-judges although in the US in some complex court systems, there may also be a judge (called an “administrative judge”) assigned to oversee their work, but certainly not to do it. Malaysia appears ready to consider this alternative although it will certainly take a while to introduce, and will also require changes to the Judicial and Legal career system, at least to the extent of eliminating rotation of its members into administrative positions. As regards other professional staff not recruited from the Judicial and Legal career (e.g. IT personnel) a similar problem exists and they reputedly rotate through the entire public sector, so that again, the chances of developing their expertise as applied to the judicial system is again limited.

Suggestions for Additional In-Depth Studies and Assessments

178. This section offers some suggestions on additional in-depth studies and assessments to address the potential mismatch between supply of judicial services and manifest or latent demand for justice. The courts appear to be doing fine, but their small size suggests either that Malaysia has a remarkably small number of justiciable disputes or that citizens resolve their conflicts in other venues (or not at all); thus the issue is whether the full range of alternatives is adequate. Except for the first item on training, these additional studies are less immediately relevant to the judiciary’s own reform program, but may be of interest to the government in assessing the effectiveness of the overall justice system and such issues as crime reduction, violence prevention, and economic growth. The courts seem to be playing their role quite effectively, but other actors and agencies may now need more attention.

Training Needs and Alternatives for Meeting Them

179. The judiciary currently has a limited budget for training and most of what occurs under that rubric involves short courses and large meetings (judicial conferences and seminars). There is no entry level program for new “recruits” to the Judicial and Legal Service, but none specifically for those then assigned to the courts. For

more experienced lawyers named to the superior court bench or recruited as judicial commissioners, the Judiciary has no program – and that maintained by the JL Service would not apply. There is apparently no requirement for Continuous Legal Education (CLE). Actual training sponsored by the Judiciary appears to be somewhat ad hoc, constrained by budgets and also by the recruitment practices and rotation of staff to different positions. In some sense, rotation is regarded as training inasmuch as individuals rotated from one position to another learn relevant skills on the job and also develop what they call a “multi-tasking” orientation or a greater appreciation for the different roles necessary to court functioning.

180. More systematic training will require a higher budget, but its creation also faces some unusual structural impediments – the internal logic of the Judicial and Legal Services model. So long as this model remains in place, it will affect the kinds of training that can be done. An argument could be made for an entry level course for Judicial and Legal officers starting judicial service – most commonly as senior assistant registrars – and possibly for those moving up to the next logical position – as a magistrate, deputy registrar, or administrator. However after that it is hard to say what kind of training might be needed under the current system or any modification of it likely to be realized over the next few years.

181. Training is always high on judicial wish lists but much of it, according to evaluations done in other countries, has little impact on the quality or quantity of services.⁷⁷ This is not because training is not important, but rather because it is so often poorly designed and organized. Hence a first step in establishing a training program should be a thorough evaluation of the situation of performance, identification of how training might improve it and at the same time, specification of the additional measures that would be needed for training to have its desired impact. Few training programs start in this fashion which is the prime explanation for why so many of them produce little improvement. Instead the focus is usually on the size of the building, where we will place it, who will teach, and who will be the director. As regards buildings, the courts could probably start with some of the currently unused space

⁷⁷ An unreleased review of World Bank judicial reforms thus found that in the program evaluations, training often received the lowest grade among all components. Some problems encountered – for example, donor-funded training activities that collapsed once the donor left – are unlikely to affect Malaysia, but the impact on services needs consideration.

or that freed up by the elimination of physical files. Over the short run that should be adequate and longer-term decisions can be made later, on the basis of the earlier results. Directors and instructors are another problem but while the director should be full-time with some sort of tenure (thus making the selection of the candidate more controversial) instructors should be hired on a part-time basis for specific courses, or where possible, be judges in practice. The needs assessment should also cover various scenarios for starting and developing the program, including with each estimated start-up and recurrent costs. Initial programs could also be conducted through an existing law school, thereby reducing start-up costs until final plans can be developed.

