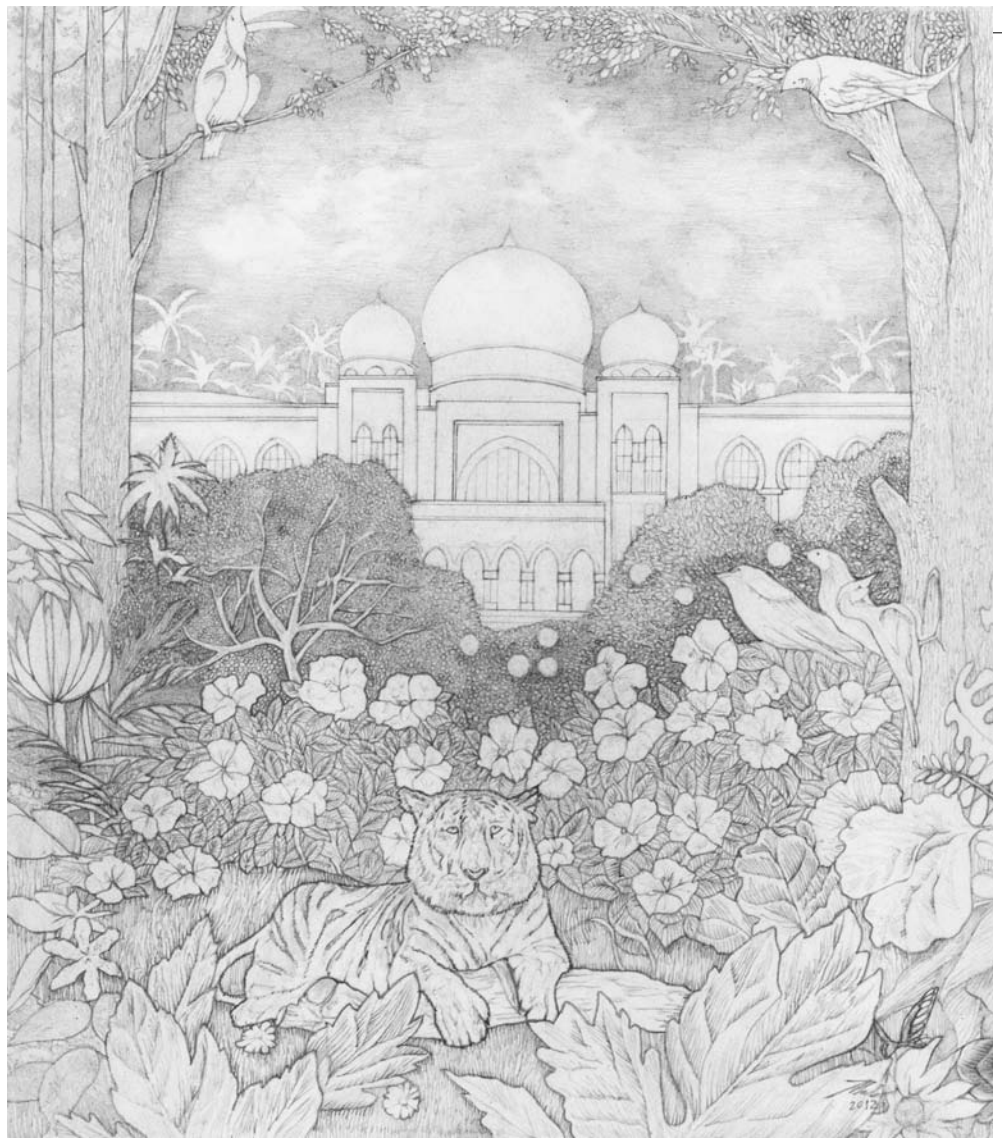
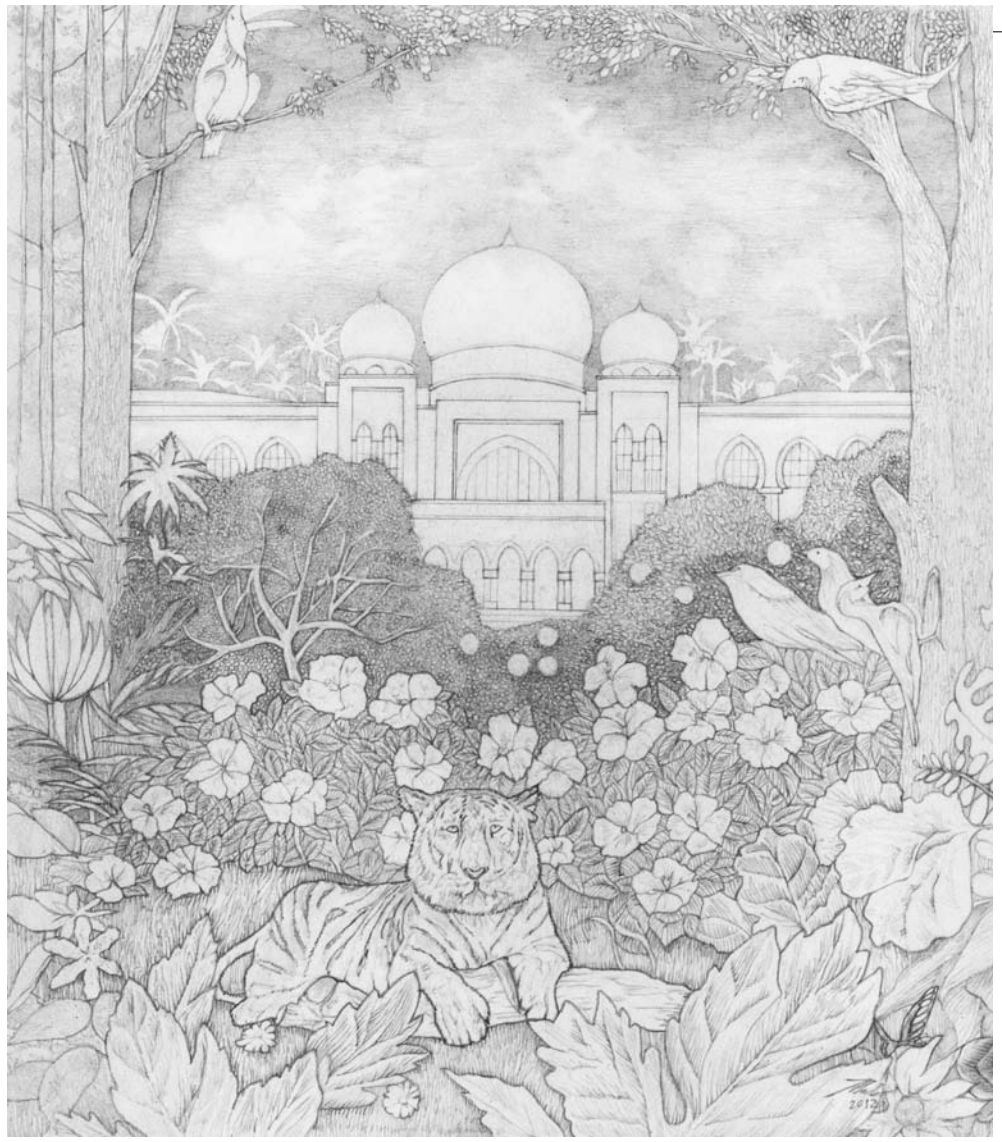


THE MALAYSIAN JUDICIARY

YEARBOOK 2011

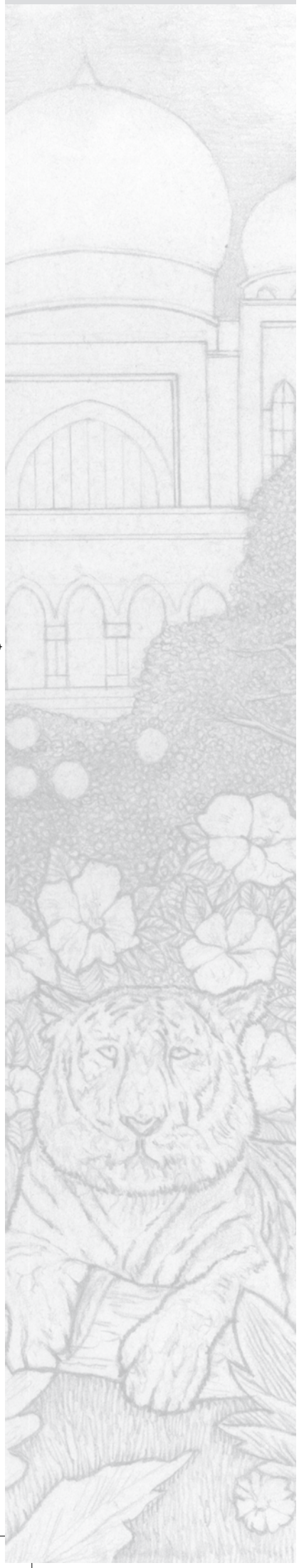
Cover Drawing : “The Power Of Justice”

by Jimmy Khalil



THE MALAYSIAN JUDICIARY

YEARBOOK 2011



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Tan Sri Arifin Zakaria
Chief Justice of Malaysia

Foreword

The Right Honourable Tan Sri Arifin Zakaria
Chief Justice of Malaysia

It gives me great pleasure in welcoming the publication of the Malaysian Judiciary Yearbook 2011. If the previous Judicial Journal had espoused a more historical approach, this Yearbook will take on a different, more robust outlook. Apart from providing a report on the statistics of cases disposed and initiatives taken to improve judicial governance, this Yearbook also holds a spectrum of views on certain issues from former and sitting judges. I believe this would make for a stimulating read.

The year 2011 witnessed the continuing transformation of the judicial landscape, with the introduction of some new measures to enhance the judicial delivery system and the quality of court decisions and judgments.

I am happy that our practical and uninhibited application of methods in dealing with our backlog reduction programme has inspired high praise from the World Bank.

In fact our model has been recommended by the World Bank for adoption by other judiciaries dealing with similar problems.

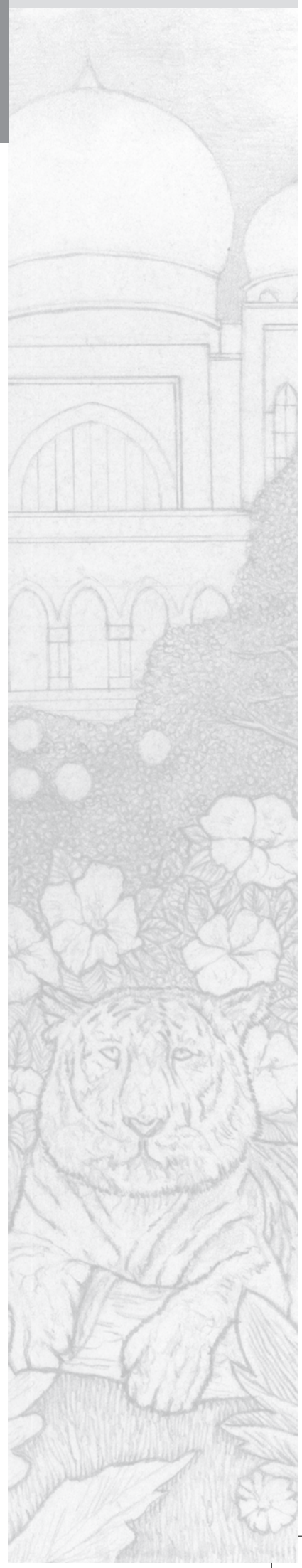
In developing our own system of case disposal, we have managed to finally eliminate our age-old affliction (i.e. the backlog of cases) in which by the end of March 2012, cases in the subordinate courts will all be current. This means that as of now, all new cases filed in these courts will be disposed within 6 months from the date of filing. In the same way, for the High court, all new civil cases will be disposed within 9 months and the criminal cases within 12 months from the date of filing. Thus, we now have a yardstick by which cases can be resolved.

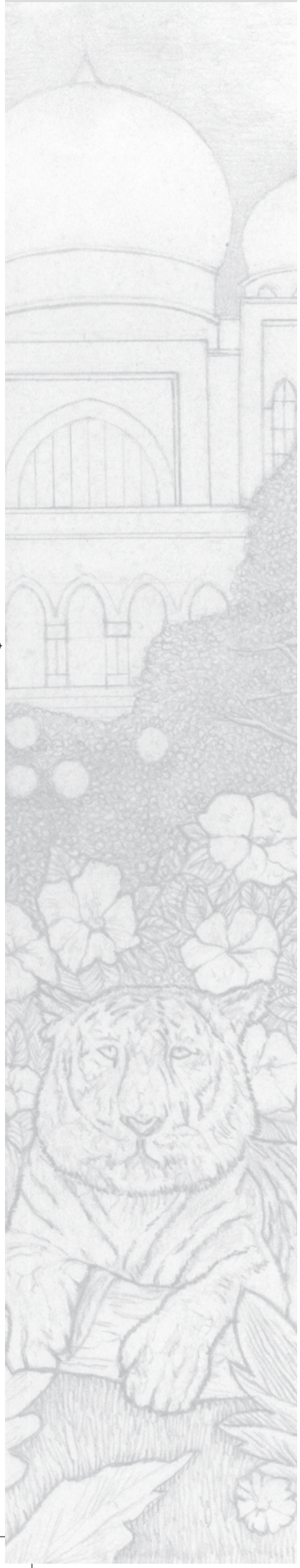
As we now live in an age of accountability, it is incumbent upon us to be willing to change and respond accordingly. We need to continue to re-evaluate our old routines and revisit and update them, since we all know that the path to justice is not always self-evident.

However, one thing is certain; that in all of this, there is no respite from hard work. But I believe that as long as we are conscious that enhanced judicial output does not run counter to our sense of justice and fairness, we will continue in our quest to improve the system.

In this regard, I am pleased that we are in the midst of putting in place a continuing judicial training program along the lines of the judicial training academies or institutes found in other jurisdictions. This program will encompass the training of judges in various dimensions of judgeship and judge-craft. In this connection may I congratulate and thank Justice James Foong for having comprehensively outlined a judges training programme which will in no small way, form part of the blueprint of our Judicial Academy.

In keeping with our trend towards greater openness and public knowledge of our judicial institution, we are serious in





using mediation as a means of resolving disputes between parties. The utility of this device is fast gaining popularity in our courts, due to the persuasive and communicative skills of our judges who could successfully find common grounds upon which parties can agree to sort out their differences.

To improve our service to the public and stakeholders, the Rules Committee has put up a commendable set of combined rules, which will simplify the procedure of trials in both the Subordinate and Superior Courts. We strongly believe that this will undoubtedly enable justice to be made accessible to a greater number of people. The proposal may have a superficial attraction, but we are convinced that in the long term, it will greatly impact the entire judicial system.

By the same token, we are actively revitalising our maritime legal regime. Although we have a respectable series of legal digests, rules and laws which form an integral part of the maritime legal framework, we lack our own corpus of case law. At the moment we look to precedents handed down by the courts in the United Kingdom, being part of the lineage which identifies us with the great history of the common law. However an urgent review and promulgation of a consolidated and comprehensive domestic legal regime is needed, which will enable our courts to adjudicate admiralty and maritime disputes efficaciously.

The establishment of the Admiralty Court in Kuala Lumpur in 2010 is therefore a step in the right direction in determining our own destiny in this regard.

We shall therefore continue our efforts to improve the system with renewed dedication and to uphold the highest standards of service and efficiency in the administration of justice. More importantly I take this opportunity to reaffirm our commitment to the Rule of Law and the principle of the independence of the judiciary.

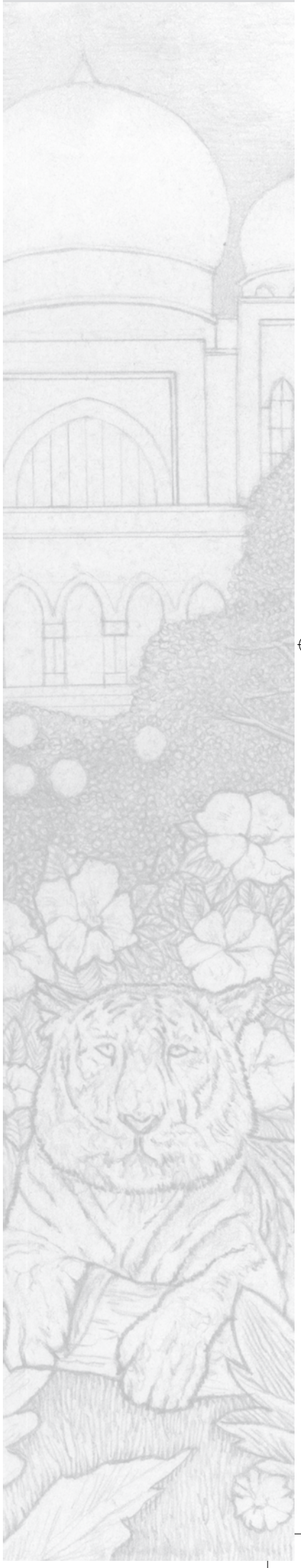
In the final analysis, our achievements could not have been attained without the sacrifice and hard work put in by each and every member of our court staff, officers and judges at all levels, including the cooperation rendered us by officers from the Attorney General's Chambers and members of the Bar. My gratitude to all of them is heartfelt.

I would also like to express my appreciation to all the contributors who have unhesitatingly responded to our request to pen their thoughts for this publication.

My appreciation also goes to **Puan Hamidah Abdul Rahman** and **Encik Shaharin Amran** who put in time in ensuring that the photographic content of this publication is creatively executed. I am also appreciative of the fine drawings on the cover and portraits of the contributors by artist **Mr. Muhammad Nur Hazimi Dato' Seri Mohamed Khalil (Jimmy Khalil)**.

On a final note, I wish to express my appreciation to the **Yearbook Committee** led by **Justice Zainun Ali**, together with **Justice Alizatul Khair Osman Khairuddin, Justice Azahar Mohamed, Justice Abdul Aziz Abdul Rahim, Justice Lim Yee Lan, Justice Nallini Pathmanathan, Justice Dr. Badariah**

Sahamid, Justice Mah Weng Kwai, and the Chief Registrar Dato' Hashim Hamzah, officers, Dato' Che Mohd Ruzima Ghazali, Azhahari Kamal Ramli, Chan Jit Li, Nor Hazani Hamzah, Nurul Husna Awang, Mohd. Sabri Othman, Mohd. Faizi Che Abu, Noorhisham Mohd Jaafar, Fadzilatul Isma Ahmad Refngah, Husna Dzulkifly, Mohd. Aizuddin Zolkeply, Sabreena Bakar @ Bahari, Shazali Dato' Hidayat Shariff, Safarudin Tambi and Mohd. Zulhilmi Ibrahim, who, in collaboration with **Sweet and Maxwell (Asia)** represented by **Ms. Rachel Jaques**, spared no effort in ensuring that this publication reflects the pride we take in what we do in the Judiciary.



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Preface

If the preceding three years of judicial governance have been turbulent, the lull which must come after the "storm" will be welcome indeed.

For the good news is that, the relentless disposal of cases has successfully been dispatched and we are near to achieving some closure of the gap between those ageing and current caseloads.

But the corollary to the above is that the level of appeals has increased. In this connection, the appellate judges (both Federal Court and Court of Appeal) by dint of sheer hard work, have systematically disposed these appeals, though it can never quite eradicate the number.

But for all that, interesting times are ahead for us, now that we are entering a new phase in our judicial reckoning, with the simultaneous appointments of our top three judges, i.e. a new Chief Justice, a new President of the Court of Appeal and a new Chief Judge of Malaya.

The significance of this historic moment has not escaped us, as it is clear that together, they will now shape our judicial personality and philosophy in the years to come.

Significantly too, their reports in this Yearbook mark their debut. We will no doubt be guided by their approach as facilitators of justice and proponents of fairness.

The changing of the guards, so to speak, calls for a change in the tone and tenor of this publication.

The Chief Justice's directive is that the practical dimensions of the system should be central in this publication.

Thus for a start, the rousing industry of the judges and judicial officers at all levels are reflected in the reports prepared by the top and Managing Judges.

Added to this is the fact that we are in the throes of getting several initiatives off the ground. These include the impending establishment of the Judicial Academy, the implementation of the combined rules, the continued strengthening of the admiralty court and the building up of the judicial museum.

The Judicial Academy comes in for special mention, not least since it is reposed with the responsibility of redefining and even of reinventing the judiciary to meet global challenges. We need to come to terms with the fact that occasionally, in the hurly burly of carrying out our duties, something of the essential elements of judgeship may have been blunted. Thus a continuing judicial training is a rejuvenation of sorts. More importantly it reinforces our competence as judges when we acquire a whole new range of skills.

One other aspect which merits mention is the resources available at our disposal, as reported in Chapter 3.

The resource materials form an integral part of our lives as judges, since in writing our judgments, the process of reasoning requires not only intellectual strength but also in-depth research and learning. The giving of reasons accord with the longstanding conceptions of the judicial role in which reasoned analysis stands as the core feature of legitimate judging.

Thus our selection of Cases of Interest (both civil and criminal) in this publication portray this precept. These cases will show that if there is anything that characterises the judiciary's oeuvre, it is its continued loyalty to the Rule of Law.

In this publication, the Chief Justice conceptualised a forum whereby former and sitting judges have been invited to share some concerns they might have about certain matters. Their judicial insights are snippets from a vast array of issues which affect us one way or the other, but the views they have expressed are nevertheless engaging and even provocative.

Since we barely had four months in which to complete this Yearbook, the committee galvanised into action in no time at all.

In line with the pragmatic approach we had in mind, we wanted the lay-out to be lean and mean but then in reporting our year's work, nothing could be spared.

All the reports, write-ups and articles in this publication have been carefully pulled together by us. In our view, if the previous journal (A Perspective) was the seminal, coming –of-age chronicle, this Yearbook would be its sequel.

In the preparation of this publication, I have many debts of gratitude. Firstly I am honoured that the Chief Justice has entrusted the Committee with the production of this Yearbook.

I am happy that our officers i.e. Puan Hamidah Abdul Rahman and Encik Shaharin bin Amran have been able to infuse this publication with their flair for vivid photography. I would also like to thank artist Mr. Muhammad Nur Hazimi Dato' Seri Mohamed Khalil (Jimmy Khalil). The Committee is particularly grateful that he bore our frequent suggestions and amendments to his exquisite drawings of the cover and portraits of the contributors, with infinite grace and patience.

Finally I would like to thank my sister and brother judges and officers in this Committee including Ms Rachel Jaques (Sweet & Maxwell, Asia), for their unstinting support in putting up this publication. They understood very early on the exacting nature of this project. But their equanimity, good humour and innate understanding of the fundamental metaphor of justice has allowed this Yearbook to be finally completed.

Justice Zainun Ali
Editor

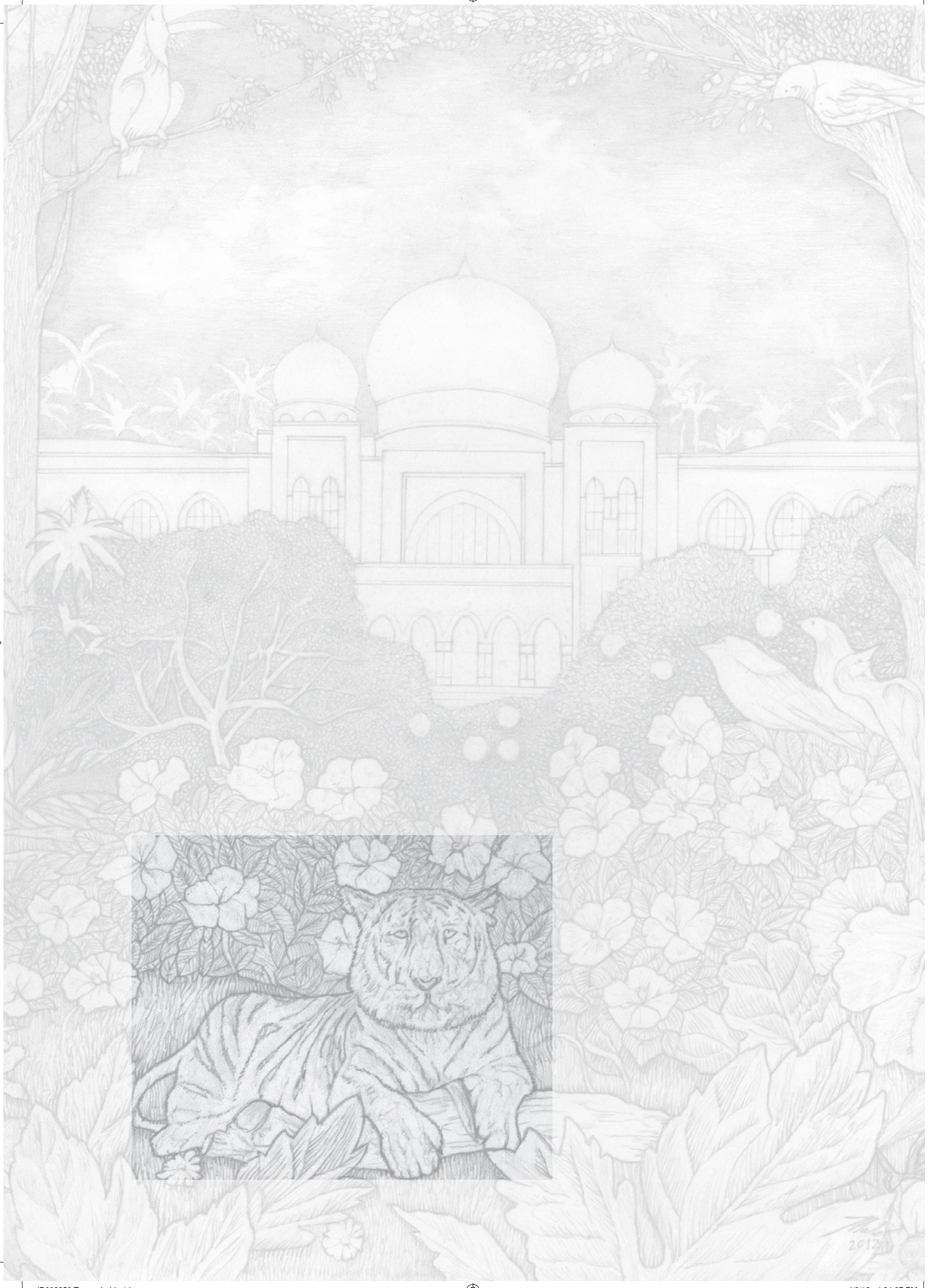
Message from the Chief Registrar

I am delighted that this issue of The Malaysian Judiciary Yearbook 2011 is published as a fitting sequel to the journal produced in 2010 - The Malaysian Judiciary-A Perspective.

On behalf of The Chief Registrar's Office, I wish to express my deepest appreciation to The Hon. Justice Zainun Ali, Editor of this yearbook and the editorial committee for their effort in producing this yearbook.

I hope you will enjoy reading this annual publication and find it both informative and insightful.

Dato' Hashim Hamzah
Chief Registrar
Federal Court of Malaysia



CHAPTER 1

THE JUDICIARY — SIGNIFICANT EVENTS 2011

The year 2011 has been a momentous year for the Judiciary. It saw the Judiciary ushering in new faces for the top three echelons. With the retirement of Justice Tun Zaki Azmi as the Chief Justice of Malaysia, Justice Arifin Zakaria, the Chief Judge of Malaya was appointed to helm the Judiciary. Justice Md. Raus Sharif assumed the post of the President of the Court of Appeal when the post fell vacant with the retirement of Justice Alauddin Dato' Mohd. Sheriff. Justice Zulkefli Ahmad Makinudin then took over the reins from Justice Arifin as the Chief Judge Of Malaya.

These three personalities bring with them a sum total of 110 years of experience and knowledge. With that we are confident that the Judiciary will be brought to exciting and exhilarating heights.

NEWLY APPOINTED CHIEF JUSTICE

THE RIGHT HONOURABLE TAN SRI ARIFIN ZAKARIA

Born in Kg. Repek, Pasir Mas, Kelantan on 1 October 1950, His Lordship had his early education at Sekolah Melayu Tiang Chandi, Repek, Pasir Mas, Sekolah Melayu Gual Periok, Pasir Mas, Sultan Ibrahim Primary School, Pasir Mas before completing his secondary education at Sultan Ibrahim Secondary School, Pasir Mas and Sultan Ismail College, Kota Bharu.

At 21 years of age, His Lordship left for the University of Sheffield, United Kingdom for his law studies and upon acquiring his LL.B (Hons.) degree in 1974, returned to serve the nation.

In 1978, His Lordship again left for the United Kingdom, this time, to pursue his LL.M in the field of taxation at University College and to also complete the Bar Finals; both of which he successfully secured the following year. To this day, His Lordship is an Honourable Barrister of Lincoln's Inn.

His Lordship has had a varied career. As a young officer, Justice Arifin served as a Legal Officer in the Prime Minister's Department (1974) and the High Court at Kuala Lumpur (1975), Magistrate (1976) at the Magistrates Court, Petaling Jaya, Senior Assistant Registrar, High Court Kuala Lumpur (1976) Federal Counsel at the Attorney General's Chambers (1977), Legal Officer at Ministry of Primary Industry (1978) and Federal Counsel at the Ministry of Law (1978). His Lordship has also held several key positions in the Government such as the State Legal Advisor of Malacca (1981-1983) and Perak (1985-1990), the Legal Advisor to the Public Services Department (1983-1984), Deputy Parliamentary Draftsman (1990), Senior Federal Counsel at the Attorney General's Chambers and the Department of Inland Revenue (1991).

Malaysia's 14th Chief Justice The Right Honourable Tan Sri Arifin Zakaria accepting His Letter of Appointment from The King (Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong Al-Wathiqu Billah Tuanku Mizan Zainal Abidin Ibni Al-Marhum Sultan Mahmud Al-Muktafi Billah Shah)

As a serving Legal Officer, His Lordship represented the Malaysian Government in several international agreements including the International Tin Agreement and agreements in relation to double taxation.

On the 1 March 1992, His Lordship left his post as Head of the Legal Division, Department of Inland Revenue to assume his appointment as Judicial Commissioner. Two years later, His Lordship was elevated as a Judge of the High Court of Malaya. This was followed by a meteoric rise for His Lordship with his appointment as Judge of the Court of Appeal on 6 August 2002 and then his appointments as Judge of the Federal Court on 17 September 2005, the Chief Judge of Malaya on 18 October 2008, and, finally at the pinnacle, as the Chief Justice of the Federal Court on 12 September 2011.

In the course of his judicial career, His Lordship was entrusted with additional duties when he was appointed as Panel Member of the Syariah Appeal Court of Kelantan (1977), Judge of the Special Court constituted pursuant to Article 182(1) of the Federal Constitution (1 February 2006), member of the Judicial Appointment Commission (9 February 2009, member of the Qualifying Board constituted under section 7(b) Legal Profession Act, 1976 and member of the Committee for Rules of the Subordinate Courts (1 January 2008 and 28 February 2010).

A firm believer in continuously improving oneself through education, His Lordship has made time to contribute towards judicial and legal education by being the Patron of the Commonwealth Judicial Education Institute and by being a member of the Editorial Advisory Board of the Current Law Journal. His Lordship also sees his appointment as Adjunct Professor at the UiTM as an opportunity for him to reach out to today's youth.

At the behest of the nation, His Lordship has attended numerous international conferences and seminars at which, His Lordship has presented numerous papers amongst them :-

i. "The Relation Between Constitutional Review Organs, Governments and the Ordinary Judiciary – Malaysian Perspective" at the Sixth Conference of Asian Constitutional Judges, Mongolia (2009)

ii. "Tax System in Malaysia" at the Asean Tax System Seminar, Bangkok (2010)

The Right Honourable The Chief Justice of Malaysia, Tan Sri Arifin Zakaria shortly after taking Oath of Office as Chief Justice.

iii. "Access to Justice – A Fundamental Human Right" at the 17th Commonwealth Law Conference at Hyderabad, India (2010)

iv. "Improving Court Efficiency : Better Methods for Case Management and procedural Efficiency" at the 14 Conference of Chief Justices of Asia and the Pacific at Seoul, Korea (2011)

v. "The Mechanism of Checks and Balances Among State Institutions" at the International Symposium on "Constitutional Democratic State" at Jakarta, Indonesia (2011)

In recognition of His Lordship's sterling services to the country, His Lordship was conferred the following honours:-

Darjah Panglima Setia Mahkota (Persekutuan) P.S.M (06.06.2009)

Darjah Kebesaran Seri Paduka Setia Mahkota Kelantan Yang Amat Terbilang (Kelantan) S.P.S.K (30.03.2005)

Darjah Seri Paduka Mahkota Perak (Perak) S.P.M.P (19.04.2010)

Darjah Dato' Paduka Cura Simanja Kini (Perak) D.P.C.M. (19.4.1988)

Darjah Dato' Paduka Mahkota Kelantan (Kelantan) D.P.M.K (30.03.1999)

His Lordship is happily married to Yang Berbahagia Puan Sri Robiah Abd. Kadir and they are blessed with five children, two of whom have chosen to follow his illustrious path in pursuing a legal career.

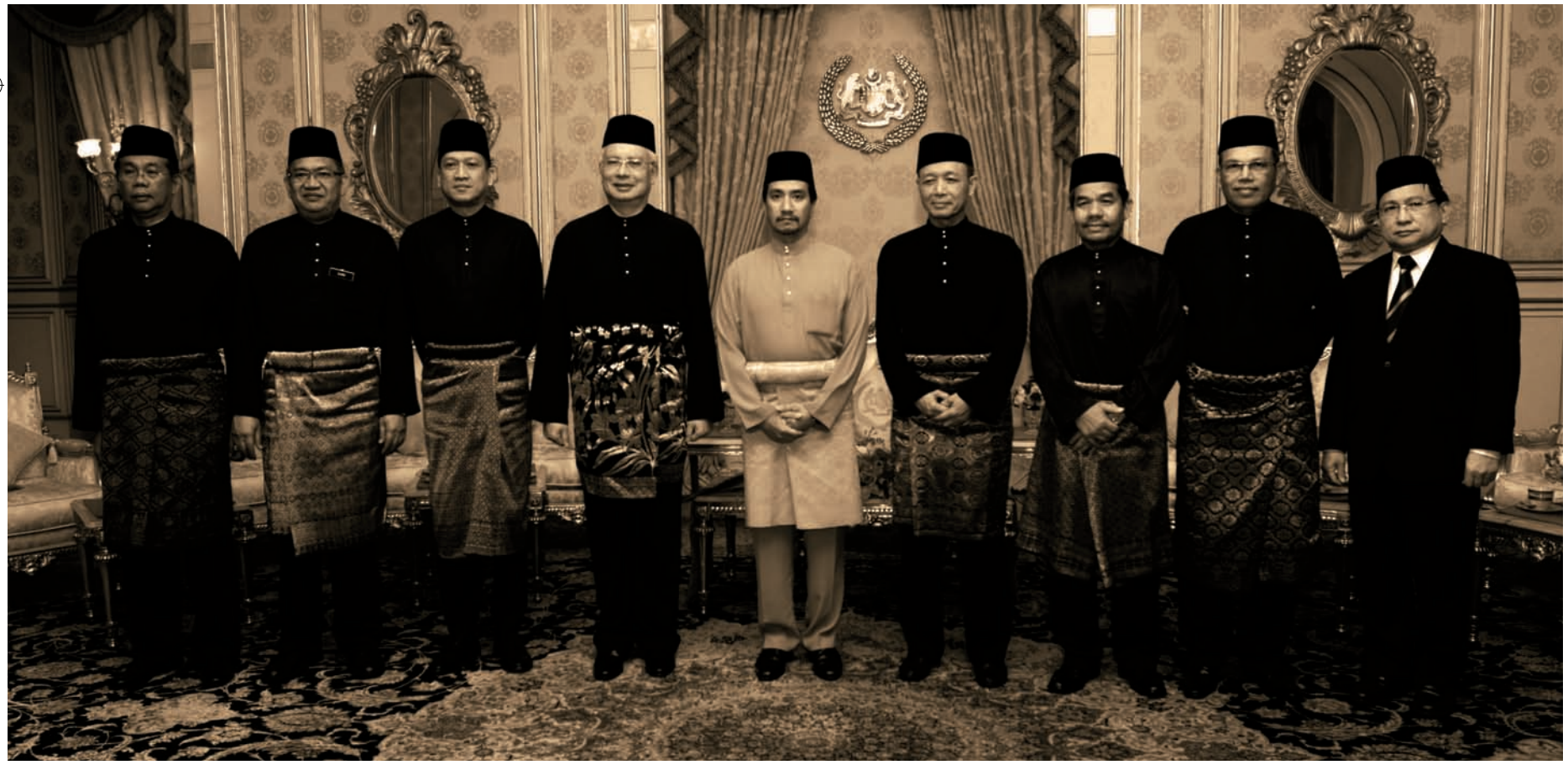
NEWLY APPOINTED PRESIDENT OF THE COURT OF APPEAL

THE RIGHT HONOURABLE TAN SRI DATO' SERI MD RAUS SHARIF

His Lordship who was born on 4 February 1951 in Rembau, Negeri Sembilan started his early education at Sekolah Rendah Kg. Astana Raja before continuing his secondary education at Tengku Besar School, Tampin and completing his sixth form at Sekolah Tengku Abdul Rahman (STAR) Ipoh. An alumnus of the pioneer batch of the Faculty of Law, University of Malaya His Lordship secured his LL.B (Hons.) degree in 1976 and went on to pursue and obtained his LL.M at the prestigious London School of Economics and Political Science, United Kingdom.

On 28 July 2006, Tan Sri Dato' Seri Md. Raus Sharif was appointed as a Judge of the Court of Appeal Malaysia. His Lordship's career started in the Judicial and Legal Services on 1 July 1976.

Apart from his academic qualifications, His Lordship comes equipped with a multitudinous experience garnered from his postings as a Magistrate in Pontian, Johor (1976-1977), President of the Sessions Court at Kluang, Johor (1977) and Muar (1978-1979), Deputy



Photograph taken at Istana Negara on the occasion of the appointments of the Chief Justice, the President of the Court of Appeal and the Chief Judge of Malaya 12.9.2011

(from left to right - The Right Honourable Tan Sri Zulkefli Ahmad Makinudin , The Attorney General Tan Sri Abd Gani Patail, Minister in the Prime Minister's Department Datuk Seri Nazri Abd Aziz, The Prime Minister Dato' Sri Mohd Najib Tun Haji Abdul Razak, The King (Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong Al-Wathiqu Billah Tuanku Mizan Zainal Abidin Ibni Al-Marhum Sultan Mahmud Al-Muktafi Billah Shah), The Right Honourble Chief Justice Arifin Zakaria, The Chief Secretary to the Government Tan Sri Sidek Hassan, The Right Honourable Tan Sri Dato' Seri Md Raus Sharif and The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum.

Public Prosecutor for the states of Kelantan and Terengganu (1980-1982), Senior Federal Counsel, Ministry of International Trade & Industry (1982-1983), State Legal Adviser Malacca (1983-1986), Senior Federal Counsel, Ministry of Defence (1988),Senior Federal Counsel, Ministry of Home Affairs (1988-1989), State Legal Adviser Kelantan (1989-1991) and Treasury Solicitor (1991-1994)

With his appointment as a Judicial Commissioner on 1 November 1994, His Lordship returned to serve the Judiciary. On 12 January 1996 His Lordship was elevated as a Judge of the High Court of Malaya. As a High Court Judge, His Lordship went on to serve in various states including Shah Alam, Muar, Penang and Kuala Lumpur before His Lordship's appointment to the Court of Appeal on 28 July 2008. On 12 September 2011 His Lordship was appointed the President of the Court of Appeal.

His Lordship has been credited with and is instrumental in the setting up of the New Commercial Courts (NCC) and the Admiralty Court. These specialised courts exist to expedite the disposal of cases (by way of full trial) within the target date of 9 months from the date of filing. Benefiting from observations garnered from comparative studies in tours to the United Kingdom in May 2009 and San Francisco, Washington DC and New York in June 2011, His Lordship worked tirelessly to ensure that the courts were expeditiously set up and the Courts are now running smoothly due to His Lordship's personal hands-on approach.

His Lordship has also been tasked with being the nation's representative at several international conferences such as the Forum of Asia Pacific Countries – Legal and Economics Aspects of International Trade Development at Vladivostok, Russia (2008), Asia Pacific Court Conference, Singapore (2010), Sixth International Judges Conference on Intellectual Property, Brussels (2011) and at the Patron Chief Justices Meeting Commonwealth Law Conference at Hyderabad, India (2011) His Lordship was requested to present a paper entitled "Rights to Religious and Other Minorities in Malaysia". Similarly while representing the nation at the 7th Law Asia Conference at the International Islamic University Malaysia, Kuala Lumpur, His Lordship presented a paper regarding "Law in Pluralist Asia : Challenges and Prospect: Civil Court v Shariah Court".

His Lordship's contribution to the nation has not gone unnoticed and in appreciation of His Lordship's services His Lordship has been bestowed the following awards:

Pingat Kesatria Mangku Negara (KMN) in 1994

Darjah Yang Mulia Pangkuan Negeri (DMPN) in 2000

Panglima Setia Mahkota (Persekutuan) in 2010

His Lordship and the Right Honourable Tan Sri Zulkefli Ahmad Makinudin's appointment as the President of the Court Of Appeal and Chief Judge of Malaya respectively is a cause of pride to the Faculty to be appointed to two of the highest posts in the Malaysian Judiciary.

His Lordship is married to Yang Berbahagia Puan Sri Salwany bt. Mohamed Zamri and they are blessed with two children.

The Chief Justice (centre) flanked on the left by the President of the Court of Appeal and the Chief Judge of Malaya on the right.

NEWLY APPOINTED CHIEF JUDGE OF MALAYA

THE RIGHT HONOURABLE TAN SRI DATO' ZULKEFLI AHMAD MAKINUDIN

His Lordship who hails from Ipoh, Perak was born on 2 March 1951 and started his education at St. Michael Institution, Ipoh, Perak before entering the Royal Military College, Sungai Besi, Kuala Lumpur – an institution imbued with discipline and precision. In 1972 His Lordship went on to join the University of Malaya as one of its pioneer batch of undergraduates in the Faculty of Law.

Upon graduating with an LL.B (Hons.) degree, His Lordship joined the Judicial and Legal Services and served in the following capacities :

1. Deputy Public Prosecutor, Attorney-General's Chambers (5.7.1976 – 30.10.1976)
2. Deputy Public Prosecutor, Department of Customs & Excise (1.11.1976 – 31.12.1978)
3. Federal Counsel, Department of Income Tax, Kuala Lumpur (1.1.1979 – 15.6.1982)
4. Legal Adviser, Ministry of Trade & Industry, Kuala Lumpur (6.6.1982 – 30.9.1982)
5. Legal Adviser, Ministry of Housing & Local Government (15.10.1983 – 31.10.1984)
6. Senior Federal Counsel, Inland Revenue Department (1.11.1984 – 31.5.1985)
7. Senior Federal Counsel, Sarawak, Kuching (1.6.1985 – 31.12.1987)
8. State Legal Adviser, Johor (1.1.1988 – 15.2.1992)
9. State Legal Adviser, Selangor (16.2.1992 – 30.11.1992)
10. Chairman of the Advisory Board, Prime Minister's Department, (1.12.1992 – 31.10.1994)

On the 1 November 1994, His Lordship left the Attorney General's Chambers to join the Judiciary when he accepted the appointment of Judicial Commissioner. On 12 January 1996, His Lordship was elevated as a Judge of the High Court of Malaya. This elevation was followed by successive rapid elevations to the Court of Appeal (17 June 2005), the Federal Court (5 September 2007) before His Lordship assumed the office of the Chief Judge of Malaya on 12 September 2011.

Believing that the leaders of tomorrow should be nurtured today, His Lordship has set aside his time to share his experience and expertise by being a member of the Advisory Council to the Faculty of Law, University of Malaya and regularly sitting in the Moot Courts conducted by the said university. His Lordship's contribution has been significant as a part from his tenure in the Judicial and Legal Services. His Lordship has served as the Chairman, Appeal Board of Engineers when so appointed by His Majesty the Yang di-Pertuan Agong in 2006, member of the Judicial Commission and member of the Judicial and Legal Services Commission.

Apart from the practical experience of these appointments, His Lordship has also completed his LL.M at the University College, London in 1983. His Lordship has also represented the Judiciary at international levels such as The Study Tour of California Judicial/Legal Systems in San Francisco, San Diego and Los Angeles, where he presented a paper on "Enforcement of Foreign Arbitral Awards and Judgments in Malaysia – The Extent of Success in Its Execution As Seen From The Development of Case Law" at The 50th Anniversary of the New York Convention: Challenges for the Judiciary Conference in Beijing, China.

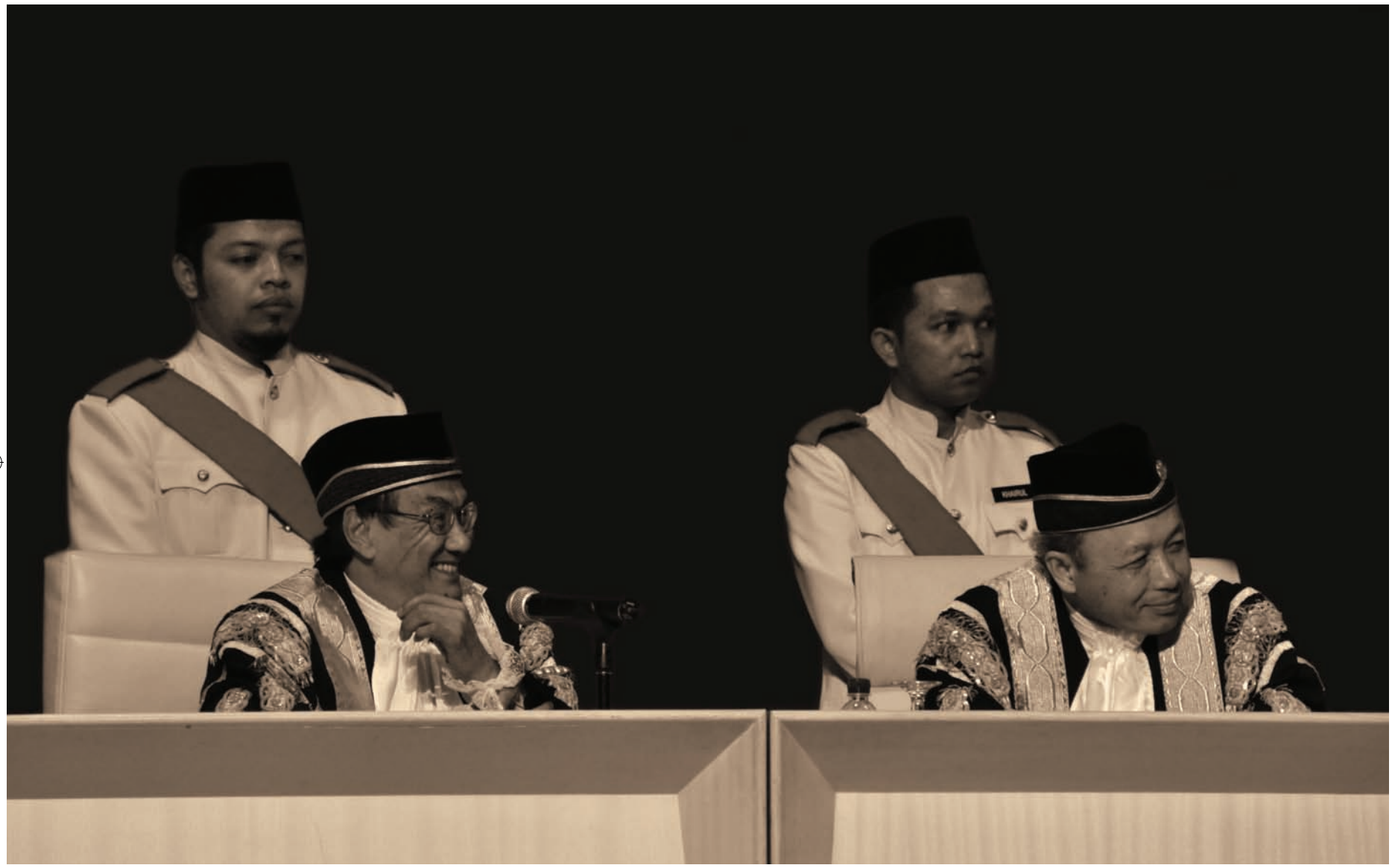
The following honours have been bestowed upon His Lordship for his contributions to the nation :

- Pingat Ibrahim Sultan (PIS) in 1990,
- Setia Mahkota Johor (SMJ) in 1992
- Dato' Paduka Mahkota Perak (DPMP) in 1996.
- Panglima Setia Mahkota (PSM) 2010

His Lordship is happily married to Yang Berbahagia Puan Sri Rohani Bt. Mohamed Kassim and blessed with five children.

OPENING OF THE LEGAL YEAR 2011

FEDERAL COURT, COURT OF APPEAL AND HIGH COURT OF MALAYA



Tun Zaki and Tan Sri Arifin at the Opening of the Legal Year

The Opening of the Legal Year 2011 which was held on 15 January 2011 at the Putrajaya Convention Centre commenced with the arrival of invited guests as early as 8 am.

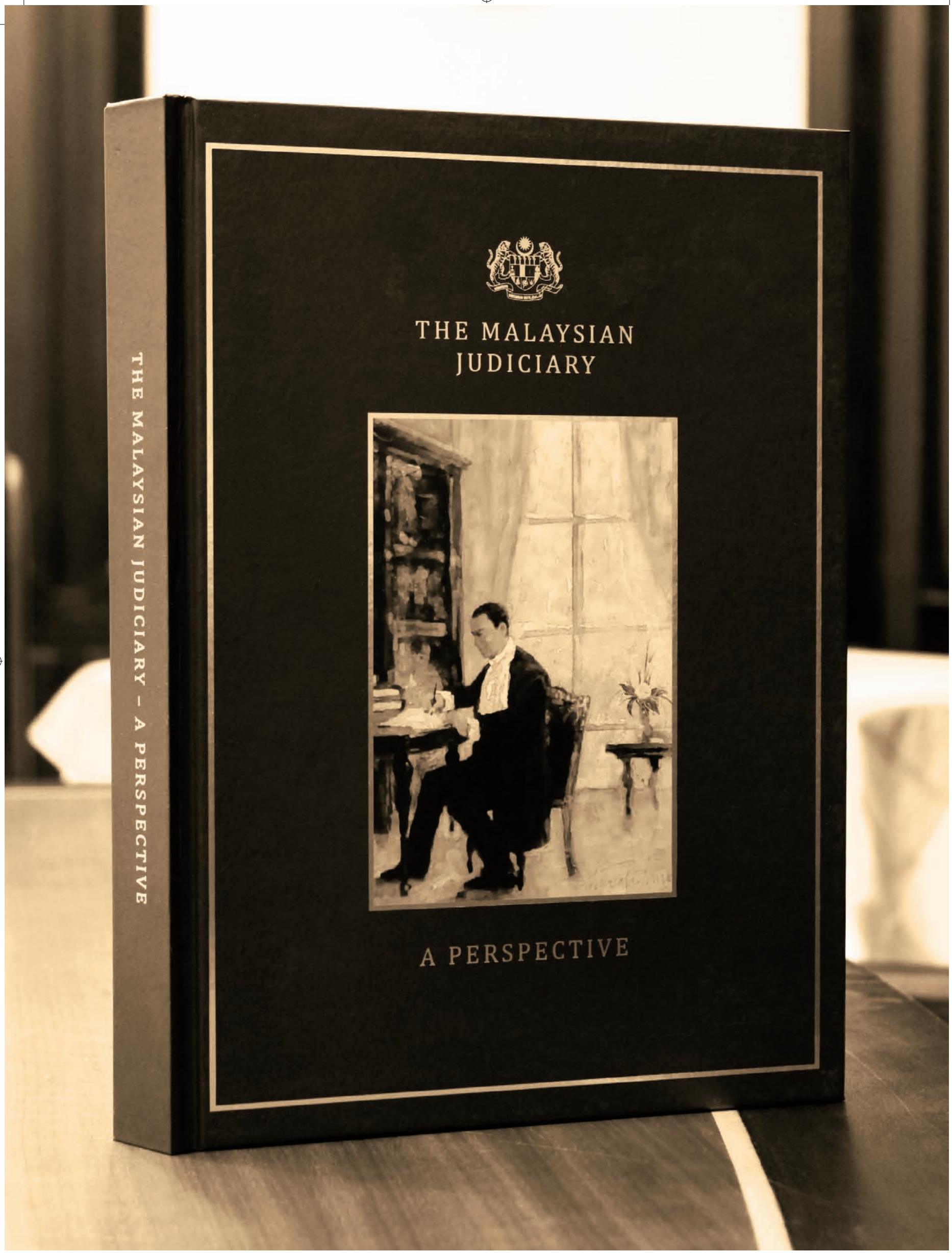
Among the distinguished guests present were the Deputy Minister in the Prime Minister's Department, the respective Attorneys-General of Malaysia, Sabah, Sarawak and Brunei, the Registrar of the Supreme Court representing the Chief Justice and Judiciary of Singapore, the High Commissioners and Ambassadors and the Presidents of the Bar and Law Associations of Malaysia, Hong Kong and Singapore. Also present to witness the ceremony was former Chief Justice Yang Amat Berbahagia Tun Mohamed Dzaiddin bin Hj. Abdullah.

Meeting of the three stakeholders at the Opening of The Legal Year

Judges from all over the country converged to participate in this event and at 8.45 a.m., the procession proper entered the hall. All persons present in the hall stood in respect as the Honourable Chief Justice, President of the Court of Appeal and the Chief Judge of Malaya and Chief Judge of Sabah and Sarawak entered.

The Rt. Honourable Chief Justice, Tun Zaki Tun Azmi presiding over the event invited the Chairman of the Bar Council, Mr. Ragunath Kesavan, to address the assembly. Speaking on behalf of the Bar Council, the Sabah Law Association and the Advocates' Association of Sarawak, Mr. Ragunath spoke of the Bar's desire to expand legal representation in criminal matters and to educate the general public on the Federal Constitution. He also stated that the Bar through Yayasan Bantuan Guaman Kebangsaan would conduct programs to educate the public of their legal rights and duties. In closing, Mr. Ragunath recorded his appreciation of the Judiciary's openness and willingness to work towards a closer working relationship before wishing the Judiciary a progressive and healthy year.

Judges entering the hall (left to right: Judicial Commissioners Harmindar Singh Dhaliwal, Ravinthran Paramaguru, Yeoh Wee Siam, Nor Bee Ariffin and Noraini Abdul Rahman)



Journal of The Malaysian Judiciary - "A Perspective"

In accepting the invitation to speak, Tan Sri Abdul Gani Patail, Attorney-General of Malaysia congratulated the Judiciary on the remarkable success in the disposal of the backlog of cases. Tan Sri Gani then spoke of the Attorney-General's Chambers programme to enhance the quality of its officers and consequentially its services through its Strategic Transformation Program and Centre of Excellence for Law and Legal Studies. Before closing, Tan Sri Gani gave an assurance that the Attorney-General's Chambers stood united with the Judiciary in the quest to serve justice.

The Rt. Honourable Chief Justice, Tun Zaki Tun Azmi, in his reply extended a warm welcome and recorded his appreciation to the honourable guests who had come from near and far. In what would be his final speech at the Opening of the Legal Year ceremony, the Chief Justice stressed on the independence of the Judiciary when His Lordship said:

> "... The previous Chief Justice of Hong Kong, Justice Andrew Li at the 2010 Opening of Legal Year said "*Everyone, including all organs of government and all public officials, are subject and equal before the law. The Judiciary is and must be seen to be impartial. Judges resolve all disputes, whether between citizens or between citizen and government in an impartial manner.*" I would like, without hesitation, to associate myself with that statement. Every individual having access to our courts must leave feeling that the courts had been impartial in hearing their case although they may not be happy with the result."

His Lordship conceded that the changes that he had made were both radical and revolutionary and not readily acceptable by many. Nonetheless the changes were never at the expense of justice but, rather, His Lordship's relentless pursuit had been solely for the betterment of the Judiciary in particular and the public in general. The results of the policy changes are now reflected in the closure of 3 High Courts, 3 Sessions Courts and 12 Magistrates' Courts and a reduction of 260 supporting staff which translates into a saving of RM4 million for the Government.

His Lordship then acknowledged that the success of the changes were made possible with the joint efforts of the President of the Court of Appeal, the Chief Judge of Malaya, the Chief Judge of Sabah and Sarawak and the Managing Judges with the co-operation from the Attorney-General's Chambers and the Bar.

Tun Zaki and Justice Zainun Ali officiating the launch of the journal 'The Malaysian Judiciary -A Perspective'

When invited to address the assembly, YBhg. Tun Mohamed Dzaiddin bin Hj. Abdullah gave an honest view of the Judiciary. He spoke of the best and worst times of the Judiciary before commending the Chief Justice on his success in eliminating delays and backlogs. Before concluding, Tun Dzaiddin spoke of his renewed confidence that the Malaysian Judiciary will once again regain its former glory and be the best.

Before the ceremony was brought to an end, the Chief Justice launched the Judiciary's publication entitled "*The Malaysian Judiciary: A Perspective*". This publication gives a comprehensive and fascinating historical account of the faces and facets of the Malaysian Judiciary dating back to the era of the Malay Rulers. The said publication was made possible by the efforts of Her Ladyship Datuk Zainun Ali and the editorial team.

OPENING OF THE LEGAL YEAR 2011 THE COURTS OF SABAH AND SARAWAK

The first Legal Year was held in Sandakan on 19 January 2001. Exactly a decade later, the Opening of the Legal Year was again held in Sandakan with the theme "Justice for One and All."

The memorable event began with the procession of Judges and judicial officers and members of the Sabah Law Association ('SLA') and the Advocates' Association of Sarawak ('AAS') from the Sabah Country and Golf Club to the Sandakan Court. This was followed by a ceremony in open court where the Sabah State AG, the Deputy Sarawak State AG, the representative of the Federal AG, the President of the SLA and the President of the AAS were given the opportunity to deliver their respective speeches. The increased efficiency of the Courts through computerisation and improved rate in the disposal of cases attributed to the new tracking system were acknowledged by all parties.

The Presidents of both the SLA and the AAS, Dato' John Sikayun and Encik Khairil Azmi b. Haji Mohamad Hasbie respectively, were in tandem on the need to maintain and enhance the dignity of the legal profession through various means, among them, the implementation of specific Rules in the respective states.

For the Sabah Law Association, Dato John Sikayun highlighted the success achieved by the Association in the field of native law with the publication of the Sabah Native Court of Appeal law report spanning from 1989 to 2009 which was officially launched by Tuan Yang Terutama of Sabah, Tun Datuk Seri Panglima Juhar Mahiruddin. He then thanked the Honourable Chief Judge of Sabah and Sarawak, Y.A.A. Tan Sri Datuk Seri Panglima Richard Malanjum for being instrumental in the admission of 15 pioneer members of the Bar to practice in the Native Court of Appeal.

Encik Khairil Azmi, in addressing the assembly, spoke of the additional efforts the Sarawak Bar was taking to raise the standard of the Bar which includes, *inter alia*, the setting up of an Inquiry Committee to ensure that complaints of misconduct of its members would be dealt with expeditiously. Before drawing to a close, Encik Khairil thanked the Honourable Chief Judge of Sabah and Sarawak for addressing the concerns that the Association had raised and for cultivating and maintaining the good relationship between the Bar and the Bench.

The Sabah State Attorney-General, Datuk Roderic Fernandez, was happy to announce that Chambers itself had given the public access to its website thereby making the laws of Sabah now accessible free of charge. As part of its ongoing exercise in reforming and reviving the law, the Chambers had gazetted the Remuneration, Account, Inquiry Committee and Practice and Etiquette rules. The Sabah Advocates Ordinance was also amended to give recognition to the law degrees conferred by the Universiti Utara Malaysia and the Multimedia University. Datuk Roderic also announced the setting up of a working committee to look into the creation of a legal department to handle matters heard in the Native Courts.

