



A REPORT ON THE MALAYSIAN JUDICIARY'S CRISIS MANAGEMENT EXPERIENCES IN RESPONSE TO THE COVID- 19 PANDEMIC

BY

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Introduction

1. This report summarises the administrative measures undertaken by the Government of Malaysia to curb the Covid-19 problem. This helps to put into perspective the resulting measures the Malaysian Judiciary imposed. The report is thereafter split into two further parts.
2. The first portion discusses how the Malaysian Judiciary has coped with Covid-19 in light of the Government's protective measures (**Part A**). The second portion shares the lessons the Malaysian Judiciary has learned as a result – moving forward (**Part B**).

The Government of Malaysia's Response to Covid-19

3. The Government of Malaysia acted under the Prevention of Infectious Diseases Act 1988 [Act 342] to put in place certain protective measures to curb the spread of Covid-19. This resulted in three (3) phases.

4. The first phase is the Movement Control Order phase which took effect from 18 March 2020 to 3 May 2020 (**'First Phase'**). During this phase, all movement in Malaysia was heavily restricted, that is, all persons were prohibited from travelling within the country and all businesses were shut down save and except for those falling within the 'essential services' category.

5. The courts were not generally listed as an 'essential service' and as such, all court buildings were closed to Judges, court staff and the public. The role of the Judiciary as an 'essential service' was only to the extent of the role played by the Magistrates' Courts in remand applications – the temporary detention of suspects for the purposes of police investigation.

6. The second phase, the Conditional Movement Control Order phase, took effect from 4 May 2020 to 9 June 2020 (**'Second Phase'**). During the Second Phase, movement restrictions were relaxed, people were allowed to return to work but subject to strict standard operating procedures. That said, court buildings still remained closed to the general public while Judges and court staff were allowed to return to work on a shifts basis.

7. The third phase, the Recovery Movement Control Order phase, which is currently in effect throughout the nation, began on 10 June 2020 until 31 August 2020 (**'Third Phase'**). During this phase, I announced that

Courts will resume full operations beginning 1 July 2020. This is because all national operations and almost all businesses were allowed to recommence but again, subject to strict standard operating procedures.

8. Due to the staggering surge in the number of cases in the States of Selangor and Sabah and the Federal Territories of Kuala Lumpur and Putrajaya, the Government has had to revert to the Second Phase measures in these territories from the period beginning 14 October to 9 November 2020.

9. In light of the broad background above, this report will now detail how the Malaysian Judiciary remained committed to its constitutional obligation of maintaining access to justice in spite of Covid-19.

A. Judicial Measures in light of the Movement Control Measures

First Phase

10. It is important to state that it was unrealistic and impossible for the Courts to operate in the usual way during the First Phase. Doing so would have run the risk of jeopardising not only the health and safety of judges and lawyers, but also that of litigants, court staff including officers and clerks.

11. To ensure that access to justice did not come to a halt, as a sign of preparedness, a day before the First Phase took effect the Malaysian Judiciary issued guidelines to judges and judicial officers on the following matters:

- (a) trials/hearings of civil and criminal cases;
- (b) filing/case management of civil cases;
- (c) case management of criminal cases at the Federal Court and Court of Appeal; and
- (d) case management of criminal cases at the Subordinate Courts;

12. It was our observation that by the issuance of the aforementioned guidelines, we managed to cushion the impact that Covid-19 had on the operation of our Courts by relying primarily on processes we already had in place. In fact, even long before the implementation of the First Phase, the Malaysian Judiciary had long adopted the e-Courts platform which encompasses a widespread digitalisation of its services and processes.

13. Under the e-Courts platform there exist several sub-platforms such as e-Filing, e-Review and e-Lelong (online foreclosure proceedings).

14. Our thought process during the First Phase was quite clear. All we had to do was to place greater reliance on the digital platforms we already had in place to keep our processes running. We also took the bold step of conducting hearings online.

15. If I may summarise.

16. E-Filing enables practitioners and litigants alike to file their documents and cause papers remotely through an online repository without having to deliver hard-copy versions of the same. Although not all courts in Malaysia are equipped with the e-Courts system, parties can still

have their documents filed electronically at the nearest Court which has the platform.

17. Trials fixed during the First Phase were postponed to a later date. Case managements continued to take place for the fixing of hearing and filing dates via e-Review. E-Review is an online telecommunication platform which allows counsel and court officers or judges to communicate remotely with one another through an online messaging platform instead of face-to-face meetings. E-Review was first launched and has been in operation since 2019.

