Country Profile: Malaysia

Introduction

In 2009, Malaysia underwent a series of judicial reforms.[1] These reforms aimed to reduce the country's significant court congestion and increase judicial accountability.[2] Some of the reforms modernized the judicial system, such as with electronic case management and establishing new, specialized courts.[3] Other reforms sought modest structural changes to the judicial system. For example, the Malaysian legislature expanded the remedial jurisdiction of its lower courts to prevent appellate courts from being bogged down with such cases,[4] and the legislature also amended the way it appoints judges to promote transparency and judicial competence.[5]

What makes Malaysia's judicial reforms remarkable is not the ambition or goals of the reform movement. It is not even the specific reforms the country adopted. Malaysia's reforms are noteworthy for their success.[6]

Background

Malaysia is a federation comprised of thirteen different states.[7] It is a constitutional monarchy with a democratically elected parliament derived from the British system.[8] The king is

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[1] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 15.

[2] *See id*.

[3] *See Malaysia: Court Backlog and Delay Reduction Program* i-ii (World Bank ed., 2011).

[4] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 20.

[5] Judicial Appointments Commission Act 2009, § 23(2), https://www.jac.gov.my/spk/images/stories/10_akta/akta695/act695_judicial_appointments_commission_act2009.pdf%20Section%20 (last visited Mar. 22, 2022).

[6] *See Malaysia: Court Backlog and Delay Reduction Program* 18 (World Bank ed., 2011).

[7] *See id*. at i.

[8] *See id*.

elected to five-year terms from the rulers of the states.[9] However, unlike the United Kingdom, Malaysia has a written constitution called the "Federal Constitution."[10] The Federal Constitution provides for separate executive, legislative, and judicial branches.[11]

Although Malaysia has states, its judiciary is not divided between the federal government and the states. However, the judiciary is divided between the federal judiciary and a religious, Sharia, court system, which in some respects operates as a type of state court.[12] The Sharia court system has jurisdiction over all issues of Islamic law and the personal law of Muslims.[13] They have their own rules of procedure and evidence, and the Sharia courts are regulated by state law.[14] As Malaysia has secularized over time, jurisdictional issues have arisen between the Sharia courts and the federal courts.[15] This report and the reforms discussed within focus exclusively on the federal judiciary.

The federal judiciary is composed of five courts: the Magistrates' Court, Sessions Court, High Court, Court of Appeals, and the Federal Court.[16] The Magistrates' Court and Sessions Court are referred to as subordinate courts and hear cases in the first instance.[17] The High Court, Court of Appeals, and the Federal Court are known as the superior courts.[18] The High Court

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[9] *See id*.

[10] *See id*.

[11] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 16.

[12] *See Malaysia: Court Backlog and Delay Reduction Program* i (World Bank ed., 2011).

[13] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 16

[14] *See id*.

[15] *See id*.

[16] *See id*.

[17] *See id*.; *Malaysian Court System*, GLOBAL BERISH, https://www.globalbersih.org/resources/know-your-rights/malaysian-court-system/#:~:text=The%20hierarchy%20of%20courts%20of,highest%20court%20of%20the%20land (last visited Mar. 22, 2022).

[18] Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 16

exercises both appellate jurisdiction over cases from the subordinate courts and original jurisdiction over certain civil matters (such as claims over a specified amount in controversy and divorce cases) and severe criminal cases (such as death penalty cases).[19] The Court of Appeals and the Federal Court are exclusively appellate courts.[20]

As a formal matter, the king is responsible for appointing judges to the superior courts.[21] However, by tradition, the king defers to the recommendation of the prime minister,[22] whom the Federal Constitution grants the power to give advice on judicial appointments.[23] As will be discussed below, the Judicial Appointments Commission now plays an important role in judicial appointments as well.[24]

Subordinate court judges are government officials pulled from the Judicial and Legal Services Commission.[25] They serve on three-year rotations through which they shift between the various branches of government. Because the attorney general serves on the Judicial and Legal Services Commission, some have raised concerns that the subordinate judges are not impartial.[26] However, the Federal Court rejected these objections in *Cheah Yoke Thong v. Public Prosecutor*,

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[19] *See Malaysian Court System*, GLOBAL BERISH, https://www.globalbersih.org/resources/know-your-rights/malaysian-court-system/#:~:text=The%20hierarchy%20of%20courts%20of,highest%20court%20of%20the%20land (last visited Mar. 22, 2022).