Tuan Francis Johen anak Adam, the Deputy State Attorney-General representing the State Attorney-General of Sarawak, acknowledged the success of the tracking system but hoped that the Judiciary would also take into consideration the time constraints faced by lawyers and legal officers alike when fixing cases especially during the weekends. In closing, he urged the Bar to play its role in facilitating compliance with Order 35A of the Rules of the High Court 1980 so that cases may be speedily disposed of.

In representing the Federal Attorney-General, Tuan Salim Sain @ Hamid, thanked the Judiciary and the Bar for the co-operation which resulted in the chambers disposing the majority of criminal cases in the shortest possible time in 2010. The chambers in discharging its role in law reform saw the Whistleblower Protection Act 2010 coming into force on 15 December 2010 and the proposed amendments to the Criminal Procedure Code in respect of plea bargaining and pre-trial case management in the pipeline.

The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum in his reply, gave an assurance that in line with the 'People First. Performance Now' ethos, all shortcomings would be addressed and no client would be turned away for whatever reason as both officers and

The Judges march in procession

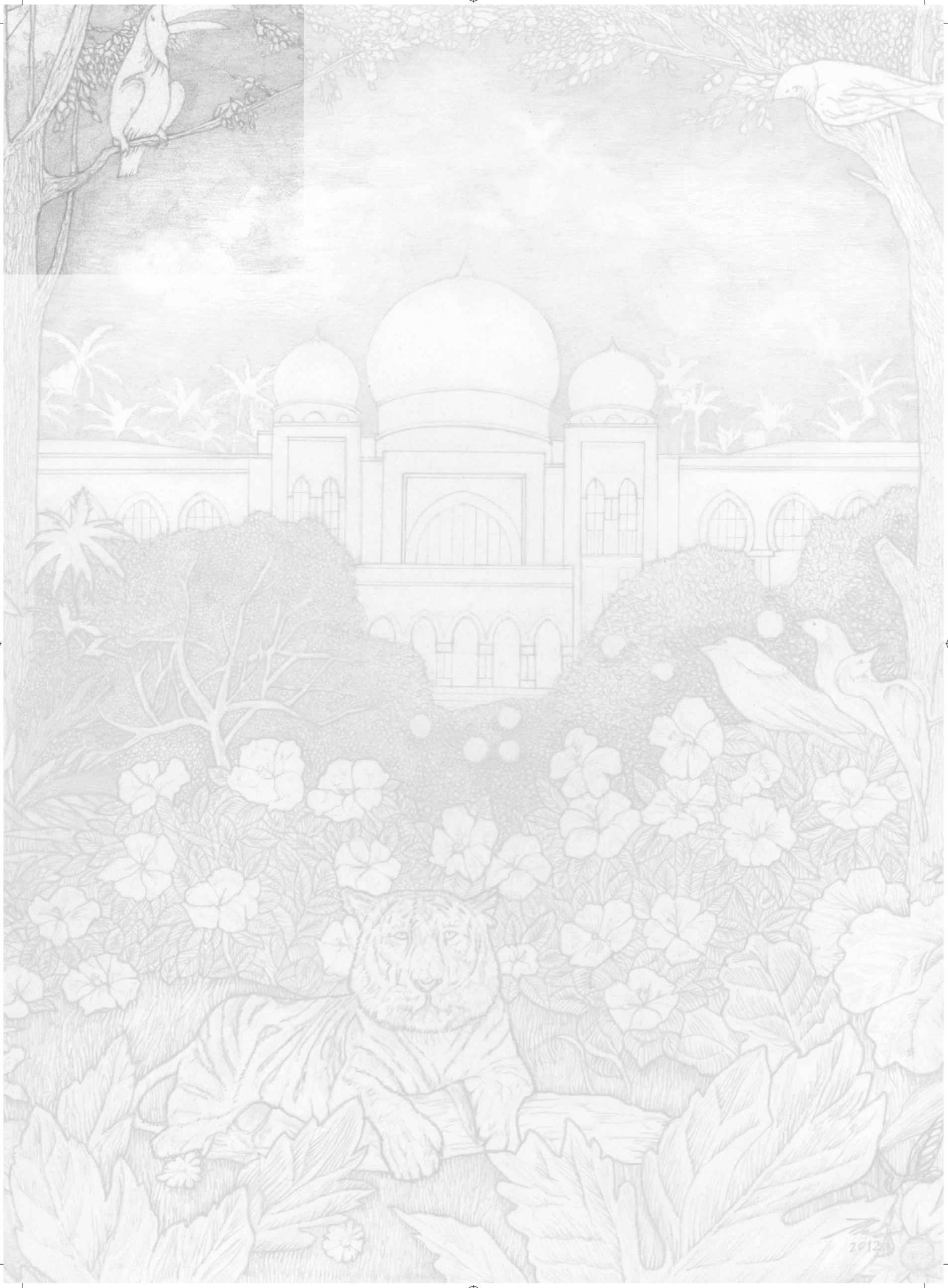
staff would be required to multi-task to take on whatever task that may be asked of the court. As last year's performance had brought about a decrease in pending cases, one High Court in Kota Kinabalu will be closed. For increased efficiency for the coming year, officers would be moved to maximize their potential. Under the 3 in 1 concept, courts at smaller stations will be manned by Sessions Court Judges who shall, apart from Sessions Court cases, also hear Magistrate's and Senior Assistant Registrar's cases. Magistrates and Senior Assistant Registrars will act as Research Officers for High Court and Sessions Court Judges so as to expedite and improve the quality of written judgments. Judicial training will be intensified and the Court Officers are expected to extend their Community Social Responsibility to more schools and villages.

In delivering the delivery system to the public, flying squad magistrates will handle court cases related to Birth Certificate extracts in Sabah where the pending figure as at 31 December 2010 is 11,884. Buses modified into mobile courts will be dispatched to remote areas to cut down travelling time for both litigants and witnesses and litigants will be allowed to file an action at any time and place regardless of where the proper forum is. With that His Lordship declared the Legal Year 2011 open.

To make the ceremony more meaningful and memorable, an Open Day cum Family Day was held and it culminated in a dinner held at the Sabah Hotel. It was at the dinner that Y.A.A. Tan Sri Datuk Seri Panglima Richard Malanjum announced that the Bintulu court will be the next host of the Opening of the Legal Year 2012. The ceremony came to a close with the handing over of the gavel.

A group photo of Judges of the Federal Court, Court of Appeal, High Court and Judicial Commissioners at The Opening of The Legal Year 2011 at the Palace of Justice, Putrajaya


KEHAKIMAN



CHAPTER 2

THE JUDICIARY — PROJECTIONS AND PERFORMANCE OF THE MALAYSIAN COURTS 2011

THE FEDERAL COURT

THE RIGHT HONOURABLE
TAN SRI ARIFIN ZAKARIA
CHIEF JUSTICE OF MALAYSIA

In the year 2011, the disposal of cases in the Federal Court increased compared to the previous year but at the same time the number of new registrations also increased because of the increase in disposal of cases by the Court of Appeal. The number of sittings in 2011 was considerably increased to dispose of the pending cases in the Federal Court. This could not be achieved without the commitment on the part of the judges, the Attorney General's Chambers as well as members of the Bar.

To ensure the expeditious disposal of cases, the following timeline has been set with regard to the disposal of the following matters:

(i) leave applications within 6 months from the date of registration

(ii) civil appeals within 6 months from the date of registration

(iii) criminal appeals within 3 months from the date a complete appeal record is received

(iv) appeals on writs of habeas corpus within 3 months from the date of registration.

However, it is stressed that the expeditious disposal of cases should never be at the expense of justice. Therefore, where the circumstances demand, this timeline may, at the discretion of the Court, be extended.

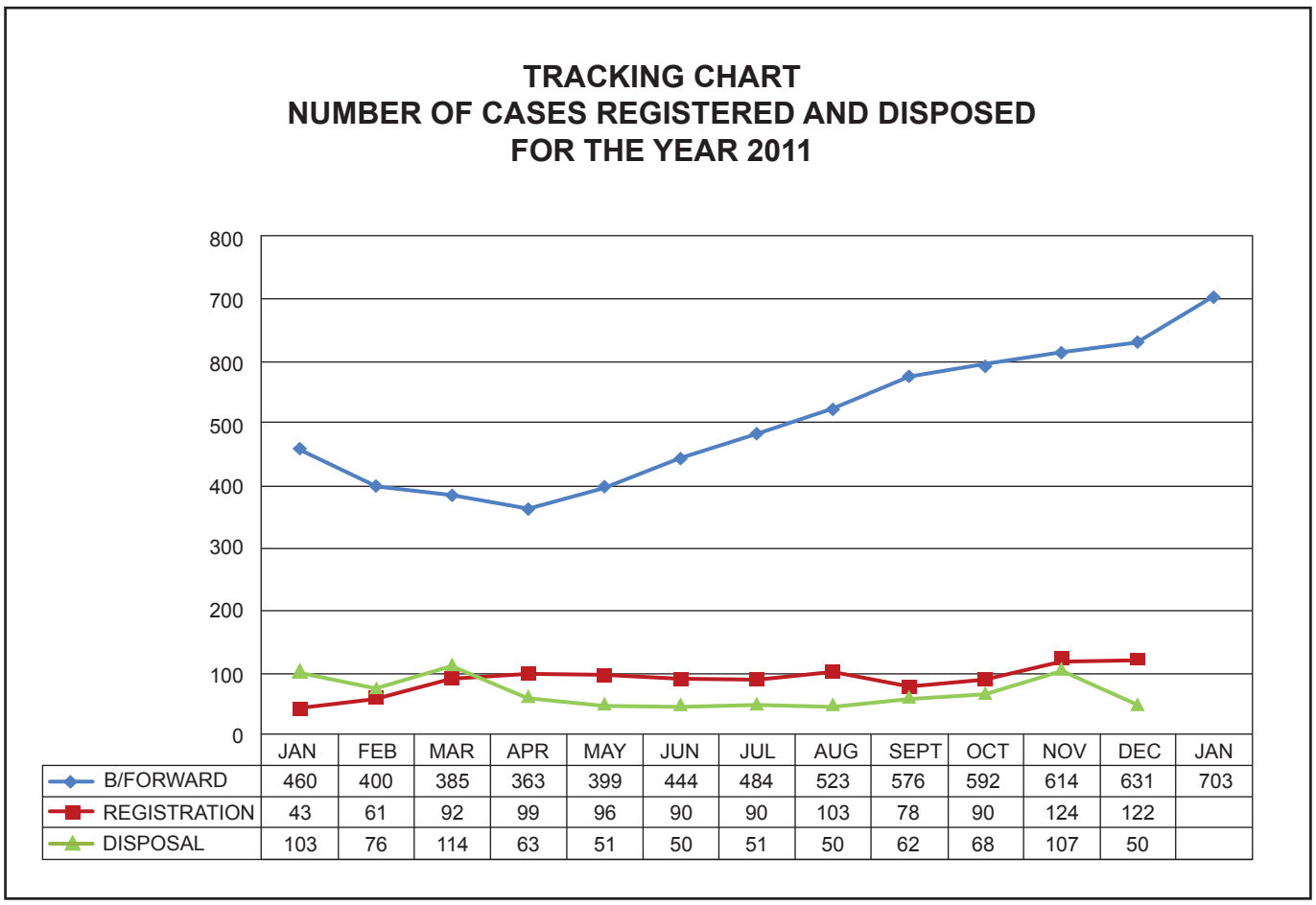
With a view to improving the quality of the court's decisions, effective from 1st January 2012, both the criminal and the civil appeals in the Federal Court are heard by a quorum of five judges instead of the usual three. To further enhance the quality, specialised civil and criminal panels have been set up.

The year 2011 witnessed the retirements of Tun Zaki Tun Azmi, Chief Justice of Malaysia, Tan Sri Alauddin Shariff, President of the Court of Appeal, Datuk Heliliah Haji Mohd Yusof, Judge of the Federal Court and Datuk Kang Hwee Gee, Judge of the Court of Appeal. I would like to record our sincere appreciation to them for their invaluable contributions to the Judiciary. May Allah bless them all in their retirement.

I welcome the appointments of Datuk Suriyadi Halim Omar, Datuk Ahmad Maarop and Datuk Hasan Lah to the Federal Court Bench. I congratulate them and wish them many fulfilling years as Federal Court Judges. With their vast experience as trial and appellate judges, I am confident they will contribute immensely to the Judiciary.

PERFORMANCE OF THE FEDERAL COURT IN 2011

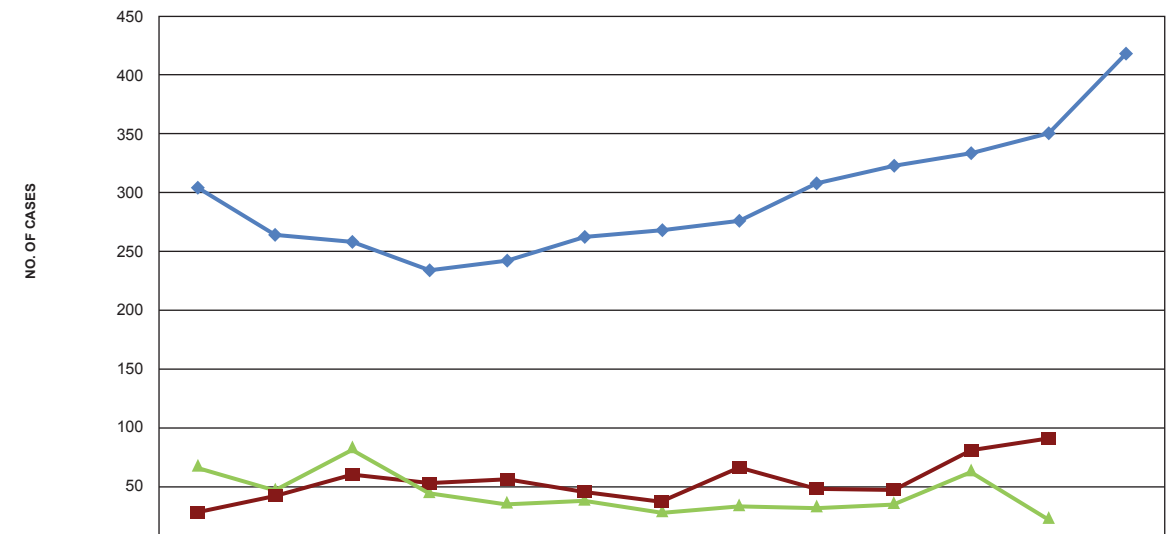
The performance of the Federal Court in 2011 is shown below in graphical form.



	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC	JAN
B/FORWARD	460	400	385	363	399	444	484	523	576	592	614	631	703
REGISTRATION	43	61	92	99	96	90	90	103	78	90	124	122	
DISPOSAL	103	76	114	63	51	50	51	50	62	68	107	50	

Cases adjudicated upon in the Federal Court include substantially motions for leave to appeal, civil appeals, criminal appeals and appeals on writs of habeas corpus. Other matters include civil reference, criminal application and cases of original jurisdiction. As at 1 January 2012, there was an increase in the number of pending cases in the Federal Court, amounting to 703 cases as opposed to 460 cases as at 1 January 2011. This increase was consequential upon an increase in the number of cases registered in the Federal Court. In 2011, a total of 1088 cases were registered as opposed to 713 in 2010. Out of these cases, 845 cases were disposed of, achieving a clearance rate of 77.7%. Considerable effort was expended by the Federal Court judges to achieve this clearance rate. Such efforts are directed at eliminating the backlog of cases. By December 2012, this number of pending cases is expected to be disposed of by 90%.

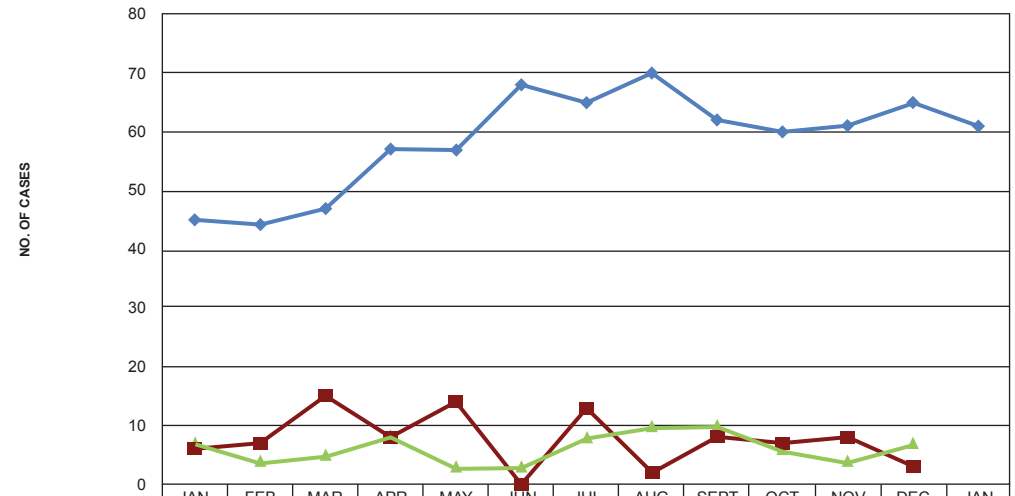
TOTAL NUMBER OF REGISTERED, PENDING AND DISPOSED CASES AS AT 31 DECEMBER 2011 (LEAVE APPLICATIONS)



	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC	JAN
B/FORWARD	304	264	258	234	242	262	268	276	308	328	334	351	419
REGISTRATION	27	41	59	52	55	44	36	65	47	46	80	90	
DISPOSAL	67	47	83	44	35	38	28	33	32	35	63	22	

For leave applications, the registration increased by 21%, from 506 in 2010 to 642 in 2011. However, the Federal Court managed to increase the disposal from 437 in 2010, to 527 in 2011. As at 1 January 2012, there were only 419 leave applications pending in the Federal Court. Such applications are now targeted to be disposed of within 6 months from the date of registration.

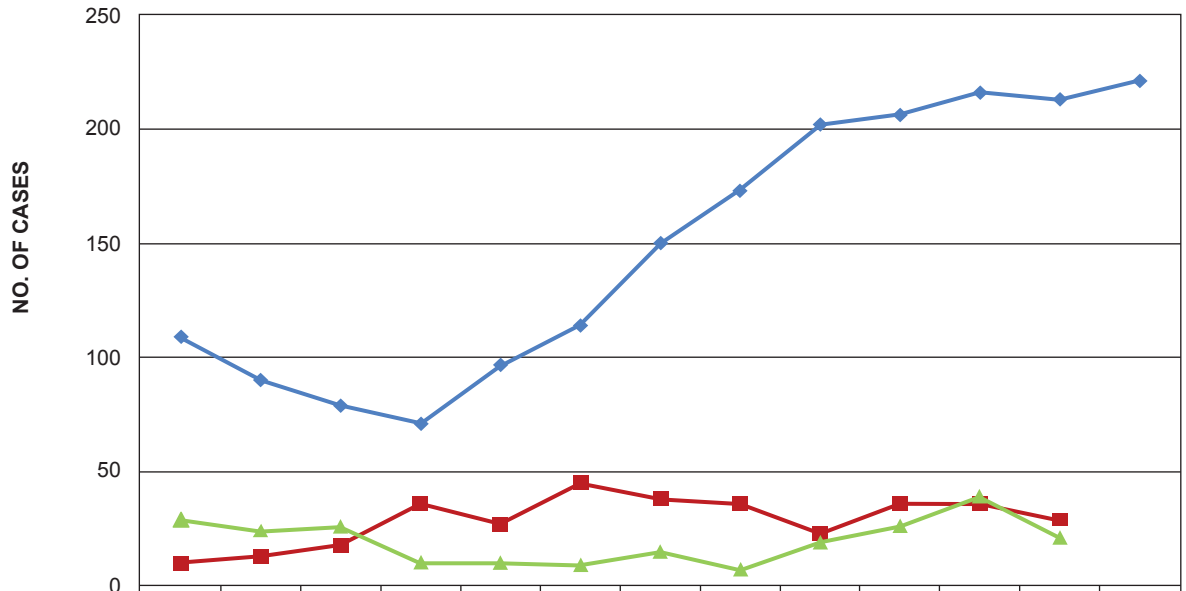
TOTAL NUMBER OF REGISTERED, PENDING AND DISPOSED CASES AS AT 31 DECEMBER 2011 (CIVIL APPEALS)



	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC	JAN
B/FORWARD	45	44	47	57	57	68	65	70	62	60	61	65	61
REGISTRATION	6	7	15	8	14	0	13	2	8	7	8	3	
DISPOSAL	7	4	5	8	3	3	8	10	10	6	4	7	

The registration for civil appeals also increased by 127%, from 40 in 2010 to 91 in 2011. Despite that, the Federal Court managed to dispose 55% of the total civil appeals pending in 2011, leaving a balance of only 61 appeals as at 1 January 2012. Civil appeals are now targeted to be disposed of within 6 months from the date of registration.

TOTAL NUMBER OF REGISTERED, PENDING AND DISPOSED CASES AS AT 31 DECEMBER 2011 (CRIMINAL APPEALS)

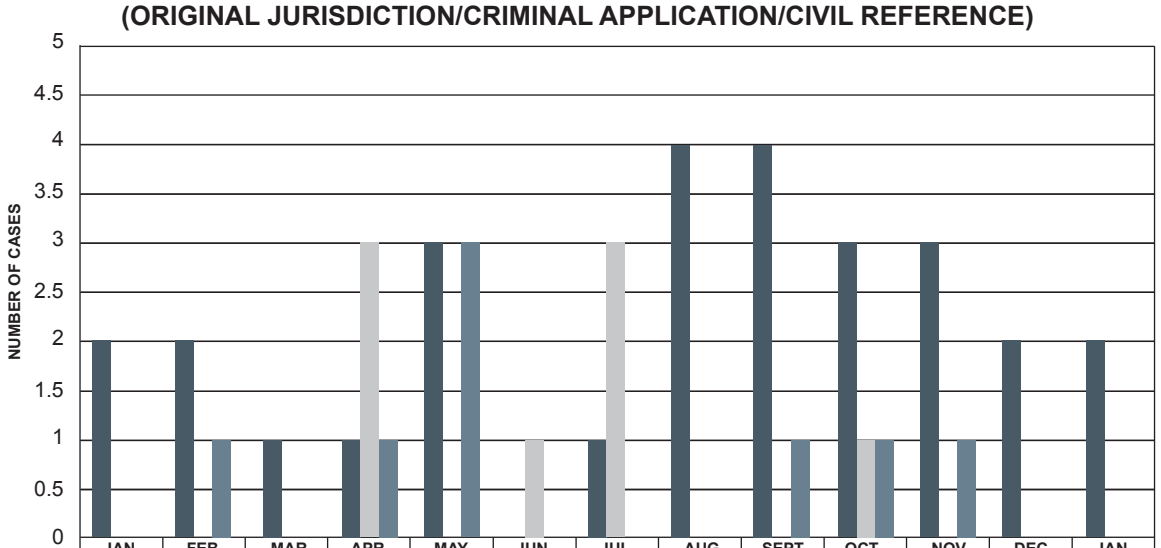


	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC	JAN
B/FORWARD	109	90	79	71	97	114	150	173	202	206	216	213	221
REGISTRATION	10	13	18	36	27	45	38	36	23	36	36	29	
DISPOSAL	29	24	26	10	10	9	15	7	19	26	39	21	

As for criminal appeals, the registration also increased by 114%, from 162 in 2010 to 347 in 2011. Notwithstanding this substantial increase, the Federal Court managed to increase the disposal from 186 in 2010 to 235 in 2011. As at 1 January 2012, there were only 221 criminal appeals pending, out of which 14 cases are appeals on writs of habeas corpus.

Currently, criminal appeals can be disposed of within 3 months from the date a complete record of appeal is received by the Federal Court. Whereas, appeals on writs of habeas corpus are targeted to be disposed of within 3 months from the date of registration.

TOTAL NUMBER OF REGISTERED, PENDING AND DISPOSED CASES AS AT 31 DECEMBER 2011 (ORIGINAL JURISDICTION/CRIMINAL APPLICATION/CIVIL REFERENCE)



	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC	JAN
B/FORWARD	2	2	1	1	3	0	1	4	4	3	3	2	2
REGISTRATION	0	0	0	3	0	1	3	0	0	1	0	0	
DISPOSAL	0	1	0	1	3	0	0	0	1	1	1	0	

For other matters comprising civil references, criminal applications and cases of original jurisdiction, there were 10 cases pending in the Federal Court throughout 2011, out of which, 8 cases were disposed of. As at 1 January 2012, there were only 2 cases pending.

The increase in the disposal by the Federal Court was achieved through the implementation of, inter alia, the following measures:

(i) Increase in the number of cases allocated for all weekly sittings of the Federal Court;

(ii) Increase in the number of sittings per month and the number of days per sitting; and

(iii) Introduction of specialised panel in the Federal Court.

Judges of the Federal Court:

1. Justice Hashim Dato' Haji Yusoff
2. Justice Mohd Ghazali Mohd Yusof
3. Justice James Foong Cheng Yuen
4. Justice Abdull Hamid Embong
5. Justice Suriyadi Halim Omar
6. Justice Ahmad Haji Maarop
7. Justice Hasan Lah

THE COURT OF APPEAL

THE RIGHT HONOURABLE TAN SRI MD. RAUS SHARIF
PRESIDENT OF THE COURT OF APPEAL

2011 has indeed been a challenging year for the Court of Appeal. There was an overwhelming increase in the appeals filed, by reason of the frenetic disposal of cases in the courts below. However as trained judicial arbiters, we are equal to the task. The rapidly expanding workload has become such that further organisational restructuring is needed to ensure that the various categories of appeals are dealt with efficaciously.

This is because the pace of events increases the need for the judiciary to fulfill its traditional role of providing the essential elements of certainty and continuity.

So, with these precepts in mind, I sought to strengthen the appellate court's profile.

Since the statistics of appeals pending in the Court of Appeal stood at a staggering 10,771 appeals as at 1.1.2011, a comprehensive strategy to resolve them was called for.

One of the most critical categories is the appeals on Interlocutory Motions which has swelled to 3,369 in number. The importance of their disposition cannot be denied since pending their outcome, the main suits in the courts below would be delayed.

Then there are the criminal appeals involving the death penalty. It has been the bane of the system that the accused would languish for long periods in prison, waiting for their appeals to be determined. This is an affront to justice for both the accused and the criminal justice system. A way out of this has to be found, before the situation degenerates.

The next problem revolves around public servants who, after being charged in court for an offence, are suspended on half month pay. A faster way of dealing with this problem had to be sought.

Other critical areas which I will expand on later relate to the implementation of new commercial cases (NCC) and new civil court cases (NCVC). The disposal of criminal appeals from subordinate courts has also to be considered, bearing in mind that for these cases the Court of Appeal is the final appellate court.

Given that the Court of Appeal only exercises appellate jurisdiction and hears appeals from orders and judgments of the court below and does not deal with original applications, a different work ethics and culture pervades from that found in the lower court.

The main function of the Court of Appeal is to supervise the operation of the lower courts, to correct their errors and mistakes. In this regard, the Court of Appeal is conferred jurisdiction to correct and interfere in cases where it appears that a miscarriage of justice has occurred or where the trial in the court below is tainted by legal misdirection or procedural irregularity.

Thus, regardless of the issues that may be before the Panel, in the exercise of its civil or criminal jurisdiction there is one requisite: that the coram is to display a collegiate spirit. Discussions of issues need to be done collectively, for it is not possible for a single judge to dominate the system.

A Court of Appeal sitting comprising entirely of East Malaysian judges – 11.12.2011
Left to Right — Justice Clement Allan Skinner, Justice Sulong Matjeraie, Justice Linton Albert.
The Registrar of the Court Mr. Steve Ritikos, is also from East Malaysia.

A lack of collegiate spirit if it exists at all, is an unwelcome phenomenon since even the most assiduously industrious judge does not work alone. Or rather he should not do so since his colleagues contribute collectively to judicial decision-making.

This approach may take some getting used to especially if the judge is a newcomer to the appellate court bench. Nonetheless, team spirit is the order of the day.

Having said that, I would like to speak a little about our procedure for hearing cases.

Depending on the complexity of the appeal or on the approach adopted by the Chairman of the Panel, arguments before the court can either be fairly extensive or fairly brief. It goes without saying that reading the appeal records beforehand will ensure a smooth run of the appeals.

The hearing itself is relatively formal but there is a free flow of communication where judges tend to engage counsel and freely discuss the facts and the law, testing the arguments and even hinting at the trend of judicial thinking.

If the matter is a simple and straight forward issue, the Panel would likely decide and pronounce its decision there and then extemporaneously.

Since most judges read the appeal records in advance, they would have formed initial views even before hearing counsel's submission, though sometimes after having heard counsel, they would turn the other way completely.

In cases where the issues on appeals are complex, or where further research or time is needed for deliberation, judgment would be reserved. The Panel will adjourn and depending on the Chairman, would discuss amongst themselves either at the end of the hearing or on some other day to see what tentative views they may have or on which they agree or disagree as the case may be. Further discussions may be had and this is actually one of the great advantages in the collegiate system where judges work together in a group. The point is that if it is a single judgment, then all Members of the Panel are bound and committed by it and if there is a dissenting judgment, we are still alive and curious as to what the dissenting member has to say. Most reserved judgments are delivered within a month or at the most, three months after hearing.

I will now briefly discuss the positions taken by the Court of Appeal to overcome its pending problems.

Action Taken/Proposals Made

(i) The Interlocutory Motions (IM) Appeals

In view of the massive number of IM appeals, a proposal to amend Section 68 of the Courts of Judicature Act, 1964 is in the pipeline. Basically it is proposed that if the cases are ordered to go for full trial or when the rights of the parties are not fully disposed off, no right of appeal lies to the Court of Appeal. This proposal is to be discussed further with the stakeholders.

(ii) Criminal Appeals

One of the contributing factors to the delay is that there is a shortage of criminal lawyers willing to take up assigned cases. A series of meetings between the Judiciary, the Bar Council and the Sarawak and Sabah Law Associations have been held to address this concern. The Bar Council and the Sarawak & Sabah Law Associations have indicated that they will be assigning more criminal lawyers for this purpose.

(iii) Cases Involving Public Servants

To expedite the hearing of appeals involving public servants, special panels have been established.

(iv) The New Commercial Courts (NCC) Panel

As Malaysia is one of the most commercially vibrant developing countries in the region, commercial disputes are to be accorded serious consideration. With that in mind, New Commercial Courts (NCC) were established in the Kuala Lumpur High Court. The objective was for all new commercial cases to be disposed off within nine (9) months from the date of registration. To complement the fast track in the court below, the Court of Appeal has introduced the Court of Appeal NCC Panel which is designated to hear appeals from the NCC courts within three (3) months for IM appeals, five (5) months for full trial appeals involving affidavit evidence and six (6) months for full trial appeals involving oral evidence. Thus commercial disputes in Malaysia will be disposed within 9 to 12 months from date of filing.

(v) Introduction of the New Civil Courts (NCVC) Panel

The same concept as the NCC Panel was established for the disposition of new civil cases, now referred to as the New Civil Courts (NcVC).

I am pleased to say that the initiatives which were implemented at the beginning of the year have shown a remarkable reduction in the pending appeals.

The statistics have shown that as at 31.12.2011, the number of appeals pending in the Court of Appeal was 8,302 as compared to 10,771 in January 2011. There was a marked reduction

in the IM Appeals from 3,369 in January 2011 to 1,233 as of 1.12.2011, which means that 2,136 IM Appeals were disposed of for the past 12 months.

The stark reduction of the pending appeals in the Court of Appeal can be seen from the number of cases registered and disposed of during the same period. There were 5,495 appeals registered from January 2011 to December 2011. During the same period 8,064 appeals have been disposed of. Thus the clearance rate in the Court of Appeal is 144%.

I would like to say that these achievements could not have been possible without the support and tremendous hard work put in by my sister and brother judges. I wish therefore to place on record my utmost appreciation to all of them in assisting us to forge all the positive changes in the Court of Appeal. My heartfelt gratitude also goes to the Federal Court Judges who sat as Chairman in the Special Panels (for Appeals under Codes 04, 6B and 09)[1]

I would also like to extend my appreciation to Puan Azimah Omar the Registrar of the Court of Appeal, who, together with all the Deputy Registrars, Senior Assistant Registrars and staff in the Court of Appeal Registry, have shown a high degree of commitment in ensuring the success of the initiatives which have been put in place.

Finally I would like to express my appreciation to the officers of the Attorney General's Chambers and members of the Bar for their cooperation and support, making it possible for us to achieve our aspiration.

I am well aware that the expeditious disposal of appeals in the Court of Appeal should never be done at the expense of justice. However our judicial development and society's needs must be heeded too and I am positive that in balancing that equation, we will not allow justice to be compromised.

JUSTICE RAUS SHARIF
President
Court of Appeal, Malaysia

1 04 – Civil Appeals Originate from Subordinate Court
6B – Corruption Appeals
09 – Criminal Appeals Originate from Subordinate Court

PERFORMANCE OF THE COURT OF APPEAL IN 2011

1. The Court of Appeal was established on 24 June 1994. It is headed by the President of the Court of Appeal. When it was first established, there were only 10 judges of the Court of Appeal (not including the President Court of Appeal). The law allows a maximum of 32 Court of Appeal Judges to be appointed. However, currently there are 24 judges in the Court of Appeal.

2. 2011 had been a very challenging year for the Court of Appeal. Expeditious disposal of cases in the courts below had resulted in a drastic increase in the number of appeals filed in the Court of Appeal for the last two (2) years. The increase was very significant in 2010 and 2011 in which there were 6,415 appeals filed in 2010 whilst 5,595 were filed in 2011 compared to 5,048, 2,624 and 1919 appeals filed in 2009, 2008 and 2007 respectively.

3. The increase in the number of appeals filed contributed to the huge number of appeals pending in the Court of Appeal. As at 31 December 2010, there was a total of 10,771 appeals pending in the Court of Appeal comprising 3,369 Interlocutory civil (IM) appeals, 5,712 Full Trial civil appeals, 1,583 Criminal appeals and 107 New Commercial Courts (NCC) appeals.

4. The 10,771 appeals pending in the Court of Appeal was the accumulation of appeals from the last six (6) years. It had always been the trend in the past that the number of appeals disposed was lower than the registration. Thus, if this is not addressed, the number will continue to grow. To deal with the large number of pending appeals, the Court of Appeal in 2011 had implemented several initiatives. As a result, for the first time since the the last six (6) years, the disposal of appeals was much higher than the number of appeals registered.

5. In expediting the disposal of appeals, special focus was given to three (3) categories of appeals, namely IM appeals, Criminal appeals involving capital punishment and Criminal appeals involving government servants.

IM Appeals

6. As at 31 December 2010, there were 3,369 IM appeals pending in the Court of Appeal. This caused great concern as these appeals arose out of applications before the main suit had been adjudicated upon by the trial court and thus if they were not disposed, the substantive proceedings in the court below would be put to a halt. This would obviously be detrimental to the public as they would have to wait longer for their cases to be fully litigated in the courts below. Therefore, in an effort to clear off IM appeals faster, the initiatives below were undertaken:

   i. Increasing the number of sittings for the IM panel, from three (3) days to four (4) days i.e. Monday to Thursday as opposed to the previous arrangement where the Court of Appeal judges only sat from Monday to Wednesday.

   ii. Increasing the number of IM appeals fixed for hearing from seven (7) to twenty (20) cases per day. In total the IM panel hears 80 IM appeals per week as compared to 25 appeals weekly previously.

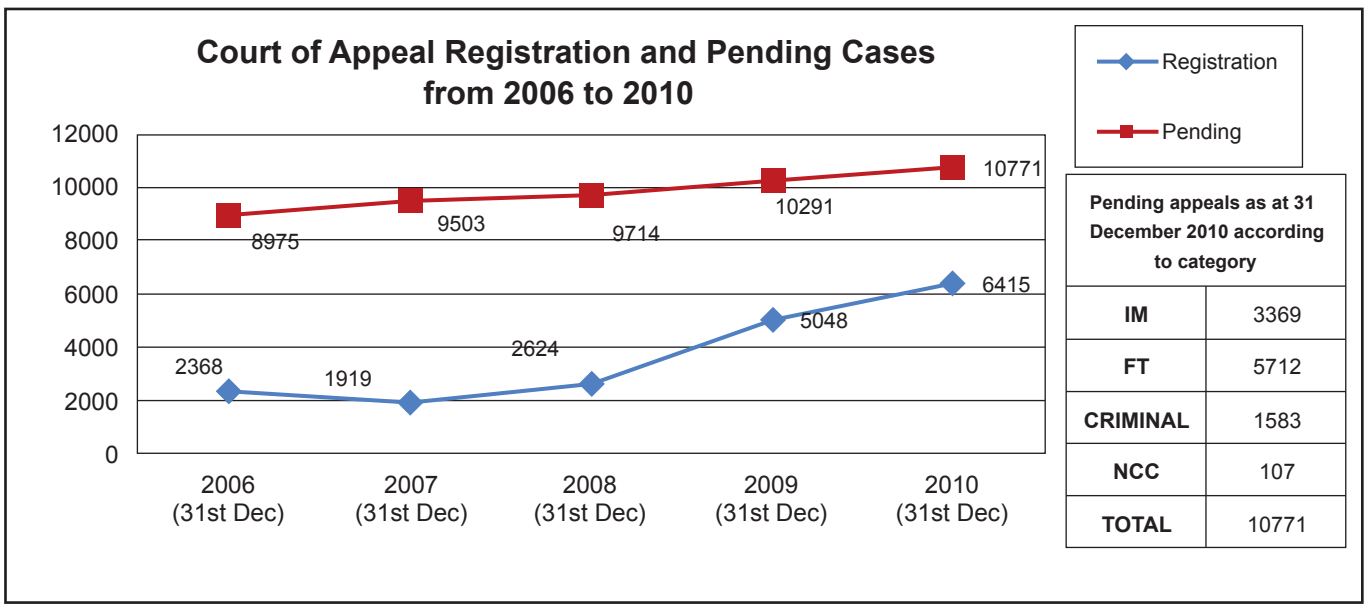
   iii. IM appeals are fixed on a staggered basis namely from 9.00 am, 11.00 am and 2.00 pm, to enable counsel to manage their schedules.

   iv. A special panel which sits every Thursday was set up to hear IM appeals registered in 2011. The objective of this special IM panel is to dispose IM appeals registered in 2011 within three (3) months from the registration date.

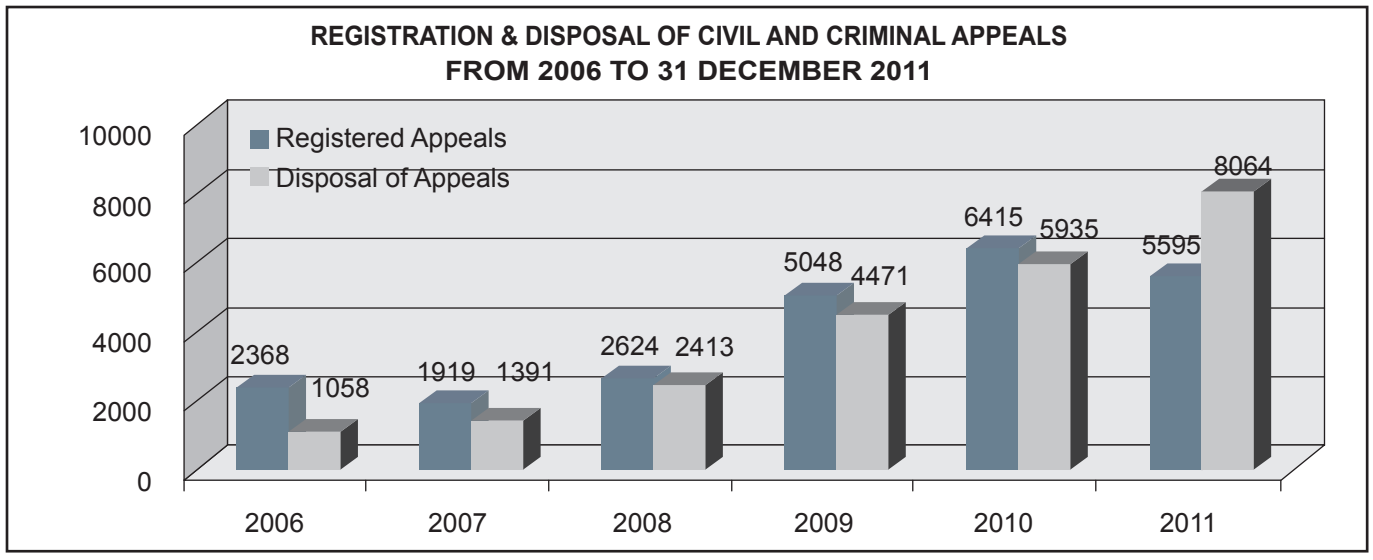
7. By 31 December 2011, IM appeals had been reduced to 1,233 as compared to 3,369 in December 2010. Despite there being 1,502 IM appeals registered in 2011, the Court of Appeal had successfully disposed of 3,638 appeals in 2011 with a clearance rate of 242%.

8. It is targeted that by the end of June this year, all pre 2012 IM appeals will be disposed of. It is expected that by 1 July 2012, the Court of Appeal will only have 2012 IM appeals pending. From then on the Court of Appeal will strive to meet the ultimate aim of disposing IM appeals within three (3) months from the date of registration.

9. Also with regards to IM appeals, to further assist counsel in the Klang Valley, beginning March 2012 the Court of Appeal will sit in the Kuala Lumpur High Court Complex at Jalan Duta to hear IM appeals from Kuala Lumpur and Shah Alam. This is to enable counsel to attend other matters before the courts below as well as having their IM appeals hearing, without the need to travel to the Palace of Justice in Putrajaya.



Pending appeals as at 31 December 2010 according to category	
IM	3369
FT	5712
CRIMINAL	1583
NCC	107
TOTAL	10771



Criminal Appeals

10. With regard to criminal appeals, the following initiatives were implemented, namely:-

    i. Specialised panels were empanelled to hear criminal appeals particularly those involving death penalty cases.

    ii. The Criminal panels were increased from two (2) to eight (8) panels per month.

    iii. Increasing the number of sittings for criminal panels, from three (3) days to four (4) days i.e. from Monday to Thursday.

    iv. Special panels chaired by Federal Court Judges.

11. With the said initiatives, the year 2011 saw a huge reduction in criminal appeals pending in the Court of Appeal. By 31 December 2011 there were only 1,148 Criminal appeals pending as compared to 1,583 in January 2011. There were 1,159 criminal appeals disposed of in 2011 compared to 382 in 2010. The clearance rate is 160%. In fact, the number of criminal appeals disposed of in 2011 tripled the number in 2010.

12. The performance of the Court of Appeal in respect of criminal appeals involving the death penalty can be clearly seen in the number of such cases disposed. In 2011, it had successfully disposed 239 appeals involving the death penalty. The clearance rate is 99%.

REGISTRATION, DISPOSAL AND PENDING CASES FOR CRIMINAL APPEALS INVOLVING THE DEATH PENALTY
31 DECEMBER 2010 – 31 DECEMBER 2011

Pending (as at 31.12.2010)	Registration 2011	Disposed 2011	Pending (as at 31.12.2011)	% Disposed against Registration
484	240	239	485	99%

**REGISTRATION, DISPOSAL AND PENDING CASES FOR CRIMINAL APPEALS INVOLVING CORRUPTION (CODE 06B)
31 DECEMBER 2010 – 31 DECEMBER 2011**

Pending (as at 31.12.2010)	Registration 2011	Disposed 2011	Pending (as at 31.12.2011)	% Disposed against Registration
135	61	102	94	167%

13. As had been stated earlier, special focus was also given to criminal appeals involving government servants. The majority of appeals brought to the Court of Appeal involving government servants emanated from the lower courts. This includes corruption cases which are registered under code 06B. To expedite the disposal of these appeals, special panels were set up to hear criminal appeals registered under codes 06B as well code 09 (criminal appeals which originate from subordinate courts) where the Court of Appeal is the final appellate court.

14. The Court of Appeal is committed in the near future to reduce the waiting period of criminal appeals involving the death penalty to eighteen (18) months. It is targeted that all pre 2011 criminal appeals be disposed by the end of 2012. Thus, by 1 January 2013, the Court of Appeal will only have the remaining criminal appeals registered in 2011 and 2012 pending. As for corruption appeals registered under code 06B, it is expected that by 1 July 2012, all corruption appeals will be disposed of within six (6) months from the date of registration. Similarly code 09, is targeted to be disposed within six (6) months.

Full Trial Civil Appeals

15. In 2011, in respect of Full Trial civil appeals, the Court of Appeal had disposed of 2,743 Full Trial civil appeals. Out of 2,743 disposed of, 1,897 were pre 2010 Full Trial civil appeals. As at 31st December 2011, there were 5,565 Full Trial civil appeals pending as compared to 5,712 in December 2010. The special panel chaired by Federal Court judges which were also tasked to hear Full Trial civil appeals registered under code 04 which originated from the subordinate courts, had contributed to the expeditious disposal of Full Trial civil appeals.

16. It is the Court of Appeal's target to dispose of all the 743 pre 2010 Full Trial civil appeals by June 2012. It is also targeted that by the end of December 2012, the Court of Appeal would be able to dispose of the remaining 2331 Full Trial civil appeals registered in 2010. By 2013, the Court of Appeal will only have the remaining Full Trial civil appeals registered in 2011 and 2012 to be cleared together with the current registration.

17. Eventhough the disposal of the Full Trial civil appeals is not critical, nevertheless the Court of Appeal is reducing the number of cases pending. The immediate target is to dispose of the older appeals and all code 04 where the Court of Appeal is the apex court. Presently, we have 909 civil appeals code 04 pending in December 2011. It is targeted that all these appeals will be disposed by the end of this year.

18. The New Commercial Courts (NCC) and New Civil Courts (NCVC) were established in the High Courts to expedite disposal of NCC and NCVC cases. In the High Court, the timeline for disposal of these cases is three (3) months for interlocutory matters and nine (9) months for full trial. To ensure that appeals from these courts are disposed within the timeline, a dedicated panel to hear these appeals were empanelled in the Court of Appeal. The timelines are; three (3) months for disposing IM(NCC/NCVC) appeals, five (5) months for disposing Full Trial(NCC/NCVC) appeals decided by the High Courts by way of affidavit evidence and six (6) months for disposing

Full Trial(NCC/NCVC) appeals decided by the High Courts by way of oral evidence.

19. With regard to NCC appeals, the disposal timeline set has accelerated the disposal of appeals. There were 255 NCC appeals registered in 2010 and by January 2012, the Court of Appeal had successfully disposed of all the 255 appeals. As at 31 December 2011, from 408 NCC appeals registered in 2011, a total of 276 appeals had been disposed of leaving a balance of 132 appeals. However, out of these 132 appeals, 89 appeals are still within the timeline of disposal.

20. NCVC appeals are brought to the Court of Appeal from see the NCVC courts which were established in the High Court beginning January 2011. In respect of these appeals as at 31 December 2011, from 365 appeals registered in 2011, a total of 142 appeals had been disposed of leaving a balance of 223 appeals. Out of these, 181 appeals are also still within the timeline of disposal.

COURT OF APPEAL NCC APPEALS 2011 PENDING AS AT 31 DECEMBER 2011

CASES REGISTERED					DISPOSED	PENDING			TOTAL PENDING APPEALS
MONTH		IM	FT (WITNESS)	FT (AFFIDAVIT)		IM	FT (WITNESS)	FT (AFFIDAVIT)	
JAN	42	26	9	7	40	0	1	1	2
FEB	44	10	11	23	32	0	10	2	12
MAR	35	15	10	10	33	1	1	0	2
APR	37	17	8	12	37	0	0	0	0
MAY	48	27	13	8	39	5	1	3	9
JUNE	35	20	8	7	32	2	1	0	3
JUL	25	18	6	1	23	1	1	0	2
AUG	24	17	4	3	19	2	2	1	5
SEPT	31	17	11	3	7	13	10	1	24
OCT	26	14	7	5	5	11	8	2	21
NOV	27	10	7	10	9	9	2	7	18
DEC	34	16	13	5	0	16	13	5	34
TOTAL	408	207	107	94	276	60	50	22	132

COURT OF APPEAL NCVC APPEALS 2011 PENDING AS AT 31 DECEMBER 2011

CASES REGISTERED					DISPOSED	PENDING			TOTAL PENDING APPEALS
MONTH		IM	FT (WITNESS)	FT (AFFIDAVIT)		IM	FT (WITNESS)	FT (AFFIDAVIT)	
JAN	2	0	1	1	2	0	0	0	0
FEB	6	4	1	1	6	0	0	0	0
MAR	8	5	1	2	8	0	0	0	0
APR	11	5	5	1	11	0	0	0	0
MAY	30	17	10	3	29	0	1	0	1
JUNE	32	17	10	5	25	4	2	1	7
JUL	26	15	7	4	17	6	3	0	9
AUG	48	29	15	4	18	17	10	3	30
SEPT	40	19	12	9	12	11	8	9	28
OCT	31	20	7	4	1	19	7	4	30
NOV	79	47	26	6	13	42	19	5	66
DEC	52	20	18	14	0	20	18	14	52
TOTAL	365	198	113	54	142	97	62	35	223

21. In respect of civil leave applications, there are 409 leave applications currently pending in the Court of Appeal. Out of the 409 leave applications, 404 were registered in 2011. The Court of Appeal had successfully disposed all the 1,653 leave applications registered in 2010 except for five (5). These five (5) leave applications have been fixed for hearing in January 2012. The President of the Court of Appeal has taken it upon himself to chair the leave applications panel. This is to ensure consistency in granting leave to appeal in the Court of Appeal.

22. It is the Court of Appeal's target that by June 2012 all leave applications registered in 2011 be disposed of. By 1 July 2012, the Court of Appeal will ensure that all leave applications will be heard within three (3) months from the date of filing.

Conclusion

23. The initiatives implemented in early 2011 had shown an outstanding reduction of cases pending in the Court of Appeal. By 31 December 2011, there were only 8,302 appeals pending compared to 10,771 in December 2010. There were 8,064 appeals disposed of in 2011. The clearance rate i.e. disposal against registration is at 144%.

24. The efforts taken have also resulted in the clearing of old cases. In January 2011, there were a considerable number of old cases pending. However, by 31 December 2011, the number of old cases pending had been reduced.

25. With the current rate of disposal and taking the average rate of registration in the Court of Appeal as at 5,500 appeals in the last three (3) years, the number of appeals pending by the end of this year will be further reduced to the region of 6,000 appeals.

REGISTRATION, PENDING AND DISPOSAL RATES FOR CIVIL LEAVE APPLICATIONS 31 DECEMBER 2010 – 31 DECEMBER 2011

Subject Matter	Pending (as at 31.12.2010)	Registration 2011	Disposed 2011	Pending (as at 31.12.2011)	Percentage (Disposed against Registration)
Leave Application (Civil)	761	1231	1583	409	128%

COURT OF APPEAL PERFORMANCE
REGISTRATION, DISPOSED AND PENDING CIVIL AND CRIMINAL APPEALS
31 DECEMBER 2010 – 31 DECEMBER 2011

Subject Matter	Pending (as at 31.12.2010)	Registration 2011	Disposed 2011	Pending (as at 31.12.2011)	Percentage (Disposed against Registration)
Interlocutory (IM)	3369	1502	3638	1233	242%
Full Trial (FT)	5712	2596	2743	5565	106%
Criminal	1583	724	1159	1148	160%
NCC	107	408	382	133	94%
NCVC		365	142	223	39%
Total	10771	5595	8064	8302	144%

COURT OF APPEAL
COMPARISON OF TOTAL APPEALS PENDING
AS AT 31 JANUARY 2011 vs. 31 DECEMBER 2011

SUBJECT MATTER	APPEALS PENDING AS AT 31 JANUARY 2011				APPEALS PENDING AS AT 31 DECEMBER 2011			
	West Malaysia	Sabah	Sarawak	TOTAL	West Malaysia	Sabah	Sarawak	TOTAL
CIVIL INTERLOCUTORY (IM)	3121	107	141	3369	1077	70	86	1233
CIVIL FULL TRIAL (FT)	4994	377	341	5712	4844	382	339	5565
CRIMINAL	1401	85	97	1583	1008	72	68	1148
NCC	107	-	-	-	133	-	-	133
NCVC	-	-	-	-	223	-	-	223
TOTAL	9623	569	579	10771	7285	524	493	8302

Judges of the Court of Appeal

1. Justice Zaleha Zahari
2. Justice Low Hop Bing
3. Justice Zainun Ali
4. Justice Abdul Malik Haji Ishak
5. Justice Nihrumala Segara M.K.Pillay
6. Justice Abu Samah Nordin
7. Justice Sulong Matjeraie
8. Justice Sulaiman Daud
9. Justice Mohd. Hishamudin Haji Mohd Yunus
10. Justice Ramly Haji Ali
11. Justice Jeffrey Tan Kok Wha
12. Justice Azhar @ Izhar Haji Ma'ah
13. Justice Syed Ahmad Helmy Syed Ahmad
14. Justice Abdul Wahab Patail
15. Justice Clement Allan Skinner
16. Justice Mohamed Apandi Haji Ali
17. Justice Zaharah Ibrahim
18. Justice Azahar Mohamed
19. Justice Linton Albert
20. Justice Balia Yusof Haji Wahi
21. Justice Alizatul Khair Osman Khairuddin
22. Justice Aziah Ali
23. Justice Mohtarudin Baki
24. Justice Anantham Kasinather

THE HIGH COURT OF MALAYA

THE RIGHT HONOURABLE TAN SRI ZULKEFLI
AHMAD MAKINUDIN
CHIEF JUDGE OF MALAYA

On 12 September 2011, the new line up for the highest positions in the Malaysian Judiciary were appointed and with the new appointments, a new era of the Malaysian Judiciary has begun. The Chief Justice of Malaysia has pledged in his elevation speech that he will continue with the reforms that have been made so far. The Malaysian Judiciary has undergone a major reform beginning in 2009. This reform is aimed at enhancing public confidence towards the Judiciary and in particular to reduce the backlog of cases pending before the courts. Before that, a reduction in the backlog of cases seemed to be near impossible as there were more cases registered and pending to be heard and tried when compared to the number of cases heard and disposed of. However, the reforms made over the past two years have indicated otherwise and silenced the critics.

In support of the Chief Justice's pledge, the Judiciary has plans to further enhance the reforms that have been made. Amongst the plans that have been put in place are the enhancement of the E-Filing systems in the courts. As of January 2012, the Courts in Kuala Lumpur, Shah Alam, Georgetown and Johor Bahru are equipped with the E-Filing systems. Our long term plan is to make all courts in Malaysia fully electronic and paperless.

Our reforms made over the past two years are primarily aimed at disposing of cases swiftly and without sacrificing justice. The public's expectation of the judiciary is that they would receive justice whenever they refer their disputes to the courts for resolution. As the maxim goes "justice delayed is justice denied", the court must not only deliver its decision swiftly but must also demonstrate a readiness to give a fair hearing to all parties appearing before it. Judges and Judicial Officers are often reminded not to delay in delivering their decisions and preparing their grounds of judgment after the conclusion of a trial. They are required to give reasons in arriving at their decisions and to prepare their written grounds of judgment within the timeline that has been prescribed.

The step taken to reduce the backlog of cases is also an effort to increase public confidence in the Judiciary. Backlog of cases is a bane to any Judiciary in this world. The Chief Justice has issued a direction that all pre-2007 Criminal and Civil Cases at the High Court must be disposed of by 31 March 2012. The same target date for disposal is set for Pre-2010 Criminal and Civil Cases at the Sessions Court and the Pre 2010 Criminal Cases and Pre 2011 Civil Cases at the Magistrates' Court. We are confident of achieving the target date. After the target is achieved, we must not rest on our laurels. We must ensure that the backlog of cases does not recur. It is our earnest hope that by the end of 2013, the backlog of cases will be cleared and we will be current in the hearing and disposal of cases filed before the courts.

As part of our efforts to increase the rate of disposal of cases, court annexed mediation was introduced in 2009. In August 2011, the former Chief Justice of Malaysia officially launched the

Mediation Centre at the Kuala Lumpur Court Complex. The Mediation Centre aims to centralize all mediation in that court. Due to the growing popularity of court annexed mediation, more Mediation Centres will be established at the courts in the major cities across the Peninsula. As of now, Mediation Centres have been established at the courts in Johor Bahru, Muar, Kuantan and Ipoh. Active promotional exercises on the use of Mediation Centres at the Courts will be pursued in order to encourage litigants to opt for mediation.

Specialization of courts is another important step which has been initiated by the Judiciary to address the issue of the backlog of cases and efforts taken towards its reduction. The following special courts have been established at the Kuala Lumpur High Court:

i) The New Commercial Court
ii) The New Civil Courts
iii) Intellectual Property Court
iv) Muamalat (Islamic Financing) Court
v) Admiralty Court

The expertise and competency of the Judges and Judicial officers must also be enhanced in order for them to effectively discharge their functions and duties. In this regard a continuing legal education for Judges and Judicial Officers is essential for them to keep up with the development of the law. Seminars and workshops are held at regular intervals. Local as well as international speakers including eminent judges have been invited to speak at these seminars and workshops on various subjects of interest in the law. More specialized courses will be conducted in the near future as part of the continuing legal education programmes for judges and judicial officers.

The plans that we have put in place are aimed at enhancing the standards of the Judges and Judicial Officers in order to increase public confidence in the Malaysian Judiciary. It is my sincere hope that all Judges and Judicial Officers will share this aspiration and together we will bring the Malaysian Judiciary to greater heights and achievements surpassing all expectations of the public and the nation.

The commitment of the judges and officers of the High Court are reflected in the Report prepared by the Managing Judges.

JUSTICE ZULKEFLI AHMAD MAKINUDIN
Chief Judge of Malaya

REPORTS OF MANAGING JUDGES

"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.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011"

To improve and streamline the administration and management of the courts in the country, Managing Judges have been appointed by the Chief Judge of Malaya with the concurrence of the Chief Justice of the Federal Court, for the various states and divisions namely:-

1.		Kelantan, Terengganu & Pahang	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YAA Tan Sri Dato' Zulkefli bin Ahmad Makinudin CJM
2.		Penang	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YA Tan Sri James Foong Cheng Yuen FCJ
3.		Selangor	High Court – Civil, Criminal. Subordinate Courts – Civil, Commercial and Intellectual Property.	-	YA Tan Sri Abdull Hamid bin Embong FCJ
4.		Kedah & Perlis	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YA Datuk Suriyadi bin Halim Omar FCJ
5.		Johore (North), Negeri Sembilan and Malacca	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YA Dato' Ahmad bin Hj. Maarop FCJ
6.	(a)	Kuala Lumpur	High Court - Civil, Family	-	YA Tan Sri James Foong Cheng Yuen FCJ
	(b)	Kuala Lumpur	High Court – Criminal. Subordinate Courts – Criminal.	-	YA Dato' Hasan bin Lah FCJ
	(c)	Kuala Lumpur	High Court - Commercial, Appellate & Special Powers. Subordinate Courts – Civil.	-	YA Datuk Zaharah binti Ibrahim JCA
7.		Johore (South)	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YA Datuk Ramly bin Haji Ali JCA
8.		Perak	High Court – Civil, Criminal. Subordinate Courts – Civil, Criminal.	-	YA Dato' Jeffrey Tan Kok Wha JCA

At the head of this structure is the Managing Judge and assisting him is his team of the Deputy Registrars and Senior Assistant Registrars.

"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. Managing Judge Units (MJUs) report directly to the Chief Judge.

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.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

1. KELANTAN

Currently, there are 2 High Courts, 7 Sessions Courts and 12 Magistrates' Courts in Kelantan. The total number of Sessions Court Judges and Magistrates serving in Kelantan are 4 and 9 respectively.