182. The real issues have to do with content, and here both the initial needs analysis and the courts’ personnel policies come into play. Some of the suggestions made above as regards separating the Judicial and Legal Services Officers assigned to the courts (or the creation of a separate judicial career staff, a proposal to this effect already having been forwarded by the judiciary) or creating a court administrator as well as judicial administrator (for other administrative tasks) career track would also affect long-term planning. Over the immediate run, however, the proposals and the study should address current needs, especially as regards three types of training – entry level, general continuing education for those in service, and very specialized courses on issues affecting only a limited range of cases (e.g. courses for those hearing corruption issues where a knowledge of money laundering, basic accounting and so on may be needed). It is recommended that the study be done by a multi-disciplinary team including members with experience in organizing training programs as well as substantive experts.

Situation of the Legal Profession and Its Possible Liberalization

183. The topic of liberalization of the legal profession was raised by a few of those interviewed and has also been under discussion in the press, although further descriptions of the aims and content of any such measure varied among the few interviewees who referenced it. On the one hand, it is used to refer to loosening or eliminating the restrictions on legal practice in Malaysia by lawyers from other countries. On the other (NEAC interviews), it referred to allowing non-lawyers to handle certain kinds of legal work and thus creating a larger pool of talent on which users could draw. In explaining their proposals,

the two groups did agree on a few aspects of the current situation they regarded as problematic.

184. First, the quality of legal education and thus of lawyers in the country leaves much to be desired. A proliferation of law schools and the popularity of the discipline may also be producing an overabundance of lawyers as well as of trainees who stop short of admittance to the bar. Many of those who are admitted (an estimated 60 percent) operate individually; there are few law firms and even they are relatively small.

185. Second, it was said (but could not be verified) that fees for legal services were low, and that as a result some of the best local candidates went to other countries (e.g. Singapore) to practice. Moreover since criminal practice is still less remunerative, the criminal bar remains very small.⁷⁸

186. Third, while no interviewee referenced this point, it is likely that most lawyers reside, as they tend to do everywhere, in the major cities and thus there may be a shortage in certain parts of the country. Thus although legal representation is not required to go to court, the shortage of lawyers in many areas may constitute a further restriction on expressed demand. It bears mentioning here that the Malaysian bar, law schools, and the Judiciary have continued with a very formal set of legal procedures, parts of which have already been eliminated in England (the multitude of writs and other formalities unintelligible to the layperson). Hence seeking to conduct a case without a lawyer could be a daunting and probably not very productive proposition. Judges can of course be trained to deal with unrepresented clients, but so far, that practice appears not to have been adopted in Malaysia.

187. Liberalization will not be a panacea for all the problems facing the legal profession. However, the decision on whether to liberalize should be based on an analysis of the larger public interest, and not just on the impact of livelihoods of legal professions. And the benefits to the economy as a whole of having high-end legal services would be considerable.

188. No one wants unqualified lawyers performing legal work, but there may be types of work currently monopolized

by lawyers which could be done by an appropriately certified paralegal or someone from another profession. It would thus be important to explore the potential here. Facilitating the process for allowing lawyers to practice in Malaysia on the basis of adequate certification in another country could also have benefits, especially, as suggested above, in raising local standards, and not incidentally, in promoting the formation of multi-national law firms. Such a measure should be quite consistent with Malaysia's intention to attract international business. The presence of foreign law firms and lawyers is likely to raise legal standards, raise fees and remuneration in some sectors and spur investments in Malaysia by firms that require high quality legal services. On the other hand, liberalization is less likely to improve the criminal bar and other measures need to be considered to improve them. Liberalization is also likely to increase inequality as the salaries of best paid lawyers are likely to increase very quickly.

189. The experience of the manufacturing sector where Malaysia has liberalized is instructive. The arrival of MNCs helped upgrade Malaysia's manufacturing sector in short order and was the basis for a substantive transformation of Malaysia's economy and success in reducing poverty. Services such as the legal profession have been a lagging sector as they remained unliberalized.

190. It is recommended that a more detailed study on the local legal profession be done for the purpose of better understanding the issues, their underlying causes, and most importantly the impact, not just on lawyers' livelihoods but on the functioning of the justice system and the quality of services provided to all types of actual and potential clients.

Analysis of the Organization, Distribution and Working Methods of Public Prosecutors (DPPs)

191. This is not a study the Judiciary would finance, but having it done and having its recommendations adopted would have important effects on court performance. The study done by PEMANDU as a prelude to its crime reduction program suggests a number of areas where more focused research would be useful. Among them, the delays attributed to the prosecutors seem to require more concerted attention, as opposed to the targeted remedies offered. Other interviewees provided further details that could not be verified but do indicate the possible presence of more fundamental structural problems calling for organizational reforms, possibly along the lines of what the

⁷⁸ It bears noting that the current Chief Justice was applauded by the Bar Council for lobbying with the Prime Minister to increase fees to attorneys hired by the government to do this kind of work.