18. Urgent civil matters filed under certificates of urgency and which could not risk adjournment were heard forthwith online e.g. through applications such as Skype or Zoom, or email. To this effect, the Malaysian Judiciary issued an Online Hearings guideline on 26 March 2020 for all High Courts and Subordinate Courts. Parties consented to have their cases argued and heard via an exchange of emails or through video-link – subject to the discretion of the Court. The relevant Registrar or Court was responsible for ensuring the smooth running of the process.

19. Online hearings were later extended to uncontested applications, brief interlocutory applications and interlocutory appeals.

20. These modes of hearing were originally made subject to the consent of parties, as we did not have specific legislation that expressly allows for remote hearings. 23 April 2020 marked history when for the first time, the Court of Appeal of Malaysia conducted an online hearing which was live-streamed for the benefit of the public's viewing. The Federal Court eventually followed suit.

21. To have a more structured regulatory regime on remote hearings, the Judiciary recommended amendments to relevant laws such as the Courts of Judicature Act 1964, Subordinate Courts Act 1948 and Subordinate Courts Rules Act 1955 to allow for direct legislative sanction for online hearings without having to base it on the consent of parties.

22. The Bills to amend those laws were recently tabled in Parliament. They have since been passed and have come into force as of 22 October 2020. The amended statutes cater to long-term measures and the much-needed shift towards using technology in court processes. This is not a choice but arises out of necessity without jeopardising the elements of a fair trial and for disputes to be resolved without inordinate delay.

23. Internally, the Malaysian Judiciary is in the midst of amending the Rules of the Federal Court 1995, Rules of the Court of Appeal 1994 and Rules of Court 2012 to streamline court procedure relating to remote hearings and other matters consequential thereto.

(Note: the amendments to the above mentioned subsidiary legislation were eventually approved and gazetted on 14 December 2020).

24. The above measures the Malaysian Judiciary undertook were, and still are, either not wholly or only partly applicable to criminal cases. This is because criminal cases involve a higher degree of consideration given that they involve the liberty of the subject. We still consider the physical presence of the accused necessary. As such, we have for the time being, discouraged online hearings for criminal matters.

25. In sum, during the First Phase when physical access to the courts was restricted in the name of public health and safety, the Judiciary nonetheless remained accessible via online means. This, for reasons stated earlier was limited to civil matters except in remand cases where the Magistrates' Courts remained accessible.

Second and Third Phases

26. To recap, during the Second and Third Phases beginning 4 May 2020, the Government eased certain restrictions which allowed the public to resume movement throughout the country beyond their homes. Accordingly, the Malaysian Judiciary also gradually reopened its doors to staff and the public.

27. In the first phase of the reopening of the courts with effect from 4 May 2020, a number of court services resumed operations. Among these include the Court Registries, One-Stop Counters, and Commissioners for Oaths Counters, Powers of Attorney Counters, and e-Filing Service Bureau Counters. The Judiciary's immediate aim was to maintain the services essential to the public's needs.

28. In the second phase of the Malaysian Judiciary's resumption of operations, that is, from 13 May 2020 to 31 July 2020, we set a timetable for gradual access to courts across the country in several stages.

29. The decision to reopen the courts did not mean we would operate at full capacity immediately. Initially, only a limited number of courts were allowed to operate on a rotational or shifts-basis. The number of cases in a given courtroom in any one session was reduced. Judges were required

to start their open court hearings at staggered times to avoid everyone congregating at a particular time. For judges who were not sitting, we put in place a more flexible working timetable: they and their supporting staff were required to work from home.

30. At present, we have fully resumed operations but subject to a laxer version of the measures imposed during the 13 May to 31 July period. The second phase of judicial arrangements at present is no longer applicable to the Courts in Sabah, Selangor, Kuala Lumpur and Putrajaya due to the Government's re-imposition of the stricter measures under the Second Phase.

31. However, to control the process in all other locales, we have issued numerous guidelines which encompass the following areas:

- (i) Social Distancing and a New Order of Business;
- (ii) Remote Hearings;
- (iii) Crowd Management Measures;
- (iv) Enhanced Cleanliness and Hygiene Control; and
- (v) A General Emphasis on the Well-Being of Court Staff and the Public.