ANALYSIS OF STATISTICS AND ACHIEVEMENTS

HIGH COURT-CIVIL AND CRIMINAL

In January 2011, 946 civil cases and 224 criminal cases were pending in the High Court. In respect of its pre-2007 cases, the High Courts had 44 civil cases and nil for criminal cases. By 31 December 2011, the number had reduced to 821 civil cases and 167 criminal cases. The reduction may not appear to be large, nevertheless all of the pre-2007 cases were cleared. The Kota Bharu High Court has fulfilled the Chief Justice's target of disposing all pre-2007 cases by 31 March 2012.

SESSIONS COURT - CIVIL AND CRIMINAL

The Sessions Courts in Kelantan started 2011 with 1,903 civil cases and 124 criminal cases pending. For its pre-2010 cases, there were 48 civil cases and 47 criminal cases. By 31 December 2011, the civil cases were significantly reduced to 1,153 while there was a slight increase in the number of criminal cases to 125. The Sessions Courts no longer have any pending pre-2010 civil cases and also managed to successfully dispose of its 2010 civil cases as well. For its criminal cases, there are only 19 pre-2010 cases left.

MAGISTRATES' COURTS - CIVIL AND CRIMINAL

The Magistrates' Courts in Kelantan started 2011 with 1,647 civil cases and 1,315 criminal cases pending, excluding traffic and departmental summons cases. For its pre-2010 cases, there were only 5 civil cases and 64 criminal cases. By the end of 2011, the civil cases pending before the Magistrates' Courts were significantly reduced to 809 cases while there was an increase of criminal cases to 1,652. The Magistrates' Courts no longer have any pending pre-2011 civil cases while for its criminal cases, there are only 17 pre-2010 cases left.

2. TERENGGANU

There is 1 High Court, 5 Sessions Courts and 9 Magistrates' Courts. There are currently 3 Sessions Court Judges and 6 Magistrates serving in Terengganu.

ANALYSIS OF STATISTICS AND ACHIEVEMENTS

HIGH COURT - CIVIL AND CRIMINAL

The High Court in Kuala Terengganu started 2011 with 753 civil cases and 217 criminal cases pending. For its pre-2007 cases, the High Court had 38 civil cases and nil for criminal cases. With only 1 High Court Judge, the Kuala Terengganu High Court has managed to significantly reduce its pending cases to 410 civil cases and 182 criminal cases. As for the pre-2007 civil cases they have now been reduced to 8. The Kuala Terengganu High Court is expected to achieve the Chief Justice's target within the stipulated time.

SESSIONS COURT - CIVIL AND CRIMINAL

The Sessions Courts in Terengganu started 2011 with 1,370 civil cases and 78 criminal cases pending. Their pre-2010 cases were 130 civil cases and 10 criminal cases. By the end of 2011, the pending cases were 1,567 civil cases and 197 criminal cases. Nevertheless, the pre-2010 cases were completely disposed of leaving only 2010 and 2011 cases pending before the Sessions Courts.

MAGISTRATES' COURTS - CIVIL AND CRIMINAL

The Magistrates' Courts in Terengganu started 2011 with 2,238 civil cases and 4,488 criminal cases pending. Their pre-2010 cases were 86 civil cases and 502 criminal cases. By the end of 2011, there were only 2,127 civil cases and 3,739 criminal cases left. The pre-2011 civil cases were reduced to 19 cases and there were only 4 pre-2010 criminal cases.

TERENGGANU

CIVIL

COURT	BALANCE AS AT 1 JANUARY 2011	REGISTRATION IN 2011	DISPOSAL IN 2011	BALANCE AS AT 31st DECEMBER 2011	DISPOSAL PERCENTAGE
HIGH COURT	753	744	1,087	410	72.6%
SESSIONS COURT	1,370	3,489	3,292	1,567	67.8%
MAGISTRATES' COURT	2,238	6,321	6,432	2,127	75.1%

CRIMINAL

COURT	BALANCE AS AT 1st JANUARY 2011	REGISTRATION IN 2011	DISPOSAL IN 2011	BALANCE AS AT 31st DE-CEMBER 2011	DISPOSAL PERCENTAGE
HIGH COURT	217	184	219	182	54.6%
SESSIONS COURT	78	459	340	197	63.3%
MAGISTRATES' COURT	4,488	15,940	16,689	3,739	81.7%

3. PAHANG

The 2 High Courts in Pahang are situated in Kuantan and Temerloh. There are 8 Sessions Courts and 13 Magistrates' Courts. The High Courts comprise of 1 resident Judge at the Kuantan High Court and another circuit Judge from Shah Alam sitting at the Temerloh High Court. There are 8 Sessions Court Judges and 9 Magistrates in Pahang.

ANALYSIS OF STATISTICS AND ACHIEVEMENTS

HIGH COURT - CIVIL AND CRIMINAL

The High Courts in Pahang started 2011 with 910 civil cases and 140 criminal cases pending. For its pre-2007 cases, there are 30 civil cases and there is nil for criminal cases. By the end of the year, Pahang had managed to reduce the numbers to 706 for its civil cases and 116 criminal cases. For its pre-2007 civil cases, it has managed to reduce it to 3 cases by the end of the year.

SESSIONS COURT - CIVIL AND CRIMINAL

The Sessions Courts in Pahang started 2011 with 2,447 civil cases and 276 criminal cases pending. The pre-2010 cases were 477 civil cases and 94 criminal cases. By the end of the year, the pending cases were 2,448 civil cases and 190 criminal cases. The pre-2010 cases were reduced to 4 civil cases and 67 criminal cases.

MAGISTRATES' COURTS - CIVIL AND CRIMINAL

The Sessions Courts in Pahang started 2011 with 2,138 civil cases and 1,074 criminal cases pending. Their pre-2010 cases were 8 civil cases and 25 criminal cases. By the end of the year, the pending cases were 2,287 civil cases and 725 criminal cases. Their pre-2011 cases comprised only 1 civil case and they have cleared their pre-2010 criminal cases.

PAHANG

CIVIL

COURT	BALANCE AS AT 1st JANUARY 2011	REGISTRATION IN 2011	DISPOSAL IN 2011	BALANCE AS AT 31st DECEMBER 2011	DISPOSAL PERCENTAGE
HIGH COURT	910	1,845	2,049	706	74.4%
SESSIONS COURT	2,447	8,703	8,702	2,448	78%
MAGISTRATES' COURT	2,138	10,598	10,449	2,287	82%

CRIMINAL

COURT	BALANCE AS AT 1st JANUARY 2011	REGISTRATION IN 2011	DISPOSAL IN 2011	BALANCE AS AT 31st DE-CEMBER 2011	DISPOSAL PERCENTAGE
HIGH COURT	140	354	378	116	76.5%
SESSIONS COURT	278	1,396	1,484	190	88.6%
MAGISTRATES' COURT	1,074	12,102	12,451	725	94.5%

PLANNING AND TARGET

1) The Mediation Centre has also been established in Kuantan, Pahang. It will be established in other states as well and will be headed by a full time Senior Judicial Officer. It adopts the Kuala Lumpur model, however certain changes will have to be made to suit the local circumstances of each Mediation Centre.

2) On the issue of the disposal of the backlog of cases, once the current target is achieved, the next target will be set as follows:-

   i. On the disposal of civil and criminal cases in the Magistrates' Courts, it shall be targeted and maintained to be current.

   ii. On the disposal of civil and criminal cases in the Sessions Courts, it shall be targeted to be current by the end of 2012.

   iii. On the disposal of civil and criminal cases in the High Courts, it shall be targeted to be current by the end of 2013.

3) Active monitoring of the files such as file operation shall also be continuously conducted from time to time. This serves as a measure to ensure that the backlog of cases are kept at a minimum and cases are swiftly disposed of.

"Up to the present the Judiciary's indicators have served it well, first for motivating judges and second, for monitoring progress towards its goals.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

4. PENANG

HIGH COURT – CIVIL DIVISION

Original Civil Courts ('OCvC')

As the volume of cases filed in Penang has increased in recent years, a new structure in the administration of the court system was put in place in 2009.

As at January 2011 there was a total of 3,495 cases pending, some as old as 1995. This has been reduced to 1,513 cases as at December 2011. The monthly progress of OCvC cases from January to December 2011 can be seen in the chart below.

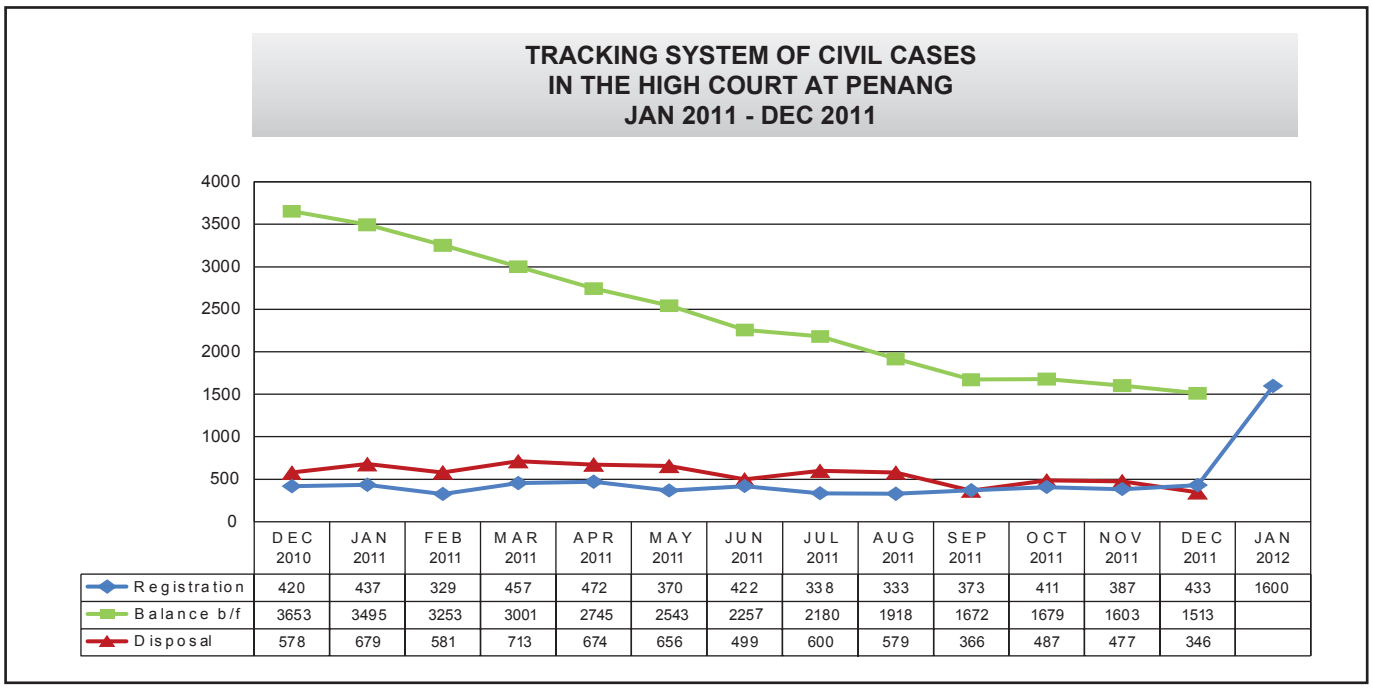
Appeals from the Subordinate Courts were reduced from 538 cases to 169 cases. This is the result of the joint efforts of the registrars and Judges who sacrificed some weekends to clear the backlog.

New Civil Courts ('NCvC')

While the old civil courts continued to dispose of cases in the normal manner, the High Court introduced another innovative system by establishing the NCvC in Penang.

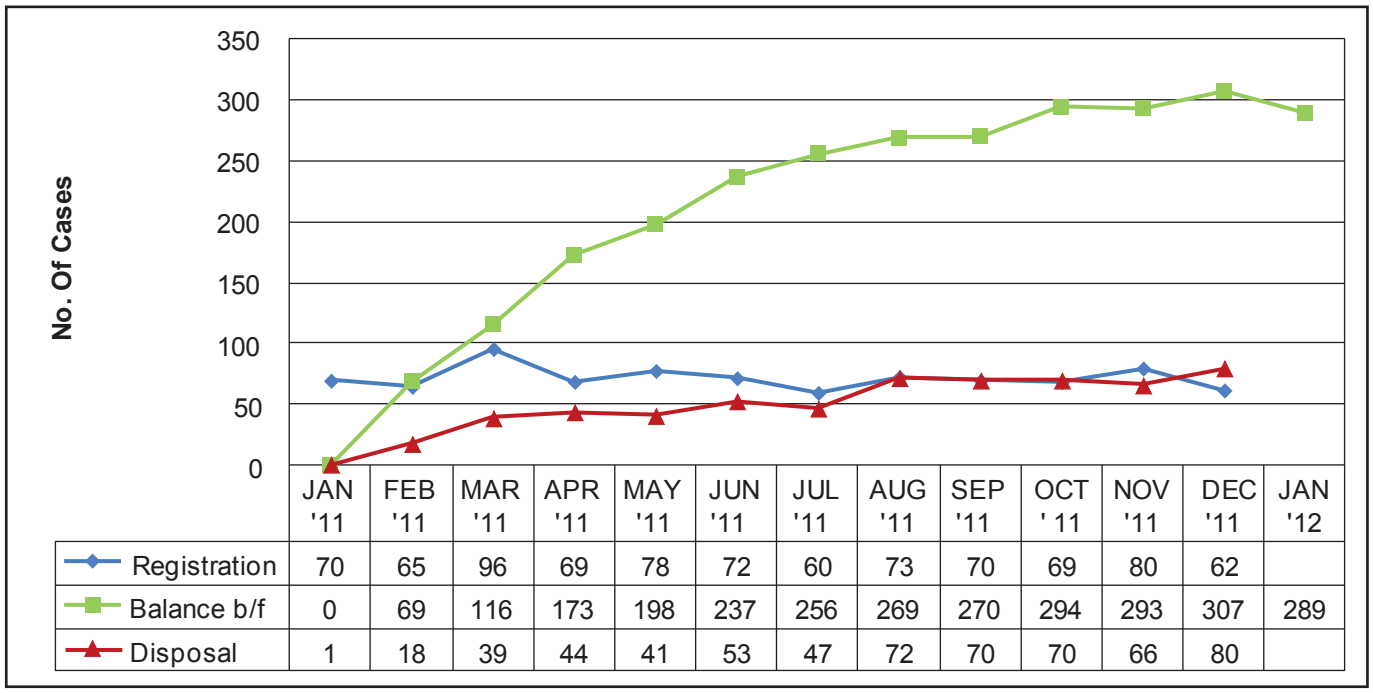
As from January 2010, all civil cases filed in the High Court will be dealt with by a set of judges in the NCvC. They are to dispose of these cases within a period of 9 months from the date of filing. Since they do not carry any backlog of cases and with an aggressive proactive approach to case management, this target was achieved. The monthly achievement of NCvC from January 2011 to December 2011 is shown in the following chart.

MONTHLY PROGRESS OF OCVC FROM JANUARY 2011 TO DECEMBER 2011



	DEC 2010	JAN 2011	FEB 2011	MAR 2011	APR 2011	MAY 2011	JUN 2011	JUL 2011	AUG 2011	SEP 2011	OCT 2011	NOV 2011	DEC 2011	JAN 2012
Registration	420	437	329	457	472	370	422	338	333	373	411	387	433	1600
Balance b/f	3653	3495	3253	3001	2745	2543	2257	2180	1918	1672	1679	1603	1513	
Disposal	578	679	581	713	674	656	499	600	579	366	487	477	346	

MONTHLY ACHIEVEMENT OF NCVC FROM JANUARY 2011 TO DECEMBER 2011
HIGH COURT – CRIMINAL DIVISION



	JAN '11	FEB '11	MAR '11	APR '11	MAY '11	JUN '11	JUL '11	AUG '11	SEP '11	OCT ' 11	NOV '11	DEC '11	JAN '12
Registration	70	65	96	69	78	72	60	73	70	69	80	62	
Balance b/f	0	69	116	173	198	237	256	269	270	294	293	307	289
Disposal	1	18	39	44	41	53	47	72	70	70	66	80	

2 Judges are assigned to the Criminal Division in the Penang High Court assisted by one registrar.

As of December 2011 there were only 173 appeal cases from the Subordinate Courts and 36 substantive cases pending.

SUBORDINATE COURTS

There are 6 Sessions Court Judges to deal with civil claims, running down and medical negligence cases, defamation suits, criminal applications and trials. As at December 2011 there were 5,167 cases pending.

12 Magistrates are assigned across Penang. As at December 2011 there were 4,302 pending cases.

Having registrars to do proactive case management, allows the Sessions Court Judges and Magistrates to devote their time to hearing and disposing cases. It is targeted that by the end of 2012 all post-2009 cases will be disposed of.

5. SELANGOR

There are 13 Civil High Courts and 7 Criminal High Courts in Shah Alam while there are 30 Sessions Court Judges and 26 Magistrates sitting in Shah Alam, Klang, Ampang, Selayang, Petaling Jaya, Kajang (sitting in Putrajaya), Bangi, Sepang, Kuala Kubu Bharu, Telok Datok, Kuala Selangor and Sungai Besar.

ANALYSIS OF STATISTICS

HIGH COURT

The civil and criminal cases pending as at 1 January 2011 were 6,670 and 826 respectively. As at end December 2011, the number of civil cases had been reduced to 4,772, a reduction of 33%, but the number of criminal cases showed an increase of 36% to 1,131 cases. The cases registered in 2011 are in fact current cases.

SESSIONS AND MAGISTRATES' COURTS

On 1 January 2011 there were 11,171 civil cases and 2,111 criminal cases in the Sessions Courts. In the Magistrates' Courts there were 5,023 civil cases and 8,787 criminal cases. As at end December 2011, the number of cases in the Sessions Courts and Magistrates' Courts had been markedly reduced. In the Sessions Courts there was a reduction by 46% to 6,022 civil cases and by 13% to 1,836 criminal cases. Similarly in the Magistrates' Courts there was a reduction by 32% to 3,372 civil cases and by 47% to 4,639 criminal cases.
(The comparative chart of Pending Cases can be seen below.)

In September 2011, the New Civil Courts (NCvC) were officially launched in Shah Alam. 2 Judges were assigned to work in pairs to handle NCvC cases. The first pairing started in January 2011 and as at end December 2011, there were still 276 NCvC cases pending from the January to August 2011 registration period. The second pairing started in September 2011 and as at end December 2011, there were 386 NCvC cases pending for this registration period.

COMPARISON OF PENDING CASES AS AT 1 JANUARY 2011& 1 JANUARY 2012

COURT	CASES	Pending as at 1 Jan 2011	Registration (Jan 2011-Dec 2011)	Disposal (Jan 2011-Dec 2011)	Pending as at 1st Jan 2012	Reduction (%)
HIGH COURT	CIVIL	6,670	11,434	13,332	4,772	33%
	CRIMINAL	826	1,588	1,283	1,131	36% (Increase)
SESSIONS COURT	CIVIL	11,171	20,113	25,262	6,022	46%
	CRIMINAL	2,111	7,328	7,603	1,836	13%
MAGISTRATES' COURTS	CIVIL	5,023	19,469	21,120	3,372	32%
	CRIMINAL	8,787	19,794	23,942	4,639	47%

ACHIEVEMENTS

Significant Disposal of Ageing Cases

In October 2011, a target date was set for all courts throughout the country to dispose of ageing cases. All pre-2011 civil and pre-2010 criminal cases in the Magistrates' Courts as well as all pre-2010 civil and criminal cases in the Sessions Courts are to be disposed of by 31 March 2012. By the same target date, the High Courts are required to dispose of all their pre-2007 civil and criminal cases.

Over the last 12 months, the number of pre-2011 civil cases and pre-2010 criminal cases at the Magistrates' Courts have been significantly reduced towards achieving the target. In January 2011, there were 3,063 pre-2011 civil cases and 3,735 pre-2010 criminal cases compared to 32 civil cases (reduction of 99%) and 138 criminal cases (reduction of 96%) respectively as at end December 2011. Similarly, there were 3310 pre-2010 civil cases and 963 pre-2010 criminal cases at the Sessions Courts in January 2011 compared to 120 civil cases (reduction of 96%) and 86 criminal cases (reduction of 91%) respectively over the same period of time.

As for the High Courts, the number of pre-2007 civil cases has showed a 76% reduction from 840 cases in January 2011 to 205 cases as at end December 2011. 4 pre-2007 criminal cases pending in January 2011 have all been disposed of as at end December 2011. Nevertheless, 2 pre-2007 criminal cases are currently pending trial having recently been remitted by the Court of Appeal and the Federal Court and are expected to be completed by 31 March 2012.

PLANNING AND TARGET

In order to expedite the disposal of cases at the Sessions Courts, action has been taken including the addition of new Sessions Courts in 'busy' centres such as Shah Alam, Klang, Ampang, Petaling Jaya and Sepang. Besides that, specialised courts such as special corruption courts, commercial crimes courts and intellectual property courts have also been set up in Shah Alam. Redistribution of cases among the Sessions Courts has also been carried out to speed up the disposal of cases. Apart from the above measures, cases will in the future be filed in courts according to the jurisdiction of the respective courts. For instance, criminal cases from Hulu Selangor and Kuala Kubu Bharu, which were filed in Shah Alam before, will instead be filed in Selayang. This is to ensure better efficiency and a more systematic distribution of cases as well as for the convenience of parties. It is hoped that cases registered in the Subordinate Courts can be disposed of within a year.

In order to tackle the backlog and expedite the disposal of all the pre-2007 civil cases, 19 cases have also been distributed to be heard by 4 Judges in the criminal division and it is hoped that Shah Alam High Courts will be able to meet the target of disposing all pre-2007 civil and criminal cases come 31 March 2012.

The plan to shift all the Civil High Courts in MRCB Building to the main complex in Kompleks Mahkamah Sultan Salahuddin Abdul Aziz Shah is in the pipeline and may be realised by the third quarter of 2012. Once all the Civil High Courts are under the same roof, management of cases will be much easier and more efficient. There is also a plan to add another 2 Sessions Courts in Klang this year.

COMPARISON OF AGEING CASES AS AT JANUARY 2011 & DECEMBER 2012

COURT	CASES	Pending as at 1st January 2011	Pending as at 1st 2012	Reduction (%)
HIGH COURT	CIVIL (Pre-2007)	840	205	76%
	CRIMINAL (Pre-2007)	4	*2	50%
SESIONS COURT	CIVIL (Pre-2010)	3,310	120	96%
	CRIMINAL (Pre-2010)	963	86	91%
MAGISTRATES' COURTS	CIVIL (Pre-2011)	3,063	32	99%
	CRIMINAL (Pre-2010)	3,735	138	96%

*Cases which have been remitted by the appelate courts

"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.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

6. KEDAH

The history of the tracking system in Alor Setar started at the High Court on 1 March 2010 when instruction was received that all 'ageing cases' must be cleared. At that time there were only 3 High Court Judges. In May 2010 the number was increased to 4 with all the Judges hearing a mixture of civil and criminal matters in their respective courts.

Due to the current requirements, the Managing Judge directed that 3 High Court Judges hear criminal trials (and criminal appeals) and civil appeals, and 1 Judge dispose of all the civil cases. The result was phenomenal when a large number of the ageing cases were drastically reduced. Many changes took place along the way to solve teething problems and these intelligent changes have helped tremendously to reduce the number of ageing cases. Kedah has also started to hear the NCvC cases which must be disposed within a period of 9 months.

There are 4 High Courts and 8 Sessions Courts in Kedah with Alor Setar and Sg. Petani each having 4 Sessions Court Judges. Kedah with 11 districts also has a total of 16 Magistrates.

There is 1 High Court which hears NCvC cases, 2 High Courts which hear OCvC cases and the 4th High Court hears criminal cases.

The 4 Sessions Court judges in Alor Setar and the other 4 in Sg. Petani all hear criminal and civil cases, with 1 at Alor Setar hearing "Pendatang Asing Tanpa Izin (PATI)" cases. All the Magistrates hear civil, criminal, traffic summonses and juvenile cases.

ANALYSIS OF STATISTICS

As at 1 January 2011, the High Court at Alor Setar had a balance of 2,245 civil cases and 332 criminal cases. Sieving through the registration records at the High Court a total of 4,087 cases were registered in 2011. Adding them up, the global figure came to 6,664. A total of 5,053 civil and criminal cases were disposed thus leaving only 1,611 cases as at 30 December 2011.

The Sessions Courts had a balance of 3,722 civil cases still pending as at January 2011. 12 months later the number was reduced to 3,009. For criminal cases, as at January 2011 there were only 459 cases left. A year later only 326 active criminal cases were left. With the total registration of 8,646 cases, for both civil and criminal, 5,293 cases have been disposed of by the Sessions Courts.

The Magistrates' Courts likewise has done tremendously well. Initially, there were 4,379 civil cases pending as at January 2011. 9,124 new civil cases were registered in 2011. The combined number of cases was 13,503. After the disposal exercise the number was reduced to 3,046 cases by December 2011; in a nutshell almost 10,457 civil cases had been disposed within a year. Regarding the criminal cases, 2,369 criminal cases were pending in January 2011 at the Magistrates' Courts. 7,600 cases were also registered that year. The sum total thus came to 9,969. With the disposal of 8,464 criminal cases only 1,505 active cases were left by December 2011.

To summarise, both the High Courts and the Subordinate Courts had handled a total of 42,963 cases in 2011. Out of this total only 9505 active cases are left in all the courts in Kedah as at December 2011. A summary of the statistics for Kedah is seen in the Table below:

REGISTRATION & DISPOSAL
KEDAH COURTS
JANUARY 2011 — DECEMBER 2011

COURT	CIVIL ACTION			
	BALANCE AS AT JAN 2011	REGISTRATION	DISPOSAL	B/C FORWARD
HIGH COURT	2,245	3,685	4,573	1,357
SESSIONS COURT	3,722	8,078	4,592	3,009
MAGISTRATES' COURTS	4,379	9,124	10,457	3,046
TOTAL	10,346	20,887	19,622	7,412

COURT	CRIMINAL			
	BALANCE AS AT JAN 2011	REGISTRATION	DISPOSAL	B/C FORWARD
HIGH COURT	332	402	470	264
SESSIONS COURT	459	568	701	326
MAGISTRATES' COURTS	2,369	7,600	8,464	1,505
TOTAL	3,160	8,570	9,635	2,905

*At the High Court, statistics are not inclusive of Bankruptcy cases.
** At the Sessions Courts, statistics are not inclusive of PATI cases.

ACHIEVEMENTS

As at 30 December 2011, the criminal and civil cases at the High Courts were current, *with the exception of 1 criminal case registered in 2007 and 5 pre-2006 civil cases*. The High Courts have therefore disposed almost 90% of the combined ageing and current civil and criminal cases in 2011. Needless to say this success story is due to the diligence, doggedness and maturity of all the judges and officers who had contributed their efforts in the disposal of those cases.

FUTURE PLANNING AND TARGET

The current instruction is that all pre-2007 cases both civil and criminal must be disposed by the end of March 2012. In view of only 5 civil cases and 1 criminal case not having been disposed that target is achievable. In fact all the 164 pre-2010 civil cases are targeted to be disposed by the middle of 2012; this will leave a balance of 494 civil cases (2011) which shall be reduced in stages.

7. PERLIS

Perlis has 1 High Court, 1 Sessions Court and 1 Magistrate's Court.

ANALYSIS OF STATISTICS

The number of cases pending in Kangar totalled 788 civil cases as at January 2011 for both the High Court and the Subordinate Courts (ageing and current). For criminal cases, there were only 199 cases pending in January 2011. With the addition of the newly registered cases, by December 2011, 627 civil cases and 412 criminal cases were still pending. *With the drastic reduction of cases Perlis has attained 'current' status*. The number of current cases left is not alarming and everyone is working diligently to reduce them. A Summary of the statistics for Perlis is shown in the Table below.

ACHIEVEMENTS

The statistics reflect Perlis' achievement. Not only are the High Court Judge, Sessions Court Judge and Magistrate involved with the hearing of cases e.g. auctions, summons for directions, bill of costs and interlocutory matters but they are also concerned with matters of administration.

FUTURE PLANNING AND TARGET

Since the given target was met much earlier than expected, with the exception of the 6 cases in Kedah, the plan is simple. All cases even with the newly registered cases are targeted to be current by the end of the year.

REGISTRATION & DISPOSAL
PERLIS COURTS
JANUARY 2011 — DECEMBER 2011

COURT	CIVIL ACTION			
	BALANCE AS AT JAN 2011	REGISTRATION	DISPOSAL	B/C FORWARD
HIGH COURT	159	201	262	98
SESSIONS COURT	379	1,174	1,300	253
MAGISTRATES' COURTS	250	1,141	1,115	276
TOTAL	788	2,516	2,677	627

COURT	CRIMINAL			
	BALANCE AS AT JAN 2011	REGISTRATION	DISPOSAL	B/C FORWARD
HIGH COURT	52	55	48	59
SESSIONS COURT	45	206	108	143
MAGISTRATES' COURTS	102	1,199	1,091	210
TOTAL	199	1,460	1,247	412

"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). 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.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

8. NEGERI SEMBILAN

There are 2 High Court Judges, 7 Sessions Court Judges and 8 Magistrates sitting in the Negeri Sembilan Court Complex in Seremban. There are 4 registrars assisting both the High Court Judges.

Statistics

The number of registrations and disposal of cases in Negeri Sembilan can be summarised as follows:

Negeri Sembilan High Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	816	1,426	1,555	687	69%
Criminal	81	144	153	72	68%

Negeri Sembilan Sessions Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	3,903	6,179	7,632	2,450	76%
Criminal	207	1,268	1,125	350	76%

Negeri Sembilan Magistrates' Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	1,749	8,982	7,803	2,686	73%
Criminal	1,886	12,077	10,613	3,350	76%

9. MALACCA

The Malacca Court consists of 2 High Courts, 4 Sessions Courts and 3 Magistrates' Courts. There are also Magistrates' Courts in the districts of Jasin and Alor Gajah.

Achievements

The re-launching of the 5S (Sisih, Susun, Sapu, Seragam, Sentiasa amalkan) implementation methodology was held on 26 January 2011. The 5S implementation methodology is a system to reduce waste and optimise productivity by maintaining an orderly workplace.

Statistics

The number of registrations and disposal of cases in Malacca can be summarised as follows:

Malacca High Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	1,090	1,930	2,270	750	75%
Criminal	220	192	264	148	64%

Malacca Sessions Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	1,432	4,207	4,429	1,210	79%
Criminal	196	430	386	240	62%

Malacca Magistrates' Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	989	5,411	4,825	1,575	75%
Criminal	414	2,697	2587	524	83%

"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 and the High Court 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 "organising 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.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

10. KUALA LUMPUR

(a) HIGH COURT - CIVIL DIVISION

The Civil Division of the Kuala Lumpur High Court is organised into the Original Civil Courts ('OCvC'), the New Civil Courts ('NCvC') and the Family Court.

OCvC

The 6 OCvC Judges deal with all pre-October 2010 cases.

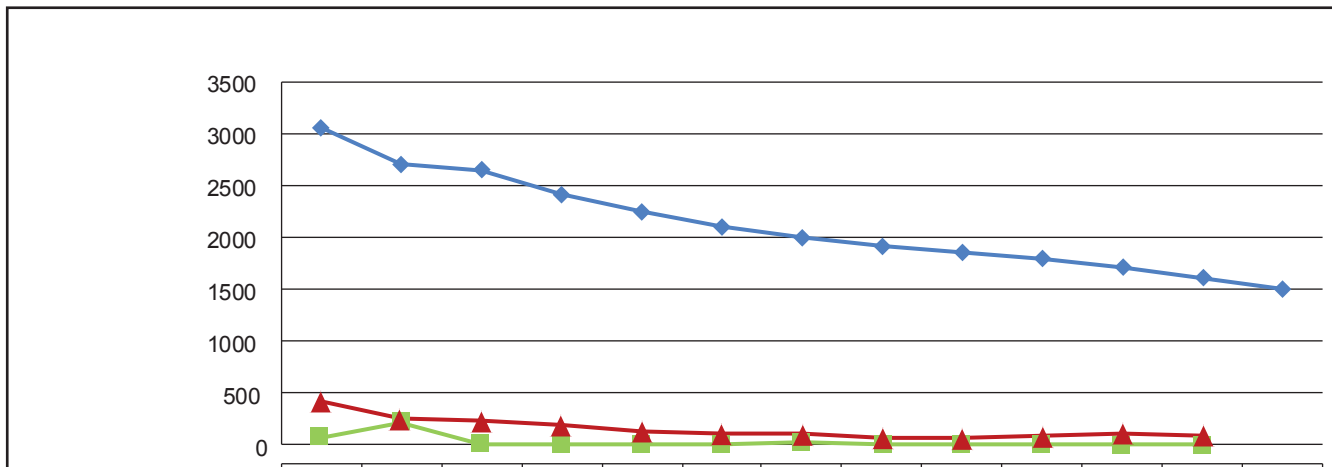
As at 1 January 2011 there were 3,159 cases pending and as at 31 December 2011 the number of these pending cases was reduced drastically to 1,511.

The chart shows the overall monthly performance of the OCvC from January 2011 to December 2011.

As of 31 December 2011 there were 85 pre-2007 and 1,426 pre-2010 cases pending. It is targeted that the pre-2007 cases will be disposed of by the end of March 2012 and the pre-2010 cases will be disposed by the end 2013.

The OCvC will continue to function until all pre October 2010 cases are disposed of.

KUALA LUMPUR HIGH COURT
OLD CIVIL COURT (OCvC)



	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Jan-12
Balance c/f	3070	2712	2657	2429	2250	2111	2008	1925	1863	1805	1715	1604	1511
Registration	72	212	16	12	5	15	24	12	5	12	6	5	
Disposal	430	267	244	191	144	118	107	74	63	102	117	98	

NCvC

The NCvC Courts were set up on 24 September 2010 to deal with all civil actions filed after 30 September 10.

6 Judges are assigned to NCvC. They work in pairs at intervals of 3 months. Their task is to hear and dispose of cases within 9 months from the date of registration.

> Judges in NCvC who deal with current cases are not burdened with any backlog. They adopt a proactive style of case management and are able to expedite hearings and resolve cases within the stipulated time.

As at December 2011 there were 1,766 cases pending. Reduction of 82% of cases is clear testimony of the success of the principle adopted by the NCvC Judges to dispose cases within 9 months from the date of filing. This demonstrates that the 9 month timeline is achievable.

The chart below shows the overall monthly achievement of NCvC from January 2011 to December 2011.

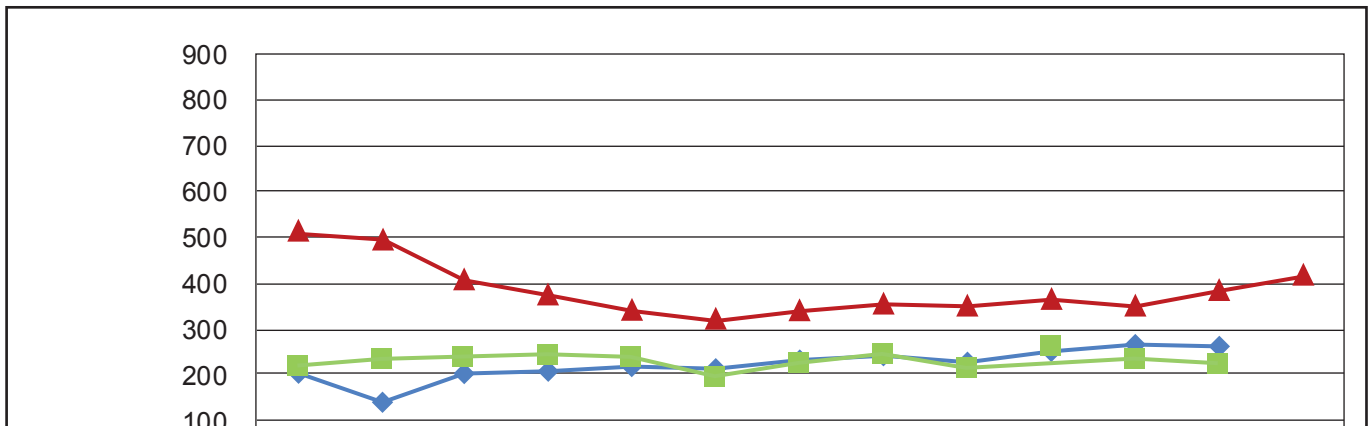
KUALA LUMPUR HIGH COURT NEW CIVIL COURT (NCvC)

Monthly Registration		DISPOSAL														
		Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Balance
Jan	615				154	206	130	50	21	10	9	7	4	7	4	13
Feb	387					63	159	65	46	19	9	9	6	3	3	5
Mar	635						99	271	118	57	31	13	10	10	12	14
Apr	600							147	232	106	33	25	13	11	11	22
May	639								105	319	99	36	14	15	16	35
Jun	672									117	305	114	46	29	14	47
Jul	677										132	317	82	41	37	68
Aug	727											107	311	120	61	128
Sep	548												31	263	113	**131**
Oct	646													101	281	264
Nov	609														135	474
Dec	685														110	575
	7440								5674							1776

FAMILY COURT

1 Judge is assigned to deal with family related-matters. With proactive case management and close monitoring, the Family Court has successfully disposed of all pre-2010 cases. As at December 2011 there were 421 cases pending in the Family Court. The performance of the Family Court from January 2011 to December 2011 is shown below.

KUALA LUMPUR HIGH COURT
FAMILY DIVISION



	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	12-Jan
Registration	202	142	203	209	217	213	232	239	224	248	263	258	
Disposal	219	232	236	242	234	195	220	241	211	260	232	221	
Balance c/f	514	497	407	374	341	324	342	354	352	365	353	384	421

(b) HIGH COURT AND SUBORDINATE COURTS – CRIMINAL DIVISION

At present there are 3 High Court Judges who hear all criminal cases including trials, appeals, revisions and applications.

There are 14 Sessions Courts and 12 Magistrates' Courts.

ANALYSIS OF STATISTICS

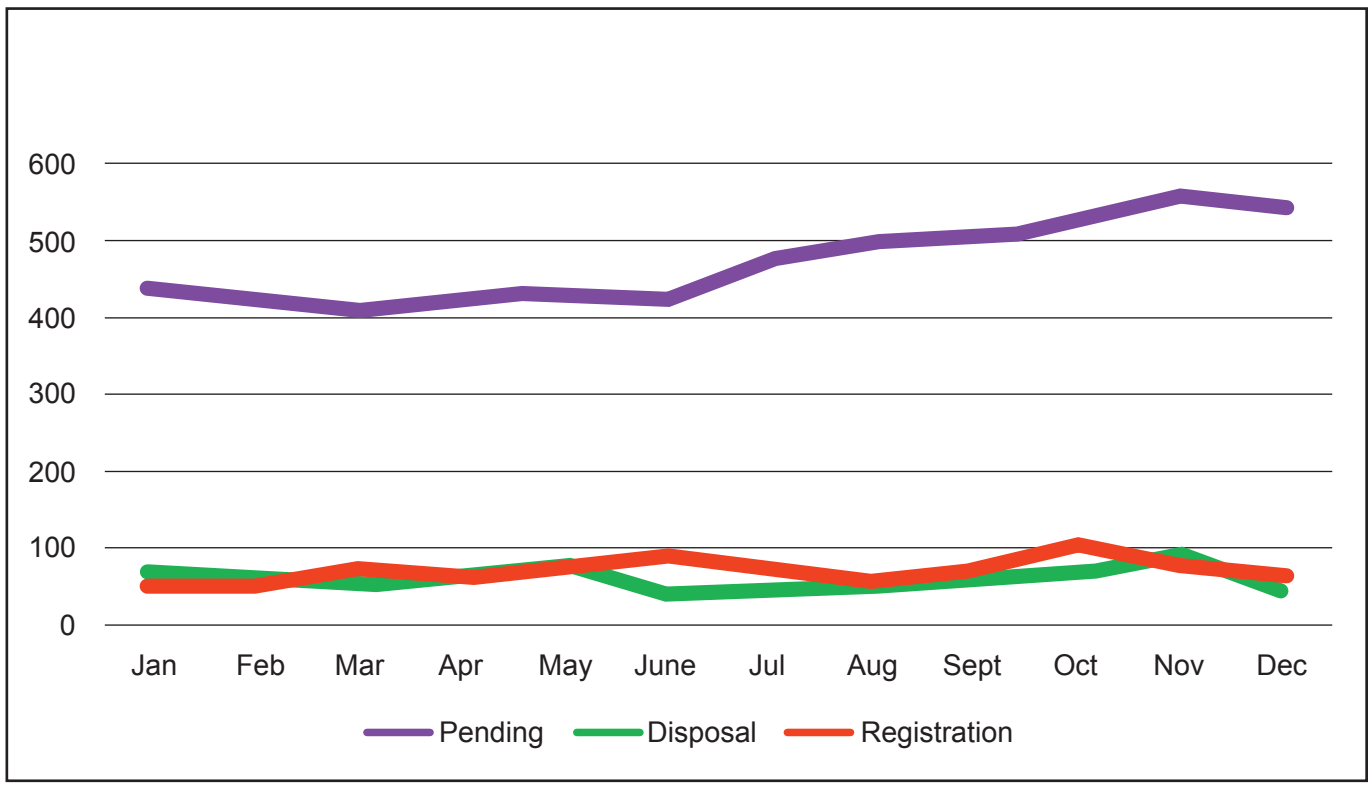
HIGH COURT

The year 2011 saw further progress in the administration of justice. While the clearance rate is encouraging, the registration rate remains high. The total registration for all codes from January until December 2011 was 433 cases. Of 565 pending cases, 130 were trials, 325 were appeals and the balance 110 were criminal applications. From the total figure, only 19 were pre-2010 cases while 113 cases were registered in 2010 and 433 cases were registered in 2011. As for criminal trials, from January to December 2011, 28 cases were disposed of.

SUBORDINATE COURTS

The performance of the Sessions Court in 2011 has improved. The pending criminal cases were reduced by 35% from 1,941 cases to 1,428 cases from January until December 2011. However, there are still 172 pre-2010 cases pending as at 31 December 2011 all of which were part heard. As for the Magistrates' Courts, the performance was consistent throughout 2011. Although the pending cases have only been reduced by 0.4% at the end of 2011, the average disposal rate was equivalent to the average registration rate which was 971 cases per month.

GLOBAL TRACKING CHART
HIGH COURT (CRIMINAL DIVISION)



ACHIEVEMENTS

HIGH COURT

After the commencement of the tracking system in 2011, the disposal of criminal applications had increased. The average period for an application to be heard from the date of filing to the date of disposal was less than 6 months. This achievement was very significant in cases involving habeas corpus applications and applications to reduce bail.

Although the statistics showed an increase of 22% of the total number of cases pending, the performance of the High Court was satisfactory. The pre-2010 cases were reduced to 19 from 47 cases including 5 cases which had been re-instated and/or defence ordered to be called by the Court of Appeal. At present, there are only 7 pre-2010 criminal appeals and 12 pre-2010 criminal trials pending

SUBORDINATE COURTS

There were significant achievements by both the Sessions and Magistrates' Courts especially in the disposal of the pre-2010 cases. As for the Sessions Court, 427 pre-2010 cases were disposed of leaving a balance of only 172 cases. The Magistrates' Courts had successfully disposed of 380 cases from January until December 2011 leaving only 15 pre-2010 cases pending.

FUTURE PLANNING AND TARGET

The Criminal Division of the Kuala Lumpur High Court looks forward to 2012 with renewed commitment to uphold justice with the highest standards of efficiency in the management of criminal cases. The short term plan is to dispose of all pre-2010 cases by March 2012. While the number of new cases is increasing, there are efforts to clear the backlog and to reduce the waiting period for the cases to be heard.

The Criminal Division is hoping that additional High Court judges will be assigned as a temporary measure to assist the present 3 Judges in disposing of the outstanding cases. If this is possible, the target to have each case heard within a year from the date of the registration can be achieved.

(c) HIGH COURT - COMMERCIAL DIVISION

The Commercial Division consists of 12 courts. 8 courts are assigned to deal with cases registered after the New Commercial Courts ('NCC') were established on 1 September 2009. Of the remaining 4 courts, 2 courts (known as the Original Commercial Courts ('OCC')) are devoted to the disposal of cases registered before the establishment of the NCCs, 1 court deals with Intellectual Property cases and the 12th court is responsible for Muamalat (Islamic Banking) cases.

The NCCs were established to expedite proceedings involving commercial matters (save for Muamalat and Intellectual Property cases).

The OCC cases are handled by a different set of judges who no longer need to be concerned with newly registered cases. This approach has significantly reduced the backlog of commercial cases registered before 1 September 2009.

Before the designation of a court specialising in Muamalat (Islamic Banking) cases, a court in the Commercial Division was assigned to hear Muamalat matters together with other matters. The specialised Muamalat (Islamic Banking) Court commenced in February 2009. This specialisation has doubled the rate of disposal of cases after that date.

The same goes for the Intellectual Property Court. The judge's expertise has contributed to the quick disposal of cases. The rate of disposal of Intellectual Property cases has substantially increased and the cases are now disposed of in a matter of months from the date of filing.

There is also a specialised court under the Commercial Division which has been given the task of dealing exclusively with shipping and maritime-related matters. This is the Admiralty Court which is necessary to cope with the country's booming shipping industry and maritime services sector.

HIGH COURT - APPELLATE AND SPECIAL POWERS DIVISION

The Appellate and Special Powers Division exercises both original and appellate jurisdiction in civil matters. As an *appellate court*, it has *power* to hear civil appeals from the subordinate courts. It also exercises supervisory and revisionary jurisdiction over subordinate courts in civil matters.

A special aspect of the Court's original jurisdiction is its judicial review jurisdiction. As of 31 December 2011, there are 2 courts exercising this appellate and special powers jurisdiction.

KUALA LUMPUR SUBORDINATE COURTS - CIVIL

The Sessions Courts Civil Division consists of 11 courts. There are 4 Magistrates' Courts in Kuala Lumpur which deal with civil matters.

ACHIEVEMENTS

Initially, the Commercial Courts had 17 judges. However, with the introduction of the Court Management System (CMS), Court Recording Transcription (CRT), e-Filing and Queue Management System (QMS) and after the launching of the specialised courts, the number of judges has been gradually reduced to 12. Under the new electronic system, fresh cases can be disposed of three to four times faster.

The specialisation of courts allows the Intellectual Property cases, Islamic Banking cases and Commercial cases to be heard before judges who are knowledgeable and more experienced in those areas of the law. With these specialised courts, cases are disposed of more efficiently and speedily. Judgments are delivered on schedule without compromising on quality because the judges understand the issues better as those are within their specialised knowledge.

FUTURE PLANNING AND TARGET

HIGH COURT

The OCC disposed of 682 cases in 2011 leaving, as at 31 December 2011, only 145 cases registered prior to 1 September 2009.

Meanwhile, the Appellate and Special Powers Division had disposed of 2,121 cases in 2011 and had only one pre-2007 case left.

It is targeted that by 31 March 2012, all the pre-2007 cases would be disposed of. It is hoped that by the end of 2012, all the remaining 145 OCC cases will be completely disposed of.

As of 31 December 2011, the disposal target of 9-12 months from the date of registration for NCC cases had a 90% rate of achievement. It is the mission of the NCC to achieve a 100% rate of success in meeting that disposal target by the end of 2012.

Stock-taking exercises have been conducted in order to determine accurately the actual number of cases at every level of the courts. The stocktaking process will still be continued from time to time. This process will also be used to ensure the physical files are neatly arranged and organised so that they can be systematically managed and retrieved. This goes a long way towards improving efficiency and saving of manpower.

SUBORDINATE COURTS

Beginning from January 2012, the cases registered at the Sessions Court will be administered similar to the system adopted by the NCC. Under the new system, 10 courts will operate in pairs in 5 cycles, with each pair being assigned cases registered in a period of 2 months. The target disposal period of 9 months from the date of registration will remain. With the introduction of this system, 1 of the Sessions Courts - Civil will be closed.

REGISTRATION, DISPOSAL AND PENDING CASES
KUALA LUMPUR COURTS
AS AT 31 DECEMBER 2011

COURT	REGISTRATION/ PENDING	DISPOSAL	BALANCE
NEW COMMERCIAL COURT (NCC)	**3,701**	**2,799**	**902**
ORIGINAL COMMERCIAL COURT (OCC)	**827**	**682**	**145**
INTELLECTUAL PROPERTY	**171**	**120**	**51**
MUAMALAT (ISLAMIC BANKING)	**1,679**	**1,451**	**228**
ADMIRALTY	**52**	**21**	**31**
APPELLATE AND SPECIAL POWERS	**2702**	**2121**	**581**
SESSIONS COURT	**55664**	**50503**	**5161**
MAGISTRATES' COURT	**174635**	**152456**	**22179**

11. JOHORE (NORTH)

The courts in Johore (North) are in the districts of Muar, Kluang, Batu Pahat, Segamat and Tangkak.

Presently, there are 2 High Court Judges, 2 Sessions Court Judges in Muar and 1 Sessions Court Judge in Segamat, Batu Pahat and Kluang respectively.

A Mediation Centre was launched in October 2011 at the Muar Court Complex. It is hoped that the disposal of cases will increase with the services of the Mediation Centre.

Statistics

The number of registrations and disposal of cases in North Johore can be summarised as follows:

Johore (North) High Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	1,132	1,924	2,491	565	82%
Criminal	68	121	118	71	62%

Johore (North) Sessions Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	3,744	4,697	6,244	2,197	74%
Criminal	163	367	377	153	71.1%

Johore (North) Magistrates' Court

	Pending as at 1.1.2011	Registration in 2011	Disposal in 2011	Pending as at 1.1.2012	Percentage of disposal
Civil	2,513	6,855	7,805	1,563	83.3%
Criminal	1,585	5,329	6,110	804	88.4%

12. JOHORE (SOUTH)

HIGH COURT

There are 4 High Courts (Civil), 2 High Courts (Criminal) in Johor Bahru. There are 5 Deputy Registrars and 6 Senior Assistant Registrars in charge of all civil cases and 1 Deputy Registrar in charge of criminal cases.

SUBORDINATE COURTS

There are 4 Sessions Courts (Civil), 3 Sessions Courts (Criminal) and 3 Suruhanjaya Pencegahan Rasuah Malaysia Courts and 1 Magistrate's Court (Civil), 2 Magistrates' Courts (Criminal), 1 Juvenile Court and 1 Departmental Summonses Court. There is 1 Sessions Court in Kota Tinggi, 1 Sessions Court (PATI) in Pekan Nanas and 3 Magistrates' Courts in Kota Tinggi, Pontian and Kulai respectively, hearing civil and criminal matters. There are 6 registrars.

ACHIEVEMENTS

- Setting up of Johor Bahru Court Mediation Centre (JBCMC) on 5 September 2011. Out of 47 cases registered for mediation, 20 cases were settled, 16 were unsuccessful and 11 are pending.
- Reduction of OCvC cases from 2,621 as at 1 January 2011 to 1,634 as at 31 December 2011.
- Reduction of Foreclosure cases (Code 24F) from 1,119 to 641.
- Initiated operation to dispose Bankruptcy cases on 1 July 2011. Number of pending Bankruptcy cases was reduced from 6,692 to 4,946.
- Implementation of e-filing on 30 May 2011 followed by e-filing for all codes on 15 June 2011.
- Reduction of High Court pre-2007 civil cases from 27 as at 1 January 2011 to 8 cases as at 31 December 2011; the trial of all pending 8 cases were concluded in January 2012. In the Subordinate Courts, there are only 5 pre-2007 cases pending which are fixed for trial in March 2012.
- Except for 5 cases, all pre-2009 High Court criminal cases have been disposed; 4 cases were disposed in January 2012.
- Expeditious disposal of NCvC cases registered between October 2010 to January 2011 within the timeline of 9 months.
- In July 2011, the NCvC tracking system was extended to all civil codes.
- Implementation of work flow charts for all civil codes.
- Study visit to the Singapore Mediation Centre on 8 November 2011.
- Study visit together with Johore Bar Committee to the Singapore Supreme Court to study the e-filing and CRT systems on 15 September 2011.
- Meeting with CPO Johor to discuss issues of common interest.
- Meeting with Insolvency Department to improve the disposal of bankruptcy cases.
- Meetings with local Auctioneers Association to improve the conduct of auctions.
- Completed the profiling of all 2011 cases for all civil codes (except Bankruptcy cases which will be completed by end January 2012).
- Closure of 1 High Court (Civil) in October 2011 and 1 Johore Bahru Magistrate's Court (Civil) in April 2011.
- Beginning from 1 January 2012, the NCvC system as in the High Court will also be implemented in the Subordinate Courts in Johor Bahru and on 1 February 2012, in the Subordinate Courts in Pontian, Kota Tinggi, Kulai, Mersing and Pekan Nanas.

FUTURE PLANNING AND TARGET

HIGH COURT – CIVIL DIVISION

- Save as indicated below, all 2011 cases are targeted for disposal within 12 months of registration.
- Writ Action cases – As at 31 December 2011, the Johore Bahru High Court has 8 pre-2007 cases and 112 pre-2011 cases. All the pre-2007 cases are expected to be disposed by March 2012 and the pre-2011 cases by June 2012 accordingly.
- Bankruptcy cases – the 31 pre-2009 Bankruptcy cases are targeted to be disposed by January 2012. All the 1,001 cases registered in 2010 should be disposed by March 2012. All Bankruptcy cases have been profiled as 'BN' files and 'CP' files. All CP files will be disposed within 6 months from the date the CP is filed. All BN files will be automatically closed immediately after the time limit for filing of the CP has expired.
- Appeals – there are no pre-2010 appeals. The pending 16 appeals registered in 2010 will be disposed by February 2012. Interlocutory appeals are targeted for disposal within 3 months and full trial appeals within 6 months of registration.
- Land Reference cases – the 2 pre-2010 cases and 2 cases registered in 2010 should be disposed by March 2012.
- Originating Summons – there are 3 pre-2008 cases and 3 cases registered in 2010. The trials of the 3 pre-2008 cases were concluded in January 2012 and the decisions fixed in March 2012. The remaining 2010 cases are targeted to be disposed by April 2012.
- Winding Up – there are no pre-2011 cases. Winding up cases are disposed within 6 months.
- Divorce – the 1 pending 2010 case was disposed on 9 January 2012. Uncontested petitions are disposed within 3 to 4 weeks of registration. Contested petitions are disposed within 3 months.

HIGH COURT – CRIMINAL DIVISION

- Save as indicated below, all cases are targeted for disposal within the 12 months timeline.
- Appeals – there are no pre-2011 appeals pending. Appeals against sentence are heard on a priority basis without the need for grounds of judgment. Appeals against conviction and sentence are targeted for disposal within 3 months.
- Criminal Applications – there are no pre-2011 applications pending.
- Review – there are no pre-2011 review applications pending.
- Full Trial – There were 4 pre-2008 cases but they have all been disposed of on 6 January 2012. There is 1 case registered in 2008 which is fixed for continued hearing on 8 February 2012. There is 1 case registered in 2009 and it was disposed of on 10 January 2012. The remaining 1 case registered in 2010 is expected to be disposed of by February 2012.

SESSIONS COURT – CIVIL DIVISION

- There are 5 pre-2008 cases, 4 cases registered in 2009 and 225 cases registered in 2010 pending at the Johor Bahru Sessions Courts. The pre-2010 cases should be disposed of by February 2012 and the 2010 cases by March 2012.
- There are no pre-2011 cases pending at the Kota Tinggi Sessions Court.

SESSIONS COURT – CRIMINAL DIVISION

- There are no pre-2011 cases pending at the Pekan Nanas Sessions Court.
- There were only 40 cases registered in 2010 at the Kota Tinggi Sessions Court. All the 40 cases are being jointly tried and are part-heard.
- At the Johore Bahru Sessions Court, there are 20 pre-2010 cases pending and they should be disposed by February 2012. The 16 cases registered in 2010 are targeted for disposal by June 2012.

JOHOR (SOUTH) MAGISTRATES' COURT - CIVIL

- There are only 2 2010 cases pending at the Johore Bahru Magistrates' Courts which should be disposed of by February 2012.
- There is only 1 2010 case pending at the Pontian Magistrate's Court and it should be disposed of by February 2012.

MAGISTRATES' COURT – CRIMINAL DIVISION

- There are no pre-2011 cases.
- All 2011 cases will be disposed within the timelines.

The target is for all cases in Johore (South) Courts to be current by June 2012.

STATISTICS FOR YEAR 2011

HIGH COURT JOHORE (SOUTH)

Cases	Registration	Disposal	Balance
Civil Cases [excluding codes 31 and 32]	6,838	**7,825**	1,634
NCvC	1,050	**1,022**	199
Foreclosure	3,171	**3,469**	641
Bankruptcy	5,477	**7,437**	4,946
Criminal Cases	441	**497**	198

SESSIONS COURT JOHORE (SOUTH)

Cases	Registration	Disposal	Balance
Civil Cases	11,808	**12,773**	4,013
Criminal Cases	1,075	**1,637**	330

MAGISTRATES' COURT JOHORE (SOUTH)

Cases	Registration	Disposal	Balance
Civil Cases	15,521	**15,607**	3,268
Criminal Cases [excluding codes 86 & 87]	12,252	**12,985**	618

13. PERAK

2011 saw a steady but healthy reduction of all pending cases in the High Courts at Ipoh and Taiping.

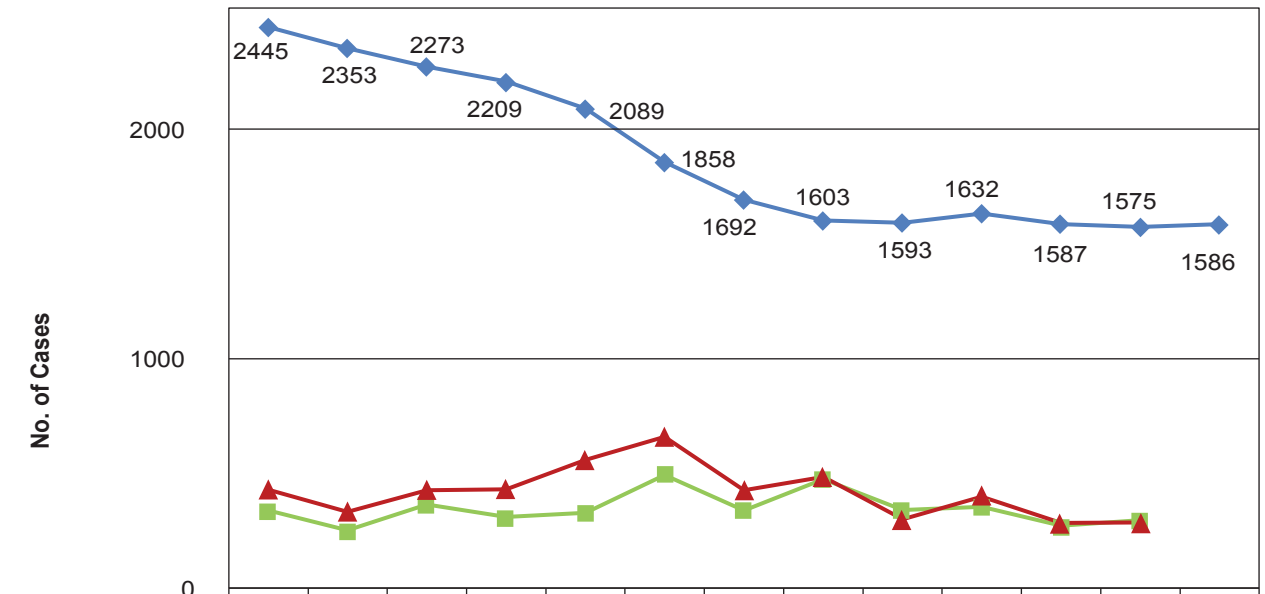
IPOH HIGH COURT

There were 2445 civil cases at the beginning of the year which were reduced to 1586 cases by the end of December (see Tracking Chart A). This reduction was achieved despite the registration of an average of 350 new cases for each month over the same period. The challenge therefore is to reduce the overall number of pending cases in the face of the registration of new cases. A higher rate of disposal will have to be the order of the day. It is anticipated that the overall number of pending cases will be further reduced in 2012.