[20] *See id*.

[21] Constitution of Malaysia, § 122B, cl. 1; *Malaysia's Constitution of 1957 with Amendments through 2007*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en (last visited Mar. 22, 2022); *See also Malaysia: Court Backlog and Delay Reduction Program* i (World Bank ed., 2011).

[22] *Malaysia: Court Backlog and Delay Reduction Program* i (World Bank ed., 2011).

[23] Constitution of Malaysia, § 122B, cl. 1; Malaysia's Constitution of 1957 with Amendments through 2007, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en (last visited Mar. 22, 2022

[24] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 22

[25] JUNRONG YE ET AL., ASIAN COURTS IN CONTEXT 386-87 (Cambridge Univ. Press, ed. 2014).

[26] *Id*. at 387

holding the conflict alone was insufficient because litigants needed to demonstrate the judge was either actually biased or likely to be biased.[27]

The ratio of judges to population in Malaysia is abnormally low—even for a common law country.[28] However this might be partially explained by the existence of the Sharia courts and other judicial administrators.[29] Despite the low starting salary for judges, the judiciary in Malaysia is generally well funded.[30]

Reforms

Impetus for Reform

By 2008, court congestion had developed into a serious problem for the Malaysian judiciary. Parties in civil litigation frequently waited four to five years just to get a trial date.[31] And once they finally got a trial date, the process was lengthy and further delayed by frequent adjournments (a continuance in American courts).[32] In 2009, most cases at the High Court of Kuala Lumpur—the capital of Malaysia— were over five years old.[33] Some were as old twelve years.[34] Criminal defendants also experienced significant delays.[35]

Efficiency Reforms

[27] *Id*. at 387

[28] *Malaysia: Court Backlog and Delay Reduction Program* ii (World Bank ed., 2011).
[29] *Id*.
[30] *Id*.
[31] Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 16.
[32] *See id*. at 16, 18
[33] *Id*. at 16
[34] *Id*.
[35] *Id*.

In response to this crisis Chief Justice Zaki Azmi commenced a series of reforms.[36] He worked primarily with other members of the judiciary,[37] but the Chief Justice solicited advice from the bar and attorney general as well, and the legislature passed some reforms.[38] The reforms focused on reducing court congestion and increasing judicial competence.[39]

To address the backlog of court cases, the Chief Justice established a New Commercial Court and a New Civil Court which adopted an aggressive and proactive case management style in 2009.[40] These new courts had a target to resolve cases in nine months or less.[41] Judges were expected to resolve an average of four trials a month or six interlocutory matters a day.[42] With time the expectations heightened.[43] While the older courts resolved pre-existing cases, once the backlog was resolved they would be transitioned over to the new court model.[44]

One critical element of the reform package was ending the practice of frivolous adjournments. Historically, courts had permissively granted adjournments, which continually delayed litigation both for the case in question and other matters.[45] Judges themselves were responsible for nearly 23% of adjournments in criminal cases because they failed to show up or arrange for a substitute.[46] The Chief Justice issued directives outlining instructions fixing

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[36] *See id*. at 15

[37] *See id*.

[38] *See* JUNRONG YE ET AL., ASIAN COURTS IN CONTEXT 403 (Cambridge Univ. Press, ed. 2014).

[39] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 15

[40] *See id*. at 17.

[41] *See Malaysia: Court Backlog and Delay Reduction Program* 16 (World Bank ed., 2011).

[42] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 18.

[43] *See id*. at 19.

[44] *See Malaysia: Court Backlog and Delay Reduction Program* 16(World Bank ed., 2011).

[45] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 18.