32. Each of these measures may be explained in turn.

Social Distancing and a New Order of Business

33. The new norm entails observing social distancing in every aspect be it in over-the-counter transactions, queuing up to enter the elevator or to purchase food at the Court canteens. To promote social distancing, all

Courts have been marked with red borders with which the public must comply in view of the need to maintain social distancing.

34. Social distancing will also bring about a new order of business which entails institutional structural adjustments. To this end, the Government has put in place rotational working days for Government servants to ensure continuous delivery of services while keeping safe.

35. Changes have also been made to the daily work culture in line with the social distancing rule. A fixed team of essential staff are on duty at Court premises and only within fixed and limited durations. Duty rosters have been drawn up so that all Court staff can work rotationally, that is, sometimes from home and sometimes at their designated work-stations.

Remote Hearings

36. As far as possible, Courts may conduct online hearings using electronic means of communication to dispense with the need for movement and physical attendance before the Court. Interlocutory applications, appeals and mediations may be heard via electronic means. Systematic applications such as e-Review are fully utilised for case management and pre-trial conferences. Inspection and signing of documents are done electronically.

37. Parties are encouraged to apply to the Courts for online hearings in suitable cases to minimise physical interaction. It is at the discretion of the individual Judge or Registrar hearing the case to determine if the hearing should proceed remotely in the interest of justice.

Crowd Management Measures and Hearing Protocols

38. Special arrangements are in place to regulate the entry of Court Users into and out of Court premises. There are fixed points of entry where all persons seeking to enter Court premises must queue up and undergo health checks before entering the said Court premises.

39. The capacity of locations in all areas of the Court such as courtrooms, lobbies, and registry areas are limited to contain the flow of people entering within reasonable limits and having regard to the need for social distancing.

40. To contain the spread of Covid-19, we have implemented measures to minimise the number of visitors to the Courts. All Court premises are temporarily unavailable for social visits. All guided tours, internships and industrial trainings have also been suspended until further notice.

41. If cases are to be heard in a physical courtroom, the number of cases in a given courtroom in any one session is reduced. This is to avoid a large gathering of lawyers, litigants and the public. Those in the public gallery will have to comply with seating arrangements suitable for social distancing.

42. As mentioned earlier, Judges and Judicial Officers will operate on a shifts-basis. Locations that only have one courtroom do not adopt the shifts system but to compensate, the number of cases in those Courts are reduced.

43. All in-Chambers matters are now conducted in Open Court.

44. The fixing of case hearings is done on a staggered basis. This means that only counsel and parties related to the case are allowed into the courtroom. This measure serves to reduce the number of people in a courtroom at any given time.

45. Additional holding spaces or waiting areas in other courtrooms or at Court lobbies are provided so that fewer people will need to gather in a courtroom. The Courts rely on an electronic system called 'Queue Management System' (QMS) or any other suitable medium to call parties in for the next case.

46. Where the Court or parties may adopt measures to reduce the number of people in a hearing or trial, those measures are encouraged.

47. In criminal cases, where the accused person is represented by counsel, his/her attendance at such hearings may be dispensed with unless otherwise directed by the Court.

48. Mediation in cases where the parties are represented by lawyers can be conducted via video conferencing.

49. Applications for adjournment are managed online without the need for parties to attend court. In cases where the Court does not require the attendance of parties, directions for the conduct of the case will be given through electronic means such as e-Review or email.

50. Additionally, in civil and criminal cases, the Court may choose to expedite trials while reducing the number of people involved by relying on witness statements.

Enhanced Cleanliness and Hygiene Control

51. Preventive measures are taken to enhance hygiene in Court buildings. Public areas (such as building entrances, lobbies, lifts, courtrooms and registries) and often touched surfaces (such as door handles and handrails) are cleaned at least once every three hours.

Emphasis on the Well-being of Court Staff and of the Public

52. All measures taken are to ensure the well-being of Court Users and Court staff within Court premises consonant with best public health practices. These include:

- a. Court Staff are required to have their body temperature taken every day at the point of entry before they report for work;
- b. Court Users are required to have their body temperature taken at the point of entry to ensure normal body temperature;
- c. Court Users are required to complete a form for social tracing purposes before they enter the Court building;
- d. Court Users may not attend Court proceedings or conduct business at Court registry/offices if they are under quarantine or medical surveillance by the Government;
- e. Court Users should not attend the Court premises if he/she is generally unwell or has a fever and/or flu-like symptoms;

- f. Court Users are to wear a surgical face mask when entering Court premises, in particular when interacting with other people within the premises;
- g. Court Users are to disinfect their hands after entering and/or touching any handles or pressing any buttons etc., as far as practicable; and
- h. the well-being of Courts staff is to be monitored constantly. If there are any reports of Covid-19 infections, the Head of Department is required to inform the Health Department for further action.