Of the pending civil cases, 94% were registered in 2010 and 2011, 4% were registered in 2007 to 2009, and less than 2% were registered in 2006 and before. Almost all pre-2007 cases are civil trials under code 22. In 2012, full attention will be given to trials. At the same time, disposal of cases under codes 24 and 24A will not be ignored. Civil appeals under codes 11 and 12 will also be given priority.

There were 126 criminal cases pending at the beginning of the year but there were 184 cases at the end of the year (see Tracking Chart B). At first blush, it would seem that the number of pending cases had not been reduced. There was a reason for that: 19 criminal trials were transferred from Taiping High Court to Ipoh High Court for hearing and disposal. If not for that, the disposal of Ipoh High Court's cases would be much higher. Of the criminal trials, only 1 was registered in 2007. Otherwise, there are no outstanding pre-2009 criminal trials in Ipoh. All criminal appeals are current.

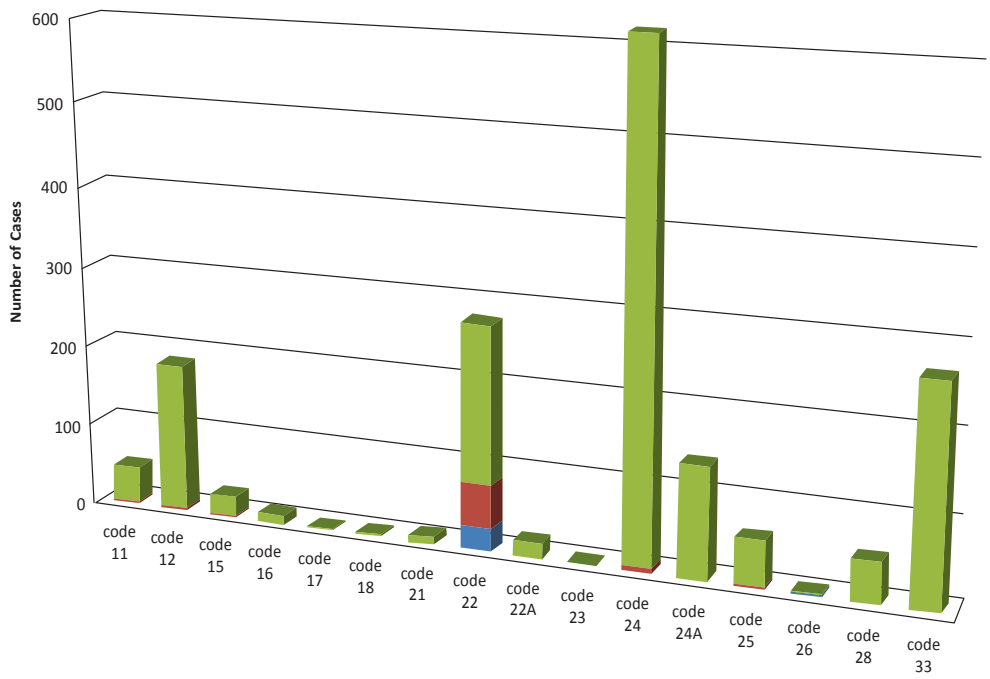
TRACKING CHART (A): IPOH CIVIL CASES



	Jan - 11	Feb - 11	Mar - 11	Apr - 11	May - 11	Jun - 11	Jul - 11	Aug - 11	Sep - 11	Oct - 11	Nov - 11	Dec - 11	Jan - 12
Pending	2445	2353	2273	2209	2089	1858	1692	1603	1593	1632	1587	1575	1586
Registration	337	251	363	310	328	493	337	475	339	353	271	296	
Disposal	429	331	427	430	559	659	426	485	300	398	283	285	

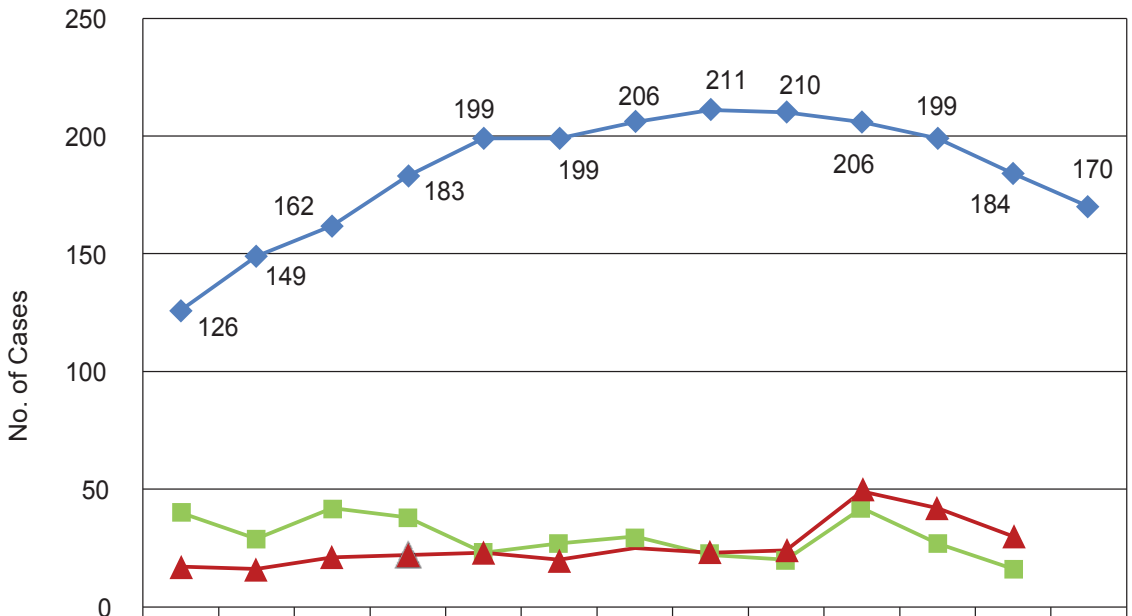
*Note : Exclude cases under codes 29, 31 & 32

Ipoh Civil Cases: Composition of Aged & Current Cases



	code 11	code 12	code 15	code 16	code 17	code 18	code 21	code 22	code 22A	code 23	code 24	code 24A	code 25	code 26	code 28	code 33
2010-2011	41	182	22	11	1	3	8	197	18	1	565	136	55	1	46	265
2007-2009	1	2	2	0	0	0	0	49	0	0	5	0	2	0	0	0
pre2006	0	0	0	0	0	0	0	26	0	0	0	0	0	1	0	0

TRACKING CHART (B): IPOH CRIMINAL CASES



	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep 11-	Oct-11	Nov 11-	Dec-11	Jan 12-
Balance B/F	126	149	162	183	199	199	206	211	210	206	199	184	170
Registration	40	29	42	38	23	27	30	22	20	42	27	16	
Disposal	17	16	21	22	23	20	25	23	24	49	42	30	

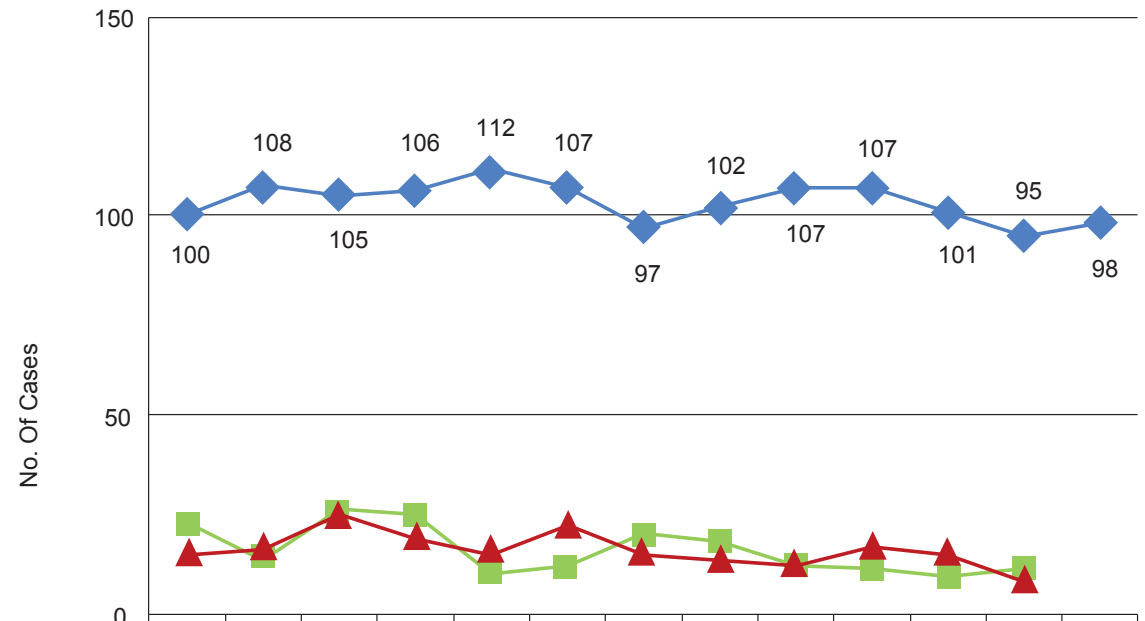
TAIPING HIGH COURT

There were 311 civil cases at the beginning of the year which were reduced to 227 cases at the end of December (see Tracking Chart C). About 54 new cases were registered each month. In other words, the total outstanding civil cases in Taiping amounted to about the total registration for 5 months. The outstanding cases were therefore well below the total filing for the year.

Of the outstanding civil cases, 91% were registered in 2010 and 2011, 8% were registered in 2007 to 2009, and 1% was registered in 2006 and before. All pre-2007 cases were civil trials under code 22. As in the case of Ipoh, in 2012 full attention will be given to trials, and cases under codes 24, and 24A, and civil appeals under codes 11 and 12.

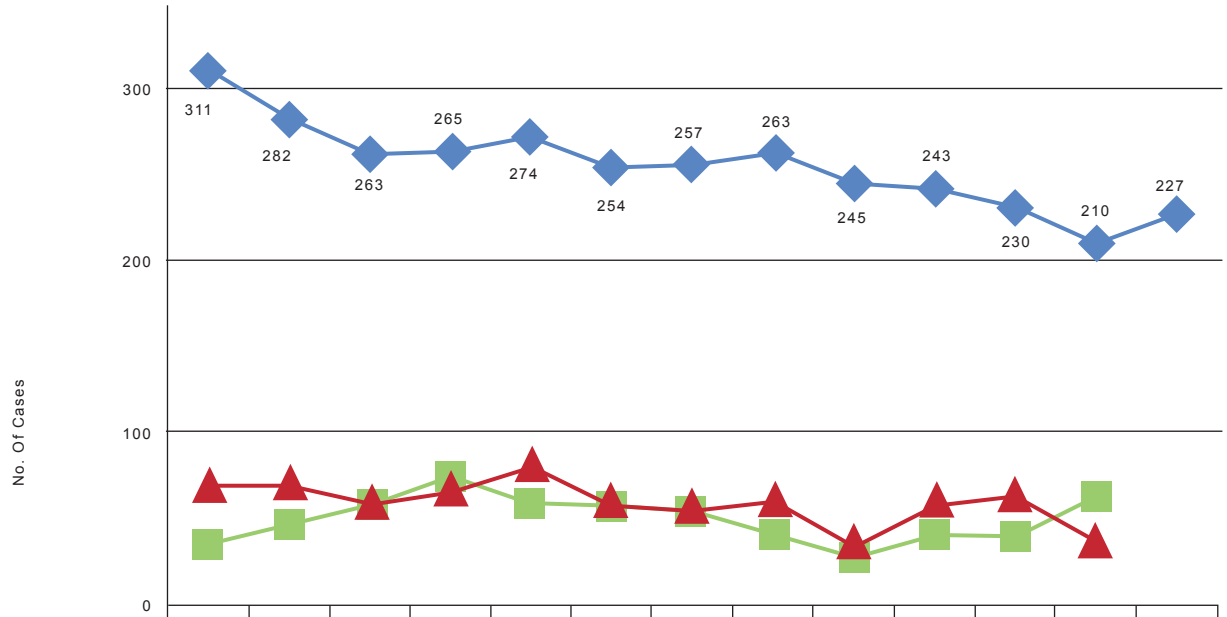
In relation to criminal cases, there were 100 pending cases at the beginning of the year, and there were 98 cases at the end of the year (see Tracking Chart D). Only 2 of those cases were pre-2007 trials. 17 cases (pre-2007 – 2 cases, 2007 – 3 cases, 2008 – 1 case, 2009 – 3 cases, 2010 – 3 cases and 2011 – 5 cases) were transferred to Ipoh for disposal. There will be a drastic drop in the number of outstanding criminal trials once those 19 trials transferred to Ipoh have been disposed. Other than the above, all other cases are current.

TRACKING CHART(D):TAIPING CRIMINAL CASES



	JAN-11	FEB-11	MAR-11	APR-11	MAY-11	JUNE-11	JULY-11	AUG-11	SEPT-11	OCT-11	NOV-11	DEC-11	JAN-12
Balance C/F	100	108	105	106	112	107	97	102	107	107	101	95	98
Registration	23	13	26	25	10	12	20	18	12	11	9	11	
Disposal	15	16	25	19	15	22	15	13	12	17	15	8	

TRACKING CHART (C): TAIPING CIVIL CASES



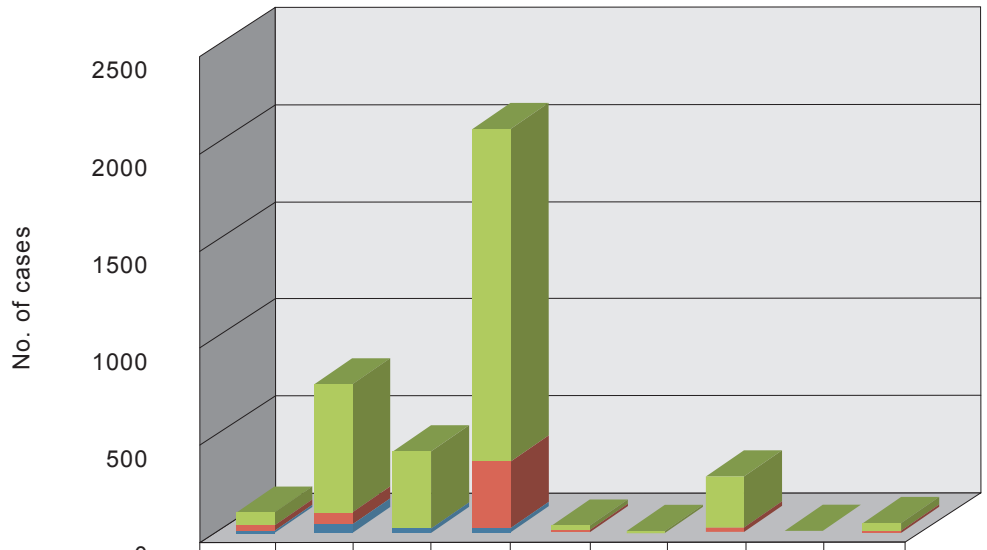
	JAN-11	FEB-11	MAR-11	APR-11	MAY-11	JUNE-11	JULY-11	AUG-11	SEPT-11	OCT-11	NOV-11	DEC-11	JAN-12
Balance C/F	311	282	263	265	274	254	257	263	245	243	230	210	227
Registration	42	52	65	76	63	64	63	45	35	46	43	56	
Disposal	71	71	63	67	83	61	57	63	37	59	63	39	

*Note : Exclude cases under codes 29, 31 & 32

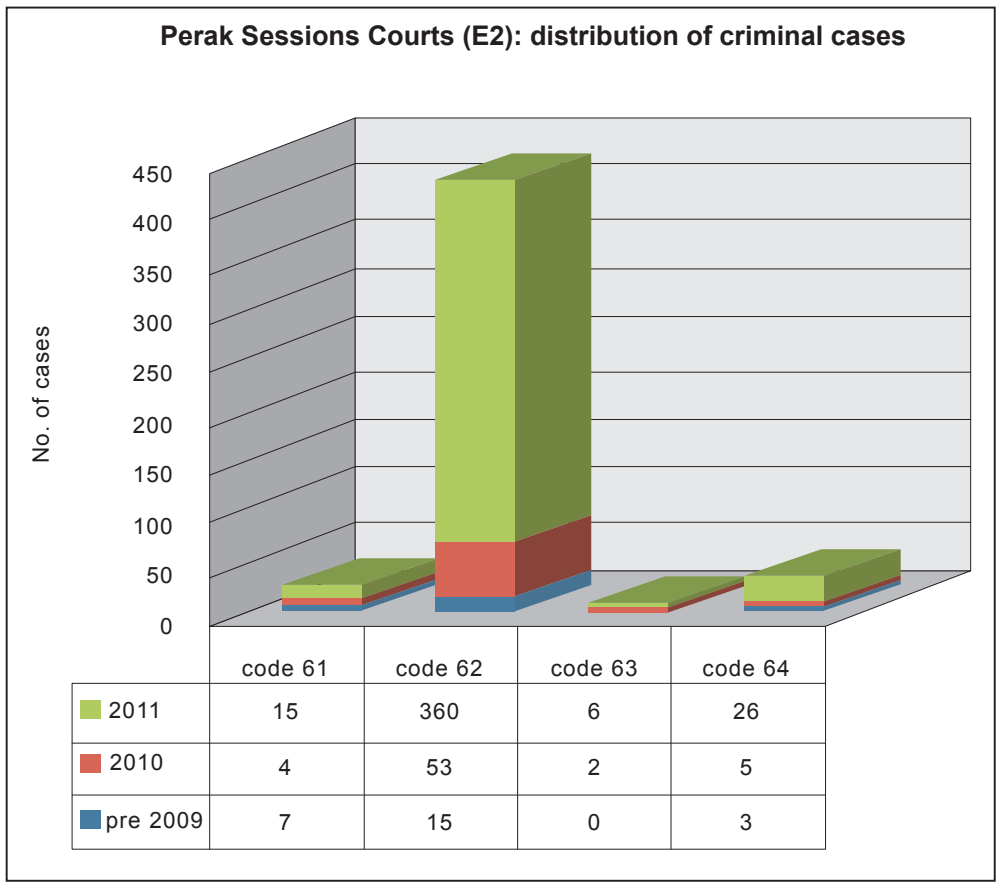
SUBORDINATE COURTS

As for the lower courts, the total number of outstanding civil cases in all the Sessions Courts was 3634. Of those cases 87% were registered in 2011, 12% registered in 2010, and 1% registered pre-2009 (see Chart E1). The total number of outstanding criminal cases in the Sessions Courts was 496; 82% were registered in 2011, 13% were registered in 2010, and 5% were registered pre-2009 (see Chart E2). There were 5,072 outstanding civil cases in all Magistrates' Courts. Of those cases, 98% were registered in 2011, less than 2% were registered in 2010, and only 0.35% was registered in pre-2009 (see Chart F1). For the criminal cases in all the Magistrates' Courts, excluding traffic and departmental summons, there were 1,611 cases outstanding; 92% of those cases were registered in 2011, 7% were registered in 2010, and 1% was registered pre-2009 (see Chart F2).

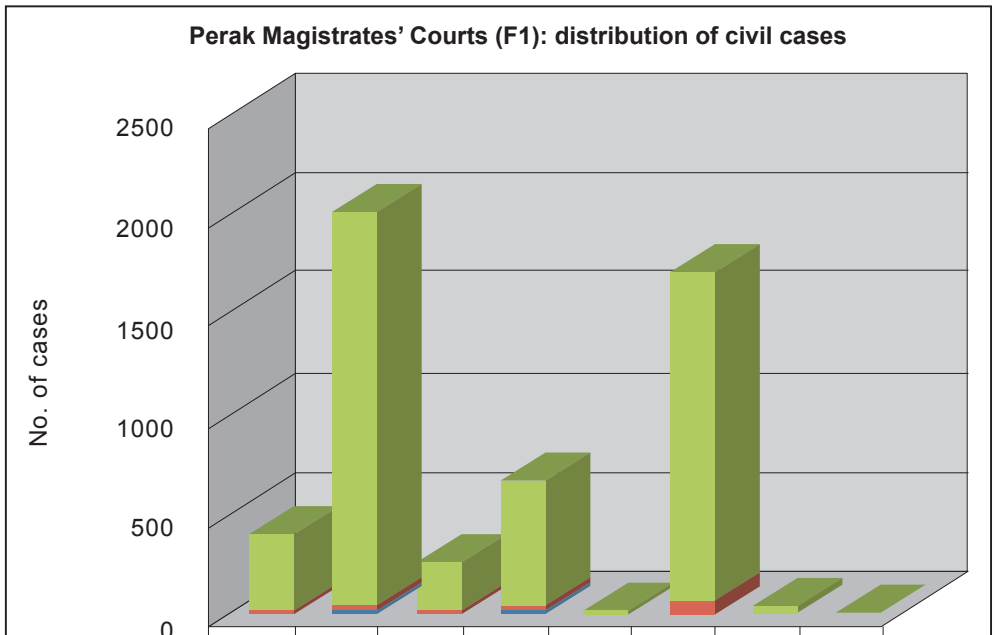
Perak Sessions Courts (E1): distribution of civil cases



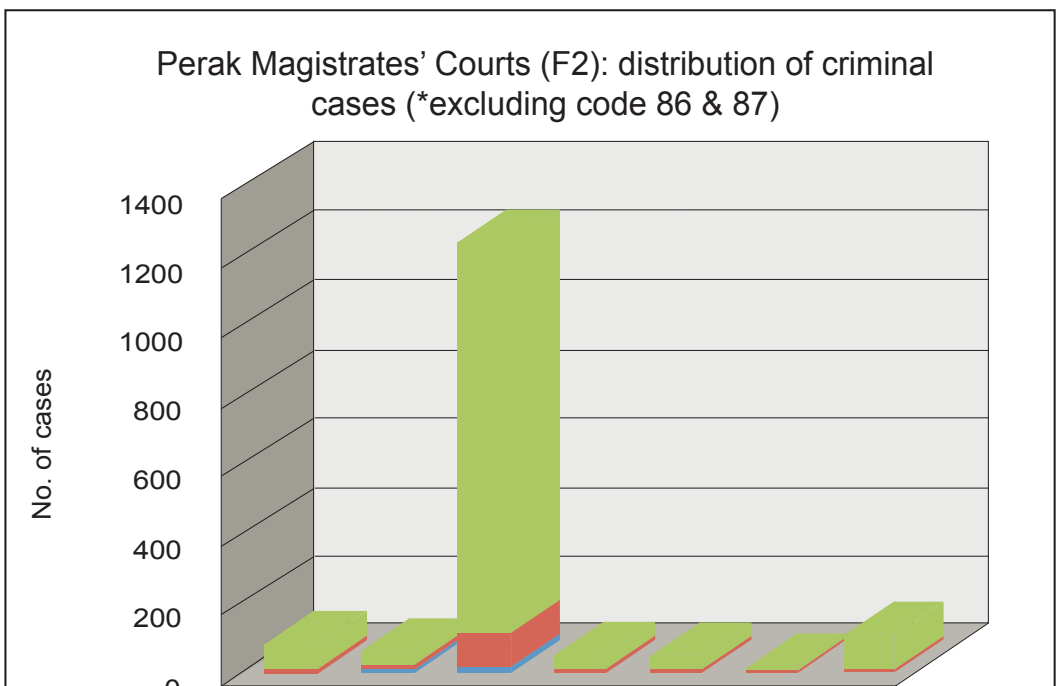
	code 51	code 52	code 52A	code 53	code 54	code 55	code 56	code 57	code 58
2011	78	666	393	1711	10	1	263	0	34
2010	5	62	0	353	2	0	19	0	0
pre 2009	4	26	1	4	0	0	0	0	0



	code 61	code 62	code 63	code 64
2011	15	360	6	26
2010	4	53	2	5
pre 2009	7	15	0	3



	code 71	code 72	code 72A	code 73	code 74	code 76	code 77	code 78
2011	390	1984	256	617	9	1655	30	2
2010	1	21	1	41	0	47	0	0
pre 2009	0	13	0	5	0	0	0	0



	code 81	code 82	code 83	code 84	code 85	code 88	code 89
2011	82	47	1138	49	49	12	107
2010	0	12	96	2	0	2	1
pre2009	0	3	11	0	0	0	0

PLANNING AND TARGET

Outlook for 2012

There will be no let up in efforts to dispose of all the cases. And with the cooperation of all, the goal of speedy and just administration of justice will be achieved.

Judges of the High Court of Malaya

1. Justice Thiripurasingam Veerasingam
2. Justice Zakaria Sam
3. Justice Su Geok Yiam
4. Justice Zainal Adzam Abd. Ghani
5. Justice Abdul Aziz Abdul Rahim
6. Justice Lau Bee Lan
7. Justice Siti Mariah Haji Ahmad
8. Justice Wan Afrah Dato' Paduka Wan Ibrahim
9. Justice Mohamad Zabidin Mohd. Diah
10. Justice Abd. Halim Aman
11. Justice Rohana Yusuf
12. Justice Nurchaya Haji Arshad
13. Justice Zulkifli Bakar
14. Justice Mohd. Zaki Md. Yasin
15. Justice Mohd. Azman Husin
16. Justice Mohd. Sofian Tan Sri Abd. Razak
17. Justice Tengku Maimun Tuan Mat
18. Justice Abdul Alim Abdullah
19. Justice Ghazali Haji Cha
20. Justice John Louis O'hara
21. Justice Rosnaini Saub
22. Justice Lim Yee Lan
23. Justice Suraya Othman
24. Justice Abdul Rahim Uda
25. Justice Noor Azian Shaari
26. Justice Mohd. Zawawi Salleh
27. Justice Ahmad Zaidi Ibrahim
28. Justice Dr. Haji Hamid Sultan Abu Backer
29. Justice Abang Iskandar Abang Hashim
30. Justice Nallini Pathmanathan
31. Justice Mohamad Ariff Md. Yusof
32. Justice Mariana Haji Yahya
33. Justice Dr. Badariah Sahamid
34. Justice Azman Abdullah
35. Justice Hinshawati Shariff
36. Justice Mohd Yazid Haji Mustafa
37. Justice Zainal Azman Ab. Aziz
38. Justice Ahmadi Haji Asnawi
39. Justice Zamani A. Rahim
40. Justice Ong Lam Kiat Vernon
41. Justice Zaleha Yusof
42. Justice Halijah Abbas
43. Justice Mary Lim Thiam Suan
44. Justice Kamardin Hashim
45. Justice Yaacob Haji Md. Sam
46. Justice Zabariah Mohd. Yusof
47. Justice Umi Kalthum Abdul Majid
48. Justice Akhtar Tahir
49. Justice Hue Siew Kheng
50. Justice Noraini Abdul Rahman
51. Justice Nor Bee Ariffin
52. Justice Yeoh Wee Siam
53. Justice Amelia Tee Hong Geok Abdullah
54. Justice Has Zanah Mehat
55. Justice Prasad Sandosham Abraham
56. Justice Varghese George Varughese
57. Justice Mah Weng Kwai

Judicial Commissioners of the High Court of Malaya

1. Judicial Commissioner Ridwan Ibrahim
2. Judicial Commissioner Dr. Haji Hassan Ab. Rahman
3. Judicial Commissioner Tarmizi Abd Rahman
4. Judicial Commissioner Harminder Singh Dhaliwal
5. Judicial Commissioner Hadhariah Syed Ismail
6. Judicial Commissioner Haji Ahmad Nasfy Haji Yasin
7. Judicial Commissioner Zakiah Kassim
8. Judicial Commissioner Nik Hasmat Nik Mohamad
9. Judicial Commissioner Choong Siew Khim
10. Judicial Commissioner Nurmala Salim
11. Judicial Commissioner Asmabi Mohamad
12. Judicial Commissioner Siti Khadijah S. Hassan Badjenid
13. Judicial Commissioner Mohd Amin Firdaus Abdullah
14. Judicial Commissioner Teo Say Eng
15. Judicial Commissioner Chew Soo Ho
16. Judicial Commissioner Hasnah Dato' Mohammed Hashim
17. Judicial Commissioner Ahmad Zaki Haji Husin
18. Judicial Commissioner Hanipah Farikullah
19. Judicial Commissioner Mohd Zaki Abdul Wahab
20. Judicial Commissioner See Mee Chun
21. Judicial Commissioner Gunalan Muniandy
22. Judicial Commissioner Rosilah Yop
23. Judicial Commissioner Abdul Rahman Abdol
24. Judicial Commissioner Samsudin Hassan
25. Judicial Commissioner Lee Swee Seng
26. Judicial Commissioner Vazeer Alam Mydin Meera

Special Officers / Research Officers To the Managing Judges

1. Nithiyanantham Murugesu
2. Nor Ruzilawati Mohd Noor
3. Che Wan Zaidi Che Wan Ibrahim
4. Aizatul Akmal Maharani
5. Mohd Faizi Che Abu
6. Mahyudin Mohd. Som
7. Noorhisham Mohd Jaafar
8. Ashraf Rezal Abd. Manan
9. Shazali Dato' Hidayat Shariff
10. Mursyida Dato' Abdul Halim
11. Nor Azizah Aling
12. Faizal @ Amrin Noor Hadi
13. Liew Horng Bin
14. Noor Aisyah Mohd Yusoff
15. Safarudin Tambi
16. Kaveetha Arumugem
17. Nik Ahmed Asraf Nik Othman
18. Umzarul An-Nur Umar

THE COURTS OF SABAH AND SARAWAK

THE RIGHT HONOURABLE TAN SRI DATUK SERI
PANGLIMA RICHARD MALANJUM
CHIEF JUDGE OF SABAH AND SARAWAK

Policy Statement

To maintain and enhance public confidence in the Courts of Sabah and Sarawak through judicial independence, efficiency and integrity.

Remarks

To achieve the intent and spirit of the stated policy the Courts in Sabah and Sarawak embarked on proactive reforms to enhance their delivery system. The strategy adopted was focused on creating a user-friendly working system while maximising the use of all available resources and modern technology. The results are the substantial clearance of backlog of cases and currently proceeding to dispose of all pending cases within the desired timelines but without sacrificing justice.

For criminal cases registered in the Subordinate Courts the targetted timelines for disposal is within 3 months from the date of registration while in the High Court it is 6 months from the date of registration.

For civil cases registered in the Subordinate Courts the disposal timeline is 6 months and in the High Court it is 12 months from the date of registration.

Some of the steps and reforms implemented are thus:

1. The introduction of e-filing system as part and parcel of the computerization project of the Courts. Under the system a legal firm may digitally sign its cause papers and legal documents before filing online. In turn a Court official would then process the documents, stamp his or her digital signature and seal and thereafter the documents are returned electronically to the legal firm for its further action. For now legal firms are encouraged to utilise the system. By June 2012 it is hoped that the Courts in Sabah and Sarawak would be operating on a paper-less basis. This system complements the existing virtual files feature of the Court Management System (CMS) implemented earlier on. This feature mirrors the contents of the physical files so that Judges, judicial officials and lawyers (only limited to their respective cases) any time and any where since it is accessible online.

2. The implementation of Radio Frequency Identification (RFID) system for the file room. With the system each physical docket is tagged with an RFID tag to ensure that essential documents kept in the docket are safe and secure.

3. The setting up of Technology Courts. Initially through video conferencing (VC) between courthouses in different stations Judges, judicial officials and lawyers need not physically travel to the respective stations to attend to their cases in particular for case management

hearings and mentions. This approach has saved time and money for all parties. The next phase of the project to be implemented by April 2012 concerning the same types of hearings is to allow VC between courthouses and legal firms. Thus lawyers need not come to the courthouses irrespective of where the courthouses are situated.

4. The use of steno-machines and video and audio recordings of trial proceedings both in open court and chambers hearings. This is commonly known as the Court Transcript Recordings (CRT). With this system hearing transcripts can be made available to parties within 72 hours after the close of proceeding. This has avoided the need to farm out audio or video recordings to third parties to produce the transripts.

5. Some of the unique features of the CMS in Sabah and Sarawak are the auto-monitoring of hearing dates and delays, the return of court orders and documents to legal firms, daily hearing schedules of Judges and officers and real time information shown on screens in the courthouses and on mobile phones of daily hearings. These features have improved the management of pending cases in courts as well as providing transparancy to the public.

6. There is also the Forum column in the CMS for officers to discuss and assist each other on points of law and other work related issues. This is to complement the regular seminars and workshops organised by the Courts in Sabah and Sarawak to enhance the judicial capability of Judges and judicial officers in their handling of cases.

7. Mediation as an alternative mode is resolving disputes has also been implemented. So far it has been well received by lawyers and litigants. The success rate, in particular in running down cases, is in the range of 60-80 percent.

8. Court Social Responsibility (CSR)- to further contribute to society Judicial officers have gone to schools and organizations to give talks on various issues including careers in the legal profession, some specific offences such as drug abuse and punishments and functions of the courts. The idea is to incalculate public awareness and public education on those matters which are relevant in daily life.

For the year 2012 it is the aim of the Courts in Sabah and Sarawak to ensure that cases are heard within the timelines and that Justice and the Rule of Law are dispensed and observed for the betterment of the Malaysian society.

JUSTICE RICHARD MALANJUM
Chief Judge of Sabah and Sarawak

"Thus, in a period of slightly more than 2 years, the Malaysian Judiciary has designed and conducted a model program and one that merits study by those contemplating any reform.

World Bank Progress Report on Malaysia – Court Backlog and Delay Reduction Program, August 2011."

PERFORMANCE OF THE COURTS OF SABAH AND SARAWAK

The Courts of Sabah and Sarawak are distinct although concurrent with the Courts of West Malaysia. This distinction is provided for by the Federal Constitution. The responsibility of the Courts of Sabah and Sarawak lies with the Chief Judge of Sabah and Sarawak, Tan Sri Datuk Seri Panglima Richard Malanjum, who reports directly to the Chief Justice of Malaysia regarding its performance and other related matters. This write up will consider the performances of the Courts in both states and its future plans and targets.

PERFORMANCE SARAWAK

It is not practical to list down the number of Courts that are in Sarawak because the number of Courts, inclusive of circuit courts, which have been set up is more than the number of Judges and Judicial Officers in the state. There are a total of 6 High Court Judges and Judicial Commissioners, 7 Sessions Court Judges, and 8 Magistrates in Sarawak. Several Deputy Registrars of the High Court have also been gazetted as Sessions Court Judges, whereas some of the Senior Assistant Registrars also function as Magistrates.

Analysis of Statistics and Achievements

High Courts – Civil and Criminal

In January 2011, there were 1,232 civil cases which were pending before by the High Courts of Sarawak. A total of 3,753 cases were registered, assigned or reactivated throughout the year. At 31.12.2011, a total of 4,132 of those cases were disposed of (whether by full trial, non full trial, or otherwise). Therefore, as at the end of 2011, there were 853 pending civil cases in the High Court. The total disposal figure of 4,132 for the entire 2011 was higher than the registration figure of 3,753 for the same period. This shows that the High Courts of Sarawak have definitely eaten into the backlog to some extent. It also shows that the number of pending cases which were carried forward to 2012 was significantly less than the number of cases which were carried forward to 2011 (which are 853 and 1,232 cases respectively).

For criminal cases, in January 2011, there were 140 cases pending before the High Courts of Sarawak. Throughout the year, a total of 403 cases were registered and reactivated. As at 31.12.2011, a total of 464 cases were disposed of, thereby leaving the High Courts of Sarawak to have a mere 79 pending cases. Again, this reflects that the High Courts of Sarawak have eaten into the backlog of cases to a certain extent, and that the number of carried forward cases to 2012, being just 79 cases, is significantly less than the 140 cases that were carried into 2011.

Sessions Courts – Civil and Criminal

For the civil cases in the Sessions Court, there were 1,590 cases pending in the Sessions Courts of Sarawak in January 2011. A total of 5,174 cases were registered and reactivated throughout the entire year. As at 31.12.2012, 5,607 cases were disposed of. Thus, at the end of 2011, there were 1,157 pending cases before the Sessions Court of Sarawak. Once more, the total number of cases disposed outnumbered the cases registered in that year, signifying that the Sessions Courts too have eaten into the backlog of cases. Indeed, the number of cases carried forward into 2012 was also considerably less than the number of cases which were carried forward into the previous year.

With respect to the criminal cases in the Sessions Courts, 260 cases were carried forward into 2011. Throughout the year, a total of 1,667 cases were registered and reactivated. At the end of 2011, 1,789 cases were disposed of (whether by full trial, non full trial or otherwise). Thus, at the end of 2011, the Sessions Courts of Sarawak had 138 cases pending which were carried forward into 2012. Similarly, this is reflective

of the performance of the Sessions Courts which managed to reduce the number of cases carried into the following year by approximately 50%.

Magistrates Courts – Civil and Criminal

There were a total of 3,391 civil cases pending before the Magistrates Courts of Sarawak as at January 2011. A total of 12,008 cases were newly registered and reactivated throughout the entire year. Come the year end, 13,090 cases had been disposed of. Accordingly, a total of 2,309 cases were pending at year end and carried forward to 2012. This is reflective of the performance of the Magistrates Courts in significantly reducing the number of cases carried forward into the following year from a figure of 3,391 in 2010 (carried forward to 2011) to a figure of 2,309 in 2011 (carried forward to 2012).

For the criminal cases in the Magistrates Courts of Sarawak, a total of 3,570 cases were carried forward into 2011. Throughout the year, 25,357 cases were newly registered or reactivated. At the end of the year, a total of 24,163 cases were disposed of (whether by full trial, non full trial or otherwise). Indeed, a total of 4,764 cases were pending before the Magistrates Courts of Sarawak in 2011 which had to be carried forward to 2012. Admittedly, this was a sharp increase from the number of cases carried forward into the previous year. However, a careful analysis revealed that more than 50% of the criminal cases carried forward into 2012 were traffic cases, many of which were registered late in 2011. As such, the performance of the Magistrates Courts of Sarawak in 2011 was highly commendable.

PERFORMANCE SABAH

Similar to Sarawak, it is not practical to list down the number of Courts that are in Sabah because the number of Courts, inclusive of circuit courts, which have been set up is more than the number of Judges and Judicial Officers in the state. There are a total of 4 High Court Judges and Judicial Commissioners, 5 Sessions Court Judges, and 10 Magistrates in Sabah. Several Deputy Registrars of the High Court have also been gazetted as Sessions Court Judges, whereas some of the Senior Assistant Registrars also function as Magistrates.

Analysis of Statistics and Achievements

High Courts – Civil and Criminal

In January 2011, there were 798 civil cases which were pending before the High Courts of Sabah. A total of 2,486 cases were registered, assigned or reactivated throughout the year. At 31.12.2011, a total of 2,547 of those cases were disposed of (whether by full trial, non full trial, or otherwise). Therefore, as at the end of 2011, there were 737 pending civil cases in the High Court. This shows that the High Courts of Sabah have slightly eaten into the backlog. It also shows that the number of pending cases which were carried forward to 2012 was marginally less than the number of cases which were carried forward to 2011.

For criminal cases, in January 2011, there were 295 cases pending before the High Courts of Sabah. Throughout the year, a total of 591 cases were registered and reactivated. As at 31.12.2011, a total of 604 cases were disposed of, thereby leaving the High Courts of Sabah with 282 pending cases. Again, this reflects that the High Courts of Sabah have marginally reduced the number of carried forward cases compared to the previous year.

Sessions Courts – Civil and Criminal

For the civil cases in the Sessions Court, there were 1,306 cases pending in the Sessions Courts of Sabah in January 2011. A total of 4,254 cases were registered and reactivated throughout the entire year. As at 31.12.2012, 4,449 cases were disposed of. Thus, at the end of 2011, there were 1,111 pending cases before the Sessions Court of Sabah. Here, the total number of cases disposed outnumbered the cases registered in that year, signifying that the Sessions Courts has successfully eaten into the backlog of cases. Indeed, the number of cases carried forward into 2012 was also considerably less than the number of cases which were carried forward into the previous year.

With respect to the criminal cases in the Sessions Courts, 317 cases were carried forward into 2011. Throughout the year, a total of 4,829 cases were registered and reactivated. At the end of 2011, 4,778 cases were disposed of (whether by full trial, non full trial or otherwise). Thus, at the end of 2011, the Sessions Courts of Sabah had 368 cases pending which were carried forward into 2012. Indeed, the Sessions Courts' performance did not

manage to match its counterparts in Sarawak, but it must be noted that the Sessions Court in Sabah deal with a much more significant number of illegal immigrant cases and this is one of the reasons for that. Taking that into account, the Sessions Court in Sabah had put up an admirable performance.

Magistrates Courts – Civil and Criminal

There were a total of 2,756 civil cases pending before the Magistrates Courts of Sabah at January 2011. A total of 9,616 cases were newly registered and reactivated throughout the entire year. Come the year end, 10,226 cases had been disposed of. Accordingly, a total of 2,146 cases were pending at the year end and carried forward to 2012. This is reflective of the performance of the Magistrates Courts in significantly reducing the number of cases carried forward into the following year from a figure of 2,756 in 2010 (carried forward to 2011) to a figure of 2,146 in 2011 (carried forward to 2012).

For the criminal cases in the Magistrates Courts of Sabah, a total of 8,928 cases were carried forward into 2011. Throughout the year, 40,600 cases were newly registered or reactivated. At the end of the year, a total of 38,890 cases were disposed of (whether by full trial, non full trial or otherwise). Indeed, a total of 10,638 cases were pending before the Magistrates Courts of Sabah in 2011 which had to be carried forward to 2012. Admittedly, this was a sharp increase from the number of cases carried forward into the previous year. However, a careful analysis revealed that, as was the case with its counterparts in Sarawak, more than 30% of the criminal cases carried forward by the Magistrates Courts for the year 2012 were traffic cases, many of which were registered late in 2011. As such, the performance of the Magistrates Courts of Sabah in 2011 was highly commendable.

PLANNING AND TARGETS

Currently In Practice

1. Judges and Judicial Officers are encouraging litigants and lawyers to explore mediation to avoid unnecessary delay and expense. The response has been highly encouraging.

2. Case management by way of video-conferencing, tele-conferencing, or email for lawyers to obtain simple directions or to obtain a further date as cause papers remain unserved. This helps save precious judicial time calling up cases and also prevents unnecessary trips by lawyers to court.

3. Full-fledged e-filing and e-payment commenced in Sabah and Sarawak in the middle of 2011. It is yet to be made mandatory, but response from lawyers has been encouraging. Big firms and mid-size firms are the main proprietors for now. It is hoped that by the middle of 2012, the response would be sufficiently favourable to enable the Courts of Sabah and Sarawak to make it a mandatory practice.

4. The disposal period:

   (a) Magistrates Court – Criminal 3 months, Civil 6 months
   (b) Sessions Court – Criminal 6 months, Civil 12 months
   (c) High Court – Criminal 6 months, Civil 12 months

5. Usage of Virtual Files – where soft copies of notes of proceedings and judgment are uploaded into the CMS. If submitted by e-filing, it automatically becomes part of the Virtual File. If submitted over the counter, either lawyers themselves or the court staff would upload the same. Usage of Virtual File is very high. It is placed on the CMS internet database and can be accessed from anywhere in the world.

6. Usage of CRT and Vortex. Speedier way to generate notes of evidence during trial. With the recording, stenographers would be able to record down the proceedings with use of short hand keys. Draft copies would be given to lawyers upon request at the end of the day and fair copies could be provided within 3 days. Audio recordings are given free to lawyers upon request.

7. Usage of 10 in 1 strike. This is extremely useful in the Magistrates Court where numerous similar charges are dealt with in the same day by the A Track Judge. By typing in the required details and populating it to the other cases, numerous notes of proceedings can be generated at the same time without having to type out each of the same.

8. Usage of NOP Template. Widely used in the High Court for chamber matters and for non-contentious matters (non trial) in open court. The Template is designed in an easy to use fashion and Judges, Officers and support staff would instantly type out the proceedings.

9. Auto fixture and auto scheduling of court dates. Documents e-filed and documents submitted over the counter would automatically be given a hearing date and the assigned judicial officer to hear the case.

10. Monitoring and triggering. Documents which are submitted over the counter and not returned within 3 days would automatically trigger a notification to the Chief Judge of Sabah and Sarawak, the Registrar of the High Court of Sabah and Sarawak, and the officers concerned. Documents which are e-filed and not returned within 24 hours would also trigger the same. Interlocutory applications not disposed within 2 months would trigger notifications. Inactive cases, i.e. 3 months without any movement would also cause triggering. Cases pending decision (i.e. 4 weeks after date of conclusion) and cases pending grounds (i.e. 8 weeks after date of decision) would also cause triggering if the period has been exceeded.

11. Statistics and reports are automatically generated from the CMS.

12. Issuance of Notice of Hearing - automatically generated from the CMS.

13. Physical docket management – Use of RFID technology for active dockets to ensure movement of files are tracked and unauthorized movements of file from the Filing Room would trigger an alarm.

14. Forum and knowledge sharing – Avenue for judicial officers and Judges to share their experience, pose questions, and to give opinions.
15. Judicial training – training and exposure for judicial officers in various aspects of the law to keep them abreast with judicial developments.

16. Mobile Court and Mobile Court Room. The Mobile Court has been active throughout the year and visited many small towns and villages as part as our initiative to bring the Courts to the people and to promote access to justice. The Mobile Court Room is an initiative implemented early this year where an actual bus has been converted into a court room. A Magistrate together with support staff, the prosecution, and the police would travel to small towns and conduct proceedings in the bus. It serves as an important deterrence tool because being brought into the Mobile Court Room to face a charge in a small town would be an embarrassing event for the criminals.

17. Corporate Social Responsibility (CSR). As part of our continuous commitment to society, the Courts of Sabah and Sarawak had conducted numerous visits to schools and welfare centres to share our knowledge of the law and help educate the younger generation to be law abiding citizens.

Plans For 2012

1. Use of Virtual File for Appeal cases – to dispense with the need for physical appeal records for appeal cases. All necessary documents would be automatically sorted in the CMS to form an appeal record. Some courts are currently practicing this.

2. Monthly tracking of cases. To track the monthly disposal progress of cases from any given month of registration. This would ensure that no backlog of cases would accumulate. This is already in place and is being perfected. Cases which are outside the timeline set (see above – period for disposal of cases) would be triggered and individually monitored up until final disposal.

3. Aim to go paper-less by June 2012. The Courts will place more reliance on the Virtual File and the CMS and reduce reliance on physical dockets. This will slowly be phased out with the expected increase in usage of e-filing.

4. E-filing and e-payment. To encourage usage of e-filing and e-payment, the opening hours of the registry counters and payment counters would be reduced to 9am – 12pm only. Also, ongoing training is being provided to departments such as the prosecution, police, JPJ, etc for them to come onboard with e-filing and e-payment. Their full presence is expected early next year.

5. Training of stenographers. Training of the second batch is concluding before the turn of the New Year. Further batches would be trained in 2012 to ensure accuracy and speed in producing notes of evidence.

6. Mobile Court Room – 4 new buses are expected to arrive early next year. This would greatly help us to beef up our service to the public. Of these, 2 buses will be given to Sarawak, and 2 to Sabah.

7. Rule-based Dataset Sentencing System - This is a computerized system with sets of rules defined by users and a comprehensive database containing legally and statistically relevant information on sentencing. It would contain a comprehensive sentencing resource that provides discrete modules of reference material. The object of the system is not to limit the sentencing discretion of each judicial officer. Its purpose is to provide judicial officers with rapid and easy access to the collective wisdom of the Judges and Judicial Officers in order to assist them when imposing a sentence decisions.

Judges of the High Court of Sabah And Sarawak

1. Justice Sangau Gunting
2. Justice David Wong Dak Wah
3. Justice Yew Jen Kie
4. Justice Abdul Rahman Sebli
5. Justice Rhodzariah Bujang

Judicial Commissioners of the High Court of Sabah And Sarawak

1. Judicial Commissioner Ravinthran Paramaguru
2. Judicial Commissioner Supang Lian
3. Judicial Commissioner John Ko Wai Seng
4. Judicial Commissioner Stephen Chung Hian Guan
5. Judicial Commissioner Lee Heng Cheong
6. Judicial Commissioner Douglas Cristo Primus Sikayun

Special Officers to the Chief Judge of Sabah and Sarawak

1. Zulhairil Sulaiman
2. Pradeep Singh Arjan Singh

CHAPTER 3

RESOURCES

A corner of the library at the Palace of Justice

THE FEDERAL COURT LIBRARY

Location and staff

The Federal Court Library ("Library") is located on the ground floor of the Federal Court Building, Istana Kehakiman, Putrajaya, with smaller branch libraries located at 22 High Court Buildings throughout the country.

The Library at the Istana Kehakiman occupies a total area of 1064.523 square metres. The Library offers electronic and print resources. Print collections and materials such as books, law reports and journals in the Library are stacked on open shelves and arranged according to subjects based on MOYs Classification system and alphabetical order.

The Library is managed by 2 professional librarians who are assisted by 13 staff.

Main function

The primary function of the Library is to provide reference and information services to support the work of Judges, Judicial Officers and other court staff.

Library collection

The Library has a collection of more than 57,000 volumes of reference and research materials, which include books, local and foreign law reports and journals, Federal and State statutes and subsidiary legislation as well as a special collection known as Grounds of Judgments of the Federal Court, Court of Appeal and High Courts, etc.

The main collections of the Library consist of:

Malaysian Law Reports

- Malayan Law Journal [MLJ] 1932-2011;
- Current Law Journal [CLJ] 1981-2011; and
- All Malaysia Reports [AMR] 1992-2011.

Older Law Reports

The Library has a collection of old reports dating back to the 18th century such as the Kyshe's Reports 1808-1890, the Straits Settlements (SS) Law Reports 1867-1939, the Federated Malay States (FMS) Law Reports 1906-1941 and the Malaysian Union Law Reports 1946-1952.

Foreign Law Reports

The Library stocks over 50 law reports and journals from the following foreign jurisdictions:

- Australia, England, India, Pakistan, United States of America, New Zealand and Singapore.

The titles of the reports and journals from these jurisdictions available in the Library include:

- The All England Reports 1937-2011;
- All India Reports 1914-2011;
- Australian Law Reports 1973-2011;
- Commonwealth Law Reports 1903-2011;

Text and reference books

The Library holds a collection of textbooks and reference books on various legal subjects. The books are catalogued, classified and arranged according to legal subject, for example, admiralty law, law of tort, contract law, company law, family law, etc. The subject matter of each book is indicated by an alpha numeric code on the spine of the book and the classification system used is the MOYs Classification and Thesaurus For Legal Materials. Complete title of the books can be accessed at *http://library.kehakiman.gov.my/equip-poj/*

Other collections

The Library also has a collection of *Annotated Statues of Malaysia* (ASM) series, *Atkins Court Forms* (Malaysia and English Court Forms) and

Malaysian Precedents and Forms, *Malaysian Court Practice*, latest encyclopedic works such as *Halsbury's Law of England* (5th edn), *Mallal's Digest of Cases*, *Words and Phrases Judicially Defined*, *Index to Legal Citations and Abbreviations* and legal dictionaries.

Library Services

(1) Reference and information services

The Library provides information and legal reference services to assist Judges and Judicial Officers and other staff of the Courts in searching and retrieving legal materials available in the Library efficiently and effectively. The Library provides the same services to High Court Judges, Sessions Court Judges and Magistrates throughout the country who are linked to its online and electronic databases, and through its inter-library loan services of printed materials such as books, periodicals, up-dated legislation and other printed research materials and information and services via the facsimile and telephone.

(2) Online database services

In line with the advancement in information communication and technology, the Library subscribes to the following online legal libraries/ resources:

- Lexis Malaysia,
- Westlaw,
- Current Law Journal (CLJ) Legal Network,
- Mylawbox, and
- Legal Workbench.

These online libraries/resources are linked to the laptop/computers in the Chambers of High Court Judges and other Judicial Officers throughout the country, thus reducing the retrieval of reported cases and legislation to just a click of the mouse.

(3) Updating of legislation

Another important function of the Library is the updating of statutes in the form of Federals Acts and State Enactments and subsidiary legislation such as regulations, rules and notifications made under relevant Federal Acts and State Enactments. The Library recognises that Acts of Parliament and State Enactments are the primary sources of law in this country and they must be continually amended and updated to ensure their accuracy and to reflect the current status of the law.

To facilitate quick reference and retrieval, Acts of Parliament and State Enactments are compiled and indexed according to the title of the Act and Enactment in alphabetical order and also according to their number as enacted by Parliament and the State Legislature.

(4) Legal research skills training

In its effort to enhance and upgrade the skills and competency of Judges, Judicial Officers and staff of the Courts in the use of its online database, the Library has conducted a number of training programmes and courses on the use of Legal Database for Judges of the Federal Court and Court of Appeal and selected High Court Judges (on 12-13 April 2011 and on 19-21 April 2011), selected Judges and Officers of the High Court of Kuala Lumpur (on 1-9 May 2011 and 7-17 July 2011) selected Judicial Officers of the Federal Court and Court of Appeal (on 20 October, 3 November and 17 November 2011). These programmes/courses are on-going and the Library is expected to hold more such programmes/courses in the coming year.

(5) Cataloguing and classification services

The Library's collections are catalogued and classified according to MOYs Classification and Thesaurus for Legal Materials (4th edn) with subject headings based on The Library of Congress Subject Headings. The titles of books,

law reports, journals can be accessed through its web Online Public Access Catalogue (OPAC) at the Library's Portal.

(6) Lending services

The Library provides lending services to its users. Membership of the Library is open only to Judges, Judicial Officers and staff of the Courts. Judges and Judicial Officers are required to register as members of the Library before they can borrow any book. Books are loaned initially for the duration of one week with extensions allowed upon request.

(7) Current awareness services

Via its "current awareness services", the Library informs and updates its users on the latest and/or new information/material/resource acquired and/or available in the Library. Through this service, the Library distributes from time to time acquisition lists of new books, contents listing of law journals and law reports as well as newspaper cuttings on various legal and judicial matters.

(8) Online public access catalogue ('OPAC')

To facilitate the quick and effective retrieval of resources and materials available in the Library, the Library undertakes the digitisation of its collections, starting with the scanning of all newspapers followed by circulars, practice directions and practice notes in its collection. All the digitised and or scanned materials are available in searchable PDF format which can be accessed and downloaded through the Library's OPAC at its website at *http://library.kehakiman.gov.my/equip-poj/*.

(9) Inter library loan services

The Library also provides inter-library loan services through the Publications Delivery System (PDS) for Judges and Judicial Officers and staff of the Courts who wish to borrow books or obtain copies of documents/articles from other libraries.

(10) Photocopying services

The Library provides photocopies of library materials especially Acts, Ordinances and old Enactments on request of its users, subject to the provisions of the Copyright Act 1987.

Access to the Library and Library hours

The Library is open only to Judges, Judicial Officers and staff of the Federal Court of Malaysia. Although the Library is not open to the public, members of the Bar appearing at the Federal Court and Court of Appeal and law students and others may at the discretion of the Library staff access selected materials for their purpose from the Library and make copies of the same subject to payment at the prescribed rates.

The Library's hours of service are 9:00 a.m. to 5:00 p.m., Monday to Friday.

How to contact the Library

Postal Address:
Library,
Level 1, Office of the Chief Registrar,
Federal Court of Malaysia,
Precinct 3,
Istana Kehakiman,
62506 Putrajaya.
Telephone No.: 03-88804124 / 4126 / 4128 / 4108
Fax No. : 03-88804125
E-mail : library.ik@kehakiman.gov.my

Challenges and future plans

Mr. Edy, the Chief Librarian, says he recognises that the Library is the lifeline of Judges and other Judicial Officers, and he always strives to ensure that yearly budget estimates take into account the requirements of Judges and Judicial Officers through feedback received from them regarding the types of resources and materials to acquire for the Library. He however acknowledges that good and or authoritative text/reference books on the laws relating to banking, insurance, securities (including market manipulations), money laundering, shipping, copyright, private debt instruments such as bonds issuance (both conventional and Islamic) are very much lacking especially in branch libraries.

In this respect, Mr. Edy says he is in constant discussion with the Chief Registrar of the Federal Court regarding adjustment to the allocation in the annual budget to the Library

Shelves of law reports at the library, Palace of Justice

so as to enable it to acquire more such reference books and materials and other materials and resources such as constitutional and public law, human rights, online piracy and civil and criminal procedures, as cases relating to these matters are on the rise in the Malaysian courts to better serve its users. In the year 2011, the Library has managed to spend RM1,762,607.68 from the allocation provided by the Office of the Chief Registrar.

Besides working towards acquiring more reference resources as required by Judges and Judicial Officers as aforesaid, the Library's future plan includes subscribing to more legal databases and e-books to provide a wider range of legal research materials and resources for its users.

The Library welcomes feedback, comments and advice from its users on how to further improve its services.

THE INFORMATION TECHNOLOGY DIVISION OF THE JUDICIARY AND ITS ROLE IN THE ADMINISTRATION OF JUSTICE

Introduction

The important role that information technology plays in the administration of justice has often been articulated but bears repetition. It promotes and facilitates accessibility to justice, ensures expeditious and timeous processes, which in turn contribute to public trust and confidence as well as judicial independence and accountability. In short the optimum utilisation of information technology in the administration of justice contributes to the integrity of the Judiciary.

The Role of Information Technology in the Judiciary's Reform Programme

The success of the reform strategy and programme initiated in 2008 by the Judiciary to improve its performance through, inter alia, the implementation of a delay and backlog reduction exercise, coupled with a monitoring of judges' productivity, can be attributed in large part to the introduction of a cohesive information technology plan which was closely matched to the Judiciary's core objectives. This component of the reform process, namely the use of Information and Communications Technology ('ICT') was expanded so as to augment several key processes in the litigation system by supporting case management, facilitating filings and expediting the course of court trials. In West Malaysia, the programme included the creation of a case management system ('CMS') as well as a Court Recording and Transcription system ('CRTS'). In East Malaysia automated recording and transcription had commenced even earlier (through a different service provider). After some initial hesitancy, judges concurred that the use of these systems enabled them to conduct hearings and trials more rapidly and efficiently. With the widespread utilisation of information technology in the Courts on a day to day basis nationwide, it is estimated that no less than five thousand court personnel actively utilise information technology equipment. Notwithstanding this sizeable usage the current number of employees in the Information Technology Division located at the Istana Kehakiman, Putrajaya is a mere thirty.

The Information Technology Division

The Information Technology Division is headed by Encik Mahassan bin Isa. Given that no less than five thousand personnel nationwide utilise information technology equipment, the functionality and integrity of which falls within the purview of this Division, it came as no surprise that he underscored and emphasised the need to strengthen the Division as his first and most urgent priority. In so doing, he is supported by the independent findings of the World Bank in its report commissioned by the Judiciary and entitled 'Court Backlog and Delay Reduction Program – Malaysia, August 2011'. The following conclusions were reported in relation to the Judiciary's information technology needs:-

'Build up IT Capacity, Attend Hardware and Develop Software

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 located in Putrajaya ...

... 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 decentralise this service given the current and probable future levels of automation ...

... Building up IT capacity clearly should be a priority of the Judiciary, and if need be, negotiated quickly with the legislature and executive ..."

Despite its inordinately low staffing, the Head of the Information Technology Division reported that the Division had managed to achieve significant goals in the course of the last two years. He explained that the Division worked so as to meet the targets stipulated in an Information and Communications Technology Strategy Framework to be achieved by 2015. The mission statement of the Division is to provide the highest quality technology based services so as to support the Judiciary's goal of being accessible, fair, accountable, transparent and timely in the administration of justice. Encik Mahassan went on to explain some of the major milestones achieved by this Division.