Judiciary has already done. On the one hand, references were made to prosecutors being overburdened, and on the other, to their already large number (as one judge said, “more than judges”). One interviewee noted that prosecutors sometimes request adjournments because, for whatever reason, they have had no time to review the case files; however the same interviewee noted that prosecutors were very reluctant to provide full discovery (information on evidence) to the defense lawyers, and that this in turn might provoke the latter’s request of a postponement. Obviously there are some problems although with the information provided it was impossible to assess their dimensions or broader impact.

192. Based on experience elsewhere it is not uncommon to find that prosecutorial agencies, like courts, often suffer from counterproductive organization, illogical distribution of staff, and unnecessarily complicated working rules that make it difficult for them to use their resources effectively. Thus it is recommended that this situation be explored, ideally using a team of experts with experience in more efficient agencies from elsewhere in the common law world. Rather than focusing on investigation and other skills training (as is often done in these studies), the study should concentrate on internal organization and procedures, including distribution of staff and mechanisms for assigning and monitoring work. It is not known whether the DPP has its own “CMIS” to register cases, record their processing, and generate management reports. If not, one should clearly be introduced. Coordination with the police should also be covered as it is a problem the resolution of which may require more than the punctual remedies proffered by PEMANDU. The suggestion implicit in some of the discussions, that the solution is to add more prosecutors, may be correct, but before any move is made in that direction, these organizational and procedural issues should be analyzed thoroughly.

Unmet Dispute Resolution Needs

193. This is the current state-of-the-art term for this type of study. The preferred methodology is based on that developed by Hazel Genn (1999) in England, and subsequently applied both by Genn (1999) and others in other countries. Essentially the interest here is in 1) identifying the types of conflicts commonly encountered by the population as a whole and specific groups or strata within it; 2) identifying the mechanisms (including doing nothing) they use for different types of disputes; and 3) determining how they fare in resolving them and with

what impact on their lives. This type of study, essentially a rather complex survey asking respondents about their own experience, can be relatively expensive, especially in a country as linguistically and culturally diverse as Malaysia. Moreover, not all attempts to do this have been successful.⁷⁹ However, in no country in the world, and much less in Malaysia with its several legal traditions, do courts resolve all problems. Therefore, it becomes important to know whether in combination with the alternatives they are adequately addressing disputes that could escalate into more violence or otherwise negatively affect citizen well being. The issue is thus less whether people take their disputes to the courts than how and whether they find means to resolve them. Knowing this can allow countries to plan more adequately their investments in dispute resolution mechanisms, determining for example whether to try to expand access to the courts, improve the performance of various alternative mechanisms, or even attack more directly certain sources of conflict so that they do not require the use of any such forum. Examples of the latter might include expanding public services to groups and communities at risk, improving the performance of administrative agencies that seem to produce conflicts based on poor service provision or unnecessarily complicated rules for accessing it and so on. Thus while in many Latin American countries, poor service by social security agencies has been addressed by creating special courts to handle the resulting disputes (see World Bank 2004 on Brazil), the better route might be to improve agency performance.

194. It is entirely possible that a study of this sort might find that the Malaysian population as a whole and distinctive groups within it (entrepreneurs, the poor, certain ethnic collectivities) are entirely satisfied with the alternatives, but if there are exceptions to that rule, it would be well to identify them now so as to be able to develop reasonable remedies for addressing them. For the courts, one conclusion might be to create real small claims courts (as opposed to the small claims proceedings currently applied by magistrates courts), to ensure that judges are trained to deal with parties not represented by lawyers, or to simplify proceedings (and language) so

⁷⁹ The South African Legal Aid Society attempted one recently with disappointing results because (as reported in private communications with the author) of methodological problems with the sample. Abbreviated forms have also been included in national household surveys (Republic of Kenya, 2006) with some interesting findings. Adopting this mechanism might be a quick way of determining whether a more extensive study is needed.

that pro se (self) representation is more effective. It also might develop that the courts are doing fine, but that more attention is required to other mechanisms that are not performing as well.