[46] *See Malaysia: Court Backlog and Delay Reduction Program* 16-17 (World Bank ed., 2011).

timelines for cases and the granting of adjournments.[47] Despite initial resistance to the change, lawyers and judges soon embraced the reform for its increase in efficiency.[48]

The reforms also emphasized alternative dispute resolution and settlements. Although significant mediation already existed in Malaysia, a 2010 directive encouraged judges to emphasize it as an alternative to trials and to facilitate settlement negotiations.[49] In the criminal context, the reforms adopted plea deals.[50]

In another effort to streamline the judicial process, Malaysia established a limited number of specialized courts. This included specialty courts in intellectual property and Islamic banking.[51] While the reforms created different courts, it standardized procedural rules between courts in 2012.[52]

Finally, and perhaps most importantly, the Chief Justice sought to modernize the logistics of the court system. Before the reforms, Malaysia primarily relied on hand-written notes by judges and physical case files.[53] One unfortunate consequence of this system was that thousands of cases which had been fully resolved remained on dockets because the record was never updated.[54] Thus they continued to delay courts' dockets.[55]

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[47] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 18.
[48] *See id*.
[49] *See id*. at 21.
[50] *Malaysia: Court Backlog and Delay Reduction Program* 20 (World Bank ed., 2011).
[51] *Id*. at 13.
[52] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 21.
[53] *See id*. at 16.
[54] *See id*.
[55] *See id*.

First, Chief Justice Zaki Azmi ordered an inventory of all existing cases and established a new filing system.[56] This helped remove resolved cases from dockets.[57] It also helped the justice establish a tracking system, which distinguished cases based on their complexity and assigned complex cases to some judges and less complex cases to others.[58] Cases were distinguished based on the kind of evidence they required and whether they would require a full trial.[59] The tracking system mitigated the historical problem of judges faced with complex and simple cases repeatedly postponing the complex cases.[60]

The reforms also included the implementation of a uniform electronic filing system. This facilitated the online submission of documents, searching of documents, payment of court fees, retrieval of court documents, and communication between attorneys.[61]

The judiciary's internal reforms were supplemented by a major reform passed in the parliament. In March 2013, the legislature amended the Subordinate Courts Act of 1948.[62] The amendment increased the jurisdiction of the subordinate courts and thus alleviated strain on the High Court. Session Courts now had the power to grant injunctions, require specific performance, and order the rescission of congrats.[63] Previously, these remedies would have required an order from the High Court.[64] This reform more than halved the number of writs filed in the High Court.[65]

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[56] *Malaysia: Court Backlog and Delay Reduction Program* 13. (World Bank ed., 2011).
[57] *Id*. at 13-14.
[58] *Id*. at 14.
[59] *Id*.
[60] *Id*. at 14-15.
[61] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 20.
[62] *See id*.
[63] *See id*.
[64] *See id*.
[65] *Id*.

Judicial Competence Reforms

As the efficiency reforms progressed, reformers turned their attention to improvements targeting judicial competence and accountability. The largest reform came from the parliament. In 2009, it passed the Judicial Appointment Commission Act, which established a commission responsible for selecting qualified judicial candidates to recommend to the prime minister for the superior courts.[66] The commission is comprised of members of the judiciary and four members of the private sector appointed by the prime minister in consultation with various legal organizations and the attorney general.[67] The commission is instructed to consider the integrity, fairness, competence, case management skills, and moral character of applicants, among other factors.[68] The Act aimed to increase transparency in judicial appointments.[69] The Commission subsequently refined the criteria to require applicants to demonstrate minimum competence in categories such as judicial temperament, public service, and financial responsibility.[70]

The parliament also passed the Judges Code of Ethics in 2009 and the Judges Ethics Committee Act in 2010. The Judges Code of Ethics establishes guidelines for the ethical conduct of judges and subjects them to disciplinary action if they violate the code.[71] The Ethics Committee, comprised of the Chief Justice and other lead judges, evaluates complaints under the ethics code.[72] The Committee does not have the power to remove a sitting judge from office.[73]

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[66] *See id*. at 22.

[67] *See id*.

[68] Judicial Appointments Commission Act 2009, § 23(2), https://www.jac.gov.my/spk/images/stories/10_akta/akta695/act695_judicial_appointments_commission_act2009.pdf%20Section%20 (last visited Mar. 22, 2022).

[69] Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 22.

[70] JUNRONG YE ET AL., ASIAN COURTS IN CONTEXT 405 (Cambridge Univ. Press, ed. 2014).

[71] Ummi Hani' Binti Maso'od, *Malaysia*, 15 Y.B. ISLAMIC & MIDDLE E.L. ONLINE 257, 257-58 (2011).

[72] *Id.*

[73] *Id.* at 257.