The Strategic Framework Plan of the Information Technology Division

The initial priority of the Division was to strengthen the infrastructure so as to create a system that was fast, efficient, modern and secure. This was achieved by ensuring that there was an adequate provision of hardware for all courts throughout the country in the form of laptops, personal computers and printers for all judicial officers and court staff. The initial financing costs for such provision (through a hire-purchase regime whereby equipment is renewed on a rotational basis every three years) was in the region of RM11 million (Ringgit Malaysia Eleven Million) for a period of three years. It is estimated that almost five thousand personnel benefitted from this exercise and no less than three thousand email accounts were set up. The periodic upgrading of the hardware so supplied is necessarily a continuous process.

Next, between 2010 and 2011, the Division undertook the setting up of Local Area Networks ('LAN') in all courts within West Malaysia. The Courts in East Malaysia are scheduled for the similar setting up of local area networks in 2012. The LAN initiative was followed by the setting up of the Wide Area Network, namely, a network to connect all the courts to one another and to the world at large.

In July 2011 the 1govnet initiative was implemented. This initiative allowed for the unification of the entire government network such that each arm of the government and departments within each arm are able to liaise with or be connected to one another. It was undertaken at the behest of the Modernisation and Mobilisation of Manpower Unit ('MAMPU'). Accordingly the costs thus incurred and the management expertise was provided for by MAMPU. This programme was of benefit in that it allowed for a significant reduction in costs to the Judiciary. Prior to the implementation of this programme the Judiciary had incurred quite considerable costs in terms of subscriptions to telecommunications providers such as Telekoms. These costs had extended to as much as RM200,000 (Ringgit Malaysia Two Hundred Thousand) a year for internet access for the Kuala Lumpur Court Complex alone. Such costs have now been transferred to MAMPU.

The IT Division also continuously monitored and upgraded the protection afforded to ensure the integrity of information in the court database. This is an ongoing process. It is achieved by using tools such as firewalls, content filtering mechanisms and band width management. Assistance in this respect is afforded by MAMPU in that it monitors the safety and security features through the 1govnet initiative. When new tools are created or introduced the ICT Division of the Judiciary is appraised of the same. Additionally there is a monitoring report in place within the 1govnet initiative that identifies any weaknesses in the system. Anti-virus programmes are regularly updated.

The foregoing initiatives were largely completed within a two year period from 2009-2011.

The Second Stage of the Information Strategy Framework Plan

In the second stage the primary concern of the Division was to ensure that systems that had been, and which were to be implemented were integrated, effective and secure. The CRTS had been implemented throughout the country. The efficiency of this system has largely been satisfactory and the service provider cum contractor, Formis undertook the servicing and maintenance of this initiative.

The case management and e-filing systems, known as the e-Court system, was installed and is utilised in six locations namely Kuala Lumpur, Putrajaya, Shah Alam, Johor Bahru, Penang and Ipoh. In similar vein, the contractor Formis has, thus far, undertaken the servicing and maintenance of this initiative.

For those regions in the country where the e-Court system was not installed, the Information Technology Division has developed in-house systems known as 'eSPEK – Sistem Pengurusan Kes'. These systems were developed using what is known as an open source system which means there was no utilisation of existing licensed software. The Information Technology Division is particularly gratified by the fact that no costs were incurred in developing this system as no licence fees or other such costs were incurred. The 'eSPEK – Sistem Pengurusan Kes' is utilised in regions in West Malaysia which are not covered by the e-Court system.

Additionally the Kuantan High Court has independently developed and now utilises and maintains an e-Court management system known as 'Sistem Pengurusan Integrasi Mahkamah'. It was developed by a member of the Court staff and is reported to be functioning efficiently.

With no less than four different systems having been installed in various locations nationwide, the critical challenge for the Information Technology Division will be the integration of these several systems. The ultimate goal of the Judiciary is to achieve a cohesive, integrated application system nationwide. This will facilitate the building up of a global database for Malaysia which will,

in turn, enable comprehensive studies to be undertaken in relation to judicial reform and enhancing performance and productivity.

It is of interest to note that the 'e-Sistem Kutipan Hasil dan Deposit' module has been implemented to manage the monies received by courts nationwide, which, it is estimated, can extend to a quantum of RM1 billion (Ringgit Malaysia One Billion). The integrity of the collection and receipt of such monies is ensured by the use of such a system. This financial module is managed by the Finance Division of the Istana Kehakiman. It now only remains for this financial module to be integrated with the e-Court system. It is anticipated that such integration will be achieved by the end of 2012.

The Third and Fourth Stages of the Information Technology Framework Plan

The third stage of the information technology plan relates to education. A key component to achieving optimum benefit from the use of information technology in the Courts is to effectively educate the personnel comprising the Judiciary, by inculcating an organisational culture which promotes the use of technology to improve and enhance the justice system. However the Information Technology Division is at present unable to strategise or implement this educational component by reason of its wholly inadequate staffing. This will, regrettably, impede the growth of the use of information technology within the Judiciary.

The fourth stage pertains to governance so as to ensure that the strategy framework plan is on course. The entire governance of the Judiciary's information technology framework is undertaken by a Committee chaired by the Director-General of the Bahagian Hal Ehwal Undang-Undang. Within the Judiciary, a committee known as the Jawatankuasa Pemandu ICT, manages governance and is chaired by the Chief Registrar.

In conclusion, the Head of the Information Technology Division summarises his vision for the Judiciary thus:-

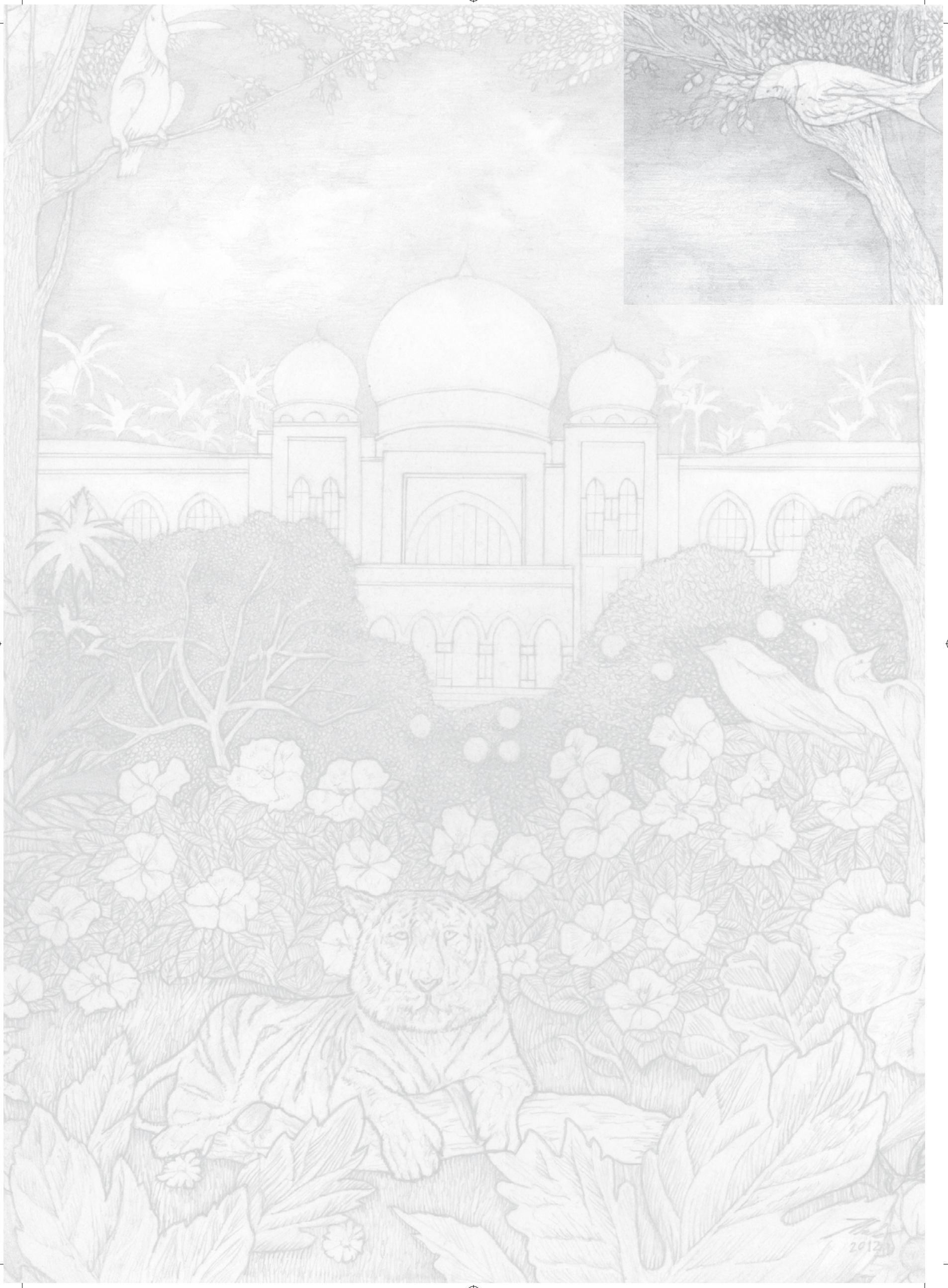
(i) Strengthening of the Information Technology Division in terms of the number of its employees as well as the quality of their collective abilities;

(ii) Formulating and implementing a system of information technology that is unified, integrated, efficient and secure;

(iii) Creating a system or environment for efficient and secure knowledge management such as a knowledge repository with the ability to comprehensively store, retrieve, search and share information nationwide;

(iv) Creating a system for the compilation of a global database for the country which will facilitate access to all users and further judicial reform.

It is evident from the initial success of the reform programme initiated, that adequate resources and funding should continue to be accorded to the Information Technology Division so as to assist the Judiciary in its ongoing journey towards excellence. Arguably, the most important component will be the creation and reinforcement of a clear philosophy of wanting to progress and move ahead with the use of technological advances, so as to meet the continuous challenges that the Judiciary faces in achieving its goals of judicial independence and excellence in the administration of justice.



CHAPTER 4

INITIATIVES

The Court Chair

The Judge's chair is almost similar to that found in England. The Chair is of teak wood with a high back, and above the chair is a carved wooden canopy. Malaysia's coat of arms lies in the centre of the canopy and comprises a shield or escutcheon, two tigers as supports and fourteen point star for a crest and a motto. The Judges's chair has the coat of arms which are symbols of power and ultimate authority of the Federation of Malaysia.

THE SETTING UP OF THE JUDICIAL ACADEMY

Introduction

[1] In August of 2011, I proposed the setting up of a judicial training institute for superior court judges and legal officers assigned to assist them.

[2] To pursue this proposition, I visited the Judicial College in London (formerly known as the Judicial Studies Board) and the legal training division of the Honourable Society of the Inner Temple at the end of October 2011. Subsequently at the beginning of November 2011, I attended the International Conference on the Training of the Judiciary in France.

[3] Both events proved to be very beneficial in respect of what to teach and how to teach. Equally important was the establishment of contacts in Canada, Australia, New Zealand, the United Kingdom and the United States of America which have well developed and proven systems of teaching judges. They can be called upon for advice on the latest and best teaching methods and the supply of teaching materials.

Observations

[4] I append below the following pertinent observations made from my study tour:

Most countries have judicial training schools or institutes

[5] I observed that most countries with a well developed legal system and judiciary have judicial training institutes or schools/colleges with this common objective:

"To ensure that the judiciary acquire and develop the skill and knowledge necessary to perform their role to the highest professional standards."

Subjects taught

[6] Most teaching programmes include the following:

(a) THE TEACHING OF SUBSTANTIVE AND PROCEDURAL LAW

The teaching of substantive and procedural law that is regularly or might be raised in the courts. This includes lectures or an explanation of newly enacted laws. In Malaysia it could cover the Competition Law Act 2010; the Arbitration (Amendment) Act, 2011; various kinds of injunctions (including 'super injunctions'); the amount of costs to be awarded to a successful litigant; the essential elements to be included in a judgment where the charge is under s 39B of the Dangerous Drugs Act 1952; etc.

(b) THE TEACHING OF JUDGE CRAFT

This includes legal skills in assessing the credibility of witnesses, weight of evidence and delivering a well structured judgment (oral and written); dealing with unexpected or controversial situations while trying a case; managing certain types of witnesses (e.g. child witnesses and experts); mediation and communication in court.

(c) THE TEACHING OF LEGAL ETHICS

This covers situations of conflict of interest; avoidance of bias; dealing with members of the public and press in court; conduct in public to include the judge's family members, servants and/or his agents.

(d) THE TEACHING OF MANAGEMENT AND INTERACTION SKILLS

This includes issues of personal management, management of cases, management of officers and staff as well as availability of resources (modern technological equipment); interaction with fellow judges (particularly those sitting in the appellate courts); maintenance of physical and psychological health; financial management and lifestyle planning.

STUDY GROUP

[7] Each educational and training programme is designed on a need to learn basis. It is either taught in groups or to the entire judiciary in a single session. This is to cater to the different and differing levels of judicial knowledge, experience and background of the judges.

Judges attending "The Legal Work Bench"

METHOD OF GIVING INSTRUCTIONS

[8] The teaching method for judges and officers must be specially designed for them to achieve maximum effect. An educationist, specialising in adult education, is always called upon to be a member of the advisory group organising and arranging training and educational courses. This ensures that the most appropriate mode is utilised in presenting the course which has to take into account anticipated prejudices and reluctance on the part of the participants to accept instructions.

[9] Some examples of teaching methods employed are:

(1) Teaching by discussion among participants after a speaker has given a talk on the subject.

(2) Workshop scenario where materials are provided beforehand to participants who would perform some exercise on the subject under discussion.

(3) An audio visual programme with real life scenes which is enacted or is shown to participants for them to familiarise themselves with before making their comments.

Canada is a forerunner in this method of teaching.

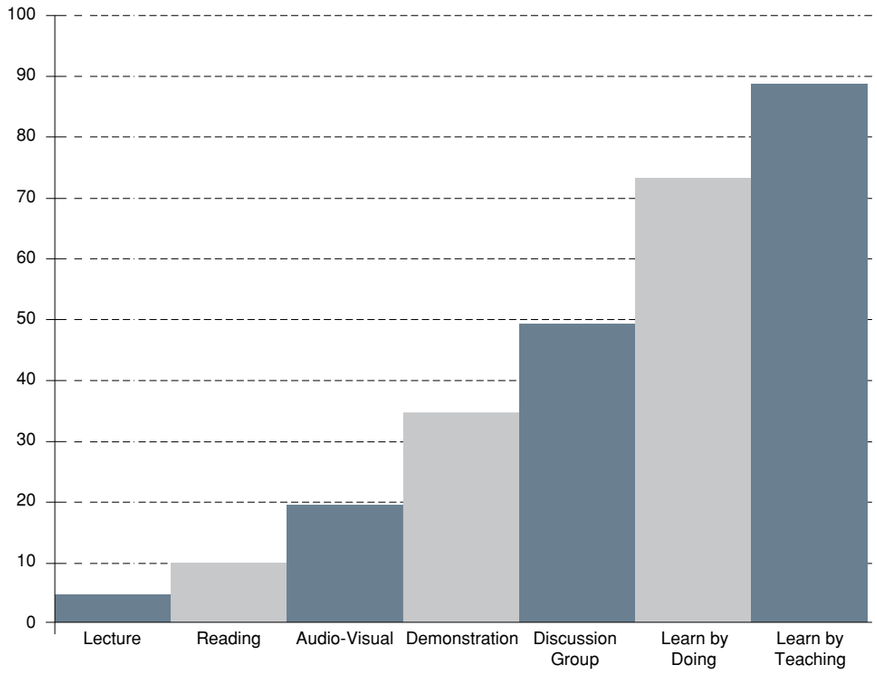
Best teaching methods

[10] The following chart obtained from the Judicial Commission of New South Wales, Australia demonstrates the degree of success in each teaching method:

Judges as teachers

[11] Most teaching courses are conducted by judges themselves unless it is necessary to call on others who are experts in certain specialised

Retention by Teaching Strategies



Source NTL Institute for Applied Behavioural Science
See also Adapted from E. Dale, *Audiovisual Methods in Training* (New York: Dryden Press, 1954,p 43)
by Jane Aiken, 2002

fields. In most countries, judges are encouraged to teach their colleagues with the more experienced taking the lead. Time spent on teaching and attending such courses is considered as part of judicial time, equivalent to presiding over a case. But it is acknowledged that not all judges can be teachers. Those selected as teachers must have interpersonal skills i.e. they must be able to impart knowledge.

Common approach on the subject taught

[12] It is essential for a teacher of a course to agree and accept an approach similar to that of the director of the course. He must not be allowed to depart from the general idea on how the subject should be approached unless the subject under discussion is intended to stimulate the mind of the participants. There must be consistency with the intention of the director of the course on the subject taught. Any differences of opinion would have to be settled before the start of the session. Otherwise, judges and their officers will be confused over the approach taught in instances where one teacher may differ from another on the same topic.

Preparation of teaching programme

[13] As virtually all the teaching programmes require preparation, there is a course director or a programme director who would coordinate and arrange for all the courses. He invariably works with a team of judges to:

(1) identify the courses to be taught;
(2) to whom it should be taught;
(3) the approach to be taken on the subject to be taught;
(4) finding the right teacher to teach it; and
(5) finding the right teaching method to apply.

[14] In my opinion, finding and preparing the right teaching method is the biggest challenge to a course director or a programme director.

Course director or programme director

[15] In England, a course director or the programme director is a full time judge seconded to the Judicial College. He returns to court and sits as a judge for about a month in a year. This enables him to touch base with the current practices in the courts and assists him in recommending and designing appropriate courses for the future.

[16] In the Philippines, the job of the Director of the Judicial Training Institute is assigned to a retired Supreme Court judge.

[17] In other jurisdictions (including the United States of America), a sitting judge on secondment to the judicial training school is the common practice.

[18] I see the benefit of this especially in training superior court judges. Any person holding an inferior rank assigned to prepare courses for them may not command the respect from the participants.

Committee to assist the programme organiser

[19] It is common that the course director or programme director is assisted by a committee of judges representing different levels of jurisdiction in the courts to provide input to the course preparation. They would be able to express and present the needs and requirements of the judges in their respective jurisdiction on subjects to be taught.

Period involved in judicial training

[20] Judicial training and learning is an on-going exercise for every judge throughout his judicial career. However, he should not be overtaxed to a point where his judicial work and family life are compromised.

[21] On the average, in England, Scotland, Australia, New Zealand and Canada, judicial training and learning does not exceed 5 days in a year. I am advised that the optimum period for judicial training and education for each judge should not extend over 10 days in a year.

Recommendations

1. A judges' training institute ('JTI') should be set up immediately to train and educate superior court judges and officers under them.
2. This JTI should be part of the Judicial Appointment Commission ('JAC').
3. A Programme Director ('Director') for JTI should be appointed. Preferably, he should be either a Federal Court Judge or a Court of Appeal Judge.
4. The Director should be answerable directly to the Chairman of the JAC, who is also the Chief Justice of the Federal Court.
5. The Director would recommend to the Chairman of the JAC to invite 4 judges from different levels of jurisdiction in the superior court to assist the Director in preparing and devising a comprehensive training programme covering a period of 12 months. This team should be known as the JTI Committee.
6. There should be at least 1 or 2 JAC staff assigned to assist the JTI Committee.
7. Office premises should be provided to the JTI Committee to carry out their work.
8. Within 3 months from date of inception of the JTI Committee, the Committee must present a comprehensive training and educational programme covering a period of at least 12 months for JAC's approval.
9. Once the JAC approves the programme immediate steps should be taken to prepare the programme, to contact and secure relevant teachers, and to select as early as possible candidates to attend the courses in order to avoid any clash with dates fixed for hearing of cases.
10. The JTI should be the only body to manage and approve all judicial training and education programmes for the superior court judges throughout the country to avoid duplication, confusion, disparity and wastage of judicial time.
11. All costs and expenses incurred in all programmes undertaken by the JTI should be borne by the JAC.

By: Justice James Foong Cheng Yuen
Judge, Federal Court of Malaysia

THE (COMBINED) RULES OF COURT 2012

1. Introduction:

With the intention of streamlining and simplifying civil procedure in Courts, the Rules Committee in 2009 formed a working committee chaired by the Chief Justice of Federal Court, Tan Sri Arifin bin Zakaria. It comprised members of the Judiciary, Attorney General's Chambers and the respective Bar Council members whose term of reference is to formulate one set of rules for both the superior and subordinate Courts.

After two years of meetings, the working committee formulated the Rules of Court 2012 (2012 Rules) which will be the only set of rules governing civil procedures in the High Courts and Subordinate Courts. This of course is in line with other Commonwealth jurisdictions, like England and Australia. This will mean that the present Rules of the High Court 1980 (RHC 1980) and Subordinate Courts Rules 1980 (SCR 1980) will be repealed to make way for a common set of Rules, ie the '2012 Rules'.

The 2012 Rules in essence is an amalgamation of RHC 1980 and SCR 1980 as amended over the last 30 years. Overlapping rules dealing with similar subject matters have been grouped together. There are no radical changes in substance or form. In fact most if not all of the forms remain the same except for some cosmetic changes. There is also no change in terminology or any attempt to use plain English as was done in Australia. To ensure a smooth transformation, the 2012 Rules adopt the RHC 1980 and continue to maintain the same numerical orders for the apparent reason that the existing orders follow the course of an action and they are familiar to both the Bench and the Bar.

Under the new regime, one obvious benefit for legal practitioners is that they will only need to keep one set of rules and forms in civil litigation for all Courts, in either paper or electronic form.

2. Application and transitional provisions:

To ensure that the implementation of the 2012 Rules do not affect proceedings filed prior to their enforcement, there is a specific savings provision stating that any pending action or application that was commenced by way of petition, motion or originating motion before the date of coming into operation of these Rules shall not be affected by these Rules and shall continue as if these Rules had not been enacted. There is also a further provision stating that any references to the RHC 1980 and SCR 1980 in any legislation shall be construed as references to the Rules of Court 2012.

3. Regard to Substantive Justice enhanced:

The present Order Rule 1A and Order 2 rule 3 RHC which concern non compliance with any of the rules have been enhanced to direct Courts to have paramount regard to substantive justice in dealing with technical non compliance on the procedural rules.

The new Order Rule 1A has been amended with the deletion of the phrase 'justice of the particular case' and substituting it with the phrase 'overriding interest of justice'. And Order 2 rule 3 which relates to preliminary objection to non compliance of the rules has also been amended to dictate that such preliminary objection on non-compliance must not be allowed unless it has 'occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both'. This renewed emphasis on substantive justice is timely and in fact reflects the sentiments of the Federal Court some three decades and more ago in Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188 at p. 189 where it held as follows:

> The rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice. In the bad

old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.

But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.

This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in Re Coles and Ravenshear:

> Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

4. Notable amendments and additions to the 2012 Rules

(i) **Only two modes of originating process:**

With the view of reducing and simplifying modes of initiating cases in Courts, there will be only two forms of commencing civil proceedings in both the High Courts and Subordinate Courts and they are by way of writ and originating summons. Prior to the issuance to the writ, it must be endorsed with a statement of claim in the usual form as we understand it now.

With this introduction, the practice of having 'return dates' endorsed on the summons as practised in the Subordinate Courts will be abolished. This will in effect abolish mention days of entering judgment in default of appearance or defence or checking the status of the summons by Subordinate Courts. The High Court's administrative practice of entering default judgments will be the prevailing practice in all Courts which will provide more judicial time for the Subordinate Courts to hear cases.

The principle that 'originating summons' be used only where there is no dispute of fact and 'writ' be used where there is substantive dispute of fact' continues to apply under the 2012 Rules.

With this amendment, the well known 'summons in chambers' in the High Court will now be known as 'Notice of Application' as is known in the Subordinate Courts now.

(ii) **One type of Memorandum of Appearance – Order 12.**

Under the 2012 Rules, the distinction between unconditional and conditional appearance will be abolished in which any defendant is only required to enter a Memorandum of Appearance which will not be treated as a waiver by him of any irregularity in the writ or service thereof and the defendant is at liberty to apply to the court for an order setting aside the writ or service of the writ on him.

(iii) **No prohibition to serve pleadings during Court Vacation**

Pleadings may be served during the Court Vacation under the 2012 Rules with the deletion of O18 r. 5 RHC

(iv) **Amendment of pleadings by agreement before trial**

The new O 20 r 12 provides that any pleading may be amended by written agreement of all parties before commencement of the trial except that such amendment shall not consist of the addition, omission or substitution of a party.

(v) **Payment Into and Out of Court**

Under the 2012 Rules, Order 22 which provides for payment into and out of court is omitted. With a view to encouraging settlement between litigants, there will be a new Order 22B which provides for Offer to Settle.

Under this Order, any party may prior to the disposal of the case make an offer to settle which is deemed to be an offer of compromise made without prejudice. Any offer to settle and any communication relating to it will remain confidential unless the same is accepted by the other party.

(vi) **Discovery of Documents –Order 24**

Under the 2012 Rules, discovery of documents prior to the commencement of proceedings by way of originating summons will be possible under the new O24 r 7A(1). Discovery of documents after commencement of proceedings against a person who is not a party to the proceedings will also be allowed under O24r7A (2). The Court will exercise its discretion under O24 r7A if the circumstances are such that it is just to do so and may impose security of costs on the applicant.

O 24 r 1 (Mutual discovery of documents) and O 24 r 2 (Discovery by parties without Order) will be abolished.

(vii) **A newly structured Order 34 on Pre-trial Case Management for just, expeditious and economical disposal of proceedings**

Wide powers and discretion are given under this newly structured O. 34 to the court in giving any order or direction as it thinks fit to secure a "just, expeditious and economical" disposal of proceedings. In view of those wide powers in case management, O 3 r 6 which requires a party to give notice of intention to proceed after a year's delay in the proceeding will be repealed as it has been found to be redundant. For the same reason of redundancy, O.25 (Summons for Directions) will also be repealed.

Courts in recent times have been actively and vigorously practicing case management through Order 34 by issuing appropriate directions to achieve the goal of a 'just, expeditious and economical disposal' of cases. Compliance with Court directions given during case management has now gained importance in the Courts' discretion in allowing amendments to pleadings or striking out cases. In Australia, the apex Court in Aon Risk Services Australia Limited v Australian National University [2009] HCA 27; (2009) 83 ALJR 951 had held that case management principles are relevant considerations in determining application for amendments to pleadings. This interpretation is premised on the philosophy that Courts must 'facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense'. Gummow, Hayne, Crennan, Kiefel and Bell JJ concluded as follows at [111] – [112]:

> "An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in J L Holdings which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future. A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why,

in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.....Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants.."

Mediation:

Practise Direction No 5 of 2010 on Mediation will be given statutory force under Order 34 rule 2(a) which specifically arms the Court the power to mandate litigants to partake in mediation if it would secure a just, expeditious and economical disposal of any proceeding. This is timely as the Courts in the last five years have actively and successfully used mediation as one of modes in settling disputes in Courts. It also emphasises the importance the judiciary now places on mediation and is reflected with the existence of a mediation centre in the Duta Court complex in Kuala Lumpur. Under the Practise Direction 5/2010, the Courts may encourage mediation as a mode of settling the dispute and such dispute may be mediated by a judge or a mediator agreed by the parties which allows the use of mediators not attached to the Courts.

(viii) **Witness Statements**

In recent times, the use of witness statements in trial has become the norm and this is reflected in the present Order 35A (inserted in 2000 and recently amended on 24 June 2011 vide P.U.(A) 210/2011).

Under the 2012 Rules, Order 35A will be repealed and the regime of witness statements will be provided for under a newly amended Order 38 which deals with the topic of 'Evidence'.

Evidence by witness statements shall continue to be the mode of giving evidence for trials subject to any direction as may be given by the Court under O. 34 r.2(2). Parties will still be required to exchange witness statements seven days prior to the hearing dates and failure to comply with such timeline, such witness may not be allowed to give oral evidence unless with permission by the Court.

(ix) **Concurrent evidence : Expert of parties**

There will be also a new Order 40A which gives legal force to what is known as 'concurrent evidence of experts' currently practised in the Courts in Sarawak and Sabah for Native Customary Rights cases and forgery cases. This new Order provides that the experts' paramount duties are to assist the Court to reach a just decision and override their obligations to the person from whom he has received instructions or by whom they are paid for their services. Counsel with the leave of the Court may put written questions to the opponent's experts who shall answer them in written form. Of great importance, the Court may direct a discussion among the experts to formulate areas of dispute and agreement together with the reasons for such dispute and agreement. Experiences from the other jurisdictions show that it has helped the Courts to better understand and appreciate technical expert evidence. It has also shown that much judicial time could be saved.

(x) **Late payment charge on judgment debts (O. 42, r. 12A)**

The re-numbered O. 42 r. 12A provides that where a judgment debt is directed on a financial transaction carried out in accordance with Shariah, the Court shall impose late payment charge as permitted to be charged at such rate approved by rulings of the Shariah Advisory Council.

(xi) Period for making an application for **judicial review**

Under O. 53 r. 3, an application for judicial review shall be made promptly and in any event within 60 days (in substitution of 40 days under the RHC 1980) from the date when the decision is first communicated to the applicant. An application to extend the time must be served on all respondents and must be heard inter partes and the court may extend the time if there is a good reason for doing so.

(xii) **Appeals from Subordinate Courts to the High Court under O. 55.** With the 2012 Rules, appeals from the Subordinate Courts will be regulated by one set of rules as opposed to the present regime which is regulated by the (RHC 1980) and Subordinate Courts Rules 1980 (SCR 1980) which in the past decade has caused much confusion among legal practitioners.

(xiii) **Costs under O. 59**

Various rules and scales for costs in the subordinate courts and the High Court have been substantially amended and all the legal practitioners should peruse this newly structured order carefully whenever costs are in issue. It is anticipated that the filing fees and costs will be substantially increased to reflect the present cost of living standards.

(xiv) **Electronic filing**

Order 63A provides the legal framework for documents to be filed electronically with the Courts and in substance formalize and give legal status to matters such as storage of documents in electronic form, service of electronic documents on parties, authenticity of electronic documents, and digital signatures of both Court officials and legal practitioners.

This new Order does not make e-filing compulsory which is understandable in view of infrastructure deficiency in broadband network in smaller stations around the country. It also allows the e-filing system to identify any issues which will arise with its use.

In the Kuala Lumpur Duta Courts, since 1.3 2011 all documents are being either filed electronically by the legal practitioners from their office or through the service bureau which under the 2012 Rules will be given legal force under O64A r.4(1). The service bureau operating hours are from 8.00 am to 3.30 pm.

Legal practitioners wishing to utilize the e-filing system must be registered with the Courts and obtain an authentication code which can be attached to the legal firm or the individual legal practitioner. Under the e-filing framework, payment via internet banking will be made possible and special arrangement must be made between the legal practitioners and their respective bankers. Thus far, approximately 193,000 (online) 650,000 (bureau) documents have been e-filed in the High Court of Malaya. For the High Court of Sabah and Sarawak, 67,070 documents have been filed online.

The time of lodgement of the document shall be deemed to be issued upon successful payment by the registered user while the time for the service of the documents shall run upon receipt of notification of the Registrar that the documents had been received in the computer system. If however there is a need to do so and if the Registrar is satisfied that there is reason to treat a document having been filed earlier than the date of payment, he or she may cause the electronic filing system to reflect such earlier date – Order 64A r.10(6).

Court documents of any case can now be accessed through any laptops or tablets from anywhere in the world or in the comfort of their home by legal practitioners and Judges.

The ultimate aim of this e-filing system is to have a 'paperless judicial system'. Currently, most lawyers use their Ipads and other tablets to attend Court hearings and Judges access the CMS system when they hear cases. There is little doubt that such mode of hearing will be a common feature in the near future.

(xv) **Newly structured O. 69 on Arbitration proceedings**

O. 69 has been amended / modified in tandem with various provisions in the Arbitration Act 2005.

(xvi) **Insufficient or excess filing fees (O.92, r. 2A)**

The new O. 92 r. 2A provides that where any document is filed in Court with insufficient or excess fees, the Registrar shall accept those documents and shall give notice to the solicitor or party concerned to make good the shortfall within seven days, failing which the Registrar is at liberty to reject the documents. Where any document is filed in Court with excess fees, the excess fees shall be treated as revenue and need not be refunded.

It is also to be noted that with the deletion of O. 92 r.3, the Registrar does not have the power to reject the filing of any document at the registry on the ground of non-compliance with the rules of the court.

5 Conclusion:

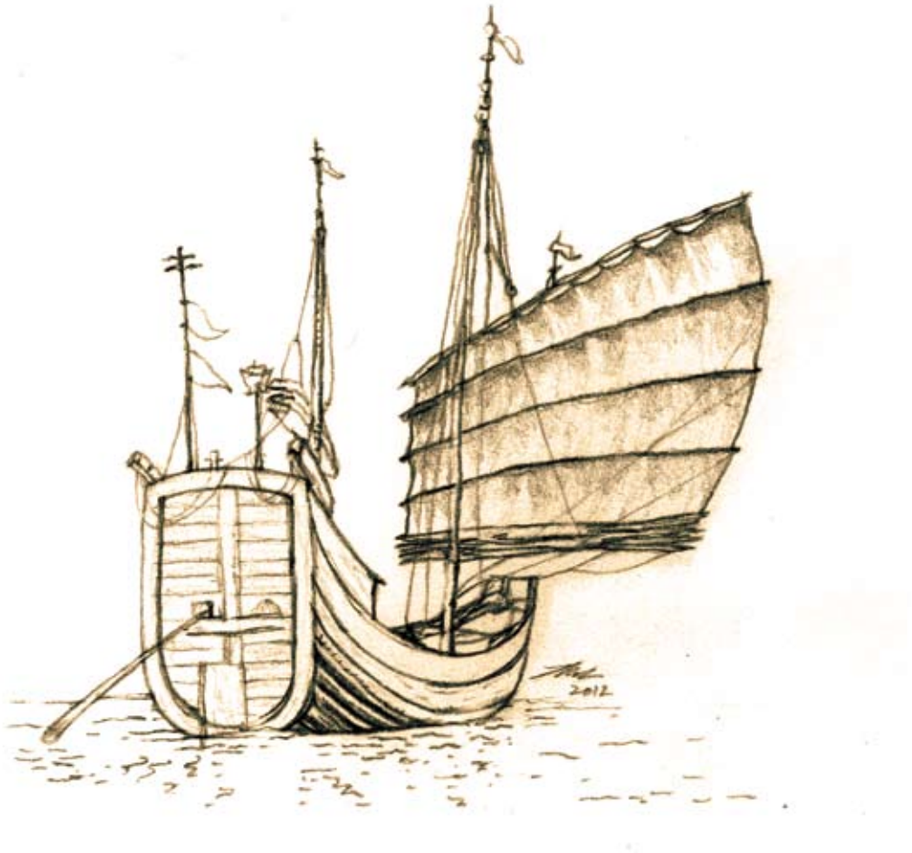
The 2012 Rules are expected to be gazetted in the middle of the year. With the extensive powers given to the Court in case management and the willingness of the justice system to involve mediation as part of dispute resolution under the 2012 Rules, the Judiciary continues to take steps to change the mindset and culture of dispensing justice and to reflect the prevailing environment of transparency, accountability and efficiency.

REVITALISING MALAYSIAN ADMIRALTY LAW

The Malaysian peninsula is a strip of land extending from the vast mainland known as Asia into the waters of the South China Sea. On either side it is flanked by the Indian Ocean and the Straits of Malacca to the west, and the China Sea to the east. East Malaysia is another elongated strip of land, extending in length to almost seven hundred miles and some 150 miles in depth. It is bounded by the South China Sea. Its exquisite positioning from a geographical perspective means that it is able to control the main trade routes plying to and from China and the Far East. Thus its critical importance in the sphere of maritime trade cannot be understated.

Historical Perspective

Historically the peoples who have populated the South East Asia region have organised their lives so as to benefit from the surrounding land and seas. It has been commented that the coastal Malays in particular regarded the seas as natural appurtenances to the land they occupy.[1] This is personified by the words 'Tanahair' which means, literally, 'land and water' embodying the unity assumed between the water and the native land. The seas also played a significant role in the defence, economic and political matters of the State concerned.



[1] See Tunku Sofiah Jewa, "Law of the Sea" in *Public International Law: A Malaysian Perspective*, Volume II (Kuala Lumpur: Pacifica Publications, 1996), p 634;

Dating as far back as 1276, during the reign of the first sovereign of the Malacca Sultanate it was found that there was already in existence a set of laws of the sea applicable in areas within the jurisdiction of the Malacca Sultanate. These laws were known as the Malacca Code.[2] It provided for "laws to be enforced on ships, Junks and Prahus". It encompassed wide aspects of admiralty laws ranging from the authority of a person on board a Prahu, which was the term for every description of a vessel, to safety regulations for such vessels. Additionally, laws on crimes at sea and punishment on board a Prahu were also specified. It would appear that the Code was promulgated to deal with trading activities within the region, which thrived for centuries under the Malacca Sultanate.

The Kedah laws of A.D. 1650 are some of the oldest Malay port laws which prescribe a variety of port regulations including provisions for a poll-tax on immigrants, port dues on ships from Gujerat to Kalinga (as it then was) down to the duty payable for the import and export of slaves, tin and elephants.

These ancient legal digests evidence the fact that the control of maritime and riverine routes was an integral part of the political and economic structure of the Malay archipelago for some considerable time. It is remarkable that such law, order and protocol governed matters at sea in that era, several centuries ago and, moreover, was successfully administered. It is however regrettable that despite such a victorious civilisation several centuries ago, we have failed to perpetuate or develop those codified laws of the sea.

The Present Day Legal Regime in Malaysia

Travelling seamlessly in a time machine to present day Malaysia, it is evident that Malaysia has a plethora of maritime and ocean laws. The country enjoys a mix of national and international legislation. Ranging from the earliest recorded 20th century national law, namely the Waters Act 1920 which was enacted to provide for the control of rivers and streams, numerous pieces of legislation relevant to shipping, navigation and ports were duly promulgated and enforced. This includes the Carriage of Goods by Sea Act 1950, Merchant Shipping Ordinance 1952, Penang Port Commission Act 1955, Port Authorities Act 1963 and the Ports (Privitisation) Act 1990.[3]

More significantly, the admiralty jurisdiction of the Malaysian courts is, as provided for in the Courts of Judicature Act 1964, *"...the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the Supreme Court Act 1981."* That this is so is almost entirely attributable to the advent of British colonial rule and its attendant introduction of the common law system into a diverse country that practiced pluralism prior to their governance. The then ruling British were active in pursuing their interests in maritime trade arising from the abundance of agricultural produce and tin in the Malay states.

The development of the admiralty jurisdiction in Malaysia has therefore, in recent times been entirely influenced by its colonial and constitutional history. We look not only to the case law and precedents handed down by the United Kingdom, but also domestic British law, in adjudicating Malaysian maritime claims. While this in itself may not be entirely objectionable, as international trade looks to national judicial systems that are predictable, provide well-reasoned decisions and enforce obligations that arise in international trade, it cannot be ignored that Malaysia is utilising legislation that has been reviewed and revised even in the country of its birth no less than twice. This signals the need for an urgent review and promulgation of a consolidated and comprehensive statute that deals efficaciously with the maritime needs of this nation.

The launch and setting up of the Admiralty Court in Kuala Lumpur in 2010 was designed primarily to enable all categories of maritime related claims to be dealt with expeditiously

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[2] See Juita Ramli, "A New Maritime Legal Regime for Malaysia within the Context of Ocean Governance" (1999). The Malacca (Maritime) Code was found and translated by Sir Stamford Raffles in *The Maritime Institutions of the Malays*, translated from the Malay language, published in 1820.

[3] See Juita Ramli, "A New Maritime Legal Regime for Malaysia within the Context of Ocean Governance" (1999).

at one centralised location in a court which routinely deals with such matters. It provided a forum of choice to maritime litigants. The benefits to be gained from an internationally recognised Admiralty Court like London, Hong Kong, New York and Singapore cannot be overemphasised. However in this jurisdiction the setting up of the Admiralty Court does not in any manner derogate from the ability of parties to continue to litigate their claims in other courts throughout the country if they so choose. As an archipelago, Malaysia's fortuitous position allows for several of its ports to be attractively located for maritime trade. The fact that timely and efficient adjudication can be expected from each of the courts located close to these ports, offers considerable choice and a saving of costs and time for parties requiring dispute resolution. In this context it is pertinent that the High Court in Malaya and the High Court in Sabah and Sarawak have had a long history of adjudicating maritime disputes. The adjudication of maritime claims comprises a part of the portfolio of cases disposed of in various courts throughout the country. As such the framework for an effective, skilful and expeditious disposal of cases is already in place throughout East and West Malaysia. What is sorely needed is a revitalising of the Malaysian maritime jurisdiction in the form of a consolidated and comprehensive domestic legal regime. Bearing in mind that the Malaysian courts exercising Admiralty jurisdiction are competing not only in the region but across the globe, the need for such legislation is compelling.

The Future

With the launch of the National Maritime Plan on 5 December 2011, there is a comprehensive and concerted strategy in place to develop the shipbuilding and ship repair industry. The Malaysia Shipbuilding/Ship Repair Industry Strategic Plan 2020 proposes to generate a significant contribution to the gross national income and create 55,000 jobs for the nation by 2020. In line with the needs of the nation, the judiciary must continue to be equipped and organised to facilitate and adjudicate on maritime related matters. The Malaysian judiciary possesses the salient requirements to succeed in establishing a successful regime of maritime adjudication. It enjoys the strategic location of courts close to each of the key ports in the country. It enjoys the presence of competent and efficient judges in these areas. The strength of this combination is and will continue to be enhanced by the development of case law which is well-reasoned, predictable and consonant with international benchmarks. The natural corollary will be that the confidence of the players and participants of the maritime industry, both nationally and internationally will, with time, increase. However a key requirement that is currently absent is a comprehensive maritime code to meet the unique needs of Malaysia. Given the ability of our forefathers to promulgate the comprehensive *Malacca Code* in an era when life was considerably simpler, the provision of a statute to meet our current needs is surely well within our capability.

COURT-ANNEXED MEDIATION

A brief background

On 5 November 1999, the Malaysia Mediation Centre ('MMC') was set up under the auspices of the Bar Council. There are presently 298 registered MMC mediators. Between 2000 and 2011, a total number of 215 cases were referred to the MMC of which 66 cases were settled.

At a conference on Court-Annexed Mediation in Kuala Lumpur on 1 and 2 February 2010, Judge John C Wallace advocated the use of mediation as an integral part of the case management process by which the number of cases which proceed to trial can be significantly reduced. According to Judge Wallace only about 1% of cases registered in his courts proceed to trial as a result of strict case management and mediation. On 16 August 2010, Practice Direction No. 5 of 2010 was issued empowering the courts to give directions for mediation for the just, expeditious and economical disposal of cases.

The precursor to court-annexed mediation in Malaysia - the Kuala Lumpur Court Mediation Centre ('KLCMC') began operations on 1 April 2011. As at 31 December 2011, a total number of 134 cases were registered for mediation; 36 were settled at mediation, 30 unsuccessful and 68 cases pending. The KLCMC was followed by the setting up of the Johor Bahru Court Mediation Centre ('JBCMC') on 5th September 2011. As at 31 December 2011, 47 cases were registered, 36 cases mediated, 20 settled, 16 unsuccessful and 11 pending. The KLCMC and JBCMC were definitive steps towards making mediation a core component of the court adjudication process. This was underscored by our Chief Justice The Right Honourable Tan Sri Ariffin Zakaria at his inaugural speech on 14 September 2011 where His Lordship also said "*Melalui mediasi kes-kes tidak perlu dibicarakan dan ianya dapat diselesaikan dengan lebih cepat dan dengan kadar kos yang rendah. Kes-kes yang diselesaikan akan muktamad kerana tidak ada rayuan. Kita perlu mempromosikan mediasi kepada orang ramai. Perbicaraan hendaklah menjadi pilihan terakhir*."

What is mediation?

Mediation is a form of facilitated negotiation. It is a process intended to enable the parties to negotiate. In a sense, mediation is already being practised in our courts when counsel for the parties, either at their own request or at the instance of the judge, stand down to enable the parties to discuss the matter among themselves. If the case is settled all that the judge has to do is to record consent judgment pursuant to the agreement reached between the parties.

A mediator's role is to help people negotiate more effectively than they could on their own. The key words are '*more effectively than they could on their own*'. The mediator helps the parties to find solutions to their dispute that makes more sense to them than going for trial. The mediator helps them find common ground and find a creative yet realistic solution to their disputes.[1]

Mediation may be contrasted with other forms of dispute resolution such as arbitration, adjudication, expert determination where the 3rd party is the formal decision maker for the parties. Unlike an arbitrator or adjudicator,[2] a mediator is not the formal decision maker. The parties decide on how they want to settle the case; there is no coercion, force or threat to settle. Even if the settlement terms seem unfair to one party, it is alright so long as the parties can live with the agreement. Settlement of the dispute enables the parties to get on with their lives. From a judge's standpoint, it is beneficial as there will be no appeals and no grounds of judgment to write.

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[1] Alan J Stitt, *Mediation: A Practical Guide* (Cavendish Publishing, 2004).
[2] See, Ir. Harbans Singh KS, "*What is Adjudication?*", KLRCA Newsletter, Apr-Sept 2011.

A mediation room at the High Court in Johor Bahru

Why mediate?

Mediation is no longer regarded as another form of alternative dispute resolution. Mediation has become an increasingly common and popular method of settling disputes in many jurisdictions. In fact mediation has already been practised by the courts in Australia, USA, Canada, Singapore, Thailand, the Philippines and Hong Kong. In the Philippines, it was reported that between 2002 and 2010, a total number of 166,901 cases were mediated. Of that number, 111,528 cases were successfully settled.[3]

Mediation is widely perceived by its proponents as a true free-standing independent profession. This was evident at the 2nd Asian Mediation Conference. The International Mediation Institute is actively promoting mediation through better understanding, appreciation and acceptance by users, raising competency and quality, training, education and transparency.

Is mediation alien to Malaysian culture?

Culture plays a significant role in shaping a person's perception of conflicts and their resolution. As a matter of fact, mediation in various forms have been a tradition in Malay, Chinese and Indian culture. India has a history of dispute resolution through mediation known as 'Panchayat' conducted by village elders. Decisions were binding on them often as a token of respect to the elder. Even after the formation

[3] Dean Eduardo De Los Angeles of the Philippines, 2nd Asian Mediation Conference 2011, Kuala Lumpur.

of a formal legal system, such village-based mediation was still used even in settlement of complex disputes. Their popularity reflects the fact that such dispute resolution allows for the maintenance of relationships.[4]

China also has a long history of resolving disputes through the intervention of a respected third party by way of mediation. They prefer dissolution of disputes to resolution of disputes. They tend to act in preventative ways so that the problem does not get out of proportion and escalate into a messy conflict. A popular Chinese saying '*Let big problems become small, and let small problems disappear*' underlines their group goals of harmony and compromise. Litigation also runs counter to the observance of harmony and the Chinese discomfort at direct confrontation.[5]

In Malay society, pressure is on disputing parties to resolve their dispute quickly. Malays are reluctant to involve outsiders to avoid publicity. *Saving face* is important. An open resolution process, as in court, is something they try to avoid. Besides the parties themselves engaging in consultation, a common method is to refer to a third party, usually a close family member, respected elders such as parents or individuals who are close to the family. In traditional Malay social structure, the family represents the most important instrument in regulating individual's lifestyles. Besides the penghulu or imam, the kathi is another third party who is often called upon to resolve family disputes. The kathi tends to resolve disputes through consensus (*muafakat*) rather than trial. Resolving disputes through consensus is a common practice in Malay society. Malay majority's cultural emphasis on good deeds, comprises *adab* and *rukun*. *Adab* requires one to show courtesy in word, deed and action to others; *rukun* directs one to encourage social harmony in the family, community and society.[6]

Mediator's role

The mediator's primary role is to assist the parties to come to their own decisions. It is not to protect the interests of the weaker party. Plaintiffs might settle for less money than they are entitled to for a variety of reasons. They might want to achieve finality in the dispute, to avoid the uncertainty and stress of litigation, to get a lesser amount now rather than a greater amount sometime in the future, or in order to turn a corner and get on with their lives. On the other hand, the defendants might also agree to a commercial settlement in order to avoid bad publicity or to save legal costs, even if the case against them is a weak or hopeless case.

Four kinds of mediation

The particular skills and techniques used by mediators will depend in part on which models of mediation they are providing to the parties. There are four models, each of which is associated with a different kind of mediator role.[7]

[compromise]

Settlement Mediation – Mediator encourages the parties to reach a point of compromise between their positional claims through various forms of persuasion, 'reality testing', and pressure without any significant emphasis on the process of decision making. – personal injury cases

[defining problem]

Facilitative Mediation – Mediator conducts the mediation process along strict lines in order to define the problem comprehensively, focus on the parties' needs and interests and attempt to develop creative solutions which the parties can apply to the problem. – civil and commercial disputes

[improving relationship]

Therapeutic Mediation – Mediator assists the parties to deal therapeutically with the underlying causes of their problem, with a view to improving their relationship as a basis for resolving their dispute. – divorce, custody, probate, disputes between relatives, neighbours, business partners, shareholders.

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4 BASESwiki.org: Business and Society Exploring Solutions – A dispute resolution community.
5 Bee Chen Goh, *Negotiating with the Chinese* (1996).
6 Joel Lee & Teh Hwee Hwee, *An Asian Perspective on Mediation* (Academy Publishing, 2009); Raihanah Azahari, "The Development of Family Mediation in Malaysian Muslim Society", (2010), Vol. 18 No. 2, *European Journal of Social Sciences*.
7 Laurence Boulle, *Mediation: Skills and Techniques* (Butterworths, 2001).

[advice on merits]

Evaluative Mediation – Mediator guides and advises the parties on the basis of his expertise with a view to their reaching a settlement which accords with their legal rights and obligations, industry norms, or other objective social standards; focusing on the mediator's assessment and standard of fairness. – motor vehicle accident cases, construction disputes, land acquisition cases, professional fees claims.

Personal injury cases

The majority of personal injury cases are motor vehicle accident cases. More than 30,000 personal injury cases are registered in the subordinate courts every year as can be seen in the following table.

Year	Sessions Court	Magistrate's Court	Total
2009	24,541	8,496	**33,037**
2010	35,739	12,337	**48,076**
2011*	22,886	12,320	**35,206**

* As at 30th November 2011

The high number of such cases underscores the need to implement court-annexed mediation for the expeditious disposal of such cases. Ideally, all personal injury cases should be mediated. The only claim that plaintiffs make is for damages which are quantifiable. Most, if not all motor vehicle accident cases are tried at the subordinate courts; and there are only two principal issues to be tried, viz., (1) liability; and (2) quantum.

The defendant either denies liability or contends contributory negligence on the part of the plaintiff. The plaintiff wants to be compensated in monetary damages. Given a choice, the defendant prefers to pay as little as possible. He disputes on the quantum. Therefore, there are no underlying interests to uncover. It is only a question of liability and quantum at the end of the day.

In such cases, Facilitative Mediation is not recommended as the needs and interests are already on the table. Neither is Therapeutic Mediation recommended since there is no relationship to be preserved or improved between the parties. Instead, a mix approach of Settlement Mediation and Evaluative Mediation is preferred. Evaluative Mediation to tackle the liability and quantum issues; and Settlement Mediation to deal with issue of quantum – to bridge the gap between the amount the plaintiff wants and the amount the defendant is prepared to pay.

There are other features which are also peculiar to motor vehicle accident cases. Whilst the defendants are the individuals or companies (tortfeasors); however, in reality the conduct of defence is controlled by the insurance companies. Even if the plaintiff is present at the mediation it is the lawyers who ultimately make the decisions. The defendant tortfeasor is not present at the mediation; instead the defence lawyer and insurance company representative are present; the insurance company representative is the decision maker.

As mediation is a flexible process it can be varied and adapted to fit any given situation. What is important is to initiate the mediation process to enable the parties to negotiate. In small stations, where a single Magistrate sits alone or on circuit, the Magistrate can initiate 'party to party' mediation. The Judge or Magistrate can encourage settlement by advising the parties to negotiate among themselves at case management stage or on the morning of the trial date. If party to party mediation fails, the Judge or Magistrate can proceed to hear the case. In bigger stations the court-annexed mediation process can be tailored to suit the particular local situation. If the parties are given some time to negotiate among themselves the prospect of settlement is usually good. This is patent from the high number of consent judgments recorded for motor vehicle accident cases on the first day of trial.

Judges as mediators

Judges, magistrates and registrars can be very effective and persuasive mediators. This

8 Conference on Applied Mediation, 8-10 July 2011, Johor Bahru.

is because judges, magistrates and registrars possess power and influence. This power and influence is derived from a number of factors which we can use to our advantage as mediators. They include:

- *Associational status* – the power derived by virtue of your position as a Judge, Magistrate, or Registrar. In our culture, there is respect for authority and people in authority; if fact, Judge Gordon Low[8]remarked that, people in the USA do not generally respect authority or people in authority.
- *Expertise* – the power that derives from your knowledge and understanding of the dispute, of the mediation process, of negotiation behaviour and substantive knowledge about the matters in dispute – your assessment of the evidence, liability and quantum of damages .
- *Control of process* – the power from your role as mediator, including the ability to make decisions on procedural matters, such as who speaks first, when to move from the discussion of one issue to another, or when to adjourn.
- *Personal attributes and skills* – the power derived from your personality, inter-personal skills, intellectual capacity, linguistic abilities, etc.
- *Access to restricted information* – the power from knowing each party's resistance points, their priorities, the factors motivating them, and other information they may disclose to you on a confidential basis.
- *Ability to transmit messages* – power from your position as the sole source of communication between the parties when they are in separate sessions or the mediation is conducted on a shuttle basis.
- *Ability to evaluate* – power from your knowledge and expertise to express an opinion to the parties on a particular matter. Your opinion is your considered view on some matter but without any firm advice or recommendation on which course of action to pursue.
- *Moral pressure* – power by virtue of your neutrality and independent status.

No agreement/partial agreement

If the mediation ends with no agreement, do not despair. Try to determine whether there are any issues on which the parties do agree. A document should be drafted setting out what has been agreed. This helps to narrow the issues at the trial, saving time and costs.

Complete settlement

Once it is clear that all issues have been resolved, confirm with each party the precise terms of the agreement and reconfirm that they have the authority and power to agree to the settlement. Ask the lawyers to draw up the consent judgment and record consent judgment promptly before they change their minds.

Concluding remarks

The enthusiasm and drive to promote mediation internationally was demonstrably evident at the 2nd Asian Mediation Conference. It was interesting to see how popular mediation has become internationally. As the initiative taken by the MMC has not seen fruition over 11 years, the implementation of court-annexed mediation in our courts is timeous. It compliments the judiciary's transformative programmes including stock-taking and improved filing system, court tracking system, specialised courts, e-court system (CMS, QMS and CRT), e-filing, e-cause list and tele-conferencing. To take court-annexed mediation to the next level, mediation should be promoted to all stakeholders – litigants, lawyers, professionals, trade and business associations and the like.

Through court-annexed mediation the number of cases proceeding to trial can be significantly reduced. For court-annexed mediation to be effective, the reference to mediation must be made promptly once the case is registered. It should be done in tandem with case management and the case set down for early trial. In the event that the dispute is not settled at mediation, the parties face the prospect of early trial. Trial should only be a last resort. The prospect of early trial is not appealing to lawyers or litigants. Ultimately, most people prefer not to go to trial and they will avoid going to trial if there is a good reason; so we give them a good reason – court-annexed mediation!

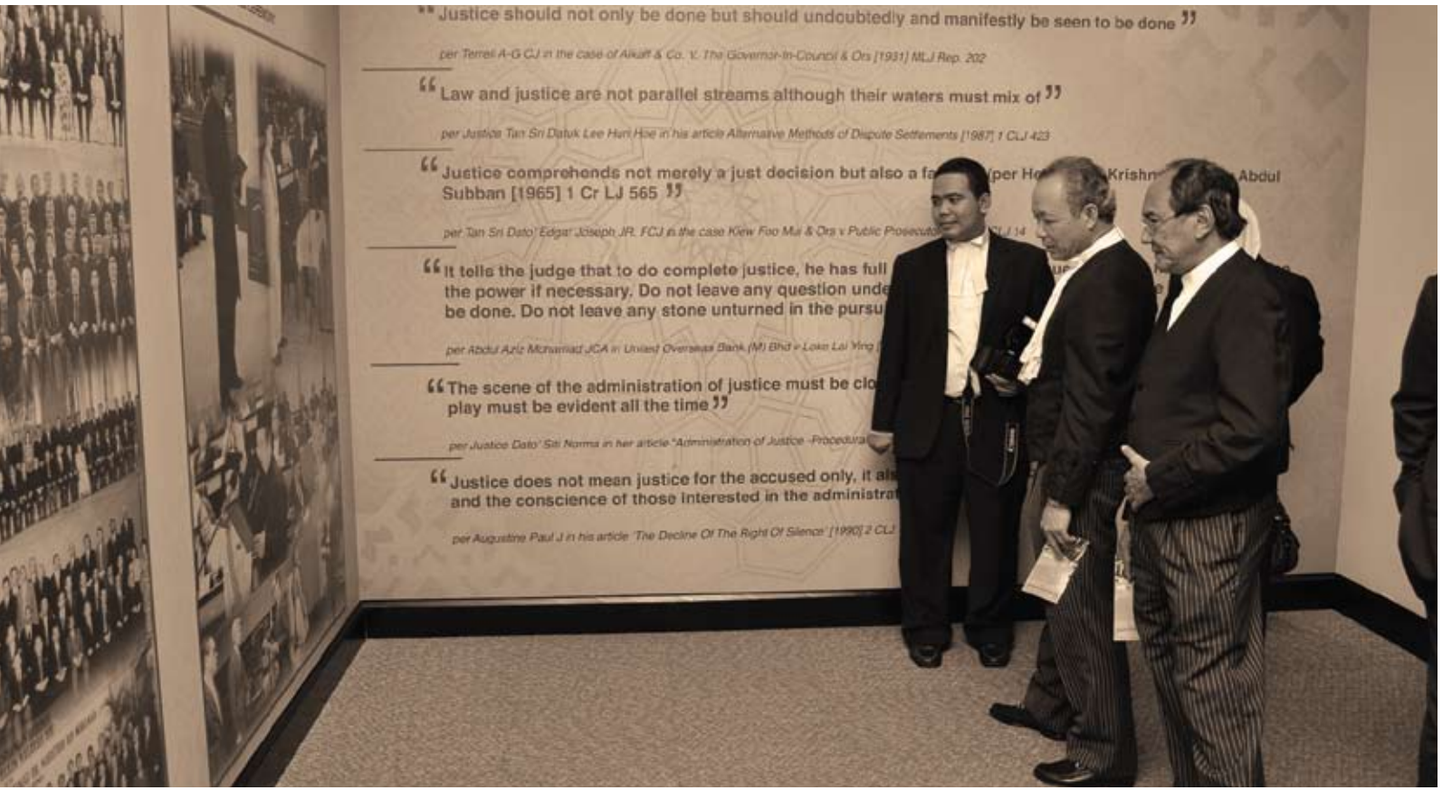
THE JUDICIAL MUSEUM

The Judicial Museum in the Palace of Justice, Putrajaya was established with a view to preserving, protecting and displaying rare objects, artefacts, manuscripts, old documents, files and photographs which depict the history of the Malaysian Judiciary. It was opened in 2003 when the Appellate Courts moved from the Sultan Abdul Samad Building to the Palace of Justice Putrajaya. The museum is located within the premises of the Palace of Justice. Formerly it was only accessible to official visitors to the Palace of Justice and was not opened to the public until 2007. In 2006, it was graced by the royal visit of His Majesty the Yang Di Pertuan Agong XII, Tuanku Syed Sirajuddin Ibni Al-Marhum Tuanku Syed Putra Jamalullail and Her Majesty Tengku Fauziah binti Al-Marhum Tengku Abdul Rashid in the course of their official visit to the Palace of Justice.