Administrative Tribunals (and Other Non-Judicial Dispute Resolution Forums)

195. This could be a follow-up to the unmet needs study or might be conducted independently. Malaysia has a series of administrative courts – for labor, housing, social security, and fiscal (taxation) matters among others. The direct intersection of the tribunals with judicial work occurs largely in the context of the potential for appealing their decisions on the basis of constitutional and legal violations (not substance). Judicial review cases represent a significant but not overly large portion of civil cases; however the way statistics are kept do not allow a distinction between these cases and those filed by government to collect taxes and fees. In theory a well-functioning administrative law system should reduce court congestion by providing satisfactory responses to citizens and thereby discouraging appeal to the courts. There is no reason to conclude that this is not the case, since where appeals are allowed, there will always be some use made of them, and the numbers of such appeals are not dramatic in Malaysia. Nonetheless, it might be well to review performance of these tribunals as regards overall user satisfaction (by interviewing users and also reviewing cases sent to court on appeal to determine whether there are patterns here), organization, caseload, delays in resolving cases, and the size and composition of the carry-over from one year to the next. In short, any such study could replicate much of the judicial reform program, starting with a caseload audit, and then continuing as the results of that exercise indicate. Similar exercises might be done for the Syariah and traditional courts, but these might be more controversial, and unless the unmet-needs study or other information already indicates serious problems, could be deferred for another time.

Conclusions on Next Steps

196. Although the Judiciary is already looking ahead to its phase two reform, it will (or should) be engaged in perfecting its first stage program for the next few years. The strategy of moving ahead with all due speed has produced important results, but to ensure those results are maintained (and expanded throughout the entire court system) more work will inevitably have to be done. Most of the early results

were not ICT dependent (although clearly having computers helped the courts in their manual tracking and generation of statistics). Now that the CMIS is coming on line, it will be important to ensure that its use consolidates the early advances. This means, inter alia, an emphasis on building up the Court's IT and Statistical Units as well as finding ways to integrate the three sources of data – the Formis and SAINS systems and the manual information that will continue to be supplied by some court districts. Eventually, it implies the construction of an integrated database incorporating and improving the systems managed in individual courts and court complexes.

197. Two types of activities will be essential for the Judiciary's second stage program – the strengthening of its administrative offices to feature a focus on planning as opposed to ordinary (house-keeping) administration and a series of studies to explore areas (especially training) where it believes it wants to work. Many judiciaries, after first focusing on efficiency, then attempt to move to the issues of quality (as the Malaysian courts appear to want to do), but this transformation is difficult because 1) it is much harder to operationalize objectives and develop means for monitoring their achievement and 2) there is more likely to be disagreement as to priorities.⁸⁰ There is a tendency in these reforms to turn to a focus on inputs (a training institute or program, an outreach program for disadvantaged groups, the creation of more specialized courts, and so on) without ever defining the improvement in services to be achieved. Malaysia's courts avoided this vice in their first phase programs; it is to be hoped that they can continue to do so. The low-hanging fruit – efficiency – poses fewer problems in that sense. There are critics of efficiency as a goal, but even they cannot dispute how its advance should be measured. In discussing quality of performance, the disputes are likely to be far more divisive. In short, a second phase program poses a second set of challenges, and the courts should probably take their time in deciding how they will overcome them. In the meantime, the first phase is hardly complete, and if the next steps – to ensure advance already made are retained – are less exciting than the first ones, they are no less important. Taking them will also provide time to reflect on what should be done afterwards.

⁸⁰ For example CEPEJ (see reports cited) is now engaged in efforts to produce "quality" court systems in the European countries it covers. This is in response to concerns that there has been too much emphasis on efficiency, an argument sometimes heard in Malaysia (although largely from lawyers who resist the emphasis on timeliness).

CHAPTER V

In Conclusion

198. This last section expands on an idea forwarded in the introduction, the value of reviewing the Malaysian reform as an example, model and source of lessons for other would-be reformers. The most striking aspect of the Malaysian example is the amount accomplished in very little time and moreover the fact that this was done before the large investments in ICT came on line. This is not to discredit the latter, but simply to point out that there is no need to wait for ICT or to lament the lack of funds to finance it in order to produce some important results. In summary the lessons derived from the experience are as follows:

- (a) A reform's success is largely conditioned by the ability of its leaders to identify problems and define concrete, measurable goals for resolving them. A reform that simply aims at "improving performance" without defining specific targets is less likely to accomplish anything. Quantification is important, no matter how objectives are further defined.
- (b) Increasing efficiency is a good start, representing a sort of "low-hanging fruit" in the goal hierarchy.
- (c) There is a logical progression to reforms, and the Malaysian judiciary recognized and acted on this principle. It may be hard for reformers to get excited about some of the preliminary steps (e.g. case file inventories), but if they are skipped reforms will founder.
- (d) One preliminary step usually recommended, a thorough assessment or diagnostic of the judiciary's situation, was skipped in Malaysia. However, the PEMANDU crime reduction program did begin with a diagnostic and others have been recommended in the present report. It does not appear that the judiciary's reform was adversely affected by this shortcut, but there were some additional special circumstances. First, the Court's working hypothesis, that there was delay and backlog that could be eliminated rather quickly, was based on prior, if less systematic, observation by the reform leaders (and especially the Chief Justice). Second, the way the reform was organized (the sequence) meant that the early steps served to verify the hypothesis. Had the inventories discovered, contrary to expectations, that all pending cases were recent ones and moreover active, the program would have needed modification. Third, there was constant monitoring of progress which *inter alia* allowed the identification and resolution of additional problems along the way. Thus, for the reform's immediate purposes a further diagnostic was probably not needed (would only have added delays and possibly weakened the initial consensus), but others contemplating similar programs should not assume this applies equally to them.
- (e) A first, essential step in any reform is to put order to what is there and establish a system for monitoring performance. Neither one requires automation, although the monitoring system can certainly be improved once ICT is introduced. Without order and without information, it will be very difficult to plan, implement and measure the effects of any further reform efforts.
- (f) It is generally recommended that prior to automation, courts improve and simplify their work processes. This is advice that few heed, but whether as a conscious strategy or simply a question of necessity, this did occur in Malaysia. This left the contractor with the task of automating an already improved process, facilitating and doubtless accelerating activities that had been done by hand (e.g. programming of hearings). How flexible CMS (the Formis software) will be as regards future changes remains unclear, but it has certainly done a good job of automating the improved manual procedures as well as adding items like internet filing and CRT that could only be done with ICT.
- (g) While seemingly simple minded, an inventory of cases and an improved filing system are essential parts of the "putting in order" phase. On the basis of both these steps, courts, or for that matter any agency, can most probably substantially reduce existing workloads and so facilitate further reform.
- (h) A tracking system, like but not necessarily the same as that introduced in Malaysia is a recommended means for further reducing backlog. The logic behind any such system is to separate cases by the level of effort required for their resolution – in the future a similar logic can be applied to more sophisticated forms of differential case management.



- (i) Judiciaries often underestimate the importance of having a global database with raw data (as opposed to statistics), and here the Malaysian courts are no exception. They have done an excellent job of utilizing basic statistics to encourage judges to improve their work, but the continuing absence of a global database is a concern. The absence does not limit the Judiciary's current plans, but it will impact on the formulation of the next stages.
 - (j) Once the low-hanging fruits have been harvested, the next challenge is to define the further directions of reform. Although Malaysia can still spend several years terminating the first stage, it will need to consider where it will go next and how it will get there.
 - (k) Courts are only one part of a justice system, and as the PEMANDU study clarifies in the case of crime reduction, many other actors are involved. Much the same is true of more ordinary dispute resolution as discussed in the prior section on additional studies. When attention is not paid to these other agencies, and comparable reform programs established, the impact of even the best court reform will be limited.
 - (l) It is easier to carry this all out with substantial funding, but many of the measures introduced by the Court were accomplished with few additional funds and others (the ICT contracts) could be simplified and thus the overall costs cut back. This might produce less dramatically rapid results but over time the same types of improvements should be possible.
 - (m) Committed leadership is essential, and it is also important to ensure such leadership persists over the longer run. Broadening the reform team (to include the President of the Court of Appeal, the two Chief Judges and more members of the Federal Court) as was done in Malaysia is thus a recommended strategy. Reforms have progressed with only one high-level leader, but they are easier to reverse when that is the major source of their momentum.
199. These are only a few of the lessons that might be derived from the experience. A further recommendation is that countries embarking on judicial reforms, especially, but not solely thus emphasizing efficiency, take a closer look at the experience, if possible by visiting the Malaysian courts and talking with the participants. The Malaysians designed their program on the basis of many such visits, and the experience clearly paid off. They selected what they saw working in other countries and then tailored the approaches to their own situation. Successful imitation with an eye to appropriate modifications allowed them to move ahead with extraordinary speed. Thus, a final lesson is to learn from others, and so to take advantage of being a late-comer by building on existing examples. Those who are only starting or who are revising "failed programs" should take heed.