Only the Prime Minister and Chief Justices possess that power.[74] Judges are required to disclose their assets under the ethics code.[75]

For its part, the judiciary took aim at judicial competence. In 2012, Chief Justice Zaki Azmi established the Judicial Academy.[76] The Academy includes courses focusing on substantive and procedural law as well as skills such as case management.[77] Some of the courses are taught by appellate judges while others rely on outside expertise.[78]

Analysis

The particular judicial reforms Malaysia embraced are not unique.[79] However, their success rate far outstrips that of other countries who adopted similar reform packages.[80] For example, the carryover rate, which measures how many cases from the previous year are carried over into the next, had fallen by 2011 to 38% of its 2008 level.[81] The country also achieved its goal of resolving almost all new civil cases filed in the subordinate courts within nine months and all criminal cases within a year.[82] The question is: What made Malaysia's reforms so successful?

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[74] *See* Constitution of Malaysia, § 125, cl. 3.

[75] Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 21.

[76] *Id*.

[77] *See id*.

[78] *See id*.

[79] *See Malaysia: Court Backlog and Delay Reduction Program* 18 (World Bank ed., 2011).

[80] *See id*.

[81] *Malaysia: Court Backlog and Delay Reduction Program* iv (World Bank ed., 2011).

[82] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 23.

One important factor contributing to the success of Malaysia's efficiency reforms is that they were largely internal. Chief Justice Zaki Azmi took advantage of the Courts of Judicature Act, which empowers a Rules Committee to set strict court rules.[83] This allowed him to enact reforms without waiting for the legislature. The internal nature of the reforms may have contributed to their efficacy. Although rank-and-file judges initially resisted some changes,[84] at least one commentator suggested the most impressive aspect of Chief Justice Zaki Azmi's reform effort was the ability to convince the judiciary, bar, and public of the reforms' necessity.[85] This was key to the reforms' longevity.[86]

Another key aspect to the reforms' success was Malaysia's use of concrete, measurable goals.[87] For example, Malaysia aimed to resolve 90% of civil cases in under nine months.[88] Admittedly, this approach may be best suited to reforms addressing access to justice. However, Malaysia's initial reforms to the logistics of its court system—such as creating tracking systems and electronic filing—helped facilitate the success of its subsequent reforms because they enabled the reformers to monitor the reforms' progress. The reformers, including Chief Justice Zaki Azmi himself, also conducted frequent spot checks and surprise visits to court rooms.[89] All these improvements were achieved at minimal financial cost to the country.[90]

However, improvements in speed often come at the cost of accuracy and procedural guarantees. Unfortunately, accuracy is not as easily susceptible to measurement as efficiency.

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[83] *Malaysia: Court Backlog and Delay Reduction Program* 15 (World Bank ed., 2011).

[84] *See* Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 22.

[85] JUNRONG YE ET AL., ASIAN COURTS IN CONTEXT 404 (Cambridge Univ. Press, ed. 2014).

[86] *Id.*

[87] *See Malaysia: Court Backlog and Delay Reduction Program* viii (World Bank ed., 2011).

[88] *Id*. at v.

[89] JUNRONG YE ET AL., ASIAN COURTS IN CONTEXT 403 (Cambridge Univ. Press, ed. 2014).

[90] *See Malaysia: Court Backlog and Delay Reduction Program* ix (World Bank ed., 2011).

Therefore, it is possible the reforms, while providing access to courts, did not help parties achieve justice in the end. But when the delays are as profound as they were in Malaysia, such that decisions are delayed so long it risks being moot or ineffectual, it is difficult to imagine the tradeoff was not worthwhile. And some increases in speed, for example through ending frivolous adjournments, are not associated with decreases in accuracy.

Conclusion

Malaysia set out to implement a series of reforms aimed at reducing court backlog and increasing judicial competency.[91] Through a combination of internal reforms and legislation it reached remarkable success in reducing court clog and increasing court efficiency.[92] However, it is less clear whether it succeeded in increasing judicial competence. Further research, perhaps by surveying the satisfaction of parties or analyzing the quality of judicial opinions themselves is needed to evaluate the success of the competency reforms.

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[91] Azahar bin Mohamed, *Court reform programmes: the Malaysian experience*, 102 J. SOC'Y ADVANCED LEGAL STUD., 2019, at 15, 15.
[92] *Malaysia: Court Backlog and Delay Reduction Program* 18 (World Bank ed., 2011).