The museum has five (5) galleries. The first gallery depicts the history of the evolution and development of the Judiciary in Malaysia from pre independence to the present day. The second gallery contains the artefacts which are exhibited in glass cabinets. The oldest artifact exhibited is a plaque of the Kedah High Court dated 1341 A.H. used during Sultan Abdul Hamid Halim Shah of Kedah. The third gallery shows the history of the Kuala Lumpur Courts and the fourth gallery contains the collection of gifts and souvenirs received by the previous Chief Justices which are now on display. The fifth gallery is a special section called the *'Justice Hall of Fame'*. All portraits of former Lord Presidents and Chief Justices accompanied with a short biography, are displayed.

There are approximately 180 artefacts in the Museum ranging from the era of pre and post independent Malaysia to the present day. The artefacts include wigs of judges, several pre-independence court registration books, and the official seals of the court collected from various sources around the country.

Stamp Holder
This stamp holder is made of steel and has been used to place the Court's steel stamps. Based on the stamp holder's flower motif, it is believed that it was made in the early 1900's



A visit to the Museum on its opening,
Left to Right: Mr. Mohd Aizuddin Zolkeply, Tan Sri Arifin Zakaria and Tun Dato' Seri Zaki Tun Azmi

The museum has received many local and international visitors. In 2011 alone, there were more than 5000 visitors including students, members of the public, judges, and others who have visited the museum. Amongst the notable personalities who have visited the museum last year were the Hon. Dato' Sri Mohd Najib Tun Abd Razak, the Prime Minister of Malaysia when he had his very first official visit to the Palace of Justice. Others included Chief Justices and Ministers from Singapore, South Africa, United Kingdom, Kingdom of Lesotho and other countries.

This rubber stamp was used in court before Independence

Seal machine used during the British Era

The museum underwent a significant makeover in 2010 with the increase and rearrangement of artefacts, to enhance its appeal to the public.

An antiquated mace symbolising judicial powers reposed in the Johor High Courts

A SPECIAL MOBILE COURT SITTING IN SABAH AND SARAWAK

Circuit courts in Sabah and Sarawak have been the main stay of the Judiciary for as long as anyone can remember. They exist to serve the rural population in the two states who were and still are grappling with problems, geographical, infrastructural and financial, to go to the main towns where the courts are situated. The circuit courts are often situated in a building owned by the State Government. The plight of the rural folks is not lost on the top management of the Courts in Sabah and Sarawak and so it was due to that that the idea of a mobile court was mooted and implemented in 2007.

As its name suggests, instead of presiding over cases in a proper court room, the judicial officer and supporting staff would go further and deeper into the interiors of Sabah and Sarawak, rendering services other than the principal service, which is hearing civil/criminal cases. The mobile court conducts its business at any available space at the place it visits, such as the community hall, the school or the verandah, also known as the 'ruai' of the long house (for the Ibans in Sarawak). Subsequently, when word spread about the existence of the mobile court, and given the popularity of the demand for two of its services – attestation of personal documents and verification of birth particulars, the sittings of the mobile court are now being held jointly with that of the National Registration Department who have their own mobile team.

On 12 to 15 November 2011 in Pagulangan and Pensiangan, Keningau, Sabah, this collaboration between government departments was extended further which saw a new level of cooperation when the court officers and staff were joined by not just the National Registration Department's representatives but those from the Lands and Surveys Department, the Fire and Rescue Department and two voluntary doctors from Lahad Datu Clinic. What is more, despite the dangerous and challenging route to these two remote places, The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum gamely participated in the sitting and His Lordship was also joined by the Member of Parliament for Keningau, YB Tan Sri Joseph Kurup.

The journey of the mobile teams on dirt roads and across a treacherous river was long and perilous but though bone-tired, the city dwellers'

The Mobile team travelling to Pagulangan led by the Chief Judge of Sabah and Sarawak (fifth from left)

Justice Richard Malanjum (right), explaining some legal issues to the natives during his visit to remote areas of Sabah

spirits were lifted high by the warm welcome of the village folks, so much so that the mobile court proceeded with its business with the aid of torchlights when darkness fell. By then it was clear that many were still waiting to be served by them. The sitting in Pagulangan only ended at 9.00 p.m. on the night of 13th November. The sitting in Pensiangan ended relatively early but there were anxious moments for the mobile court officers and staff when the last boat ferrying His Lordship (who volunteered to stay behind to ensure that all would be well) was late due to the low tide which made the journey by boat even more dangerous.

By all accounts, the mobile court sitting at these two places were ones which would live in the memories of the participants for a long time.

The Mobile Court Room In Sabah

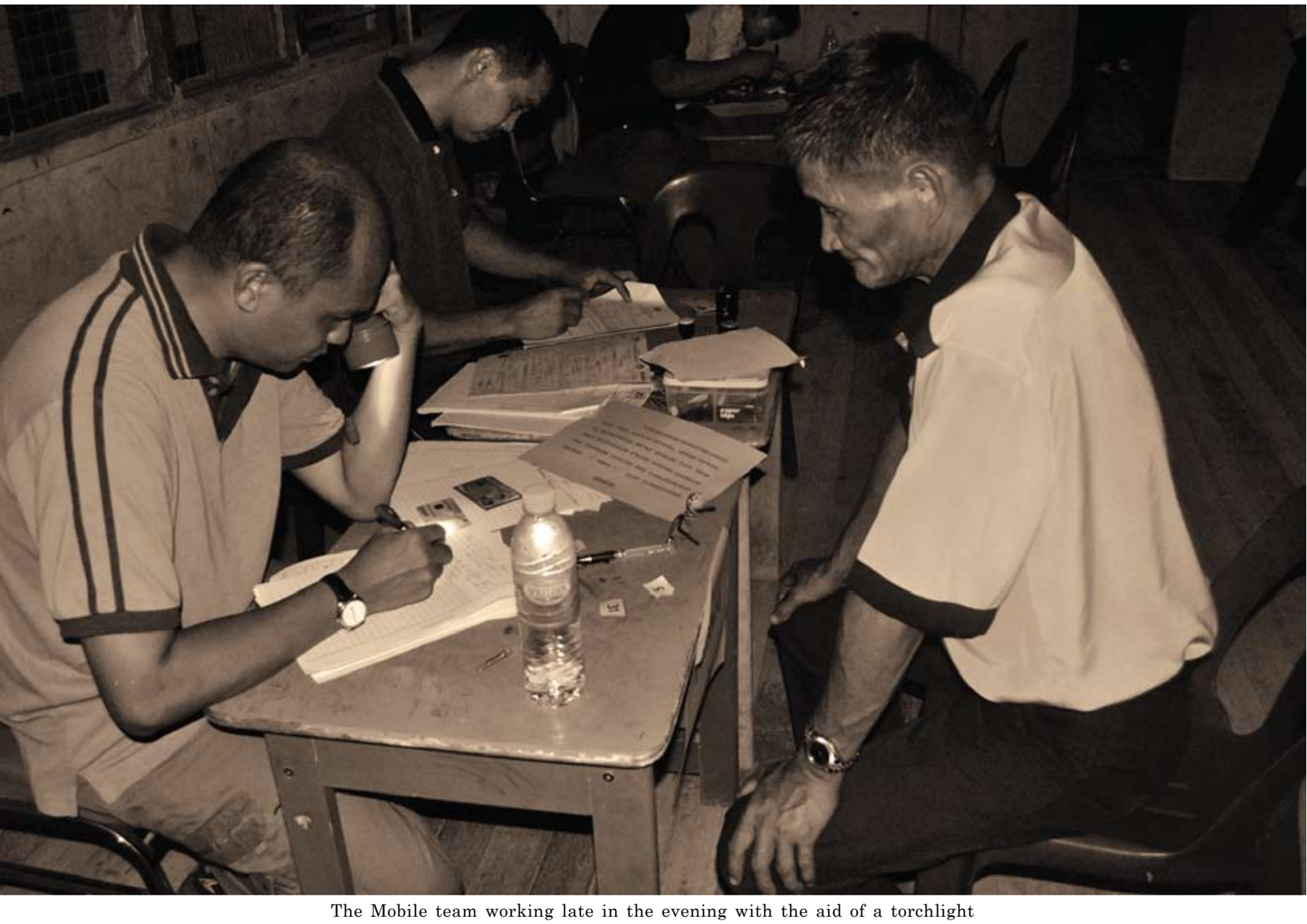
Whilst the circuit and mobile courts have served their purpose in the two states, it was realised that due to the relatively low number of cases registered in the circuit courts, the impracticality of stationing a judicial officer and court staff to man the circuit court and the need to reach out to the rural population who live in between the places served by the circuit courts and the mobile courts, an idea was born to have a courtroom on wheels. Though the idea for the mobile courtroom was mooted in 2010 it only started its operation on 15 March 2011, at a place called Donggongon in Penampang, Sabah. The State Government of Sabah and the Sabah Credit Corporation donated a bus which was quickly refurbished to become a courtroom.

An official launch of the mobile courtroom by the Chief Minister of Sabah, YAB Datuk Seri Panglima Musa bin Aman was held on 9 May 2011 at the very same place of its first sitting, Donggongon. The Chief Minister in the press conference held afterwards lauded the services rendered by the mobile courtroom and hailed its cost-saving benefit, since, with the courtroom on wheels there is no reason to build more buildings for the circuit courts in every district of the two states.

To date, a total of 495 cases have been disposed of by the mobile courtroom team.

Court Social Responsibility (CSR) Programme

The Courts have been regularly hosting visits from educational institutions and schools, giving guided tours of its premises and briefings on its functions to the visitors. In 2010, the judicial officers were challenged to take this social responsibility a step further by entrusting them to visit the schools, in order that they have a wider and younger audience to spread the primary message that crime does not pay. Plus, logistically speaking it is easier for a judicial officer to go to a school than for the school to



The Mobile team working late in the evening with the aid of a torchlight

arrange a field trip to the courts. Escalating statistics on the rampancy of crimes committed by juveniles was another factor which moved our top management to motivate the judicial officers to embrace this programme. To date a total of four schools have been visited in Sabah and five in Sarawak. The programme is still ongoing and for a better implementation of it, starting next year, a judicial officer will be tasked to coordinate the programme in every station of the Courts in Sabah and Sarawak.

CHAPTER 5

RETIRED JUDGES

RETIRED JUDGES

Tun Zaki Tun Azmi

Tun Zaki Tun Azmi was born in 1945. He read law at Lincoln's Inn, London and was called to the Degree of an Utter Barrister in 1969. Upon graduation, he started his career with the Attorney General's Chambers from December 1969 to 1970. He was appointed a Magistrate in 1970 and a President of the Sessions Court in 1971. In 1973, he was appointed Federal Counsel at the Drafting Division of the Attorney General's Chambers and later in 1976, became Senior Federal Counsel at the Ministry of Home Affairs.

In 1985, he went into legal practice as an advocate and solicitor of the High Court practising in the firm of Messrs. Shahrizat & Lee until 2006 when he resigned as a partner of that firm. However, he remained an advocate and solicitor in the firm until his elevation to the Federal Court in 2007. He was subsequently elevated to the position of the President of the Court of Appeal and a few months later he became the Chief Justice of Malaysia in October 2008. He retired on 12 September 2011.

During his short spell as a judge, he wrote numerous judgements in various areas of the law including novel issues, whilst as Chief Justice, his ideas, innovation and action brought about numerous unprecedented changes and reforms in the Judiciary. He initiated structural improvements that are designed to enhance judicial performance and to facilitate a more efficient and expeditious delivery system. The computersation of the courts and the E-court system initiated by him have transformed the Malaysian judicial landscape.

Tan Sri Dato' Seri Alauddin Dato' Mohd. Sheriff

Tan Sri Dato' Seri Alauddin was born in Kulim, Kedah on 7 August 1946. He was called to the Degree of an Utter Barrister, Inner Temple, London in 1970. He joined the Judicial and Legal Services and served in numeruous posts; among others, as a Magistrate, President of the Sessions Court, Federal Counsel at the Land Revenue Department and Legal Advisor for the states of Johor and Negeri Sembilan. He was seconded to Petronas as a Secretary cum Legal Advisor before being appointed Chairman of the Advisory Board of the Prime Minister's Department.

On 1 February 1992, he was appointed a Judicial Commissioner of the High Court of Malaya. After two years, he was elevated to the position of High Court Judge and in 2001 he was appointed to the Court of Appeal and subsequently the Federal Court in 2004. He held the post of Chief Judge of Malaya in 2007 before being elevated to the position of President of the Court of Appeal a year later. He opted for early retirement in August, 2011.

His judgements serve to reflect the comprehensive evaluation which he brought to bear on each of his cases in the course of adjudicating them. As a judge he was well known for his impartiality and integrity and conscientiousness, patience and temperance. Under his leadership the Court of Appeal maintained its high standards of resolving appeals with justice and fairness.

Tengku Dato' Baharudin Shah Tengku Mahmud

Tengku Dato' Baharudin was born in Pekan, Pahang on 30 May 1945. He read Law at the Middle Temple, London and graduated in September 1969. He immediately joined the Judicial and Legal Services in 1970, where he held numerous posts such as Magistrate, President of the Sessions Court, Senior Assistant Registrar of High Court, Deputy Director of the Legal Aid Bureau, Deputy Registrar of Companies, Official Assignee and State Legal Advisor.

He was appointed a Judicial Commissioner in 1994 and elevated to the position of High Court Judge in 1996. In 2003, he was elevated to the Court of Appeal. He retired at the age of 66 on 30 May 2011.

Througout his tenure as a judge, he adjudicated on a broad range of subjects and wrote judgements in diverse areas of law. His contribution to the Judiciary will always be remembered.

Puan Zura Yahya

Puan Zura graduated from the University of Malaya with a Degree of Bachelor of Laws (Honours). She then joined the Judicial and Legal Services where she held numerous posts, among others, as Senior Assistant Registrar of the High Court of Malaya, President of the Sessions Court, Senior Assistant Parliamentary Draftsman, Chairman of the Industrial Court as well as Chairman of the Advisory Board, Prime Minister's Office. She was appointed as Judicial Commissioner of the High Court of Malaya in September 2008. She opted for early retirement on 14 September 2010.

As a Judicial Commissioner, she is best described as one who appreciated the importance of allowing parties and their counsel to be fully heard. She treated all who appeared before her with courtesy.

Dato' Ho Mooi Ching

Dato' Ho Mooi Ching hails from Penang. She obtained her LL.B (Hons.) degree from the University of Singapore in 1976. She began her career as an Assistant Director of the Legal Aid Bureau in 1976 and was later appointed a Magistrate. She also served as a Sessions Court Judge. She opted for early retirement from the Judicial and Legal Services in 1997 before practising at Messrs. Sitham & Associates, Penang. In 2002 she was appointed Chairman of the Appeals Board established under the Town and Country Planning Act 1976. In 2008 she was appointed a Judicial Commissioner. She became one of the contributing authors for the Malayan Law Journal, and authored a book entitled " Sentencing Practice in Malaysia".

As a Judicial Commissioner she was renowned for her calm disposition and conscientious contributions to the judicial arena.

Dato' Kang Hwee Gee

Dato' Kang was born on 2 February 1945 in Tumpat, Kelantan. He read law at Grey's Inn, London. He began his career as a Magistrate then as Senior Assistant Registrar of the High Court, President of the Sessions Court, Senior Federal Counsel, Deputy Head of the International Advisory Division, Deputy Head of the Advisory and Prosecution Divison of the Attorney General's Chambers, and then Sessions Court Judge. He was appointed a Judicial Commissioner in 1994. A year later, he was appointed to the position of High Court Judge. He was elevated as a Judge of the Court of Appeal in April 2009.

He is described by the legal fraternity as a person of impeccable character. His knowledge of the law is extensive and precise. He was renowned for his ability to adjudicate expeditiously on a wide array of issues and disputes.

Datuk Heliliah Mohd Yusof

Datuk Heliliah was born in Ipoh, Perak on 16 February 1945. She graduated with an LL.B (Hons.) degree from the University of Singapore in 1970 and since then was attached to the Judicial and Legal Services of the Government in various capacities such as Magistrate, Federal Counsel at the Ministry of Communications, Senior Federal Counsel at the Ministry of Trade and Industry as well as in the International Law Division of the Attorney General's Chambers. She was the Deputy Head of the Law Advisory Division. She was appointed Head of the International Legal Division in 1988 until 1991. From 1991 until 1993, she was Parliamentary Draftsman. She was appointed to the position of Solicitor General from 1994 until 2001 before she was appointed a High Court Judge in 2002. She was elevated to the Court of Appeal in 2006 and later to the Federal Court in 2009. She retired on 16 February 2011.

As a judge she is renowned for her infinite patience and always gave all parties a good hearing. Her extensive knowledge of the law is reflected in significant judgements on diverse areas of the law.

TUN ZAKI AZMI'S FAREWELL.

In recognition of and as a tribute to Chief Justice Tun Zaki's contributions to the Judiciary, a presentation which also included a musical performance entitled 'TUN ZAKI-The Musical' was presented at the dinner held for all retirees at the Marriott Hotel & Spa, Kuala Lumpur on 8 September 2011. While the presentation comprised judges, officers and staff the cast of the musical comprised judicial officers only, who regaled the audience with tales of how life was when Tun Zaki helmed the Judiciary as the 13 Chief Justice of Malaysia.

The event began with Justices David Wong Dak Wah and Abdull Hamid Embong with their mesmerising musical renditions. This was followed by a powerful duet rendered by officers Encik Mohd. Aizuddin and Puan Norul Fitri, with Jimmy at the keyboard. Justice Low Hop Bing then recited a poem he composed for Tun Zaki.

The highlight-musical tribute of the evening's presentation, composed and produced by Justice Zainun Ali, had the trappings of a West End musical filled with tongue in cheek dialogue,

Justice Low Hop Bing reciting a poem he composed for Tun Zaki

The cast of the musical posing with Tun Zaki

slick choreography and songs reminiscent of the cabaret. It told the story of how Tun Zaki came into the Judiciary like a bolt from the blue, the initial resistance he faced as he flexed his muscle to turn the Judiciary around and how the Judges coped and triumphed through it all. The cast members' rigorous hours of practice was richly rewarded as the audience was much amused and enraptured. The hilarity and high jinks literally brought the house down.

Justice Arifin Zakaria, Chief Judge of Malaya on behalf of the Malaysian Judiciary recorded words of appreciation for the services rendered by the retiring judges comprising the Chief Justice Tun Zaki, the President of the Court of Appeal Justice Alauddin Dato' Mohd Sheriff, Justice Heliliah Mohd Yusof, Judge of the Federal Court and Court of Appeal Judges Justice Tengku Baharudin Shah Tengku Mahmud and Justice Kang Hwee Gee. Justice Heliliah in her reply speech thanked her brother and sister judges and all the officers for the co-operation that had been extended to her and wished the Judiciary well.

In a very honest speech which was at times poignant Justice Arifin reminisced about his early encounters with Chief Justice Tun Zaki when they were both young officers at the Attorney General Chambers. Tun's historic appointment to the Federal Court as the first advocate and solicitor to be so appointed directly did not endear him to many as his appointment had bypassed others who were waiting in line including Justice Arifin himself. But that night, at the rostrum, Justice Arifin in a personal tribute said: '*... You have proven to those who had reservations over your appointment that they were certainly wrong. .... I consider myself to be most fortunate to be given this opportunity to serve as Chief Justice of Malaya under Tun. We worked hard together but I cherish every moment working with you.*'

Hailing him as the Lord Goddard of Malaysia, Justice Arifin said Tun did for the Malaysian Judiciary what Lord Goddard, the Lord Chief Justice of England and Wales(1946) did to the English Judiciary- galvanized and reorganized a lethargic judiciary. This metamorphosis was made possible only because of Tun's innovative and original ideas in improving the Judiciary's delivery system and because of the man himself. Tolerating no nonsense and armed with his endless drive and demand for more and more of everyone's best, Tun was able to transform the mindset of Judges, Officers and staff and made an impact on the lawyers of this country. But despite his exacting nature, Tun never once begrudged or failed to acknowledge and immediately express appreciation for good work done.

History, Justice Arifin said, would remember Tun as the man who did what others failed, that is to provide litigants a final recourse in a matter of months not years and, for the nation, world recognition and praise for the Malaysian Judiciary as the World Bank report had said:

> *The Malaysian Judiciary's recent program offers an interesting model for other countries attempting a backlog or daily 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...*

When Chief Justice Tun Zaki took over the microphone, he admitted that his entry to the judicial family had not been easy. Being an 'outsider', he had had to prove himself not only to the members of the Judiciary but also the nation. Now, at the conclusion of his four years tenure, he is glad that his journey had ended well and this, he said, was only made possible with the support from all the judges, officers, staff and friends.

Special mention was made of Justice Alauddin and Justice Arifin. In a moving tribute to Justice Alauddin, Tun Zaki said:

> *'...Tan Sri, you have been extremely magnanimous in giving up your position when you were only one step away from the highest judicial post and a Tunship. You did so because you are honest to yourself that your health does not permit you to carry on. Your thoughts are more for the interest of the Judiciary than yourself. You have not been greedy or selfish. Tan Sri, there are not many people like you in this world... '*

The Musical – 1st Act with the song "Hello Judges"
(Hello Dolly)

As Tun Zaki expressed his words of thanks to the Chief Justice of Malaya the comradeship between them became apparent. Justice Arifin, Tun Zaki said, was a man who always thought of others before self. He gave sound advice, served tirelessly and selflessly but never once sought credit for the ideas given and the work done.

Tun Zaki's parting words to all which will be long remembered are: *So if I had been hard on you, which I do not deny, it is to improve the Judiciary … nothing personal."*

As the night drew to an end, it was obvious that the 3rd Lord President of Malaysia* would definitely have approved of the 13th Chief Justice's tenure as the 13th Chief Judge had orchestrated the ascension of the Malaysian Judiciary onto the world map - his way.

(*note: The 3rd Lord President of Malaysia, Y.A. Bhg Tun Azmi Haji Mohamed, is the father of Chief Justice Tun Zaki Tun Azmi.)

Cast Members:

Safarudin Tambi as Tun Zaki Tun Azmi, the Chief Justice, Shazali Dato' Hidayat Shariff as Justice Alauddin, President of the Court of Appeal and alternates as Tan Sri Abdull Hamid Embong, Noorhisham Mohd Jaafar as Justice Arifin, Chief Judge of Malaya, Mohd. Sabri Othman as Justice James Foong, Edwin Paramjothy as Justice Zulkefli Ahmad Makinudin, Nor Azizah Aling as Justice Zaharah Ibrahim, Priscilla Hemamalini as Justice Nallini Pathmanathan, Mohd Faizi Che Abu as Justice Raus Sharif, Nurasidah A. Rahman as Justice Aziah Ali, Nur Aslamiah Jamil as Justice Zainun Ali, Nadia Kamal as Azimah Omar, Registrar Court of Appeal, Gan Chee Keong as Justice Low Hop Bing, Syahrul Sazly Md. Sain as Justice Richard Malanjum Chief Judge of Sabah and Sarawak, Syed Adam Alhabshi as Justice Hishamudin Mohd. Yunus, Muhammad Noor Firdaus Rosli as Justice Gopal Sri Ram, Mohd. Zulhilmi Ibrahim as Justice Mohd Apandi Ali and Mohd Aizuddin Zolkeply as Dato' Hashim Hamzah, the Chief Registrar of the Federal Court

CHOREOGRAPHERS : Norul Fitri Hamdan, Aishah and Saleha Ali and Hisham Harun

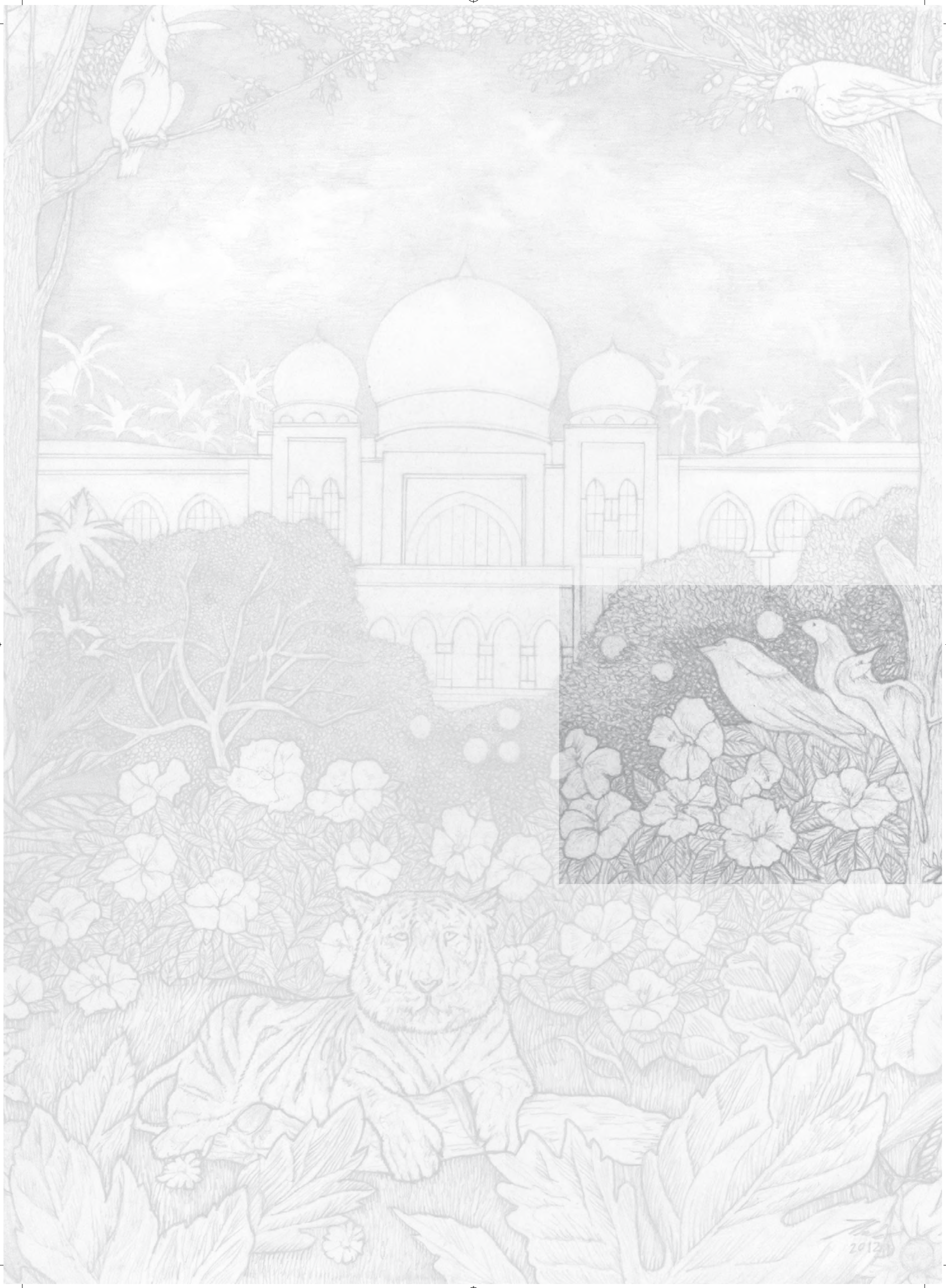
BACKSTAGE MANAGER : Sabreena Bakar

TECHNICIAN : Nor Hafiz Abdul Halim

Produced and directed by Justice Zainun Ali

The songs sung in the musical were:

Hello Dolly, Get me to the Church on Time, The Girl from Ipanema, *Dia Datang*, Its Now or Never, As Time Goes By, Upside Down, New York New York, Thank You for the Music and I Wish You Love.



CHAPTER 6

CASES OF INTEREST - 2011

The Mace - Symbol of Judicial Authority

CASES OF INTEREST - 2011

The Courts are perceived as the adjudicator of the conflicting interests of parties. While this role may appear simple, it is in fact an onerous task. There are instances where the Court is obliged to interpret the intention of the legislature, delicately balancing the interest of conflicting parties which seemingly appear equally important, allowing the law to grow and yet ensuring certainty in the law but ultimately in all decisions to give justice without fear or favour. Some cases may have involved high profile matters and others may appear mundane but the fact that remains is that regardless of its status, the decisions will have far reaching effects. The following are a selection of issues which have passed through the courts over the past year.

Civil Cases

1. **Land law : Interpretation of s 340 of the National Land Code 1965 ("the Code") and the concept of indefeasibility of title. A fraudulent transfer or a transfer using forged documents or instruments of transfer even though it is registered cannot confer indefeasible title on the registered owner under such transfer.**

   TAN YING HONG v. TAN TIAN SAN [2010] 2 CLJ 269

   It has always been understood that an owner or proprietor of an alienated land whose name appears in the land register in respect of any piece of land will enjoy undefeated title over that land under s 340 of the Code unless the registration has been obtained by fraud, misrepresentation, forgery or the title had been acquired by unlawful means. In other words, the land register is everything.

   It is also recognized that indefeasibility of title under s 340 of the Code are of two types–immediate and deferred indefeasibility. The distinction between this two is that of effect given to the instrument even after registration. If upon registration of the instrument, it grants immediate protection to the holder of the registered interest then it is immediate indefeasibility. But if after registration, the instrument still has power to affect the registered interest or estate then it is deferred indefeasibility i.e. indefeasibility only comes to be attached to the title or interest upon a subsequent transfer.

   Before *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] CLJ 133, the prevailing view is that s 340 of the Code only recognized deferred indefeasibility.

   However in *Adorna Properties,* Federal Court ruled that by virtue of the proviso to s 340(3) of the Code, any purchaser in good faith for valuable consideration enjoys immediate indefeasibility of title to the lands notwithstanding that the instrument of transfer was forged. This is because according to the Court in that case the proviso also applies to s 340(2) of the Code.

   This state of the law as to indefeasibility of title remains on the statute book until only recently – i.e. until another Federal Court in *Tan Ying Hong v. Tan Tian San* had had the occasion to re-visit *Adorna Properties* and ruled that the Court in *Adorna Properties* had erroneously applied the proviso to s 340(3) to s 340(2) and thus gave recognition to the concept of immediate indefeasibility under the Code which is contrary to the provisions of s 340. Therefore *Adorna Properties* was reversed by the later Federal Court on this point.

   The appellant in *Tan Ying Hong's* case was the registered proprietor of a piece of property and unbeknown to the appellant the first respondent acting under a forged power of attorney executed two charges in favour of the bank to secure a loan for the second respondent. The second respondent defaulted on the repayment and the bank demanded payment from the appellant. The appellant applied to the High Court to have the charges declared null and void on the ground that the Power of Attorney was

forged. But the appellant's application was dismissed by the High Court on the ground that the appellant was not the actual owner of the land and that s 340(3) of the Code read with its proviso had protected the third respondent — the chargee. The appellant's appeal to the Court of Appeal was also dismissed. Both the High Court and the Court of Appeal had relied on *Adorna Properties* in dismissing the appellant's case.

In allowing the appellant's appeal in *Tan Ying Hong,* the Federal Court says, in the judgment of Arifin Zakaria CJ in paragraph 50 and 51 at p 293 of the report :

"As we see it, subsection (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in subsection (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:

> 'Provided that nothing *in this subsection* shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.'
> [Emphasis added.]

We are of the view that the proviso is directed towards the provision of subsection (3) alone and not to the earlier subsection. This in our view is supported by the use of the words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340."

With this decision the controversy resulted from the decision in *Adorna Properties* is finally put to rest.

2. Civil Procedure : Guidelines for leave to appeal pursuant to s. 96 Courts of Judicature Act, 1964.

TERENGGANU FOREST PRODUCTS SDN BHD v. COSCO CONTAINER LINES CO LTD & ANOR [2011] 3 AMR 102

Application for leave to appeal to Federal Court from the decisions of the Court of Appeal is governed by s.96 of the Courts of Judicature Act 1964. This section has been subjected to several interpretations in several cases in particular *Datuk Syed Kechik b Syed Mohammed & Anor v The Board of Trustees of the Sabah Foundation & Ors (and Another Application) [1999] 1 AMR* 833 and *Joceline Tan Poh Choo & Ors v V Muthusamy [2009] 2 AMR 569,* which resulted in inconsistencies as to the principle to be applied in applying for leave to appeal to the Federal Court from the decision of the Court of Appeal.

In *Terengganu Forest Products Sdn Bhd v Cosco Container Lines* Co *Ltd & Anor,* the Chief Justice of Malaysia had empanelled a special panel of five judges to resolve the inconsistencies in the interpretation of s.96 of the Courts of Judicature Act, 1964 in the two cases above.

The special panel did not agree with *Joceline's* case which determined that there would have to be two conflicting or inconsistent judgments of the Court of Appeal in existence before leave could be given.

After reviewing all the relevant authorities, the special panel laid down seven factors as guidelines to be considered by an intended applicant for leave to appeal to the Federal Court. These seven factors are stated in the judgment of Zaki Tun Azmi CJ at paragraph 34 at pages 120 and 121 of the judgment as follows:

"My learned brother the Chief Judge of Sabah and Sarawak suggested and in fact assisted in drafting the following simplified guidelines, which:

> In summary, an intended Applicant for leave to appeal to this court should consider the following points before filing his application, namely:
>
> (1) Basic prerequisites:
>
> (i) that leave to appeal must be against the decision of the Court of Appeal;
>
> (ii) that the cause or matter must have been decided by the High Court exercising its original jurisdiction;

(iii) that the question must involve a question of law which is of general principle not previously decided by the Federal Court (first limb of s 96(a); and

(iv) that the issue to be appealed against has been decided by the Court of Appeal.

(2) As a rule leave will normally not be granted in interlocutory appeals.

(3) Whether there has been a consistent judicial opinion which may be uniformly wrong e.g. Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng.

(4) Whether there is a dissenting judgment in the Court of Appeal.

(5) Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance.

(6) That leave will normally not be given:

(i) Where it merely involves interpretation of an agreement unless this court is satisfied that it is for the benefit of the trade or industry concerned;

(ii) The answer to the question is abstract, academic or hypothetical;

(iii) Either or both parties are not interested in the result of the appeal.

(7) That on first impression the appeal may or may not be successful; if it will inevitably fail leave will not be granted."

In the same case the learned Chief Justice also said at paragraph 41 of the judgment that *"once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel."*

Another point to note about the decision is with regards the requirement for grounds of judgment during leave application stage. On this point the court expressed the view that as a general rule it is not necessary in every case especially when the judgment or order of the High Court has been upheld unanimously by the Court of Appeal. However if the court hearing the leave application is doubtful or if the High Court decision has been reversed, then a grounds of judgment would be helpful. The court also said that where questions of facts and laws are obvious particularly so in interlocutory matters, no grounds are necessary at the leave stage.

3. Constitutional law : A Regent, under First and Second Part of the Kelantan's State Constitution, is vested with all the powers of His Royal Highness and there is no distinction between the powers exercised by the Regent and that of a reigning Sultan. The Sultan cannot exercise the power of His Royal Highness while being incapacitated and during pendency of the Regency. The Sultan also had no locus to refer a question of law to the Federal Court pursuant to Article LXIII(2) First Part of the State Constitution whilst the Regency is in place and not terminated; the power to make such reference is vested solely in the hands of the Regent.

HIS ROYAL HIGHNESS SULTAN ISMAIL PETRA IBNI ALMARHUM SULTAN YAHYA PETRA v. HIS ROYAL HIGHNESS TENGKU MAHKOTA TENGKU MUHAMMAD FARIS PETRA & ANOR AND ANOTHER CASE [2011] 1 CLJ 541

In this case, two petitions were filed by the petitioner, the then Sultan of Kelantan, pursuant to Article LXIII(2) First Part and Article IV(4) Second Part of the Laws of the Constitution of Kelantan ('the Constitution') seeking relief and opinion of the Federal Court on a number of questions. In both petitions, the petitioner challenged the authority of the first respondent, the Regent of the State of Kelantan (Regent') in assuming the full power of the Sultan of Kelantan, as if the petitioner was no longer the Sovereign of the State. By reason of the petitioner's illness, the first respondent was appointed as Regent by the Council of Succession.

Both petitions however were dismissed with no order as to costs on jurisdictional objection raised by the first respondent. In course of deciding the merit of the jurisdictional objection the Court deliberated on the various issues raised in the grounds of objection arrived at the above rulings and at paragraph 27 at page 567 of the judgment, Zulkefli Makinudin FCJ in delivering the judgment of the court says:

"We are of the view that there can be only one individual attending to affairs of the State of Kelantan at any one time. In this instance, due to the incapacitation of the petitioner, the first respondent as the Regent of Kelantan and the acting Ruler of the State of Kelantan is the only person entitled to exercise the powers of "His Royal Highness" within the meaning of the Laws of the Constitution of Kelantan. The petitioner being incapacitated cannot be exercising such a power unless he has recovered from such incapacitation. It therefore follows that the petitioner has no locus to refer a question of law to the Federal Court pursuant to art. LXII1(2) First Part of the Laws of the Constitution of Kelantan whilst the first respondent is the Regent, as the power to do so is vested solely in the hands of the first respondent until the Regency is brought to an end and the petitioner resumes his role as the Sultan of Kelantan."

This is the first case of its kind being referred to and decided by the Court. The importance of this case is that generally all State Constitutions have almost similar provisions as to Regency. Thus this case would be a welcome precedent in interpreting those provisions for other States in Malaysia subject only to any specific and peculiar provisions applicable to each State Constitution.

4. **Constitutional Law : Any restriction imposed on the freedom guaranteed under Article 10(1)(a) of the Constitution must be reasonable. The restriction under section 15(5)(a) of the Universities and University Colleges Act 1971 which prohibits university student, organization, body or group of student of university from expressing support for or sympathy with or opposition to any political party whether in or outside Malaysia is unreasonable and therefore unconstitutional.**

MUHAMMAD HILMAN IDHAM & ORS v. KERAJAAN MALAYSIA & ORS [2011] 9 CLJ 50.

In this case the plaintiffs were students of the third defendant, the Universiti Kebangsaan Malaysia. The third defendant brought disciplinary proceedings against the plaintiffs under s. 15(5)(a) of the Universities and University Colleges Act 1971 (UUCA) for being present at a parliamentary by election held in the constituency of Hulu Selangor. Section 15(5)(a) of the UUCA barred students from expressing or doing anything which might reasonably be construed as expressing support for or sympathy with or opposition to any political party in or outside Malaysia. The plaintiffs applied to the High Court, *inter alia*, for a declaration that s. 15(5)(a) UUCA which restricted their right to freedom of speech and expression was invalid as it violated the constitutional guarantee enshrined in Article 10(1)(a) of the Federal Constitution (Constitution). The High Court dismissed their application. The plaintiffs appealed to the Court of Appeal.

By a majority, the Court of Appeal ruled that s. 15(5)(a) of the UUCA is unconstitutional.

In coming to this conclusion, the majority applied the Federal Court's decision in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 which subscribed to the principle of reasonableness in interpreting provisions of the Constitution which guaranteed fundamental rights of the citizens. In so doing, the Court of Appeal in this case also ruled that the case of *PP v. Pung Chen Choon* [1994] 1 LNS 208 decided by the then Supreme Court is no longer a good law. The Court of Appeal arrived at this conclusion by relying on the Federal Court decision in *Dalip Baghwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 which states that where two decisions of the Federal Court conflict on a point of law the later decision prevails over the earlier decision.

In this case the Court of Appeal also applied the test stated in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697 in determining whether a constitutionally guaranteed right has been violated. And the test is that whether the action taken by the authority or the State directly affects the fundamental rights in question or whether the inevitable effect or consequence of such action on the fundamental rights is such that it makes the exercise of that rights ineffective or illusory.

As to the issue of reasonableness of the restriction imposed by s. 15(5)(a) of the UUCA, Hishamudin Mohd Yunus JCA who constitute one of the majority said that the restriction under that section "*impedes the healthy development of the critical mind and original thoughts of students – objectives that seats of higher learning should strive to achieve. Universities should be the breeding ground of reformers and thinkers, and not institutions to produce students trained as robots. Clearly the provision is not only counter-productive but repressive in nature.*" The learned judge in his judgment said *"he is at a loss to understand in what manner a student, who expresses support for, or opposition against, a political party, could harm or bring about an adverse effect on public order or public morality?"* He also considered the fact that most university students are of the age of majority and can do things that a person of that age could do such as entering into contracts and voting in general elections if they are of twenty-one years old.

The other majority judgment in this case was by Linton Albert JCA. The learned judge explained the concept of reasonableness in interpreting the provision of Constitution in particular Article 10(2)(a) in the following words:

"The word "reasonable" must be read before the word "restrictions" in Article 10(2)(a) of the Constitution to avoid the absurdity that it would otherwise produce. A plain and literal meaning of Article 10(2) did not make any sense of the freedom of expression under Article 10(1)(a) because every legislative enactment which took away the freedom of expression under Article 10(1)(a) could be justified as being within the restrictions set out under Article 10(2)(a). Similarly, the word "reasonable" should be read into Article 10(2)(a) to avoid the absurdity that it would otherwise produce."

However, Low Hop Bing JCA, the minority in this case, while agreeing that *PP v. Pung Chen Choon* (supra) is no longer a good law and that the *Sivarasa Rasiah* (supra) represents the present state of the law held that the restriction imposed by s. 15(5)(a) is reasonable. In so concluding the learned judge relied on the case of *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90, which says that whether the law is harsh or unjust is not for the Court to say, but is a question of policy to be debated and decided by Parliament. In this regard, the learned judge found that the restrictions imposed under s. 15(5)(a) of the UUCA *"is necessary and seeks to prevent infiltration of political ideologies, including extremities, amongst students. This infiltration may adversely affect the primary purpose of the universities ie, the pursuit of education. This particularly significant as university students could well be vulnerable youth capable of being subject to peer pressure and be easily influenced."*

It is obvious in this case that the rationale for finding that s. 15(5)(a) of the UUCA adopted by the majority and the minority judgments are glaringly opposite. The minority opted for more conservative approach in interpreting the provision of fundamental rights guaranteed under the Constitution. The majority however, adopted a more robust approach by adopting the reasonable principle, in interpreting the article of the Constitution guaranteeing freedom of speech. It would appear that the approach taken by the majority is more in line with modern day development with regard to fundamental rights and appears to be more pragmatic.

5. Constitutional Law, Civil Procedure and Native Law and Custom : In a proper case a Court may determine a constitutional issue in an application under O. 14A of the Rules of the High Court 1980. The extinguishment of native rights under s. 5(3) and (4) of

Sarawak Land Code (Cap 81) is not ultra vires the Constitution. Pre hearing is not available to the natives before the extinguishment of the NCRs unless it is provided under the law.

BATO BAGI & ORS v. KERAJAAN NEGERI SARAWAK & ANOTHER APPEAL [2011] 8 CLJ 766.

The appellants in these two consolidated appeals were natives of the state of Sarawak who had challenged the extinguishment of their native customary rights (NCRs) by the Sarawak state government (government) in the High Court. Their NCRs were extinguished under s. 5(3) & (4) of the Land Code (Cap 81) Sarawak (Code) for the purposes of constructing a Bakun dam and a Pulpwood Mill respectively.

The appellants had sought to declare s. 5(3) and (4) of the Code unconstitutional and the extinguishment of their NCRs invalid for infringing their fundamental rights under Articles 5, 8, 13 & 153 of the Federal Constitution. Alternatively they sought adequate compensation and damages.

The High Court in Bato's case decided that the case was suitable for disposal without full trial of the action and proceeded under O. 14A of the Rules of the High Court 1980 (RHC) in deciding that s. 5(3) & (4) of the Code were not unconstitutional and the extinguishment of the NCRs was proper and valid.

This case is important on several issues. Firstly, from a procedural point the Federal Court had ruled that, in a proper case the High Court may decide a constitutional issue in an application under O. 14A of the RHC based on the materials before the Court. Secondly, the Court reiterate and reaffirm the established principle that parties are bound by their pleadings; and in this case the Court held in the judgment of Zaki Tun Azmi CJ that it was unfair to the other party to raise issues that were not pleaded such as failure to provide proper notice of the extinguishment of native rights. Thirdly, the Court held that if the natives are not happy with the compensation offered by the government, they should have referred the matter to arbitration which is provided for under s. 5 of the Sarawak Land Code. Since they have accepted the compensation without referring the matter to arbitration, they could not come to Court to review the compensation or the extinguishment of their rights. Fourthly, the Court decided that it was for the government to decide there were no guidelines provided by law for the purpose of compensation and in the absence of such guidelines, the arbitration could take any matter into consideration in determining the amount of compensation; and this consideration could be wider then if the law have provided so. The Court also held that the decision by the arbitrator could be subjected to judicial review under O. 53 of the RHC. With regard to the compensation for loss of livelihood, the Court in this case have approved the principles as decided in *Adong Kuwau v. Kerajaan Negeri Johor* [1997] 3 CLJ 885, HC.

The Court also held that whilst it was a good practice to provide for pre-acquisition hearing, a claimant could not ask for such rights if the law did not provide for it.

6. **Constitutional Law : Under Article 8(2) of the Federal Constitution, discrimination on the basis of pregnancy is a form of gender discrimination. In interpreting Article 8(2), the Court to UN Convention on the subject matter which have ratified by Malaysia and that the principle of reasonable classification is only applicable to Article 8(1) and not to Article 8(2) of the Constitution.**

NOORFADILLA AHMAD SAIKIN v. CHAYED BASIRUN & ORS [2012] 1 CLJ 769.

The plaintiff's complaint was that the 'Guru Sandaran Tidak Terlatih' (GSTT) post offered to her was revoked and withdrawn by the defendants on the sole ground that the plaintiff was pregnant. The main issue was whether the action/directive of the defendants was gender discrimination in violation of Article 8(2) of the Federal Constitution (Constitution).

The word 'gender' was incorporated into Article 8(2) of the Constitution in order to comply with Malaysia's obligation under Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in order to reflect the view that women are not discriminated. Interpreting Article 8(2) of the Constitution, it is the court's duty to take into account the government's commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The courts have to refer to CEDAW in clarifying the term 'equality' and gender discrimination under Article 8(2) of the Constitution.

The learned judge found that CEDAW is a convention; and relying on a passage by Siti Norma FCJ in *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 at p. 386, the judge held that since Malaysia is a party to CEDAW and had ratified it, it has the force of law. She reasoned that by ratifying CEDAW, Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW.

The learned judge also held, citing *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180 that the principle of reasonable classification is only applicable to Article 8(1) and does not apply to Article 8(2) of the Federal Constitution.

7. Administrative Law : The findings of Royal Commission of Enquiry set up under s. 2 of the Commission of Enquiry Act 1950 is not subject to judicial review.

AHLI-AHLI SURUHANJAYA YANG MEMBENTUK SURUHANJAYA SIASATAN MENGENAI RAKAMAN KLIP VIDEO YANG MENGANDUNGI IMEJ SEORANG YANG DIKATAKAN PEGUAMBELA DAN PEGUAMCARA BERBUAL MELALUI TELEFON MENGENAI URUSAN PELANTIKAN HAKIM-HAKIM v. TUN DATO' SERI AHMAD FAIRUZ DATO' SHEIKH ABDUL HALIM & OTHER APPEALS [2012] 1 CLJ 805.

The appellant, the Royal Commission of Enquiry ('the Commission') was set up pursuant to s. 2 of the Commission of Enquiry Act 1950 (Act 119) to, inter alia, enquire and ascertain the authenticity of a video clip recording containing a controversial material relating to the judiciary, depicting images of a person engaged in a telephone conversation relating to the appointment of judges. The respondents were among those summoned to give evidence before the Commission. Aggrieved with the findings of the appellant which implicated the respondents, the respondents filed their applications for leave for an order of certiorari to quash those findings of the Commission. The respondents alleged that the findings of the Commission were tainted due to bias and prejudice and that the findings were contrary to the principles of law. The High Court dismissed the applications on the ground, *inter alia*, that what the respondents sought to quash was not a decision within the ambit of O. 53 r. 2(4) of the Rules of the High Court 1980 (RHC). The Court of Appeal, by a majority decision, allowed the respondents' appeals and granted leave to commence a judicial review proceeding to quash the findings of the Commission. The appellant appealed to the Federal Court.

The Federal Court held under the scheme of O. 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review. The Commission is a public authority. But the Commission is not a decision making body. The Commission does not make legal decision. It makes mere findings and recommendations that do not bind the respondents, not even the Government.

Such findings are not reviewable as the respondents' legal rights are not directly affected by the findings or that any benefit that they have been permitted to enjoy had not been deprived of.

The Court was also of the view that there is a strong policy consideration that it is against public interest to allow the findings of the Commission to be challenged in our courts; and refused to follow the legal position in

New Zealand where findings of a Commission are allowed to be challenged. The Court said it would be against public policy to subject the findings and recommendations of the Commission to judicial review. The Court reasoned that if the proceedings of the Commission are allowed to be challenged either at the outset or during its continuance by prohibition or at its conclusion by *certiorari*, its purpose will come to naught. It will make the setting-up of the Commission a meaningless exercise and also a waste of public fund.

This decision by the Federal Court put to rest once and for all the debate whether findings by Royal Commission Enquiry can be challenged in a Court of law by way of judicial review.

Criminal cases

The year 2011 saw a string of notable criminal cases decided by our judges which have impacted on our criminal law and procedure.

1. **Under rule 137 of the Rules of the Federal Court 1995 (the RFC), the Federal Court has limited inherent power or inherent jurisdiction to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the court.**

DATO' SERI ANWAR BIN IBRAHIM v. PUBLIC PROSECUTOR [2011] 1 MLJ 138

In this case, the Federal Court made significant observations concerning the provisions of rule 137 of the RFC. Among others, it was made clear that the inherent powers of the Federal Court under rule 137 cannot be invoked to review its own decision on its merits. Such inherent power is strictly confined to procedural matters only. In this case, the applicant was charged with an offence under s 377B of the Penal Code. The applicant filed a notice of motion for an order to compel the respondent and/or other persons having care, custody and control to produce to the applicant documents, certain materials and items. The High Court ordered the respondent to comply with almost all of the prayers in the application. The respondent appealed against this decision and the applicant cross appealed against the decision not allowing certain parts of the applicant's application. The Court of Appeal dismissed the cross appeal and allowed the respondents appeal in parts. The applicant appealed to the Federal Court by way of three appeals against the decisions of the Court of Appeal. The Federal Court dismissed all the appeals and affirmed the findings of the Court of Appeal. The appeals were decided on merits. The applicant then filed an application in the Federal Court pursuant to rule 137 of the RFC for the Federal Court to review its judgment. The Federal Court dismissed the application. Zulkefli FCJ (as His Lordship then was) took the opportunity to explain the scope of the rule in question:

"Notwithstanding that r 137 does not confer a new jurisdiction or a statutory jurisdiction, I am of the view that the term 'inherent power' used in r 137 should be taken to mean referring to the judicial powers of the Federal Court itself. On this point I agree with the views expressed by Heliliah Mohd Yusof FCJ in her judgment that a certain reserve of power intrinsically remains with the Federal Court and as the apex court of the judiciary it has to be the organ to deal with any 'injustice' or 'abuse of process'. It is in that limited sense that when such an application is made under r 137 that the Federal Court can be said to be exercising its 'inherent power' or 'inherent jurisdiction ' to review its own decision as may be necessary to prevent injustice or to prevent an abuse of the process of the court."

2. **Rule 137 of the RFC declares the obvious that the Federal Court has the inherent power to prevent injustice or to prevent abuse of the process of the court.**

HARCHARAN SINGH PIARA SINGH v. PP (2011) 6 CLJ 625

In this case, the Federal Court reiterated that it has residual jurisdiction to rehear and reopen its own earlier decision in a fit and proper case pursuant to rule 137 of the RFC, which confers on the Federal Court a limited inherent power to prevent injustice or to prevent an abuse of the process of the court. This is what Richard Malanjum CJ

(Sabah & Sarawak) has to say about this limited inherent power:

".....in exercising such power this court must be extremely cautious and to do so only in rare and exceptional cases. (See: ***Raja Petra Raja Kamaruddin v Menteri Dalam Negeri [2010] 4 CLJ 25; Lim Lek Yan v. Yayasan Melaka [2009] 4 CLJ 665 and Chu Tak Fai v. PP [2006] 4 CLJ 931)****. Each application must be scrutinized carefully and thoroughly to determine if indeed there is any issue to be considered under the rule or for the exercise of the inherent power of the court. (See:* ***Sabah Forest Industries Sdn Bhd v. UNP Plywood Sdn Bhd*** *[2010] 3 CLJ 779).*

3. Court is free to participate in plea bargaining between the prosecution and the defence in regard to sentence

PUBLIC PROSECUTOR v. MANIMARAN A/L MANICKAM [2011] 6 MLJ 534

A significant pronouncement has been made by the Court of Appeal on the question of plea bargaining. The Court of Appeal in **Public Prosecutor v. Manimaran a/l Manickam** held that the time has come for our courts to depart from the decision of **New Tuck Shen v. Public Prosecutor** [1982] 1 MLJ in prohibiting the courts from being involved in plea bargaining. Raus Sharif FCJ (as His Lordship then was) in delivering the judgment of the court referred to and agreed with the House of Lords in **Mckinnon v. Government of the United States of America** [2008] 1 WLR 179 in that public policy has shifted towards accepting plea bargaining. On this point, His Lordship said:

"The presiding judge or the magistrate should be free to indicate the maximum sentence he or she is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused. But proper guidelines must be followed. We are proposing the following guidelines:

(a) The request for plea bargaining must come from the accused person. The application must be made by the accused person to the Public Prosecutor. If an application is made to the court, the court must forward the same to the Public Prosecutor. The application may also be made by counsel representing the accused person. In such situation, the counsel must get a written authority signed by his client that he, the client, wishes to plea bargain on the sentence. And it is the counsel's duty to ensure that his client fully appreciates that he should not plead guilty unless he is guilty of the offence;

(b) (ii) Once there is a request from the defence, the prosecution must be quick to react. Both must reach an agreement on the sentence ie, the minimum and the maximum sentence that the prosecution and defence can accept as the punishment. The agreement is preferably to be in writing. Once there is an agreement reached between the defence and the prosecution, it must be placed before the court. If the court agrees, the judge or magistrate should indicate his or her agreement to the parties. And the sentence imposed must be within the range agreed to between the parties

(c) However, if the court disagrees with the sentence proposed by the prosecution and the defence, it must accordingly inform the parties and indicate the sentence it would be imposing. It is up to the parties to decide on the next move. If there is no agreement, the case should go for trial. The agreement of the court is vital because in whatever circumstances, the judge retains the unfettered discretion whether to agree with the sentence to be imposed or otherwise

(d) The process of plea bargaining must be done transparently. It must be recorded and the notes will form as part of the notes of proceedings".

4. Guidelines to Magistrates and police in relation to remand proceedings.

INSPECTOR YUSOF HAJI OTHMAN & 4 ORS v. KWAN HUNG CHEONG [2011] 6 AMR 289

Section 117 of the Criminal Procedure Code (CPC) allows the detention of a suspect

to facilitate the police to complete their investigations. Numerous points of procedural significance and implication came to light in the case of **Inspector Yusof Haji Othman & 4 Ors v. Kwan Hung Cheong**, where the respondent and another person were arrested on suspicion of committing an offence of house-breaking and were later brought before the magistrate. On the application to the magistrate by the police, they were remanded for three days. Subsequently, the police applied to the magistrate for an order to release both of them on police bail pending completion of police investigations. The magistrate recorded that "Both suspects to be released". Immediately after the magistrate had given the order, the police officer brought them to the police station and they were made to sign separate bail bonds issued by a police officer for an undeposited sum of RM10,000 in two sureties each. Under the police bail bond, they had to appear before the police officer at the police station. When the respondent appeared at the police station, the police officer endorsed the bail form and extended the bail. The process was repeated at about monthly intervals for a period of about six months. In the interim period, the respondent wrote to the Federal Attorney General's Chambers to enquire about the decision concerning the complaint against him. The Federal Attorney General's Chambers finally wrote to inform the respondent that after a careful and comprehensive study of the case, they had decided to close the investigations and to withdraw the police bail against him. Subsequently, the respondent filed an action against the appellants and by way of an application; he raised the following questions of law for determination:

(1) Whether it was lawful for the police to release a suspect on police bail under s 388 of the CPC after the said suspect was released from a remand order by a magistrate under. 117 of the same Code;

(2) whether it was lawful to impose a condition on the bail that the suspect had to appear and report at a police station on a fixed date and whether the said condition could be extended from time to time for so long as the case against the suspect was still under police investigations; and

(3) If either or both the police bail described above was unlawful, whether that amounted to a deprivation of the suspect's personal liberty in contravention of article 5(1) of the Federal Constitution.

The High Court decided all three questions in favour of the respondent. The Court of Appeal affirmed the High Court decision. Hence, the appeal to the Federal Court on the same three questions.

On the first question, Raus Sharif FCJ (as His Lordship then was) in delivering the judgment of the Federal Court said:

"It usually occurs that investigation could not be completed within the detention period granted by the magistrate under s 117 of the CPC. Section 388 of the CPC is there to assist the police. It empowers the police to release the accused person on police bail while the investigation is still in progress. Thus, it is my respectful view that the trial judge had erred in deciding that the power of the police officer to release any person accused of a non-bailable offence under s 388(1) of the CPC is only exercisable before the accused person is produced before a magistrate under s 117 of the CPC. Section 388 of the CPC makes no such provision. Neither does such a provision under s 117 of the CPC exist. Thus, to uphold the decision of the trial judge on this issue will have the effect of defeating the intent and purpose of s 388 of the CPC. Based on the above reasoning, it is my view that question 1 should be answered in the positive. It means that it is lawful for the police to issue a police bail under s 388(1) of the CPC against the accused person who has been released by a magistrate after a detention under s 117 of the CPC".

On the second question, His Lordship held:

"*.....it is permissible for a police officer to issue a police bail by imposing conditions in the bail bond that an accused person has to appear and report at a police station on a fixed date. The said conditions can be*

extended from time to time for as long as the case against the accused person is still under police investigation".

Regarding the third question, on the facts of the case, His Lordship said:

"*..The police officer after failing to get the order of the Magistrates' Court to release the plaintiff on bail, could no longer exercise his power under s 388(1) of the CPC by making the plaintiff to sign a police bail bond and impose conditions thereon. Such an act is in defiance of the court's order. The act was unlawful and it amounts to a deprivation of the plaintiff's personal liberty in contravention of Article 5(1) of the Federal Constitution giving rise to a claim for damages".*

5. Court of Appeal has no jurisdiction or power to review its own previous decision.

PUBLIC PROSECUTOR v. ISHAK BIN HJ SHAARI [2011] 3 MLJ 595

In this case, a question was again raised as to whether the Court of Appeal has jurisdiction or power to review its own previous decision. It is to be noted that there are two previous judgments of the Court of Appeal (see: **Ramanathan a/l Chelliah v. Public Prosecutor** [2009] 6 MLJ 215 and **Public Prosecutor v. Abdullah bin Idris** [2009] 5 MLJ 192) that ruled the Court of Appeal has the inherent power to review its own previous decision under exceptional circumstances.

In this case, the respondent was charged in the Sessions Court with an offence of rape of a minor under s 376 of the Penal Code. The respondent was convicted and sentenced by the said court to 15 years' imprisonment and five strokes of whipping. On appeal to the High Court, the conviction and sentence was set aside. The Court of Appeal however allowed the Public Prosecutor's appeal, and restored the conviction and sentence recorded by the Sessions Court. Subsequently, the respondent applied to the Court of Appeal to exercise its power of review to review the earlier decision of the Court of Appeal. The Public Prosecutor then raised a preliminary objection that the Court of Appeal has no jurisdiction or power to review its own previous decision.