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Judicial Appointments Commission Act 2009 (Act 695)

Penal Code, Act 594 (as amended to January 1, 2006)

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Subordinate Courts Act 1948 (Act 92) and Subordinate Courts Rules Act 1955 (Act 55) (as amended to July 15, 2010)

PERSONS INTERVIEWED

Federal Court, Court of Appeal and High Court Presidents

Zaki Azmi, Chief Justice

Arifin Zakaria, Chief Judge, High Court of Malaya

James Foong Cheng Yuen, Justice of the Federal Court

Raus Sharif, Justice and Managing Judge (Kuala Lumpur, Seremban Malacca, Northern Johore)

Abdull Hamid Embong, Justice and Managing Judge (Shah Alam)

Suriyadi Halim Omar, Justice and Managing Judge (Kedah and Perlis)

Federal Court, Office of Chief Registrar

Hashim Hamzah, Chief Registrar

Zamri Bin Misman, Deputy Director (Management)

R. Rajasundram Deputy Director Finance

Lim Fook Yin, Senior Assistant Director (Finance)

Asrul Nizam Asat, IT Officer

Hashiza Almad Khan, IT officer

Federal Court, Administrative Offices

Nurul Nusna Binti Awang, Head of Case Management Unit

Mohd Aizuddin bin Zolkeply, Special Officer to the Chief Justice

Fadzilatul Isma Ahmad Refngah, Head of Statistical Unit

Nourul Fitri Hamdan, Special Officer to the Deputy Chief Registrar

Husna Dzulkifly, Office of Case management Unit

Court of Appeal

Azimah Binti Omar, Registrar

Kuala Lumpur High Court

Yeoh Wee Siam, Judicial Commissioner, Family Court, High Court

Mohamad Ariff bin Md Yusof, High Court Judge, NCC

Noraida Sulaiman, Managing Deputy Registrar for NCVC

Fatimah Rubi'ah, Managing Deputy Registrar, for OCVC

Hamidah Binti Mohamed Deril, Deputy Registrar High Court

Nazri Ismail, Deputy Registrar for Civil High Courts

Mohd bin Ismail, Senior Assistant Registrar for Civil High Courts

Adira Adnan, Senior Assistant Registrar for Civil High Courts

Ong Wee Ching, Registrar, Subordinate Court

Shah Alam, High Court

Mohtarudin bin Baki, Senior High Court Judge
 Nurchaya Haji Arshad, High Court Judge
 Zaleha binti Yusof, High Court Judge
 Tasnim binti Abu Bakar, Deputy Registrar for Civil High Court
 Ramesh Gopalan, Deputy Registrar for Criminal High Court
 KB Elina Hong Tze Lan, Senior Assistant Registrar
 Mislia Mohd Aris, Registrar for Subordinate

Judicial and Legal Training Institute

Azian binti Mohd Aziz, Director-General

National Economic Advisory Council

Prof. Dato Norma Mansor, Secretary to the NEAC
 Mary Artylan Fernandez, Executive Director (Economics)
 James Lidi Mathew, Deputy Secretariat

Prime Minister's Department

Mahzum binti Arifin, Deputy Director General (Planning and Development), Legal Affairs Division
 Syed Mohamed Bin Koyakutty, Legal Affairs Division, Director of Planning
 Khairulizam Othman, Legal Affairs Division, Chief Assistant Director
 Samalaa a/p Perumal, Legal Affairs Division, Senior Assistant Director
 Mohd Asta Ali, Legal Affairs Division, ICT Staff (Asst. Director)
 Chung Kuet Ping, Legal Affairs Division, Assistant Director (Project implementation)
 Adeline Lee, Senior Manager PEMANDU

Bar Council

Ragunath Kesavan, President

Formis

Mah Slew Kwok, Executive Vice Chairman and Chief Executive Officer
 Mah Xian-Zhen, Personal Assistant to the Chief Executive Officer
 Lim Puay Aun, Senior Manager
 Philip Ng, Assistant Manager
 Lau Khek Hui, Assistant Manager