B. Lessons Learned

53. Flowing from the measures taken by the Government of Malaysia and the ensuing measures by the Malaysian Judiciary to ensure that access to justice is maintained, we have learned the following lessons.

54. Firstly, there must be a healthy relationship and effective communication between all branches of Government, that is to say, between the Executive, the Legislature and the Judiciary. Check and balance surely include making an effort to ensure that the other branches can perform their obligations efficiently within constitutionally permissible limits.

55. Secondly, and flowing from the first, there must also be a healthy relationship between the Judiciary on the one side, and the stakeholders of the justice system on the other – foremost of which is with the Bar. The

said stakeholders of the justice system are the primary mediums through which judicial measures and reforms are performed and communicated. Everyone must be on the same page if reforms are to be carried out flawlessly. Little can be accomplished if the very members of the justice system resist change, or challenge measures imposed without meaningful input for improvement.

56. Thirdly, the Judiciary must play a proactive role in communication. Typical of most adversarial judicial systems is the notion that the Judiciary does not engage in public discourse. In circumstances such as an international pandemic, the Judiciary is required to take a proactive and not a reactive role. Constant engagement with the public is necessary with the view to educate them and to keep them informed.

57. For instance, when the Malaysian Judiciary first initiated its measures, the public did not know of them and accordingly, certain quarters labelled the Malaysian Courts as not having done anything to maintain access to justice. This was stated in an article titled 'NST Leader: Video Conferencing to hear cases?' published in the mainstream media at <https://www.nst.com.my/opinion/leaders/2020/04/585000/nst-leader-video-conferencing-hear-cases> (17 April 2020). In another article, certain members of the Bar criticised the Malaysian Judiciary for refusing to cease operations entirely since the beginning of the movement control period. See the article carried by The Malaysian Insight: 'Judicial Necessity or Judicial Narcissism' themalaysianinsight.com/s/232753 (28 March 2020).

58. These erroneous views were rectified by a public statement issued on 17 April 2020. Thereafter, the Malaysian Judiciary has constantly been

issuing press releases to keep the public informed of the measures it has taken and of the need to maintain access to justice. Closing down was not an option. Further, communication includes communication between members of the Judiciary. The issuance of guidelines and updating them from time to time coupled with briefings and discussions help to keep everyone on the same page.

59. Fourthly and finally, the present day and age is labelled the 'Fourth Industrial Revolution' or 'the Digital Age'. Given the prevailing adage, all members and stakeholders of the justice system must acclimatise themselves to the idea that technology is playing an increasing role in all aspects of life and business. Some judges and lawyers remain repulsed by the idea that hearings may be conducted online. They complain, for example, that the usual flare of advocacy is lost in such hearings. That may be true but given the circumstances, the entire system must learn to change by accepting technological advancements rather than to condemn them simply because the traditional method of advocacy is preferable. What is usually preferable may not always be practical.

60. Indeed, it has also been brought to our attention that a common objection against online hearings is the perceived inability to provide a fair trial. But one of the elements of a fair trial is that the dispute must be resolved without inordinate delay; justice delayed is justice denied. The pandemic will not disappear in a day or a week; we may never return to the old normal in the foreseeable future and to insist on traditional procedures in the name of a fair trial may instead cause cases to be postponed indefinitely, contradicting the very essence of a fair trial.

61. To conclude, it is our view that remote hearings are not by their very nature opposed to the notions of natural justice and a fair trial. It is a mere change in venue from a physical to a virtual one. For civil appeal, it does not alter any part of the substance and procedure. The principle of open justice can be preserved in a remote hearing by way of live streaming. Parties are in no way inhibited from presenting their case, from knowing the case against them, or from responding to their opponents' submissions. Unless a party demonstrates that real prejudice will be occasioned, there can be no objection purely on the technical or procedural basis that the hearing is a remote one. The key lies in drawing a healthy balance.

62. The measures we have taken will require judges, officers, practitioners, litigants and the general public some time to adjust, but are necessary to ensure that continued access to justice is not brought to a standstill.

Dated: 5 November, 2020.

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