By a majority, the Court of Appeal in **Public Prosecutor v. Ishak bin Hj Shaari** allowed the Public Prosecutor' preliminary objection. In delivering the majority judgment, Low Hop Bing JCA said that the jurisdiction of the Court of Appeal is to be determined by reference to art 121 (1B) of the Federal Constitution read with s 50(1) of the Courts of Judicature Act 1964 and O 92 r 4 of the Rules of the High Court 1980. In the words of His Lordship:

"The Court of Appeal does not have any criminal appellate jurisdiction to hear and determine criminal appeals which had finally been disposed of by the same court. Article 121 (IB) and s 50(1) have never contemplated the existence of the inherent powers of the Court of Appeal in the exercise of criminal appellate jurisdiction.

His Lordship then continued:

"The absence of the word 'review' in art 121(1 B), s 50(1) and 0 92 r4 means that no review jurisdiction has ever been conferred upon the Court of Appeal when it was created in 1994".

Zaharah JCA in her separate concurring judgment said that the Courts of Judicature Act 1964 sets out in detail the limits of the jurisdiction conferred on the Court of Appeal and that nothing in s 50 or any other provisions of the said Act or any other law confers upon the Court of Appeal the jurisdiction to review any matter which it has heard and finally determined, except in the circumstances set out in sections 42 and 44. Her Ladyship added:

".....it is my view that the reopening, rehearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, this court has no such jurisdiction..... As such jurisdiction has not been granted by the Federal Constitution

or by or under any federal law, or by the common law as it is applicable in this country; this court has no jurisdiction to hear this application.

In his dissenting judgment, Mohd Hishamudin JCA said:

"... I am of the view that the Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort.
.....The source of the inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art 121."

6. In an offence which was serious in nature and committed in a very cruel manner, the plea of guilt did not warrant the giving of a discount on the sentence to be meted out.

SINNATHURAI SUBRAMANIAM v. PP [2011] 5 CLJ 56

The principles of sentencing are quite established and have been discussed in numerous cases. Still, the case of **Sinnathurai Subramaniam v. PP** is noteworthy for the Court of Appeal again drew attention to the principle that public interest should be the first and foremost consideration in the assessment of sentence. The facts reveal a terribly cruel and grave nature in the way the offence was committed in this case. The appellant and his wife were initially charged of murdering two deceased persons (a mother and her little daughter) by setting ablaze a car in which the two deceased persons had been locked in. The forensic pathologist who performed the autopsies certified that the cause of death of each of them was soot inhalation. Subsequently, the public prosecutor charged them with an alternative charge accusing them of culpable homicide not amounting to murder in furtherance of their common intention, an offence punishable under s. 304(a) of the Penal Code read with s. 34 of the same, punishable with an imprisonment for a term which may extend to 30 years and the offender shall also be liable to fine. They pleaded guilty to the same and were convicted. Each of them was sentenced to 24 years imprisonment by the High Court. Dissatisfied with the sentence, the appellant appealed to Court of Appeal on the principal ground that he had pleaded guilty as soon as the amended charge was read to him and therefore he should be given a discount of one third or one quarter of the sentence. The Court of Appeal dismissed his appeal and affirmed the sentence imposed by the High Court. Ahmad Maarop JCA (as His Lordship then was) said:

"Such revolting facts which depict the very inhuman and savage nature of Sinnathurai's act would surely outrage the feeling of right thinking and sane members of the community. In such a case public interest demands that a sufficiently long imprisonment term be imposed to truly reflect the gravity of the offence and to demonstrate the society's abhorrence of this particular type of offence. The sentence passed must also serve as a stark and plain warning that the court would be in no mood to tolerate such an offence and very severe penalty awaits any person who dares commit such a crime.

Abdul Malik Ishak JCA in delivering a separate concurring judgment said:

No criminal is deterred by a slap on the wrist type of sentence or the wink of an eye type of sentence. The criminal will continue to commit the same crime, over and over again. Lawlessness will then prevail. It is crucial to impose deterrent sentences for serious offences in order to maintain law and order.

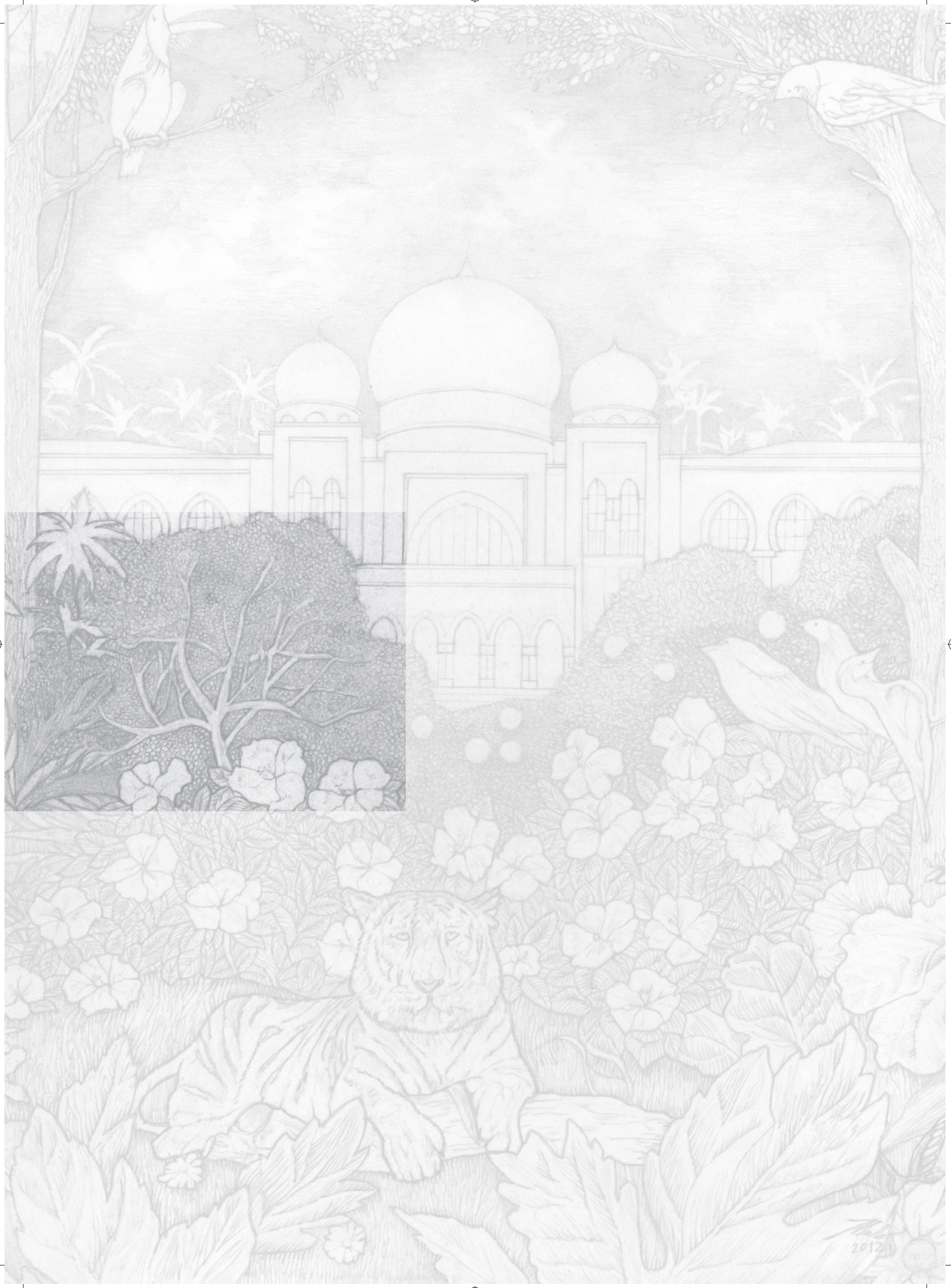
7. Court has no power to review its own prima facie ruling

LIM HUNG WANG & ORS v. PP [2011] 7 CLJ 318

A point of procedural interest in the course of a criminal trial emerged in the case of **Lim**

Hung Wang & Ors v. PP. In this case, the applicants were jointly tried in the High Court on a charge of trafficking in dangerous drugs under s 39B (1) (a) of the Dangerous Drugs Act 1952. At the close of the prosecution's case the court found a prima facie had been proved and ordered the applicants to enter their defence. Subsequently, the applicants filed an application in the High Court for the court to review its prima facie ruling. The application was dismissed. The court held that it had no power to review its own finding on prima facie case at the end of the prosecution's case for the reason that the CPC did not specifically give any such power to the court under s. 180(3) in particular or under Chapter XX in general. It was further held that the word 'review' in the context of the High Court's jurisdiction was expressly enacted in Chapter XXXI of the CPC only in respect of the finding, sentence or order recorded or passed by the subordinate court and as to the regularity of any proceeding in such court. Zawawi Salleh J observed on this point:

"Since the power of this court to hear criminal cases is regulated by Chapter XX, by allowing inherent power to exceed such power would not only cause chaos to our administration of the criminal system but also would open the door to a number of applications in the course of criminal trials which could frustrate criminal proceedings and bring proceedings at all levels of our courts to a halt. This consequence is clearly undesirable. The proper time to take the points as contained in the affidavit in support of the application is upon appeal after the court had determined the guilt or innocence of the accused at the end of the entire case".



CHAPTER 7

JUDICIAL INSIGHTS

JUDICIAL APPOINTMENTS COMMISSION AS I SEE IT

By
Tun Abdul Hamid Haji Mohamad
(Former Chief Justice and
a Member of the Judicial
Appointments Commission)

I was the Chief Justice when the proposal for the establishment of the Judicial Appointments Commission was made. I had given my comments on the contents of the then proposal. The proposal, with important modifications, to me, became law after I retired and I was appointed a member of the Commission along with three other members, namely Tan Sri Steve Shim, former Chief Judge (Sabah and Sarawak), Tan Sri Ainum Mohd. Said, former Attorney General and Tan Sri L.C. Vohrah, former Federal Court Judge. We were appointed for two years as provided by the law. We are now in our second term. The other members are the *ex officio* members as provided by the Act, with the Chief Justice of Federal Court Malaysia as the Chairman.

When I was appointed a Member, I took the position that I would work within the system. After all, I was appointed by the law with powers given by the law and to that extent only.

I was also of the view that a member should not be, and should not be seen to be, championing a particular person too much, whether for appointment or promotion. One of my reservations

about the Commission when it was first mooted with the then proposed membership, was that it might be a conduit for lobbying for appointment as Judges. So, the most that I would say is "What do you think of so-and-so?" In case of promotion, when someone is going to be bypassed, my question would be, "What is wrong with him?" Of course, I would give my view about them but I would not go so far as to plead with other members to agree to appoint or promote them.

I was also of the view that a person should be a Judicial Commissioner first before being made a Judge of the High Court and he should serve as a High Court Judge first before he becomes a Judge of the Court of Appeal.

Let me explain why. Almost every appointment or promotion has a "probation" period before a person is "confirmed" on the appointment or promotion. The purpose is to observe whether the person can really do the job as is expected of him. Academic qualification is no guarantee that a person will be an able and good worker. I have seen that from experience. Similarly, a person who appears to be suitable for the job may turn out differently due to some factors that we are not aware about him.

In the case of appointment as a judge, the "probation period" is even more important. First, judgeship is a "permanent" appointment. Once appointed, he may not be disciplined except as provided by Article 125 of the Federal Constitution. As a Judge, he enjoys what goes with the independence of the Judiciary, including the provision that his salary may not be reduced. In any event, "prevention is always better than cure".

Secondly, a person may have a very impressive academic qualification, had spent years teaching at the university or, had even been a successful litigation lawyer but he suddenly finds that the work of a Judge is very different from what he had been doing and it does not suit him. On the other hand, a person may simply not have the aptitude required of a Judge.

Besides, there is also the administrative consideration. There may be a period when the Judiciary needs more judges to clear up the backlog but after a few years, there is no need for such a big number of judges anymore. The appointment of Judicial Commissioners is the answer.

Regarding direct appointment to the Court of Appeal, the work of a trial judge is very different from the work of an appellate judge. A trial judge spends a major part of his time (my estimate is 80%) ascertaining the facts either through oral or documentary evidence. He has to sit patiently, listen to the evidence adduced orally and (until recently) write down in long hand the evidence of every witness. The most frustrating of all is the evidence of Investigating Officers which could take days to record, repeating similar things that he had done during the investigation, identifying every mark and signature on every document and exhibit as well as every person he handed them to and received them from. An appellate court judge does not have to deal with witnesses. In a High Court trial, a normal criminal case would have hundreds of pages of recorded notes, not to mention the exhibits. Then comes the sifting of the evidence to arrive at the finding of facts. This requires experience. Only then does he determine the law and apply it to the facts to come to a conclusion. In civil cases, documentary evidence may run into thousands of pages.

An appellate Judge is spared this ordeal. He reads the judgment, may be refer to parts of the recorded evidence, listen to the submissions of counsel and decide whether the trial Judge is right or wrong. An appellate Judge who had been a trial judge would understand the nature of work of the trial Judge and would be slower to find fault with a trial Judge. When debating this issue, I usually say that "Even Eusoffe Abdoolcader was appointed a High Court Judge first." The other example I usually give is about a person who was appointed a Federal Court Judge directly. Even though he had been a very senior officer and was noted for prosecution, an arrangement was made for him to spend part of his time hearing High Court cases to give him experience. This happened when Tun Suffian was the Lord President.

Of course, in very exceptional cases, an exception could be made, even though I would be very reluctant to support it. Since the establishment of the Commission, no one was appointed a

Judge and no one was appointed an Appellate Court Judge, directly.

The major part of our duties involve appointment and promotions. We wanted to attract as many people who are qualified, able, suitable and prepared to work hard, for the job. To practising lawyers, we made it clear that they should not expect the appointment to be a semi-retirement. So, a website was opened for interested persons to apply besides writing directly to the Chief Justice or the Chief Registrar. The Chief Justice and the Chief Judges also looked around for suitable candidates. Some of us also suggested a few names.

As for officers of the Judicial and Legal Service, Chief Judge (Malaya) and Chief Judge (Sabah and Sarawak) respectively would know the candidates who are on the judicial side. As for those in the legal side, we would rely on the recommendation of the Attorney General. There is a slight snag here. Quite often the Attorney General or even the Government did not want an officer to be "released" because his services were required where he was. This leads to an anomaly: a good officer is denied appointment as a Judicial Commissioner and later Judge because he is good and therefore cannot be released. The Judiciary is denied of a good material for Judgeship.

While we understand the problem, we tried to persuade the Attorney General to release such officers, at least a few of them. As for those who had "suffered" because "they were good" we gave special consideration when it came to confirmation as a Judge of the High Court or even promotion to the Court of Appeal later provided they had proved that they were good as Judges too. Similar consideration is also given to very senior members of the Bar who were appointed Judicial Commissioners.

A candidate's background, qualification, experience and suitability including integrity would be thoroughly checked. At the meeting the Chief Justice would brief us on each candidate. Members wanting to know more about the candidates would ask questions, followed by a free discussion and secret voting. While seniority is taken into account, integrity, suitability and their track records in their previous jobs would form important factors considered by the Commission. In the case of lawyers, the Chief Justice would usually consult the Bar Council as well even though the law does not require him to do so.

For appointment of High Court Judges, the list of Judicial Commissioners would be prepared according to seniority. The statistics regarding the number of cases disposed of by them, the number of judgments they have written, reported and unreported, the number of judgments pending are also made available. Statistics do not tell the whole truth. So, relying wholly on figures may not give accurate results. Reports by the respective Chief Judge is important. All factors are taken into account. Here too, most of the time the views of the members are quite unanimous.

Regarding the appointments of the Chief Justice, the President of the Court of Appeal and the Chief Judge (Malaya) made last year, of course the choices were more limited. However, we not only considered the immediate candidate in terms of seniority. There is an additional factor involved here: administrative capability. However, I must add here that, to me, a Chief Justice is a chief justice first and a chief executive officer second.

Having been a member for three years, speaking personally, I am happy to state that the Commission has served its purpose very well, decisions are mostly unanimous and that the Government has respected the Commission's recommendations. In short, it is working pretty well and it is worth having it.

The work of the Commission is not only confined to appointments and promotions of Judges. Equally important, is to keep an eye on the performance and behavior of Judges. At almost every meeting these issues are briefed, discussed or somehow raised. The Commission members are unanimous that Judges who do not perform and/or misbehave should be disciplined, the type of which depends on the seriousness of its nature. Hence during its first term, two High Court Judges were "advised" to resign. Indeed, in appropriate cases, the Commission is prepared to recommend that a Judge appear before the Tribunal as provided by the Federal Constitution. On a number of occasions, the Chief Justice, the President of the Court of Appeal or

the respective Chief Judge had (sometimes at the request of the Commission) "talked" to the Judges concerned and reported to the Tribunal at the next meeting.

Other matters regarding administration of Justice like construction of court houses, the problem of backlog, disposal of cases, staffing, equipments, training, salaries and promotion of not only Judges but also of Judicial and Legal Officers were always on the agenda. The Commission itself obtained a grant for training of Judges which was used to train judges, including in mediation, either by inviting foreign Judges to Malaysia to train them or by sending our Judges to be trained abroad. Thanks to the efforts of Tun Zaki and his colleagues and the support and cooperation of the Judges themselves, Malaysian Courts now stand as one of the best in terms of speedy disposal in the world, a fact recognized by the World Bank.

Lest it is said that it is achieved at the expense of justice, I would like to place on record that the non *ex-officio* members of the Commission are very concerned and very vocal about it. While it is admitted that, given less pressure to produce the quantity, the quality could improve, we found that, more often than not, those who produce low quantity also produce low quality products and *vice-versa*. It is like a low horsepower engine, how much power can it generate?

When I was Deputy Registrar, I initiated the removal of the power to issue money lenders' licence from the Chief Registrar of the Federal Court. It was transferred to the Local Governments. If I had my way, I would have have revised the Subordinate Court's Act 1948 too to:

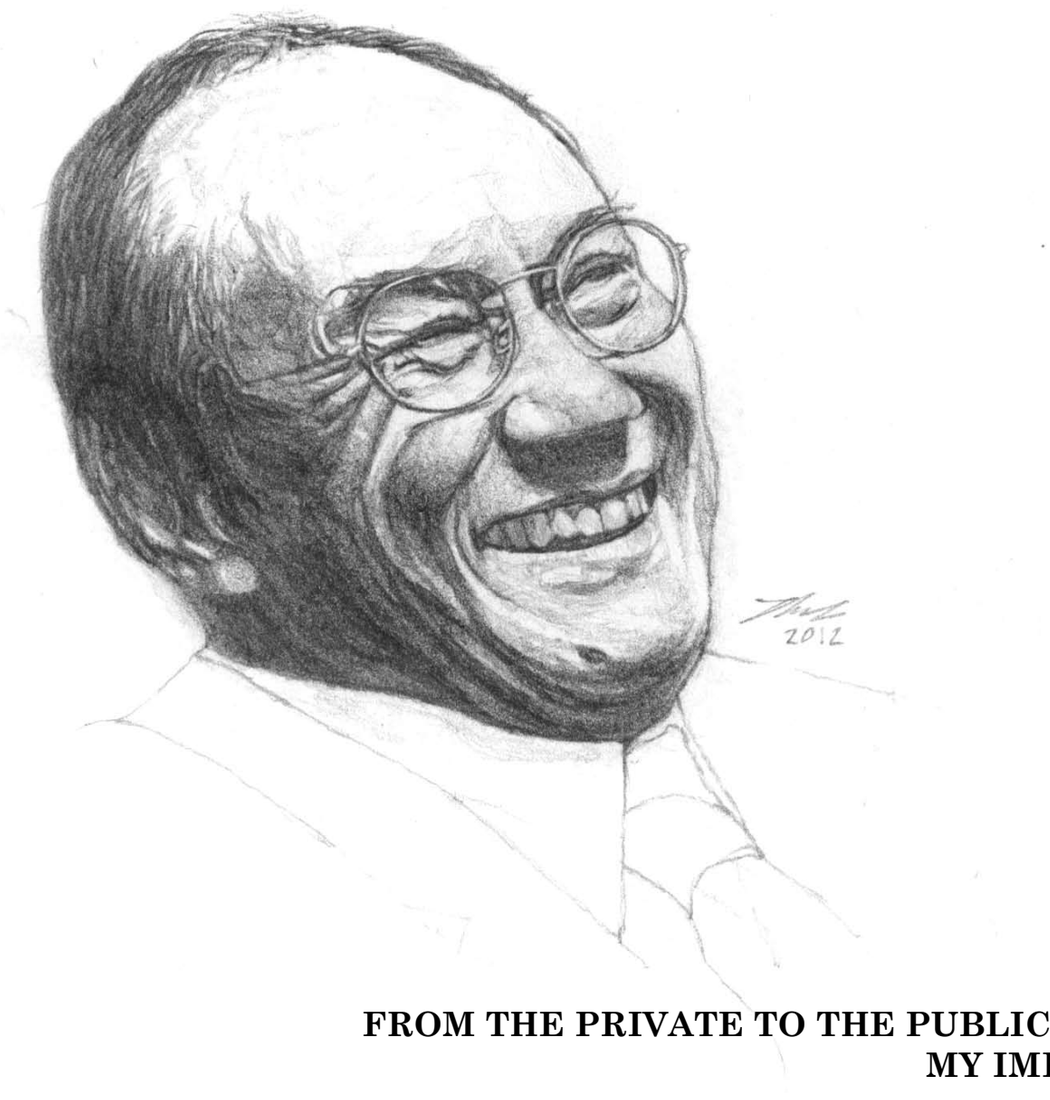
(i) repeal the provisions regarding the Penghulu's Court;

(ii) provide that appointments of Magistrates be made by the Yang Di Pertuan Agong, and not by the Ruler of a State;

(iii) abolish provisions regarding Justices of the Peace or at least remove it from the Act.

I initiated it when I was Chief Justice but my term of office was too short for me to see it through. Anyway, Penghulu's Court has been abolished but the other two remain in the statute. I have brought up the issue again and work is in progress though at initial stage. Due to lack of space, I shall not give my reasons here except to say that, regarding the appointment of Magistrates, since Merdeka, the Judiciary is a Federal matter, Magistrates are Federal Officers and there is no reason why they should be appointed by the States. Regarding Justices of the Peace, they were never made to do the work of Magistrates by the British who introduced the institution, as in England, indeed I would strongly argue that they are unsuitable for the job, especially in this age of professionalism.

While our Judiciary may not be perfect (show me one which is!), I think that honest and reasonable Malaysians should be happy with and proud of it.



FROM THE PRIVATE TO THE PUBLIC SECTOR — MY IMPRESSIONS

By
Tun Zaki Tun Azmi
(Former Chief Justice Malaysia)

On looking back, I sometimes wonder what made me finally succumb to the persuasion by the then Prime Minister Tun Abdullah Ahmad Badawi to take up the position as Judge of the Federal Court in September 2007.

It must have been the strong impulse to put some things right in the courts. It must have been the need to see a better organised judicial system. After all, I have been the recipient of some tardy responses from the courts all these years of practice at the Bar, and thus the position offered to me was hard to resist. It was also because it had the added advantage of giving something back to society, after years in private practice.

Thus on the morning of 5th September 2007, I was appointed Judge of the Federal Court.

In my first month, I found that life as a Judge was an extremely lonely and a literally cold existence. My room temperature must have been about 10 degrees celcius! I discovered that some Judges had a blanket on at all times in their chambers and some even wore long johns all day! Some others opened their windows to let in the sunshine. It was puzzling

to me why no one, not even the maintenance people knew how to make these chambers warmer.

I had to put on a cardigan or a thick blazer to brave the cold. I figured that if the temperature in my room did not improve, I would soon have to resign from my position, since I am susceptible to coughs, colds and asthma.

Since I could no longer bear being slowly frozen, I had to take matters into my own hands. Common sense told me that the room was cold because too much cold air was coming in through the air condition ducts. Thus the logical thing to do was to close or partially close the ducts. That was it. Pure common sense!

So I had a team of maintenance officers to do just that and consequently, life was a lot more bearable!

From then on, I applied nothing more than pure common sense too, to make the changes and initiatives, mainly to improve the system.

For instance, in the past, a simple letter from me to an officer or Judge would take several days to be attended to, going through a circuitous route from my desk to the secretary to the officer and so on and so forth.

Thus it was plain common sense for me to just send a letter directly to the intended officer! Once the letter or judgment was sent to an officer or to a Judge respectively, I expected the said officer or Judge to attend to the document within 24 hours. Why should it be delayed and clog up the system? In this way, things can move faster and action can be taken in double quick time.

I have always been an extremely impatient person. I am aware that I have been called all sorts of nicknames – such as 'Speedy Gonzalez' 'Jumping Joe' and so on and I am sure there are less flattering ones as well! But that is just the way I am because I believe that we have to be alert, focused, quick and hands-on when doing whatever it is that we are supposed to do.

As you can gather from the above, my way of doing things was a far cry from how things were done in the Judiciary.

When I first came on board, I was amazed how mind-boggling the bureaucracy could be. On hindsight, I suppose it is not fair for me to expect the corporate culture to immediately supplant or replace the Government bureaucracy. But at the same time I do not see why I should put up with it, either.

So the best way to tackle this thorn in the flesh was to introduce my style of doing things.

I am aware that where I came from, I am so used to the fast paced commercial realities. For instance, a mere five minute delay in a corporate decision may cost millions to the company.

Thus the slowness, due to various governmental "guidelines" and levels of seniority with which decisions must go through, nearly drove me insane.

So I had to strategise. I had to plan. I had to devise ways and means of making things work faster and better in the Judiciary because to me, it is imperative that the public and the stakeholders get a more efficient service.

In the various interviews which I had given to the media, over the course of time I was the President of the Court of Appeal and subsequently as Chief Justice, I had indicated how I had drawn up the blueprint to improve the judicial system.

Thus I shall not belabour the point, save to highlight a couple of instances. Some people have said that I had employed a McKinsey type management style in changing the Judiciary. I am not sure whether that is true or not. But what I did know is that I had to be ruthless in the implementation of the changes and initiatives.

The prospect appeared to be daunting at first. But once I had made up my mind as to how to do the changes, there was no turning back.

However, I was aware that when I first started to introduce changes to the Judiciary, I sensed that many were unhappy with them. In fact I sensed that some of the older people in the Judiciary were not receptive to the changes. This latter group must have resented the fact that an outsider (me) could flex his muscles,

give them instructions and generally make life difficult for them! I was not insensitive to these rumblings. But as far as I was concerned, I had a job to do and that was that.

Somehow I felt that the young people in the Judiciary were not averse to the changes. In fact they (the young officers) have been extremely cooperative and had chanelled their energies in re-organising the files especially those in the Court of Appeal when I was the President of the Court of Appeal. These officers and staff went into full swing in cleaning and clearing up the files. They did not mind 'getting down and dirty' so to speak, by physically re-organising the files. They even worked during weekends. Their success story was broadcasted quite widely and I am proud of what they had managed to achieve. It is therefore a matter of common sense and logic that their success is replicated in Courts all over Malaysia.

But the changes and initiatives which I made later, could not have been achieved without the immense cooperation and contribution of so many of the senior members and Judges in the Judiciary.

You might wonder why I was so driven about making the changes. The answer is very simple.

Over the years, Malaysia's growth as a nation has been nothing short of phenomenal. Increased commercial and related activities produced more business and commercial disputes, which of course found their way to the courts. It took five or more years for civil cases to be heard at first instance. Another few more years to be heard on appeal. The waiting period for criminal cases could be longer still.

I had to make a detailed assessment of these problems. What I learnt was that the main causes of the backlogs were inadequate administrative support and the failure to address this problem in a holistic manner. The implications of these problems were significant. Since I was in the corporate sector before this, I knew that whilst the public sector institutions were transformed to enhance and promote an environment which is good for market development and business activities, the Courts were somehow left in the lurch.

Thus speaking from personal experience, across the board, then, those who came into contact with the Judiciary were unhappy by its lack of responsiveness and general inefficiency.

There was therefore no doubt in my mind that I, together with the senior judges, had to press energetically for the resources which we needed if we were to perform our role effectively in the future.

As I had said earlier I had to be ruthless. In that sense, the changes were to be quick, sure and dramatic.

But the 'drama', if it could be called that, with our widespread modernising of the Courts with new technology, new work ethics and culture, has now subsided. The members of the Judiciary and the stakeholders are now familiar with each and every 'act' and 'scene' of the 'drama', and we have received 'encores' from scores of people, including the World Bank.

I am thankful therefore, that despite the 'boos' before the curtain call, we have now managed to overcome most of the obstacles. Alhamdulillah.

Another critical area which I had to consider was with regard to judicial manpower.

If in the corporate world, the goal is to maximise profits, in the Judiciary the goal is to provide justice coupled with efficiency and productivity. In my view, the Judiciary's productive capacity is the total sum of its many parts, with emphasis on its people.

It is useless having the latest technology and facility or even an improved legal framework, if the people utilising it are not competent, not interested and not effective. To me, the historical view that individual Judges are the 'assets' of the Judiciary and that their judgments and orders are their 'products', still holds good. Therefore the importance of individual Judges is significant.

That was the reason why I gave ultimatums to 'non-performing' judges and court staff. The 'shape up or ship out' concept was put to good use by me.

In my view, as shared by many others, part of the Court's authority rests upon public confidence in the Judiciary. Thus we have to 'revise' or reformulate the relationship between the Judges and the public in more contemporary terms.

There are several ways of doing this. Most Judges are experienced, knowledgeable and talented. Some are more than others. They have opinions and they bring to the Bench, their own unique life experiences. But if the talents which they bring are to be constructively used, they have to be supported by judicial input and other skills which they might lack.

Thus judicial training either by attending courses, conferences or seminars must be encouraged. I think judicial training should be part of a Judge's professional entitlement. I am happy that there will soon be a Judicial Academy for this purpose. That was why I organised as many seminars and training programs as possible on an ad hoc basis then. Judicial training is therefore an important part of the career development of the Judge.

Another important issue was the fact that there was not enough diversity in the Judiciary when I took over. I believe the public has a right to demand a Judiciary that is more representative of the population. Moreover, the changing needs of society which has enhanced the Judges' role makes this justified. Being multiracial, it is inevitable that in Malaysia, race, ethnicity and gender greatly impact public views when Judges dispense justice.

Since it was during my time that the Judicial Appointments Commission was established, I took an active role in ensuring that the appointment of judges takes care of this concern.

Thus there was a fairly high number of judges who came from the Bar (as opposed to those from the service), who are non-Malays and female, when I was the Chief Justice. As I had said, I believe that the experience of race and gender and different experiences and backgrounds can influence perception and perception influences judicial decision making and judicial outcomes.

So that was how things were done. If it is complicated, simplify it. If it is long and tedious, shorten it. If it is slow, quicken it. If it is disorganized, restructure it. In short, we have to identify the problems first, know what caused them and find the solution to overcome them.

Thus after almost three years now of inculcating a new work culture, I believe that the Judiciary is now prepared to take on constructive criticisms and to measure its performance against the standards of efficiency and justice in other parts of the world.

I am happy to say that my initial impression has since been replaced by one of respect for their heavy responsibilities the work they do and how they carry them out.

The Malaysian Judiciary has indeed witnessed some remarkable changes and I am confident that with the present leadership it will not lose its momentum but would in fact, rise to greater heights. Insya Allah.

APPEARANCE IN COURT BY RETIRED JUDGES OF THE SUPERIOR COURTS : SHOULD THEY?

By
Dato' V.C George

Unlike in Australia and England, there has not been any or any significant discussion in Malaysia on this subject, a topic which I respectfully suggest, is important enough to be included in the Malaysian Judiciary Yearbook 2011.

At the Australian Bar Association Conference held at Alice Springs in July 1986, a paper was presented by the distinguished former judge of the Supreme Court of South Australia who went on to become the Governor of South Australia, Dame Roma Mitchell, on the appointment of Judges and their retirement. Mr Justice JB Thomas of the Supreme Court of Queensland, in his book *Judicial Ethics in Australia*, says by note 155 at p 64 that considerable discussion took place in respect of Dame Roma Mitchell's paper, on the retirement of Judges.

Dame Roma Mitchell, in her paper inter alia wrote,

> "The main question for discussion on this topic is probably whether there should be a prohibition against the return to the Bar of former Judges and, if so, whether the prohibition should be absolute or should be limited in any way."

She went on to state,

> "I have always felt that the acceptance of a judicial appointment should have, as a corollary the final farewell to the Bar."

As to the situation in England, Professor Shetreet in his 1976 book, *Judges on Trial*, referred to by Justice Thomas as the Professor's 'valuable path-finding research into judicial ethics in England', has, at p 374, asserted in respect of the English practice, that '*Judges do not go back to the Bar*'.

In England, the Lords had debated the new Courts Bill in November 1970, one aspect of which touched on judges, on reaching retirement age, returning to the Bar, and also of judges retiring, before reaching retirement age, to go back to the Bar.

Dame Roma Mitchell reports Lord Dilhorne saying '*in righteous indignation*' in the course of that debate,

> "What I think is unprecedented and I myself think inexcusable is that someone who has accepted the appointment by Her Majesty as a judge should thereafter relinquish the appointment and take one in business. It should be clear, surely, to everyone at the Bar that if one accepts a judicial appointment, there are obligations attached to it that one cannot return to the Bar and practise as a barrister and that, having embarked on a judicial career one is under a moral obligation to do the job and not give it up in favour of one that appears more attractive."

Lord Denning also participated in the debate and said,

> "Perhaps it is to be remembered that in this country alone, as far as I know, by a convention, a judge on his retirement does not return to the Bar or engage in legal work at all. In the United States, Canada and in many other countries it can be done and it is done. I venture to think that it is unsatisfactory because during his tenure a judge might have his eye too much on what he was going to do when he ceased to be a judge."

Lord Hailsham, the Lord Chancellor had the final say,

> "We leave what he may do when he leaves office to the appropriate professional body. I think that it has been accepted since the 17th century that this return to the Bar is not proper for High Court Judges and I should have thought the same to be true of County Court Judges. Indeed I thought there was a ruling of the Bar Council, and probably of the Law Society, to the same effect."

At that Conference in Alice Springs in 1986, in respect of the discussion that emanated from Dame Roma Mitchell's paper, Justice Thomas reports that whilst some favoured total prohibition of the return by Judges to the Bar, the majority view seems to have been that it should be permissible, with the important proviso, that certain limitations are observed.

Justice Thomas points out at p 64 of his book in respect of the position in Australia,

> "Ethical questions aside, the retired Judge's name remains on the roll and he has a right to practice, it is generally accepted that it is improper for a Judge to accept any brief which may bring him before the court of which he was formerly a member, or before any former fellow judges. The reason is obvious enough. The public, and in particular the adversary's client, might think that the judge-barrister had an unfair advantage arising from these former intimacies and dealings; and this might translate into a fear that justice might not be done. Rulings of most Bar associations in Australia now limit the courts in which former judges may practice."

As an example of Rulings of Bar Associations in Australia, there is a provision in the New South Wales Bar Association,

> "A barrister who is a former judicial officer (including a former magistrate but excluding any acting judicial officer) shall not practice as a barrister in any court or before an officer exercising judicial or quasi-judicial functions if he has been a member of or presided in such court or exercised such function."

Dame Roma Mitchell in her paper touched on judges receiving a pension on their retirement and that that might provide a good reason for discouraging judges from returning to the Bar. But such a contention would turn on the adequacy of the pension and as such certainly does not provide per se a good reason in the Malaysian context to totally prohibit practise at the Bar by retired Judges. I elaborate on that:

> In Malaysia, the total emoluments paid to judges has increased significantly since the 1990s. Although the total amount paid cannot be said to be generous when compared to what judges are paid in Singapore, Australia or England, or when compared to what leaders at the Malaysian Bar earn, it cannot be said to be significantly inadequate. However, it has to be pointed out that the substantial part of such payments in Malaysia are in the form of allowances. The basic salary of a judge is less than half of the total emoluments he/she receives and sans allowance, can be claimed to be, without fear of contradiction, an inadequate salary. However, the allowances the judge is paid is made generous enough to make up, to some extent, for the inadequacy of the basic salary. On retirement, the judge ceases to get any of the allowances, but he/she gets a pension for life. The full pension the judge is paid when he/she has served for not less than 15 years is computed on the basis of 50% of that inadequate basic salary. In effect, after retirement, the judge is paid only some 25% of what he/she had been paid while serving as a judge. Accordingly, the suggestion that since the judge is paid a pension, he/she should not seek to earn a living on retirement will not hold in the Malaysian context. In retirement, a judge cannot hope to live anywhere near the style he/she had been used to as a serving judge. But, be that as it may, the retired judge going back to the Bar to practise in the Courts, albeit, to attempt to earn something to enable him/her to add to his meager pension in order to live in a reasonably comfortable manner, can be said to militate against those judicial ethical principles that has been referred to hereinbefore: Justice may not be seen to be done. I refer again to the quotation from Justice Thomas' book where he talked of '*The reason is obvious enough*' (for him not to go back to the Bar), and to Dame Roma Mitchell's suggestion that the appointment to the Bench (and the acceptance of his appointment) is a '*final farewell to the Bar*'.

In his book, Mr Justice Thomas, in stating his own provisional views, said at p 67, *inter alia*,

> "(a) Acceptance of judicial office is a lifetime commitment. That is not a stricture against early retirement; it is merely to say that when one does retire, the former judge remains under certain ethical duties the basis of which has been described above.
>
> (b) Academic and literary pursuits seem to be well tolerated. So are arbitrations and commissions, even governmental and quasi-political commissions.
>
> …
>
> (d) Subject to appropriate limitation of practice, a return to practice at the Bar is permissible. The spectacle of a retired Supreme Court Judge appearing before a magistrate, or competing (within ethical limitations) for opinion work, may not be attractive either to the judge, his competitors, or the magistrate, and his exclusion from the area with which he was most familiar will raise practical difficulties which will limit the number of aspirants; but it is not unethical per se for a retired judge, even on a pension, to practice at the Bar."

Those provisional views of Mr Justice Thomas as set out in his aforesaid paragraphs (a) and (b) I respectfully say, accord to some extent with my own provisional views. As to his paragraph (d) while I share his views as set out in the first limb of the paragraph, I do not agree that '*it is not unethical per se for a retired judge, even on a pension, to practice at the Bar*', at least in the sense of appearing in the Courts as an advocate.

Following from what Justice Thomas says in his paragraph (d), of the spectacle of a judge of a superior Court appearing before a Magistrate, I would respectfully suggest that for a retired Judge of one of our Superior Courts, i.e. the High Court, the Court of Appeal or the Federal Court, to appear before a sitting High Court Judge,

who in all probability had been a junior judge when the retired Judge had been on the Bench, is a situation also pregnant with all sorts of situations that could be an embarrassment, generally to the administration of justice and in particular to the presiding Judge and to counsel on the other side of the Bar. I have heard, startling as it may be, of cases of a retired judge appearing in the Courts as counsel citing his own judgments in support of his submissions! And if that is done in the Magistrates' Court or a Sessions Court, you could have the unhappy situation of the judge counsel suggesting, submitting, that the Magistrate/ Sessions Judge, is bound by judgments the judge counsel had made when serving as a Judge, based on the principles of *stare decisis* since that is a decision of a Court superior to the Magistrates'/Sessions Court!

I respectfully suggest that it is timely for planned discussions on the constraints on retired Judges, initially at an informal meeting, say, of retired Judges and representatives of the current Judiciary and of the Bar and of the Attorney General. I would respectfully point out that each of the current Judges will sooner or later retire and with that also in mind, perhaps the Chief Justice of Malaysia could consider calling for such a meeting or meetings, in the near future. I know that most, if not all the retired Judges, still around, would be keen to participate in such a meeting or meetings.

And at such a meeting/s, certain other aspects pertaining to retired Judges could be aired. I am thinking inter alia of the deprivation on their retirement, of some of the privileges Judges enjoy, including some of the allowances they had been paid and mundane as it may be, the right to have the use of the so called VIP lounge at airports and the right to have the glass windows of their motor cars tinted!

Let me explain myself by referring to a vivid recollection I have of seeing the late Justice Syed Othman a week or so after his retirement from the Federal Court Bench, queueing up with the general public to get into an economy class seat on a flight from Kuala Lumpur to his home town Johore Bahru. I was still practicing at the Bar at that time and was travelling by First Class. The Judge was a close enough friend of mine for him to explain to me that he was not anymore entitled to use the VIP lounge or the gate to the aircraft reserved for VIPs, and that on his meager pension which must have been less than RM5,000 in those days, he could only afford to fly coach or economy class!

As to the motor car's tinted windows, judges of the Superior Courts are entitled to that privilege if you want to call it that, not for style or privacy or to show that he is an important person, but as a measure of security. I recall in the early 1970s, an Inspector General of Police being shot through the window of his car when it stopped at a traffic light in Jalan Raja Chulan, Kuala Lumpur. I think it was after that murder, that certain persons including Judges, were allowed to darkly tint their motor car windows as a security measure. When I was the Judge in Pahang (1981 to 1983), and had sittings both in Kuantan and in Raub (there used to be a High Court in Raub in those days), I was 'instructed' by the then Chief Police Officer ('CPO') of Pahang, my friend Mohd Nor Khamis, to ensure that my car windows were heavily tinted and I was advised by the CPO not to sit on the same seat in the car each time I travelled, as an additional security measure. In those days, I had to preside at trials of alleged terrorists charged with offences that attracted capital punishment. And it must be remembered that judges have to give decisions whether in their criminal jurisdiction or civil, that could upset litigants and/or their relatives.

In any matter before the Court, one party has to lose and there can be desperate bad losers. Sitting Judges have to be protected from such losers and it is because of that, that arrangements are made so that they should not have to rub shoulders with the members of the general public. What seems to be overlooked is that even after a Judge retires, the bad losers with long memories, may still be around. I was reminded by the then Chief Justice, on or about the day I retired, I think a note was sent to me, that I was not anymore entitled to the privileges of using the VIP lounge at airports and/or of continuing to have my car windows tinted! I had to and did have the heavy tint removed forthwith and like my old friend, Justice Syed Othman, rubbed shoulders with the general public in public places including at airports queuing up for my economy seat and had become an open target while travelling in my motor car, of some unhappy litigant or some member of the family of persons I had had to sentence to death.

I end by repeating that the views I have on the subject are provisional and that it is indeed timely that we have a meeting or meetings to discuss some if not all the matters I have referred to for some form of consensus to be arrived on the ethical principles retired Judges have to observe.

OF ENTICING AND ENTICED MARRIED WOMEN

By
Justice Dr. Badariah Sahamid
Judge, High Court of Malaya
(Shah Alam)

"If a husband is to keep the affection of his wife, he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away both the possessiveness of her parents and the designs of would-be lovers. If she is weak and false to her trust, the harm done cannot be righted by recourse to law, nor is money any compensation. The only thing for the husband to do is to work as best he can to mend his broken life, a task in which the courts cannot help him."

Per Lord Denning in the case of **Gottlieb v Gleiser**[1]

On 7 March 2011, Darren Choy Khin Ming was acquitted by the Magistrate's court of the offence of enticing a married woman under section 498 of the Penal Code. (hereinafter referred to as 'the Code') Earlier In May 2010, Ryan Chong, after failing to obtain the sanction of the Attorney

[1] [1957] 3 All ER 715

General's Chambers to prosecute, had initiated a private prosecution against Darren Choy for the offence of enticement of a married woman under section 498 of the Code. At that time Ryan was already divorced from Daphne.

The courtroom drama that enthralled the public had as much to do with the controversial action, as with the riveting personalities of the parties themselves. At the heart of this action was the enticing (pun intended) Daphne Iking, a celebrity television personality .The other protagonists were Ryan Chong, her former husband and Darren Choy, the alleged paramour. For a large dose of mystery, there was also the issue of the identity of Daphne's three year old daughter.

After the 'fireworks' of the action in a trial that lasted almost two years, the case concluded with a whimper when Ryan Chong withdrew the action after Darren Choy agreed to tender an apology in the magistrate's court. In a further twist to the case, in the midst of the trial, Daphne re-married, not her ex husband or paramour but a third person.

The case generated not just prurient interest of the public, but reopened controversial socio legal arguments surrounding the utility of section 498 of the Code. Among the issues raised and fiercely debated in the media, coffee shops as well as cyberspace were the following: Why use public funds and resources to resolve what is essentially a domestic matter? What purpose is achieved by such prosecution since the 'married woman' was already officially divorced from her husband? Was the prosecution under section 498 of the Code a personal vendetta, an abuse of process, to publicly humiliate a rival or/and punish an erring wife (or ex wife as in this case)? Is section 498 of the Code discriminatory against women as it only allows legal recourse by a husband? Why treat a woman like Daphne as if she were a chattel and the property of her husband with no independent mind of her own? Why allow to be played out in full public glare, the mystery surrounding the identity of the daughter's biological father, without regard to repercussions on the innocent child?

In the wake of the numerous controversial issues raised by the abovementioned case, it is timely to give serious consideration to whether section 498 of the Code should be retained, reformulated or repealed altogether? In other words, is section 498 of the Code archaic law or still socially relevant?

Enticement under section 498 of the Penal Code

The provision in respect of the offence of enticement of a married woman in Malaysia is provided as a criminal offence.

Section 498 of the Penal Code states thus:

"Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

According to section 498, an offence is committed if there is either a "taking or an enticement" by the Defendant. The word "taking" has a different meaning from the word; "enticing" .In the case of **Ramasamy v Public Prosecutor,**[2] Cussen J. stated that the meaning of "taking" is that the Defendant had personally and actively assisted the married woman to leave the husband's house or the custody of any person who was taking care of her on behalf of the husband.

As to what conduct amounts to 'enticement', the enticing, procuring or persuading must be of a positive character and had resulted in the married woman leaving the matrimonial home. It is insufficient if the enticement was merely solicited advice or sexual attraction. Further, the "solicitations and advances" must have come from the Defendant.[3] It is no defence that the married woman had consented to the taking or enticement or even if she had initiated the taking or enticement since a married woman was regarded as incapable of giving consent to her own adultery, as she was a servant or chattel of her husband.

[2] [1938] 7 M.L.J.(F.M.S.R. 137)
[3] Public Prosecutor v Liew Hin {1934} M.L.J. 12

In an action for taking or enticement, the woman in question must be a married woman, the Defendant must be shown to know or have reason to believe that the enticed woman was married, and that at the time of the commission of the offence, she was living with her husband or some other person on his behalf and the Defendant had intended to take or entice the married woman for the purpose of illicit intercourse not necessarily with the Defendant, but "with any person".

The offence can be committed without the Defendant having had sexual intercourse with the married woman. Adultery is therefore not a necessary element to prove the offence of enticement.

It appears too that an action for taking or enticement under section 498 of the Code can be brought against a man or a woman as the section uses the term "whoever". However, in a typical action under section 498 of the Code, the Defendant is the paramour of the married woman.

This action is only available to a man whose wife has been taken or enticed and had consequently left the matrimonial home. Section 498 of the Code does not provide an equivalent action for a married woman whose husband has been taken or enticed by another man or woman.

Section 468 also makes it an offence for a person to conceal or detain a married woman for the same intention.

The section also provides the punishment of imprisonment for a term of up to two years or the imposition of a fine or both.

Historical origins of section 498 of Penal Code

At common law, the tort of enticement of a married woman was premised on the feudal concept of master and servant whereby a man's wife and his children were regarded as his property. Flowing from this concept, a man possessed a proprietary right to the services and consortium of his wife and the services of his minor children. Interference by a third party entitled a man to damages to compensate him for the loss of his wife's consortium and services. The damages were also intended to compensate the husband for injury to his honour and pride and his marriage.

The common law rationale for the offense was the protection of domestic relations. However, inappropriately, it adapted the action of the offense of enticement of a married woman from the action *per quod servitium amisit* which is an action whereby a master who has been wrongfully deprived of the services of his servant by the action of a third party, could sue for damages.

At common law, marriage created a unity wherein on marriage a woman ceased to be an independent legal entity. Thus the common law adage: "when a man and a woman marry, they become one-and the one is the husband!" Consequently, legal recourse was only available to the husband.

The common law action for enticement of a married woman was enacted as section 498 of the Indian Penal Code which was drafted primarily by the First Law Commission chaired by Thomas Babington Macaulay. It was introduced in Colonial India in 1862. Eventually the Code was adopted wholesale by other British colonies in Asia including Malaysia and Singapore.

Meanwhile the Married Women's Property Act, 1870, amended in 1882 and 1887 had brought a radical change to English law to allow full contractual capacity to married women. A married woman was no longer a chattel of her husband and could hold property in her own name. In order to reflect the changed status of a married woman the common law action of enticement was amended to provide legal recourse to a wife as well as children of the marriage. The argument goes that if the rationale of the tort was for the protection of domestic relations, as opposed to merely a man's proprietary right, legal recourse should be equally available not just to a wife but also to any person who was harmed by the enticement.

Nevertheless, while the amendment may have addressed the inequitable factor, the detriment arising from such action was considered to far outweigh its benefits. Thus in 1963 the

English Law Reform Committee recommended *inter alia* that the action for enticement be abolished. In 1970, the recommendation was implemented by the passing of the Law Reform (Miscellaneous Provisions) Act 1970 which *inter alia* abolished the action for enticement of a married woman.

The equivalent provision on enticement has since been abolished in most Commonwealth jurisdictions like Australia, (2002) Canada, (1978) New Zealand (1975), Singapore, (2008) and Hong Kong (1970). However, the provision remains on the statute books in Malaysia, which share this 'dubious honour' with countries like India, Nigeria, Sudan and South Africa.

The case for abolition of section 498 of the Penal Code

It is patently clear that there is little if any justification for maintaining section .498 of the Code for the following reasons.

The most obvious reason is that the action is premised on archaic notions of the status of a woman in a marriage which is based on English Victorian era concepts which are totally alien to Malaysian social norms and culture. The premise on which the action is based i.e. a master-servant relationship, in which the wife's independent personality is submerged in that of her husband, is also particularly repugnant and is out of step with contemporary mores of the equality of spouses in a marriage.

It is also, I might add, a concept that is totally alien to the Islamic concept of marriage and the status of a married woman. A married woman is not a chattel of her husband and retains her independent personality, able to own and control her own property in her own name. According to Islamic Law, a woman's right to her money, real estate, or other properties is fully acknowledged. This right undergoes no change whether she is single or married. She retains her full rights to buy, sell, mortgage or lease or dispose of any or all her properties.

It is ironic that while Islam had granted independent personality to married women centuries ago and the common law only as recently as just over a century ago, we still retain an anachronistic provision that is premised on notions of women that probably predate Islam!

An action under section 498 of the Code has been criticized as being offensive to the notion of the individual responsibility of a married woman. A married woman who leaves the matrimonial home should be regarded to have done so of her own free will and volition and should be held solely responsible for her conduct. Putting the entire blame on the paramour and none at all on the married woman is to regard her as a 'victim' rather than an autonomous individual. In any event she may have had just cause to leave the matrimonial home. Thus it may well be that a successful prosecution under section 498 penalises the wrong party!

Further**,** it is doubtful whether the clear inequality of section 498 can withstand a constitutional challenge under Article 8 (1) and 8(2) of the Federal Constitution.

Article 8 provides as follows:

8. Equality

(1) *All persons are equal before the law and entitled to the equal protection of the law.*

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race ,descent, place of birth or ***gender*** *in any law ... (Emphasis added)*

There is clear inequality between a husband and a wife in section 498 of the Code. The section exclusively protects a husband's proprietary right and consequently, legal recourse is exclusively for a husband. There is no equivalent right given to a wife whose husband has been enticed. In addition, the notion of a husband having a proprietary right over his wife is degrading the wife to the status of a piece of property or chattel.

Neither is there is an equivalent provision that criminalises the enticement of a married man. It stands to reason that a man is just as liable, (if not more so) to be enticed by another (enticing) woman or man, as the case may be,

and the consequences to his wife and family could, arguably be more devastating than the loss of masculine pride and honour! There have been well publicized cases of married men, abandoning their families after being 'enticed' by the so-called 'China dolls', leaving wives with no equivalent recourse to section 498 of the Code.

The argument can also be raised that the continued retention of section 498 of the Penal code is an infringement of Malaysia's obligation under the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which Malaysia had formally acceded to in 1995.

Another criticism that has been raised against the prosecution for enticement is the very real risk that it is open to abuse. A husband scorned or cuckholded may take the consequent blow to his pride by instituting an action for the sole purpose of humiliating and or punishing his wife, or ex-wife and paramour. This is possible under section 498 of the Code as a wronged spouse with sufficient financial resources could institute a private summons.

Justice Mc Cardie J, in **Place v Searle**[4]**,** had cautioned that claims for damages for enticement may be potent instruments of blackmail.

"Unless carefully watched and checked by the courts, they may easily develop into recognized methods of wrongful pressure and improper extortion".

The argument that retention of such an action is necessary to protect the stability of marriage is untenable as domestic relations are far too complex to buy into the simplistic argument that the continued retention of section 498 of the Code would deter potential paramours from enticing a married woman or married women from being enticed by paramours. In fact there is no evidence that supports such a contention. It is also highly unlikely that a marriage could survive a section 498 prosecution. On the contrary, a prosecution under section 498 of the Code would only aggravate marital tensions and diminish the possibility of marital reconciliation.

Furthermore a prosecution for enticement under section 498 of the Code is inconsistent with the policy change in divorce proceedings from a fault-based divorce on the 'fault' grounds of adultery or cruelty to one based on the breakdown concept .The current trend reflects the view that the reasons for the breakdown of a marriage are complex with less emphasis on matrimonial misconduct.

As a Law Commission Report succinctly puts it:

"It is desirable to prevent unnecessary judicial post mortems on dead marriages so that these marriages can be buried with the maximum dignity and the minimum bitterness and hostility".

From a jurisprudential perspective, one could also question the appropriateness of making enticement a criminal offence which on conviction is punishable with a sentence of imprisonment and or fine, while adultery *per se* is not an offence. It seems to border on the absurd that a person can be imprisoned or fined or both, if his conduct is construed as enticing a married woman to have illicit intercourse and consequentially to leave the matrimonial home. However, if he does conduct an adulterous relationship with the married woman but she continues (for whatever reason) to remain at the matrimonial home, his adultery is not a criminal offence. He may however be cited as a co-respondent in divorce proceedings.[5]

This anomaly can be traced to the common law premise of the action for enticement which seeks to protect a man's proprietary right in the consortium and services of his wife, which her leaving the marital home would deprive him.

Perhaps the most compelling argument for the repeal of section 498 of the Code is the protection of privacy of domestic relations as well as the protection of children of the marriage, if any. A prosecution under section 498 of the Code would necessarily result in the public display and exacerbation of domestic quarrels, which would have serious and far reaching repercussions on the children of the marriage, if any, particularly if they were minors. Such

[4] [1932] 2 KB 497
[5] Section 58 of the Law Reform (Marriage and Divorce) Act 1976

a prosecution would only cause acrimony and bitterness between spouses or parents of children post-divorce, which may prolong the trauma of a marital breakdown-for spouses and children of the marriage alike. What benefit is gained by allowing the public washing of dirty laundry, except perhaps to satiate the voyeuristic tendencies of the public.

Conclusion

There seems little if any justification to retain section 498 of the Code. Even if it was reformulated to give equal recourse to a married woman, the action would potentially cause more harm and little, if any good. The issue of the repeal of section 498 is not just confined to being a feminist issue on gender equality but with the larger issues of constitutionality, justice, dignity of women, dignity and privacy of domestic relations, the protection of children of a marriage and the proper utilisation of public resources.

The argument that section 498 of the Code is rarely invoked in Malaysia is no justification for its retention. On the contrary, it provides an additional reason to jettison a provision that is obsolete and has fallen into desuetude. As mentioned, the genealogy of section 498 of the Code can be traced back to the enactment of the Indian Penal Code in 1862. It was then transplanted to our shores by the wholesale adoption of the Indian Penal Code. It is now 150 years later and many jurisdictions, including the jurisdiction of its origin have acknowledged the action for enticement as an anachronistic remnant of another era and abolished the action. Is it not about time that we follow suit?

JUDICIAL ACTIVISM — THE WAY TO GO?

By
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Introduction

'Judicial activism' is a term that is not easy to define. Indeed, an American Judge, Chief Judge Frank Easterbrook, has referred to it as 'that notoriously slippery term'.[1] It is a term that is at times poorly understood and on occasions associated with negative connotations.

A writer has opined – and I am inclined to agree – that the concept of judicial activism is 'multidimensional'.[2] Judicial activism is a concept that focuses attention on the judiciary's institutional role rather than on the merits of particular decisions. Activism goes to essential questions about the role of the judge in a democratic order.

In this article I do not propose to offer a definition of the term 'judicial activism'. All that I wish to say is simply that 'judicial activism' is a term that describes a judicial decision that is creative, that breathes life into the law; a decision that involves inductive reasoning, that

[1] Frank H Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism?", 73 U. Colo. L. Rev. at 1401.
[2] Frank B Cross & Stefanie A Lindquist, "The Scientific Study of Judicial Activism", 91 Minn. L. Rev. (2007) at 1763.

is positive and takes into account the social needs of the time, whilst at the same time paying heed to the principles of justice and the legal and constitutional framework within which that decision is made.

Actually, the term 'judicial activism' is relatively new. For the term 'judicial activist' first appeared in print only in 1947, in a January 1947 article in *Fortune* magazine by one Arthur Schlesinger Jr – an article about Justices of the United States Supreme Court.[3]

But, to my mind, the truth is that Judges have been making decisions that manifest judicial activism for a long time – even before *Marbury v Madison*.[4] Indeed, I would say judicial activism is as old as the common law.

The judicial myth

Yet, there was a time when some Judges and writers subscribed to or advocated the theory that the function of judges is merely to interpret the law, and nothing more than that. For example, to the French political thinker, Montesquieu, judges were –

> "only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour."[5]

And in 1944 Lord Greene perpetuated the myth when he said:

> "The function of the legislature is to make the law, the function of the administration is to administer the law and the function of the judiciary is to interpret and enforce the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest. These are the tasks of the legislature, which is put there for the purpose, and it is not right that it should shirk its responsibilities."[6]

Perhaps it would not be wrong to say that few lawyers today subscribe to the view that judges do not make law but are mere interpreters of the law.

It is, however, true that judges do not make law everyday in their daily work. In dealing with the mundane, run of the mill sort of cases judges merely interpret and apply the law to the facts of the case. But there will be occasions (perhaps not often) where he is confronted with a peculiar situation where the written law is ambiguous, or where there is a gap in the law, and there are no precedents to guide him; or where there is a strong conviction on his part for a need to propound a new principle of law in order to do justice to the case. Or, in the case of judges sitting in the highest court, there is a need to depart from precedents, in the keeping with current situation (or prevailing conditions) and social values. It is in such situations that judicial activism comes into play.

Lord Reid in an article that he wrote in 1972 debunked the fiction that judges do not make law:

> "There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with the taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the common law in all its splendor and that on a judge's appointment there descends on him knowledge of the magic words 'Open Sesame' ... We do not believe in fairy tales any more."[7]

In Australia, Justice Lionel Murphy stated in 1980 that:

> "Judges used to pretend that they only interpreted the law, never made it. But the law-making role of the judges is now openly accepted all around the world."[8]

Judicial Activism: the American Experience

The Supreme Court of the United States is the oldest Constitutional Court in the world, having first assembled on 1 February 1790. At a very early stage of its existence, that is, in the year 1803, it bestowed upon itself the power of judicial review through the epoch-making decision in the

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[3] Arthur M Schlesinger Jr, "The Supreme Court: 1947", Fortune, Jan 1947, at 73, 74-76.
[4] 5 U.S. (1 Cranch) 137 (1803).
[5] Charles-Louis de Secondat, Baron de Montesquieu, "De L'Esprit des Lois (the Spirit of the Laws)" 1748; Quoted in CoHL.er, 1989, p 163; quoted in Kate Malleson, *The New Judiciary*, 1999 (Ashgate-Dartmouth, 1999), pp 8-9.
[6] *The Law Journal*, 1944, p 351
[7] Lord Reid, "The Judge as Law Maker", vol. 12 (Society of Public Teachers of Law, 1972), p 22.
[8] Quoted in Galligan B, "Judicial Activism in Australia" in K Holland (ed), *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991).

celebrated case of *Marbury v Madison* that I have mentioned earlier. In this article I propose to re-visit this famous case. It is a classic case of judicial activism. To understand the case is to understand what judicial activism is all about. Americans are proud of the judgment. To them it is a national treasure. The judgment is displayed in the National Archives (in Washington DC) next to the Declaration of Independence, the Constitution, and the Bill of Rights. The paired paintings of William Marbury and James Madison hang prominently in the Supreme Court justices' private dining room. To the Americans the decision is 'one of the cornerstones of the American constitutional system'.[9] It is the first case in the American legal history where the Supreme Court struck down an Act of Congress as unconstitutional (after *Marbury*, it was 54 years before the Supreme Court again declared an Act of Congress unconstitutional).[10]

This is how the great decision came about.

In February 1801, in his last month of office, President John Adams (the second President of the United States, after President George Washington) submitted about 200 nominations to the Senate. The appointments included 93 judicial and legal offices. William Marbury was one of those appointed by President John Adams. He was appointed as a justice of the peace. But very soon after the appointment, President John Adams was succeeded by President Thomas Jefferson, who became the third President of the United States. Marbury did not receive his commission. So he filed an original suit in the U.S. Supreme Court asking that a mandamus be issued to James Madison, the Secretary of State, commanding him to cause to be delivered to him (Marbury) a commission as justice of the peace. The Supreme Court, presided by Chief Justice John Marshall, ruled that Marbury had a right to the commission and that his right had been violated because the commission had not been delivered to him as required. It also ruled that he was entitled to a writ of mandamus directing Madison to cause to be delivered to Marbury the commission he sought. But the question then arose as to whether the Supreme Court had the power under the Constitution to cause the mandamus to be issued.

The Judiciary Act of 1789 authorised the Supreme Court to issue 'writs of mandamus, in cases warranted by the principles and usages of law, to any court appointed, or persons holding office, under the authority of the United States.' The Act, therefore, clearly empowered the Supreme Court to issue a writ to the Secretary of State, Madison. However, there was a problem, and it is this. The Constitution of the United States declares: 'In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction'.[11]

It was clear, the Supreme Court explained, that this was a case of original jurisdiction and that the Court had no jurisdiction under the Constitution because the case did not come within the scope of original jurisdiction set out in the Constitution. Thus, the Constitution prohibits that which the Judiciary Act had granted, i. e., the power to issue a writ directed to Madison. The Supreme Court went on to hold that the Constitution *vis-a-vis* a federal law enacted by Congress is the superior and paramount law and is the 'supreme law of the land.'[12] And, the Court held,

> "It is emphatically the province and the duty of the judicial department to say what the law is."[13]

Since the Constitution is the supreme law of the land and declares that the Supreme Court has no original jurisdiction in *Marbury*'s case, the Supreme Court held it must declare the statute, which is contrary to the Constitution, unconstitutional and void.

But the problem with such a ruling is that nowhere in the Constitution is it stated that the judiciary has the power to declare acts of Congress unconstitutional. Members of Congress are required to pass laws consistent with the Constitution,[14] and the laws they passed must be signed by the President of the United States only if they 'preserve and protect' the Constitution.[15] All three branches of government have a duty to act constitutionally. The Constitution does not

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[9] Cliff Sloan and David McKean, *The Great Decision*, RHYW 2009, p. vii.
[10] *In Scott v Sandford* 60 U.S. 393 [1856].
[11] U.S. Const., art. III, s. 2
[12] U.S. Const., art. VI; *Marbury*, 137 U.S. at 177
[13] *Marbury*, at 177.
[14] U.S. Const., art I, s. 8.
[15] U.S.Const., art. II, s 1

say that the judiciary's view of the Constitution prevails over the legislative and the executive view. Chief Justice Marshall had read into the Constitution a provision that simply was not there. Thus one could say that the decision in *Marbury v Madison* was judicial activism. The Supreme Court was reading into the Constitution an important provision that was not there.

Among famous examples of judicial activism cases are *Brown v Board of Education*[16] (the racial desegregation case) and *Roe v Wade*.[17] (a case concerning a person's right to abortion).

Judicial activism in India

During the initial years of its existence the Supreme Court of India adopted a conservative approach. This is evident in some of its rulings; for example, the ruling in the case of *AK Gopalan v State of Madras*[18] where the Supreme Court was called upon to consider adopting the American doctrine of procedural due process, but the Court declined to do so.

However, subsequently there was a change in judicial attitude. A clear example of this change in approach is the landmark case of *Kesavananda Bharati v State of Kerala*.[19] In this case the Supreme Court propounded the 'basic features' doctrine. The doctrine propounded is to the effect that there is an implied restraint on the amending power of Parliament so that the power could not be exercised to destroy the basic structure of the Constitution. The basic features are –

(1) Supremacy of the Constitution;

(2) Republican and democratic form of government;

(3) Secular character of the Constitution;

(4) Separation of powers; and

(5) Federalism.

But in enunciating the above principle, there is a problem: there are no express words in Article 368 of the Indian Constitution limiting the power conferred by that Article on Parliament to amend the Constitution. There are no express words that state that Parliament is not entitled to amend the Constitution in such a way as to alter or affect the basic structure of the Constitution. Therefore, the decision is a remarkable instance of judicial activism.

A former Chief Justice of the Indian Supreme Court, AM Ahmadi, in his article, *Dimensions of Judicial Activism*, advanced the following concept of judicial activism –

> "Simply put, judicial activism depicts the pro-active role played by the judiciary in ensuring that rights and liberties of citizens are protected. Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry. In performing its activist role the court is required to display fine balancing skills. While protecting the fundamental human rights of the people, the judiciary must take care to ensure that its orders are capable of execution, for no amount of judicial activism is useful if its orders are incapable of execution; they then remain 'paper tigers' only. This places an awesome responsibility on the court, which must ensure its directions are effective."[20]

The activist role of Indian judges is prominent in the field of public interest litigation. The Supreme Court of India, in its endeavour to help the poor and needy and to vindicate the violation of their fundamental rights, has given a liberal interpretation of the *locus standi* rule so as to enhance access to the courts (see for example the case of *Gupta v Union of India*[21]).

In this regard it is of interest to note what Justice Pandiyan, a former judge of the Supreme Court of India, said about judicial creativity in India:

> "In a country like ours more than eighty percent of people are economically backward and they are subjected to discrimination as a rule. In such an explosive situation causing adverse effect on society, when the executive

[16] 347 US 483 [1954].
[17] 410 JS 113 [1973].
[18] [1950] SC 27.
[19] AIR 1973 SC 1461.
[20] www.iosworld.org/Jahmedi.htm.
[21] [1982] 2 SCR 365.

> and legislature are apathetic and fail to discharge their constitutional duties and deliver the goods, the apex court which is the custodian of the citizens' rights and liberties and which in that capacity acts as sentinel on the *qui vive* has no other choice but to step in and direct these constitutional functionaries to discharge their obligation."[22]

A Malaysian judge (or an English judge) may not necessarily share the above concept of judicial activism.

Judicial activism in the United Kingdom

Francis Bacon in one of his essays remarked:

> Judges ought to remember that their office is *jus dicere*, and not *jus dare*: to interpret law, and not to make law. Else will it be like the authority claimed by the Church of Rome …[23]

So the theory in England, at least from Tudor Times was that judges do not make the law: they only declare what the law is and apply the law to the facts of the case.

By end of the 19th century's, Lord Esher MR in *Willis v Baddeley*[24] perpetuated the 'fairy tale' by saying:

> "This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."[25]

With the proliferation of statutory laws, the above view of the judicial function was reinforced by the positive law theory of Jeremy Bentham and John Austin. The law was to be found in rules, that is to say, the written constitutions, statutes and the reasons of judges of the higher courts. The role of the Judges was merely to declare what the law was at that particular point of time in relation to the facts of the case. Their function was basically one of verbal analysis and application. 'Such was the preferred view of most common law judges of England and its colonies well into the second half of the twentieth century.'[26]

But the above view about the role of the English Judge was merely a fiction, a 'noble lie',[27] a 'fairy tale',[28] perpetuated by English Judges so as not to appear to have transgressed into the domain of the legislature. The truth is that English judges *do* make law from time to time since the inception of the common law. In fact, the English judiciary of the 17th century is well known for their judicial activism.[29] 'Where else, one might ask, did the common law and principles of equity come from, if it was not from judicial activity?'[30] A good example is *Dr Bonham's Case*[31] of 1610 when Sir Edward Coke, the Chief Justice said:

> … when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.

Many scholars view that that decision of Coke CJ was an early expression of the doctrine of judicial review and has had a profound influence on Chief Justice John Marshall in *Marbury v Madison*.[32]

An example of judicial activism in the English judiciary that is often quoted is the late 18th century case of *Somerset v Stewart*.[33] This case is famous for this fact: in England slavery was abolished not by the executive or by Parliament but by the decision of a single Judge – Lord Mansfield. Prior to Lord Mansfield's classic judgment, slavery was considered lawful in

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[22] LK Jha Memorial Lecture, organised by Bhartiya Vidya Bhavan (1996), as quoted in MV Pylee, *Constitutional Government in India* (Delhi: S Chand Publication, 2004), at p 350.
[23] F Bacon, 'Of Judicature' in *Essays, Civil and Moral,* (New York: Bartleby.com, 2001).
[24] [1892] 2 QB 324.
[25] Ibid, at p 326.
[26] Justice Michael Kirby, *Judicial Activism*, The Hamlyn Lectures, 55th Series (London: Sweet & Maxwell, 2004), at p 6.
[27] Ibid, at p 29.
[28] Kate Malleson, *The New Judiciary* (Hampshire: Ashgate Publishing, 1999), at p 12.
[29] Sedley S, "Autonomy and the Rule of Law" in R Rawlings (ed), *Law, Society and Economy*, (Oxford: Clarendan Press, 1997), at p 313, as quoted in *The New Judiciary*, ibid, at p 13.
[30] Justice Michael Kirby, *Judicial Activism*, The Hamlyn Lectures, 55th Series (London: Sweet & Maxwell, 2004), at p 45.
[31] (1610) 8 Co Rep 107a.
[32] Robert Hockett, *Law* (London: A & CB, 2009), at p 35.
[33] [1772] Lofft 1.

England and her colonies. There was no legislation on the matter but the legality of slavery was based on the joint legal opinion of the Attorney-General and Solicitor-General given in 1729. Lord Mansfield in his judgment was troubled by the impact on commerce – if the slave was set free. Nevertheless, in the case before him (the case of a Negro slave, one James Somerset, who (through the great liberator, Granville Sharp) sought a ruling on the legality of slavery in England), he boldly ruled –

> "The state of slavery is so odious that nothing can be suffered to support it, but positive law. Whatever inconvenience, therefore, may follow from the decision, I cannot say that the case is allowed or affirmed by the law of England: and therefore the black must be discharged."

There is the famous saying in the case attributed to Lord Mansfield (as narrated by Lord Campbell)[34]–

> "Every person coming into England is entitled to the protection of our laws, whatever oppression he may heretofore have suffered and whatever the colour of his skin. The air of England is too pure for any slave to breathe. Let the black go free."

As a result of the judgment, 14,000 or 15,000 slaves in England were freed.

In 1997, Lord Bingham explained that the notion judges merely 'declare' a pre-existing law, deriving it by strict logic from past precedent, 'was inconsistent' with the subjective experience of judges, particularly appellate judges, of the role they fulfilled day by day'.[35]

Although there is a marked display of judicial restraint by the English judiciary in the first half of the 20th century, however, there has been noticeable judicial activism in England particularly in the field of administrative law since 1960s. A clear example is where the English Courts introduced the principle of natural justice in the context of administrative law. The Courts hold that administrators who implement the law must comply with this principle; otherwise the Court will declare the action in question as being ultra vires and hence null and void. Broadly speaking, there are three facets of this principle, namely, –

(1) the right to be heard by an unbiased tribunal;

(2) the right to have notice of the charges; and

(3) the right to be heard in answer to those charges.

This principle was propounded in the landmark case of *Ridge v Baldwin*.[36] In this case, the Chief Constable of Brighton was charged with and tried for conspiracy. He was acquitted but the Police Board summarily dismissed him nonetheless purportedly under a statutory provision (section 191(4) of the Municipal Corporation Act 1882) which gives the Board the power to dismiss 'any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.' He brought an action to challenge his dismissal on the ground that it violated the principle of natural justice since he was neither given notice of the charges against him nor allowed to present his case before the Board. The House of Lords upheld his claim and ordered his reinstatement. Judicial activism is also exemplified by the House of Lords cases of *Padfield v Minister of Agriculture*[37] and *Secretary of State for Education v Thameside Metropolitan Borough Council*.[38] And in 1966, in *Conway v Rimmer*,[39] the House of Lords effectively acknowledged its law-making role through the development of the common law by holding that it was no longer bound by its earlier decisions.

But it is not only in the field of public law that decisions in which the elements of judicial activism are found. Judicial activism is also found in the realm of the law of torts. A classic example is the neighbour principle of the law of negligence in the landmark case of *Donoghue v Stevenson*[40] – the famous snail and ginger beer case.

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[34] Denning, *Landmarks in the Law* (Butterworths, 1984), at p 219.
[35] Lord Bingham of Cornhill, "The Judge as Lawmaker: An English Perspective" in P Rishworth (ed), *The Struggle for Simplicity in the Law – Essays for Lord Cooke of Thorndon* (Wellington: Butterworths, 1997), at p 6, as quoted in *Judicial Activism*, supra, fn 29, at p 29.
[36] [1964] AC 132.
[37] [1968] AC 997.
[38] [1977] AC 1014.
[39] [1968] AC 910.
[40] [1932] AC 562 (HL(Sc)).

Donoghue v Stevenson is a great judgment. Lord Atkin's speech in the House of Lords propounding the neighbour principle captures the hearts and minds of many lawyers. This is how he eloquently puts it –

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[41]

The facts of the case took place in a café, the Wellmeadow Café in Paisley, a town near the city of Glasgow in Scotland.

On 29 September 1990, during a conference on the law of negligence organised in Paisley by the Canadian Bar Association, The Faculty of Advocates, the Law Society of Scotland and the Old Paisley Society, a memorial park and garden was formally dedicated by the conference to the parties in the case at the site of this café. This conference was entitled, 'The Pilgrimage to Paisley: a Salute to *Donoghue v Stevenson*.' In this memorial park there is a memorial stone. The reverse side of the memorial stone records the following (after quoting the neighbour principle from the speech of Lord Atkin):

> "At the corner of Wellmeadow Street and Lady Lane stood the Wellmeadow Café operated by Francis Minghella where Mrs. May Donoghue of Glasgow was served on August 26, 1928, with ginger beer from a bottle in which she claimed that she later found a snail. Mrs. Donoghue sued the manufacturer, David Stevenson, whose factory was in Glen Lane, Paisley. He denied her allegation. The case never went to proof and it never was decided whether there was a snail in the bottle. It was on an unsuccessful preliminary application to dismiss Mrs. Donoghue's claim that Lord Atkin gave the judgment in the House of Lords which would make *Donoghue v Stevenson* ... the most celebrated case of all time, not only in the United Kingdom but for the whole commonwealth common law world. This memorial was dedicated to Mrs. May Donoghue and David Stevenson, their solicitors and advocates by The Faculty of Advocates, the Canadian Bar Association and the Law Society of Scotland, on September 29, 1990."

Lord Atkin's neighbour principle has contributed significantly to the development of the law of negligence. Before *Donoghue v Stevenson* the law on civil liability for carelessness was in a chaotic state. In effect there was no single tort of negligence, but instead a number of separate torts each with its own rules. And the case law on civil liability for carelessness was quite rigidly formulated. If the facts of one's case did not fit comfortably within one of the factual categories in which a duty of care had been held to exist then no remedy was available. An 1889 textbook listed no fewer than fifty-six different duties of care.[42] But the judgment in *Donoghue v Stevenson* brought order to the chaos; and it brought the law of negligence into existence as a separate civil wrong.[43]

Malaysian Courts and Judicial Activism

At one time Malaysian judges too were conservative in their interpretation of the Malaysian Constitution. In this area of the law, Malaysian Courts exercised restraint and refused to follow Indian cases, when urged to do so, describing judges of the Supreme Court of India as 'indefatigable idealists'. In *Dato Harun Idris v Public Prosecutor*[44] Suffian LP said:

> What are the principles relevant to the specific question before us that may be deduced from the Indian Decisions? It is not easy to deduce them because, first, like Ong CJ in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia*, we find Indian Judges, 'for whom have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of ... powers.' Secondly, because opinion

[41] Ibid, p 580.
[42] Beven, T, *Principles of the Law of Negligence* (London: Stevens and Haynes, 1889); quoted in Mathew Chapman, *The Snail and the Ginger Beer; The Singular Case of Donoghue v Stevenson* (Wildy Simmonds & Hill Publishing, 2010), p 89.
[43] Geoffrey Lewis, *Lord Atkin* (Oxford:Hart Publishing, 1999), p 67.
[44] [1977] 2 MLJ 155 at p 165.

> among Indian judges is often as sharply divided as among counsel who appear before us, and sometimes the Indian Supreme Court retreats from previously held position and favours views that were in a minority but a few years [sic]. This is not surprising because while we are all familiar with the idealistic concept of equality, Indian – and Malaysian – judges are not familiar with it as a legal concept, having been introduced in India only in 1949 and in Malaysia in 1957.

But the irony is that it is in the Federal Court's judgment in *Dato Harun Idris* that we find early signs of judicial activism; for the Federal Court, in interpreting article 8 (the 'equality before the law' provision) of the Federal Constitution, for the first time adopted (rather cautiously) the doctrine of reasonable classification that had been propounded by the Indian Supreme Court.

Judicial restraint was also exemplified by the decision of the Federal Court in *Loh Kooi Choon v Government of Malaysia*.[45] In that case the Federal Court was urged to adopt the doctrine of the basic structure of the Constitution as propounded by the Indian Supreme Court in *Kesavananda*,[46] but the Federal Court then refused to do so.

But a classic and peculiar example of judicial activism took place in 1988 in a case of high drama involving the tribunal proceeding of the then Lord President, Tun Salleh Abas. He was asked to resign by the then Prime Minister (Tun (Dr) Mahathir Mohamad) on the ground that he had written a letter to the King and had (allegedly) offended the latter (a ground which, in my opinion, is devoid of substance). He, rightly, of course, refused to do so. Hence, a tribunal was established under Article 125 of the Federal Constitution to inquire into certain charges (also, to my mind, are devoid of merits) against him, and to make recommendations to the King as to whether he ought to be removed. Pending the recommendation of the tribunal to the King, Tun Salleh was suspended and Tun Abdul Hamid Omar (the Chief Justice of Malaya, the next senior Judge after Tun Salleh), became the Acting Lord President. Tun Hamid chaired the tribunal. Tun Salleh applied to the High Court for leave to apply for an order of prohibition to prohibit the tribunal from deliberating and making any recommendations to the King. There was some undue delay on the part of the High Court judge, Ajaib Singh J, in disposing of the matter.[47] As there was the possibility that the tribunal may be submitting its report before a decision was made by Ajaib Singh J, Tun Salleh applied to the Supreme Court by way of an ex parte notice of motion for an order to restrain the tribunal from submitting its report to the King. Since Tun Hamid, the then Acting Lord President was chairing the tribunal, and as the relief sought was against him and other members of the tribunal, the most senior judge after Tun Hamid, Tan Sri Wan Suleiman, agreed to convene a special sitting of the Supreme Court for this purpose. On 2 July 1988, the Supreme Court (Wan Suleiman, George Edward Seah, Azmi Kamaruddin, Eusoffe Abdoolcader and Wan Hamzah SCJJ) after hearing the application granted an ex parte order to restrain the tribunal from submitting any report to the King.

I consider the action of Tan Sri Wan Suleiman convening an urgent sitting of the Supreme Court (in the face of the various impediments placed before the Court on the instructions of Tun Hamid Omar), given the situation, and the decision of the panel of five judges to issue an order of prohibition, as an act of judicial activism.[48] Tun Abdul Hamid Omar as the Acting Lord President would normally have the right to convene a session of the Supreme Court under s 39(1) of the Courts of Judicature Act 1964. But the five Supreme Court Judges, in justifying what they did, took the position that under the Federal Constitution, the Courts of Judicature Act 1964 (in particular, the words 'any other cause' in s 9[49]) and Order 92 r 4[50] of the Rules of the High Court 1980, given the

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[45] [1977] 2 MLJ 187.

[46] Supra, see fn 20.

[47] A detailed account on the conduct of the High Court Judge in dealing with the application and the basis for the decision of the panel of the five Supreme Court Judges is described in Tun Salleh bin Abas with K Das, *May Day for Justice* (Kuala Lumpur: Magnus Books, 1989), Appendix XII, pp 220-226.

[48] In a subsequent Supreme Court case, *Tun Dato Hj Mohamad Salleh Abas v Tan Sri Dato Abdul Hamid bin Omar & 5 Ors* [1988] 3 MLJ 149 it was held that the decision of the five judges on 2 July was held to be a nullity.

[49] Section 9(1) of the Courts of Judicature Act 1964 provides – "Whenever during any period, owing to illness or absence from Malaysia or any other cause, the Lord President is unable to exercise the powers or perform the duties of his office (including his functions under the Constitution) the powers shall be had and may be exercised and the duties shall be performed by the judge of the Supreme Court having precedence next after him who is present in Malaysia and able to act."

[50] The power of the High Court to make any order to prevent injustice and abuse of the process of the court.

conflict of interest situation that Tun Hamid was in then, Tan Sri Wan Suleiman, being the next senior judge to Tun Abdul Hamid Omar, had the authority to empanel a Supreme Court sitting; and that, given the conduct of Ajaib Singh J in delaying in disposing the application of Tun Salleh Abas, despite the urgency of the matter, the panel had the jurisdiction to grant the interim relief sought by Tun Salleh Abas.

But the move made by, and the decision of, the five Supreme Court judges incurred the displeasure of Tun Hamid. He made a representation to the King to have the five judges suspended under Article 125(3) of the Constitution. The suspension was, accordingly, made pending the establishment of yet another tribunal under Article 125(3) to make recommendations to the King for the dismissal of the five judges.

In *Attorney-General, Malaysia v Manjeet Singh Dhillon*,[51] some disturbing facts concerning the various obstacles placed before the Supreme Court surfaced. This is related by Harun Hashim SCJ in his judgment in that case:[52]

> "So when it became apparent that there was a possibility that a special sitting of the Supreme Court may be convened without his [Tun Hamid] authority he issued instructions to the Chief Registrar that the court staff should not attend and assist such sitting, if convened, unless authorized by him. Tan Sri Wan Suleiman and the other four judges were informed by the Chief Registrar of this when they decided to accede to the request of Tun Salleh's solicitors for a special sitting that Saturday morning. They nevertheless held the sitting and made the interim order."

When the five Supreme Court judges made a press statement on 6 July 1988, explaining their reasons for their sitting on 2 July 1988, more alarming revelations surfaced. That statement reads:

> "We would add that when we sought to sit in court we were informed by the Chief Registrar of the Supreme Court, Haider bin Mohd Noor, that instructions have been given by Tan Sri Abdul Hamid bin Hj Omar, the Acting Lord President, that none of the court staff should be present in Court and the court doors should not be opened and we should not have the use of the facilities of the court including the Seal of the Supreme Court. In those circumstances it even became necessary for Tan Sri Wan Suleiman himself as the presiding judge to sign the order which we made which in fact should have been the duty of the Chief Registrar of the Supreme Court."[53]

The second tribunal was established in due course. The main allegation against all five judges was that they had participated in an 'unlawful' sitting of the Supreme Court on 2 July 1988. There were further charges leveled against Tan Sri Wan Suleiman and Datuk George Seah. One of the allegations was their 'staying away from the Supreme Court sitting scheduled for 2 July 1988 at Kota Bharu, Kelantan without reasonable cause'.

The second tribunal unanimously found that the allegations against all five judges relating to their attending the Supreme Court sitting in Kuala Lumpur on 2 July 1988 and agreeing to hear an application on the matter that was still being heard by Ajaib Singh J had not been established. However, by a majority, the tribunal found that the additional allegation against Datuk George Seah was established and his action amounted to 'misbehaviour' under Article 125(3). The tribunal unanimously found that the additional allegations against Tan Sri Wan Suleiman proved. Tan Sri Wan Suleiman and Datuk George Seah, on the recommendation of the tribunal, were subsequently removed from office.[54]

Dato' Visu Sinnadurai, a former High Court Judge, has rightly commented –

> "The action to suspend and remove the five Supreme Court judges was blatantly injudicious. They were suspended for merely exercising their responsibilities as judges, and fulfilling their oath of office. They acted bona fide, and they did what they believed in – justice. It is incomprehensible how they were expected to abdicate their duties in the face of the blatant injustice caused to one of their most senior judges. They were

[51] [1991] 1 MLJ 167.
[52] Ibid, at p 171.
[53] The joint statement of the judges is published in full in *May Day for Justice*, ibid, see fn 48, at p 339.
[54] The full proceedings of the Second Tribunal were never made available to the public.

> not removed on grounds of corruption or abuse of power. They had no interest in the subject matter of the action. These were men of high principles and conviction. They were all along serving members of the Malaysian judiciary. It is therefore not surprising that these five judges were regarded as the true 'freedom fighters' – for what good is freedom, without justice.[55]

The above episode is a dark and sad chapter in the history of the Malaysian judiciary; but the five brave judges will always be remembered for their heroic and noble deeds; they were upholders of justice without fear or favour. They were honourable men who were true to their oath of office. For what they did, they had done no wrong.

The findings and the decision of the second tribunal have been severely criticised by legal scholars.[56] As Prof HP Lee wrote –

> "What ultimately makes the adverse findings against both Tan Sri Wan Suleiman and Datuk George Seah highly questionable was the Tribunal's puzzling failure to render a decision on the proper interpretation of s 9(1) of the Courts of Judicature Act 1964."[57]

Twenty years later, in 2008 the then Minister in the Prime Minister's Department (responsible for legal affairs), Dato' Zaid Ibrahim, at a press conference at his residence in Kota Bharu, expressed regret for what had happened to the Judiciary in 1988. He said –

> "The biggest mistake was to sack Tun Salleh Abas and suspended several judges. But that was 20 years ago, now we open a new chapter. We apologise to those affected … We will repair the damage, change our attitude and our ways."[58]

This is a clear acknowledgement on the part of the Government that what was done to the then Lord President (Tun Salleh Abas) and the five Supreme Court judges was wrong. And the then Prime Minister, Tun Abdullah Ahmad Badawi, in a speech at a Malaysian Bar Council Dinner on 17 April 2008, acknowledged that the six judges had been wronged and offered compensation:

> "For many, the events of 1988 were an upheaval of the nation's judicial system. Rightly or wrongly, many disputed both the legality and morality of the related proceedings. For me, personally, I feel it was a time of crisis from which the nation never fully recovered.
>
> Again, ladies and gentlemen, let us move on. I do not think it wise or helpful to revisit past decisions as it would only serve to prolong the sense of crisis, something our nation can do without. The rakyat wants movement and progress, not continuing strife.
>
> Therefore, the Government would like to recognise the contributions of these six judges to the nation, their commitment towards upholding justice and to acknowledge the pain and loss they have endured. For Tan Sri Eusoffe and Tan Sri Wan Suleiman and their families, I know this sentiment is made too late.[59] For Tun Salleh Abas, Tan Sri Azmi Kamaruddin, Tan Sri Wan Hamzah and Dato' George Seah, although this acknowledgement is 20 years too late, it is made with much hope that a measure of the pain and loss may yet be healed.
>
> In recognition of the contributions of the six outstanding judges, the Government has decided to make goodwill ex gratia payments to them. Gentlemen, I do not presume to equate your contributions, pain and loss with mere currency, but I hope that you could accept this as a heartfelt and sincere gesture to mend what has been.[60]

As another example of judicial activism in Malaysia let us consider the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,[61] a

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[55] Visu Sinnadurai, "The 1988 Judiciary Crisis and its Aftermath", in *Constitutional Landmarks in Malaysia: The First Fifty Years 1957-2007*, in Andrew Harding & HP Lee (eds), (LexisNexis, 2007), p 184.

[56] See e.g. HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995), pp 66-77. For a critical analysis of the Tribunal's findings regarding Datuk George Seah, see Trindade, *The Removal of the Malaysian Judges*, pp 78-80.

[57] Ibid, p 70.

[58] "Zaid Ibrahim Needs Six Months To Restore Public Confidence In Judiciary", Bernama.com, 22 March 2008.

[59] At the time of this speech, Tan Sri Wan Suleiman and Tan Sri Eusoffe had already passed away.

[60] Speech by Datuk Seri Abdullah Ahmad Badawi, Prime Minister of Malaysia, at the Malaysian Bar Council Dinner on 17 April 2008: "Delivering Justice, Renewing Trust", NSTonline, Tuesday, 22 April 2008.

[61] [2010] 2 MLJ 333.

decision of the Federal Court. By reason of this decision, it is now settled law that Parliament can no longer impose a restriction on freedom of speech, in any manner it deems fit, for the purpose of protecting the interests spelt out in Clause 2(a) of Article 10 of the Federal Constitution. Any restriction imposed on freedom of speech by Parliament must be a *reasonable* restriction. In this case, Gopal Sri Ram (FCJ), in delivering the unanimous decision of the Federal Court, said (at p 340):

> "Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. …The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of Article 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article."

This 'reasonable principle' as enunciated in *Sivarasa* was followed in the recent Court of Appeal case of *Muhammad Hilman bin Idham & 3 Ors v Kerajaan Malaysia & 2 Ors*.[62]

The Federal Court in *Sivarasa* also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, but partially, to the doctrine of basic structure as enunciated by the Supreme Court of India in the landmark case of *Kesavananda*. This is a remarkable development in the law as compared to the position taken by the Federal Court previously in *Loh Kooi Choon*.

Time and space constraints limit me to citing just a few examples of judicial activism. But a very significant example that I would not want to miss telling would be the judgment of Richard Malanjum CJSS in the Federal Court case of *PP v Kok Wah Kuan*[63] where the learned Chief Judge of Sabah and Sarawak differed from his brother judges by holding on to the view that, notwithstanding Article 121 of the Federal Constitution, the judicial power of the Judiciary remains intact in the Constitution; that the jurisdiction and powers of the courts cannot be confined to federal law; and that the doctrines of separation of powers and the independence of the judiciary are the basic features of our Constitution.[64] I propose to highlight the following portion of his judgment:

> "[37] At any rate I am unable to accede to the proposition that with the amendment of Article 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> [38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law."

In cases concerning indigenous land rights the Malaysia courts have also displayed judicial activism by invoking international human rights norms. In a landmark case, *Adong bin Kuwau v Kerajaan Negri Johor*,[65] Mokhtar Sidin JCA said:

> "Of late, aboriginal peoples' rights – has gained much recognition after Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional rights are now firmly entrenched in countries

[62] [2011] 6 AMR 481.
[63] [2007] 6 CLJ 341.
[64] With the greatest respect, I am humbly of the view that the majority judgment had given a literal interpretation of Article 121 that is inconsistent with the spirit of the Constitution.
[65] [1997] 1 MLJ 418.

> that had and/or are still practising the Torrens land law – Canada, New Zealand and Australia – where special status have been enacted or tribunals set up in order for natives to claim a right over their traditional lands."[66]

In the above case, the High Court held that the plaintiffs, aborigines of the Jakun tribe, have common law rights over the land that they lived. As a writer rightly observed, this ruling has led to the development of a body of judicial precedent on the recognition of existing rights to land of the indigenous peoples in the country arising out of traditional laws and custom.[67] The reader interested on this aspect of legal development might wish to refer to the cases of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*[68] and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*.[69]

Conclusion

Perhaps it is a fair statement to say that the judiciary, in whichever common law jurisdiction, subscribes to judicial activism; only that the degree of judicial activism may differ from one jurisdiction to another. Judicial activism, say, in the United Kingdom may not be the same as, say, in India. But judicial activism is a reality. It is generally accepted today that judicial activism is a legitimate exercise of judicial function. It is recognised as being part and parcel of the role of the judiciary as being co-equal with the other two arms of government, namely, the legislature and the executive, and as being essential to good governance and the system of checks and balance.

The increasing tendency for judges throughout the Commonwealth to meet and exchange views and ideas is one of the factors that contribute to global increase of judicial activism. Judges now are generally much more aware of and influenced by international developments than they once were. Another factor contributing towards global judicial activism is the international developments pertaining to human rights.

Judicial experience has shown that there might be an occasion when a Judge or a Court is thrust into a situation that demands judicial creativity in order to arrive at a just and fair decision. The credibility, integrity and the wisdom of the judge or Court are put to public scrutiny. The activist Judge (or Court) must steer through the delicate balancing act, always bearing in mind and respecting the doctrine of the separation of powers, yet at the same time not forgetting the need for checks and balance and to uphold the rule of law. He must acknowledge that he must not cross the line. Yet the parameters within which he is to operate are never clear. All that he has to guide him in his difficult task is the statutory provision in question and the Constitution, his judicial experience, his understanding of broad principles of justice, and his perception of noble values. And in high profile cases involving the constitution, he may even be expected to be both 'philosopher and king' (to borrow the words of Prof SA de Smith).[70]

As a result of judicial activism, inevitably, at times, there would be tensions between the Judiciary and the other arms of government, especially the Executive. Chief Justice Coke occasionally offended the King, James I, because of his judicial views, particularly, his declaration that the King is subject to the law; that eventually he was removed as Chief Justice of the Kings Bench by the King. Chief Justice John Marshall was severely criticised by President Thomas Jefferson for the *Marbury v Madison* judgment.[71] In the mid-1930s, following a series of judicial activism decisions of the United States Supreme Court, President Franklin Roosevelt attempted to pack the Supreme Court by appointing more judges, but the plan failed to materialise.[72] At a later part of the history of the United States Supreme Court, several attempts were made to impeach Chief Justice Earl Warren[73] and Justice William Douglas of the Supreme Court (but none succeeded). In India at a conference of the country's chief justices in January 2010, Prime Minister Manmohan Singh voiced his concerns about what he described as 'judicial overreach', meaning the act of the Judiciary in overstepping into the domain of the other arms of government. And, of course, in Malaysia we have the tragic episode of the five heroic judges who paid a high price just because they upheld the cause of justice.

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[66] Ibid, at p 427.
[67] Izawati bt Wook, "The Role of International Human Rights Norms in Malaysian Courts" [2011] 5 MLJ cxlviii at p clviii.
[68] [2001] 6 MLJ 241.
[69] [2002] 2 MLJ 591.
[70] SA de Smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 W. Ontario L. Rev. 93.
[71] *The Great Decision*, supra, fn 10, at p 255.
[72] See Jeff Shesol, *Supreme Power, Franklin Roosevelt vs. The Supreme Court* (New York: WW Norton & Co, 2010).
[73] His role in the development of activism in the US Supreme Court in the 1960s is well known.

ACCESS TO JUSTICE — THE MALAYSIAN EXPERIENCE

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For the ordinary citizen easy and relatively cheap access to justice is a must; and the dispute resolved with less hassle and within a reasonable time frame.

The purpose of this article is to explore this concept by looking at four elements which are fundamental to the attainment of the objective of making accessibility to justice fairly easy and at reasonable cost for the benefit of the general public especially the poor and the vulnerable and to ensure equal access to justice and a level playing field for all members of the society.[1]

The first element is the physical infrastructure i.e. the court buildings, its accessibility to the public; the staffing – are they efficient and knowledgeable and more importantly are they committed and dedicated in administering justice. The second element is the legal framework – these are the laws, particularly the procedural laws. Are they simple or are they wieldy and difficult to comprehend by common people. The third element is the right to legal representation and the fourth is cost – how much it cost a

[1] Gary KY Chan, "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia", (2007) Volume 2, Issue 1 *Asian Journal of Comparative Law* Article 2-p.1).

person to assert his or her rights in a Court of law or a Tribunal.

The right to justice or access to justice may vary from one society to another, depending on the socio-economic development of the given society.[2] For example this concept may not be as developed in one of the poor African States as compared to development of the concept in Malaysia.

Access to justice involves being able to access the courts and judicial remedies as well as legal representation. It involves the right of ordinary citizens to challenge administrative decisions affecting their legal rights, their access to legislative reforms through lobbying and the observance of the procedural requirements of *audi alterem partem*.[3]

It has been said that access to justice is a fundamental human right.[4] Indeed it is. 'As a matter of principle, where there is a right there must exist a right of access to Court or Tribunal'. That should be so because if a person's right is infringed and the person whose right is infringed cannot access the Court or Tribunal to exert his right and get remedy for the wrong done to him, then right is mere illusory and devoid of any meaning or effect.[5]

In terms of physical infrastructure, Malaysia may be considered as one of the more developed societies that provide access to justice to its citizens. In every State in the country there is at least one High Court and a number of Subordinate Courts comprising of the Sessions Courts and the Magistrates' Courts. In some States however there are more than one High Court.

The number of High Court Judges correlates with the number of High Courts in each State. Likewise the number Subordinate Court Judges – Sessions Court Judges and the Magistrates – corresponds to the number of Subordinate Courts.

But the geographical distribution of the courts in each state is uneven. Most of the High Courts are concentrated in the State capital and major towns. For example Wilayah Persekutuan Kuala Lumpur and Selangor have the most number of High Courts and Subordinate Courts. But they are concentrated in Jalan Duta Courts' Complex and in Shah Alam respectively. Similarly in the States of Johor and Perak, the courts are concentrated at Johor Bahru and Ipoh respectively. The Subordinate Courts however are more widely distributed in most of the States as compared to the High Courts.

In Sabah and Sarawak the situation is more or less the same as in West Malaysia. The superior courts i.e. the High Courts are found only in the State capital and major towns.

In Sarawak, the High Courts are located at Kuching, Sibu, Bintulu and Miri. The High Court also goes on circuit about three to five times a year to the Limbang Division.

In Sabah the High Courts are located in Kota Kinabalu, Tawau and Sandakan. There is also a circuit High Court sitting once a month in Labuan.

The Subordinate Courts in Sabah and Sarawak generally follow the location of the High Courts though there are some Subordinate Courts that are located away from the High Court. The Subordinate Courts in both States also go on circuit to outlying areas and to towns of some distance away from the centre where the permanent Court sits.

As for the circuits Courts, these will sit at the appointed locations and at the appointed day of the week or month with the number of circuit sitting in a week, a month or a year depending on the necessity for such circuit sitting. One of the factors to consider for the frequency of the circuit sitting is the number of cases registered at the particular circuit Court – if the volume of cases registered is high then the frequency of sitting will be higher and the reverse is also true.

The geographical location of a circuit Court is primarily decided by the ease of accessibility and convenience of the local population where the sitting of the circuit Court is proposed. Presently there are very minimal circuit Subordinate Courts in West Malaysia as most all of the towns and population centers in West Malaysia are easily accessible and reachable by roads.

The geographical distribution of the courts (other than those in the State capitals) is influenced by many factors. Primarily it is determined by

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[2] Ibid.
[3] Ibid.
[4] Rt Hon Tan Sri Arifin Zakaria, Chief Judge of Malaysia, "Access to Justice – A Fundamental Human Right" – a paper presented at the 17th Commonwealth Law Conference, Hyderabad, India.
[5] Ibid.

the level of economic, commercial and social activities in the region or town where the courts are located. The size of the general population in the region or town is also a factor that can determine the location and the number of the courts. The proximity of a region or town to the next region or town which already has courts' houses also plays its part.

In term of geographical distribution of the courts, the State of Sabah and Sarawak is further confounded by the fact that the two States have a vast expanse of land area. The size of the two States combined is bigger than the whole of West Malaysia. But land travel between one district or division and another is tiring because of lack of good roads as in West Malaysia. The main form of travel in the two States is by air and river. Though most major towns in Sabah and Sarawak are well connected by good air services provided by Malaysia Airlines and Air Asia, this does not mean that access to the courts between districts is a breeze.

Thus in the States of Sabah and Sarawak the judiciary has been innovative and proactive. The judiciary has brought the courts to the people – the common ordinary citizens in the outlying rural areas and the interiors of Sabah and Sarawak, who are generally in the lower income group whose livelihood depends on farming and such other agricultural activities – by introducing mobile Courts on a periodical and selective basis. This is done to ease the difficulty of the rural citizenry of coming to the courts that are located in the cities and towns at great expense of time and money.

According to A Special Report of the Courts in Sabah & Sarawak, published by the Office of the Chief Judge of Sabah & Sarawak *"the mobile Court was first launched in the middle of 2006 and was customised to serve the needs of people from the rural areas in the states of Sabah and Sarawak. ...the mobile Court is important to Sabah and Sarawak due to the geographical features of both states, whereby some areas can only be reached via rivers, logging roads and on foot."*

The same report also states the objective of the mobile Court as *"... to extend the services provided by the Courts to the people of the rural areas who do not have the means to travel to the nearest court in their respective district. For those in these areas, services such as attestation or certification of documents are not easily available as they need to travel for hours or days just to get them. These journeys are uncomfortable, long and tedious. However, the existence of the mobile Court has not only saved them the inconvenience but the expensive costs borne to obtain these services."*[6]

The mobile Court conducts its business at any available space at the place it visits such as community hall, school or the verandah or 'ruai' of the Iban long house.

Another major innovation by the Judiciary in Sabah and Sarawak is the introduction of electronic Court whereby parties who are residing in two different cities or towns in the two States may conduct their cases (particularly the non-contentious matters) through tele-video conferencing. For example, the Plaintiff and his counsel in a given case are residing in Kuching whereas the Defendant and his counsel are residing in Miri which is about 1,000 miles apart and the case is registered in the High Court at Kuching; the parties may opt for this mode of hearing of the case, and the Defendant thereby would have saved the expenses on air travel and accommodation. This is not to mention the valuable time that can be saved to do some other work. The hearing by tele-video conferencing is big boon to the practitioners in Sabah and Sarawak as well as to the litigants in terms of saving time and expenses.

The state of art technology in providing access to justice is currently being implemented in West Malaysia as an on-going judicial program and policy to modernise the judiciary delivery system of dispensing justice, making it more efficient and effective. The objective and aspiration is that one day all the courts in Malaysia – be it the Superior Court or the Subordinate Court – will be electronically linked to the Palace of Justice in Putrajaya – the seat of the apex Court and where the management and disposal of cases in every court in the country can be monitored and where administrative and policy decisions on the requirements of the Courts throughout the country to function efficiently and effectively can be made in a holistic manner.

The point is that before a litigant can assert his right and seek remedy for the wrong done to him, the litigant must first of all have access to the courts literally and physically. That is where he has to register his case and where

[6] A Special Report of the Courts in Sabah & Sarawak: Annexure V – Mobile Court in Sabah and Sarawak published by the Office of Chief Judge of Sabah and Sarawak.

the management of his case will be done before the case can be heard.

Therefore if a person finds it is expensive and too troublesome for him even to get to the court house where his case is to be heard he may simply give up and suffer in silence or he may resort to some other form of action to have his right vindicated. Thus the first step to take to ensure that the concept of access to justice is to be meaningful is to ensure easy access to the courts or any other quasi-judicial tribunal that can dispense justice to the disputing parties.
The next fundamental element is the legal framework. The starting point is Article 121 of the Federal Constitution which establishes the Court of Justices namely the High Court of Malaya and the High Court of Sabah and Sarawak of co-ordinate jurisdiction and status, the Court of Appeal and the Federal Court. These are the superior Courts.

The same Article also provides for the establishment of such inferior Courts – i.e. the Penghulu Courts, the Magistrates' Courts and the Sessions Courts, under federal law. The two relevant federal laws here are the Subordinate Courts Act 1948 (Act 92) which establishes the Magistrates' Courts and the Sessions Courts and provides for their jurisdiction; and the Courts of Judicature Act 1964 (Act 91) which regulates matters pertaining to the superior Courts and also prescribing its jurisdiction.

In this regard it should be noted that Article 121(1) of the Federal Constitution provides that *"... and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law".* This is the position after the constitutional amendments in 1988. The amendments were done by s 8 of Act A704 which came into force on 10 June 1988. Before the amendments the judicial power of the federation was vested in the High Courts. Prior to the amendment the opening words of Article 121(1) read *"... Subject to Clause (2) judicial power of the federation shall be vested in ...*" the High Court in Malaya, High Court in Sabah and Sarawak and High Court in Singapore; and jurisdiction of the inferior Courts is provided by federal law.

With the amendments, this legal framework as to jurisdiction of the superior Courts changed. The judicial power no longer vested or deposited with the superior Courts. The extent of the judicial powers exercisable by the superior Courts are now prescribed by federal law. That is to say laws made and passed by the Federal Legislature or Parliament.

A point of importance in the application of the concept of access to justice particularly in the public and administrative law area is where a challenge is mounted against an administrative decision or the exercise of discretionary decision under a statute by a public authority or public officer. It is trite law that inferior tribunals and administrative decision making bodies are subject to the Court's general supervisory power. It is also of importance in another aspect – that is to what extent judicial activism is affected by the new legal framework that was put in place after the amendments. Generally Malaysian Judges are not known for robustness in dealing with issues of public interest especially when the challenge is made against the authority. That is not to say that there have been no decisions by Malaysian Courts that favour a liberal and dynamic interpretation, say, on the provisions of the Federal Constitution that affect fundamental liberties. One example of this is the recent decision by the Court of Appeal in *Muhammad Hilman Idham & Ors v Kerajaan Malaysia & Ors* [2011] CLJ JT (5) in ruling that s 15 of the Universities and University Colleges Act is unconstitutional. In that case, by majority decision, the Court of Appeal held that restriction imposed on students of higher learning institutions under s 15 of the Act to voice support in favour of political parties is unreasonable in the face of Article 10 of the Federal Constitution.

But such judicial activism is few and far apart. The Malaysian Courts prefer a more conservative approach on the interpretation of provisions of the law that limit its own inherent power to do justice. One such example is *Sugumar Balakrishnan v Pengarah Immigresen Negeri Sabah* [1998] 3 MLJ 289. In that case Mr Balakrishnan had challenged the decision of the Sabah Immigration Authority to cancel his entry permit to reside in Sabah by way of judicial review by order of *certiorari.* Mr Balakrishnan failed in the High Court. He then appealed to the Court of Appeal. The Court of Appeal allowed his appeal. The central argument in that case revolves around Article 5(1) of the Federal Constitution which provides that '*no person shall be deprived of his life or personal liberty save in accordance with the law'* and s 59A(1) of the Immigration Act 1963 which provides that '*there shall be no judicial review*

in any Court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority under this Act, except in regard to a question relating to compliance with any procedural requirement of this Act or the regulations governing that Act or decision'.

The Court of Appeal held that a statutory provision that excludes the Court's power of judicial review is inconsistent with the fundamental liberty of access to the courts. However, on appeal to the Federal Court by the respondent, Pihak Berkuasa Negeri Sabah, the Court of Appeal decision was reversed with the Federal Court holding that 'the constitutional rights under Article 5(1) of the Constitution can be removed in accordance with law as constitutional rights are not absolute'.

Another example of the Malaysian Courts' conservatism is the case of *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1. The issue in this case is the interpretation of the scope of s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 in the light of Article 8(1) of the Federal Constitution which provides that 'all persons are equal before the law and entitled to equal protection of the law'. The Act created Danaharta (the Malaysian national asset company) as a mechanism to resolve some of the economic problems (particularly those associated with large bank borrowings or loans). Section 72 of the Act shielded Danaharta from being issued with any Court orders the effect of which is to restrain them from carrying out their function and purpose for which they were established; and any such order if issued would be void and unenforceable.

In *Kekatong*, the Plaintiff is one of the many companies that were burdened with non-performance loan problems during the Asian economic crisis and eventually the Plaintiff's loan (and the charge created thereby) was vested with Danaharta. The Plaintiff applied for an interlocutory injunction to restrain Danaharta from selling the charged land. This was refused by the High Court on the ground that it had no jurisdiction to do stop Danaharta from doing so because of s 72 of the Danaharta Act. The Plaintiff appealed to the Court of Appeal and the Court of Appeal overturned the High Court's decision. The Court of Appeal held that s 72 was unconstitutional as it violated Article 8(1) of the Federal Constitution. But on further appeal by Danaharta to the Federal Court, the ruling by the Court of Appeal was reversed with the Federal Court holding that the common law right of access to justice is not a guaranteed fundamental right and that the common law is qualified and not absolute.

Though in these two cases the Federal Court preferred the conservative approach to the judicial activism approach by the Court of Appeal, the Court did not make any reference to the amended Article 121(1) as the basis for its conservatism.

The Court of Appeal and the Federal Court are established under Article 121(1B) and 121(1C) respectively. The primary function of these two courts as provided under the said provisions of the Constitution is to hear appeals from the Courts inferior to it.

The jurisdiction of the Court of Appeal is to determine appeals from the decisions of a High Court or a Judge of the High Court and such other jurisdiction as may be provided by federal law. The Court of Appeal does not have an original jurisdiction.[7]

Under Article 128(3) of the Constitution, the jurisdiction of the Federal Court to hear appeals from the Court of Appeal or High Court is 'as may be provided by federal law'. What this means is that in some matters a federal law may exclude appeal to the Federal Court. In other words, Parliament as the federal legislative body, may pass law that denies appeal to the apex Court. In this sense the access to justice may not be equal in all and every case.

Federal laws have also established other tribunals that are armed with authority and powers to determine disputes and provide avenue for litigants to have their disputes determined within the shortest time possible and at reasonable cost. For example under Part VI of the Housing Developers (Control and Licensing) Act 1966 which was introduced by Act A115 in 2002 there is established a Tribunal for Homebuyer Claims with jurisdiction to determine claim by home buyers against a developer where the total claim does not exceed RM25,000.[8] Another example is the establishment of Tribunal for Consumer Claims under Part XII of the Consumer Protection Act 1999 (Act 599) with jurisdiction to hear and determine consumer claims within the ambit of the Act including claims in respect

[7] Court of Judicature Act 1964, Part III – ss 45-49 on original jurisdiction have been deleted by Act A886.
[8] Section 16M of the Housing Developers (Control and Licensing) Act 1966 (Act 118).

of all goods and services for which no redress mechanism is provided for under any other law and where the total amount of claim does not exceed the sum of RM 25,000.

Both tribunals are required to make its award without delay and, where practicable, within sixty days from the first day the hearing before the Tribunal commences.[9] Every party to a claim before the tribunals are entitled to attend and to be heard; but no legal representation by an advocate and solicitor is allowed.[10] However, the Home Buyers Tribunal may allow legal representation if in its opinion the matter in question involves complex issues of law and one party will suffer severe financial hardship if he is not represented by an advocate and solicitor.[11]

Once a claim is filed with the any of the Tribunals, the same claim shall not be filed in the courts; and the decision of the Tribunal is final.[12] No appeal to the Court is provided in the law. Nonetheless, there is no express provision in the respective legislation that establishes the Tribunal to exclude judicial review. As such this remedy is still available to the parties who may wish to challenge the legality or validity of the Tribunal's decision.

The other aspect of the legal framework that is relevant is the procedural laws. Generally, the Rules that govern matters in the High Court and the Subordinate Court are found in the Rules of the High Court 1980 ('RHC 1980') and the Subordinate Court Rules 1980 ('SCR 1980') respectively.[12A]

The 1980 Court Rules are simpler than its predecessors and the objective is to facilitate the proceedings in the respective Courts. The central theme underlying the Rules is to ensure substantial justice is done and that cases are not defeated merely because of technical non-compliance with the requirement of the Rules.

The RHC 1980 in particular is an improvement of its predecessor the Supreme Court Rules 1957 which were heavy with technicalities so much so that a non-compliance with its rules could result in the proceedings being nullified. That is no longer true except where the non-compliance is very fundamental and substantive that causes prejudice to the other party to the proceedings and the result is miscarriage of justice.[12B]

Order 1A of the RHC 1980 provides that '*in administering any of the Rules … the Court … shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules …'*. This approach and spirit of the RHC 1980 is further enhanced in Order 2 of the Rules. Order 2 r 1(1) provides that non-compliance with the Rules shall be treated as an irregularity and shall not nullify proceedings. Under Order 2 r 1(2) the Court may allow, instead of setting aside wholly or in part the proceedings that have not complied of the rules, amendments to be done to ensure compliance. Under r 1(3) of the same Order the Court shall not wholly set aside any proceedings begun by an originating process other than the one that is required to be used for that proceeding under the Rules. Technical objection on the ground of non-compliance with the rules is no longer allowed unless such non-compliance resulted in substantial miscarriage of justice.[15]

A similar approach and spirit also underlies the SCR 1980.

The Rules are made simpler and have done away with technical objection for one reason only – that is to provide easy access to justice and the justice is not denied to a deserving party merely on technicalities.

Procedural rules are important for the courts to ensure an orderly proceeding in courts and also a fair hearing. It is recognised that 'the right to fair hearing is an essential aspect of the judicial process and it is indispensable for the protection of other human rights'.[16] It is the

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9 Section 112 of Consumer Protection Act 1999 (Act 599) and s 16Y(1) of Housing Developers (Control and Licensing) Act 1966 (Act 118).
10 Section 108 of Consumer Protection Act 1999 and s 16U of Housing Developers (Control and Licensing) Act 1999.
11 Section 16U(2) of Housing Developers (Control And Licensing) Act 1966.
12 Sections 104 and 116 of the Consumer Protection Act 1999 and ss 16R and 16AC of Housing Developers (Control and Licensing) Act 1966.
12A The Rules of the High Court 1980 replaced and repealed the Rules of the Supreme Court 1957 and the Subordinate Court Rules 1980 replaced and repealed the Subordinate Court Rules of 1950.
12B *Duli Yang Maha Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor* [2009] MLJU 401.
15 Order 2 r 3 of the RHC 1980.
16 The right to a fair hearing and access to justice: Australia's Obligation – Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, Role of Judges and Access to Justice dated 6 March 2009 by Human Rights Law Resources Centre Level 17, 461 Bourke Street Melbourne VIC 3000.

cornerstone of right of access to justice. The basic elements of the right to a fair hearing are:

(a) Equal access to, and equality before the courts;

(b) The right to legal advice and representation;

(c) The right to procedural fairness;

(d) The right to a hearing without undue delay;

(e) The right to a competent, independent and impartial tribunal established by law;

(f) The right to public hearing; and

(g) The right to have free assistance of an interpreter where necessary.[17]

Procedural law is often regarded as of secondary importance compared with substantive law.[18] International and comparative jurisprudence on the basic elements of the right to a fair hearing indicate that access to justice and equality before the law are fundamental values underpinning the right to a fair hearing.[19]

In a study or inquiry conducted in Australia in 2009 at the behest of the Australian Senate to review the Australian judicial system, role of judges and access to justice,[20] the study identifies that access to justice is a fundamental requirement of a fair legal system and recommended to the Government of Australia to take steps to ensure greater equality in access to justice by providing inter alia:

(a) Adequate funding for legal aid, community legal centres and impecunious and disadvantaged litigants;

(b) Increasing accessibility to Courts by simplifying rules of procedure and preventing the disproportionate impact of associated costs of litigation for certain individual litigants; and

(c) Adequate services to assist individuals in accessing the justice system including legal aid and free interpreters.

In our own jurisdiction, plan is afoot, and in fact steps have been taken, by the Rules Committee to further simplify the Rules of the Courts by consolidating the Rules of the High Court and that of the Subordinate Courts in one uniform Rules. It is hoped that this will become a reality soon.

The next fundamental element in access to justice is the right to legal representation. Article 5(3) of the Federal Constitution provides that a person arrested shall be informed of the grounds of his arrest as soon as possible and he shall be allowed to consult and be defended by a legal practitioner of his choice. This article enshrines the right to legal counsel and representation.

There are two issues surrounding this right to legal counsel. The first issue is the time to exercise the right and the second issue is the scope of the right itself. The Court in *Hashim bin Saud v Yahya bin Hashim*[21] has said that the right may be exercised from the time of arrest; but there has to be the balance with the duty of police to protect the public from wrong doers by apprehending them and collecting required evidence. However in *Lee Mau Seng v Minister For Home Affairs, Singapore*,[22] the Court expressed the view that the right may be exercised after 'a reasonable time' from the time of arrest.

The general consensus is that the cases have interpreted the right to counsel very narrowly and limited in scope.[23] It is said that the right is only available when the counsel chosen by the arrested or accused person is willing and able to act for that person. It was argued that a trial of an accused person is not vitiated if the accused person is not represented by counsel and that the accused person does not have the right to be informed of his right to counsel.[24]

However in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449, the Federal Court gives a new life to the right to legal counsel by holding that an ISA detainee is entitled to the right to legal counsel. This ruling has been described as 'a bright spark in a darkened tunnel'.[25]

For a meaningful access to justice an accused person or a litigant must be made aware of his or her legal rights and of available procedures to

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17 Ibid.
18 Ibid.
19 Ibid – p 3.
20 Ibid.
21 [1977] 2 MLJ 116 at 118.
22 [1971] 2 MLJ 137.
23 Chan: Access to Justice in Singapore and Malaysia, p 31.
24 Ibid.
25 Ibid.

enforce such rights. This awareness is real only if he or she is given the legal representation at the right time and in its full scope. It is said that when access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful; and in many instances 'injustice results from nothing more complicated than lack of knowledge'.

The fourth important element is the issue of cost of delivering justice. In the Inquiry (referred to above) ordered by the Senate of Australia, this issue is a specific term of reference. The Inquiry recognises that this is an important aspect of ensuring equal access to justice and approved the view by Lord Bingham that 'legal redress should be an affordable commodity'. Having analysed the cases decided by the European Court on Human Rights on this issue, the Inquiry formed the view that '*... the availability of funding for the costs of litigation, including court fees disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. In many cases, lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively*'.[26]

I think that observation also holds true in this country. There are many litigants who simply cannot pursue their claims or have to drop their claims because of cost factor. To alleviate this problem there must be a re-thinking on the nature and scope of legal aid. It is noted that in Malaysia the provision of legal aid is governed by Legal Aid Act 1971 (Act 26). However the scope of assistance given under the Act is limited to matters listed in the Second, Third and Fourth Schedules of the Act.

In Malaysia there appears to be no evidence of an express or implied constitutional right to obtain legal aid in both criminal and civil cases. It is understandable that the extent of legal aid is dependent on the availability of government funds and resources. However in Malaysia 'there is little judicial discourse on the right to legal aid'. There is no important judicial pronouncement on the nature and scope of the right to legal aid.[27]

To avoid access to justice being illusory, expanded provisions of legal aid and the provision of legal representation at minimum cost is an absolute necessity. This is to ensure that access to justice is equal to everybody. In this regard, and in relation to the provision of legal aid I would subscribe to the view that '... the concept of poverty may have to be widened to include not only those who are below poverty line, but also persons living above poverty line who nevertheless experience financial difficulties in obtaining access to justice or who are placed in a materially disadvantageous position vis-à-vis other litigants in accessing justice. This lack of or unequal access to justice may be manifested in various circumstances, for example, in the lack of financial ability of the potential litigant to engage lawyers, ineligibility for legal aid or the onerous obligation to pay Court fees'.[28]

In conclusion I would say that in five decades of our independence, Malaysia has made commendable progress to ensure equal access to justice for all at reasonable cost. It is indeed encouraging to see that the powers that be continue the effort to improve the judicial system to make it more accessible. However, there are areas of law which require the courts to take a more robust approach to protect the fundamental rights guaranteed under the Constitution to bring them in line with today's more liberal views of fundamental rights and liberties.

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[26] The right to a fair hearing and access to justice: Australia's Obligation – Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, Role of Judges and Access to Justice dated 6 March 2009 by Human Rights Law Resources Centre Level 17, 461 Bourke Street Melbourne VIC 3000.

[27] Chan: Access To Justice in Singapore and Malaysia, p 33.

[28] Ibid.

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