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Procedural Delay in the Developing Middle East

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Abstract: In this article, I explore whether and how Middle Eastern legal process can be reconciled with the idea of timeliness. The idea that any procedure physically within the Gulf Cooperation Council (GCC) and Middle East and North Africa (MENA) regions could be both fair and expeditious may appear counterintuitive to those brought up in the Anglo-American legal tradition, and the suggestion that there could exist a notion of “timely Middle Eastern procedure” that produced just and fair results is more than likely to be treated as an oxymoron. Administrative, political and legal processes throughout the Levant and Arab world are, when viewed through Western eyes, more than likely to be characterised as corrupt, slow or even Kafkaesque. I argue that procedural delay is an inherently problematic and relative concept, both legally and culturally speaking, which cannot make sense without introducing robust time standards against which court processing time can be evaluated. I seek to elucidate the fundamental nature and causes of procedural delay in relation to civil trials and propose the adoption of a distinct methodology that could be used to more objectively assess court efficiency in handling civil cases throughout the GCC and MENA regions.

Keywords: Law and Development in Middle East, Procedural Delay, Middle Eastern legal process

1 Introduction

This article seeks to move discussion of court delay beyond cultural stereotypes to avoid some of the traditional pitfalls of comparative law associated with mechanical transplants by introducing a more scientific approach to analysing and measuring court disposition time. Any civilian- or common law-based legal system will invoke a

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different mix of adversarial or inquisitorial procedure, but certain common functions and pressures on the judicial process remain and how courts and judges deal with these will influence how long it takes to resolve a dispute.¹ My specific contribution to understanding of the concept of “delay” is to apply insights from recent research directed at exploring “timeliness” in civil procedure that in turn builds upon previous research.² My objective is to offer both a different and original perspective that incorporates a far broader range of variables to explain delay that looks beyond court behaviour – to include what happens in the wider economy and other factors that may potentially influence the demand for litigation – and, furthermore, to indicate a sophisticated new methodology that could more accurately measure the elusive concept of court delay. Such an approach, if adopted, offers a more scientific understanding of Middle East justice, one that is informed by rigorous empirical measurement of the full range of factors that determine so-called “delay.”

2 Cultural notions of delay: Perceptions and reality

The roots of the Middle Eastern legal system can be traced to the former Byzantine or Ottoman Empire, which today broadly corresponds with the Gulf Cooperation Council (GCC) and Middle East and North Africa (MENA) regions.³ In seeking to place the notion of “delay” within a cultural context, some historical background may be helpful. Within these regions, three separate traditional court systems had overlapping jurisdictions: one was primarily for Muslims, one for non-Muslims (involving appointed Jews and Christians ruling over their respective religious communities) and the third was essentially a “trade court.” Oversight of the entire system was vested in an administrative authority: the *Kanun*, derived from the Turkic *Yassa* and *Töre*, which pre-dated the Islamic era. However, Islamic courts

¹ See generally M. Cappelletti and B. Garth (eds.), *Access to Justice* (Milan: Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978); M. Cappelletti (ed.), *Access to Justice and the Welfare State* (Florence: Alphen aan den Rijn: Giuffrè: Sijthoff and Noordhoff, 1981); See also K. Economides, *Mauro Cappelletti's Legacy: Retrospect and Prospect*, *Annuario di Diritto Comparato E Di Studi Legislativi* (2016), 245–257.

² K. Economides, A. A. Haug and J. McIntyre, *Toward Timeliness in Civil Justice*, 41 *Monash University Law Review*, no. 2 (2015), 414–444.

³ R. C. Jennings, *Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System*, 48 *Studia Islamica* (1978), 133–172; H. J. Liebesny, *Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions*, 20 *American Journal of Comparative Law*, no. 1 Winter (1972), 38–52.

were sometimes used to resolve trade disputes or conflict between rival religious groups. While local governors might occasionally resolve disputes between non-Muslim religious law systems, the Ottoman state tended to stay out of such matters. The dominant legal system was the Islamic *Sharia* law system which was a hybrid system comprising the *Qur'an*, the *Hadith* (sayings of the prophet Muhammad), *ijmā'* (a term that has unanimous agreement of top legal scholars), *qiyas*, (analogical reasoning) and local custom. Knowledge of these legal systems was developed and transmitted through law schools based in Istanbul and Bursa.

The Byzantine–Islamic legal system is thus rooted in a quite different procedure to that typically found in Western courts and lacked an appellate structure, meaning that litigants would often go forum shopping until they found a favourable outcome. This quest for justice often took time. A *Qadi*, or judge, presided and adjudication was typically based much more on local custom and tradition than formal legal precedent.⁴ Delay therefore appears to be an inevitable consequence of both the structure and culture of the traditional legal system and may not have been recognised as a particular problem by those who inhabited that system. It is worth remembering that delay is a relative concept that implies inefficiency, but efficiency may not be recognised as a particularly important or universal value common to all legal systems. A further complicating factor within an evolving Byzantine system would have been adherence to different codes at different times, particularly in relation to criminal law, which would have resulted in jurisdictional confusion since there was little attempt at consolidation whenever successive reforms were introduced.⁵ When looked at through the reform-oriented lens of a modern law reformer, this confusion and consequential delay clearly is a problem, but if we choose to view these processes from the perspective of those brought up within a traditional society, again, we should not assume that timely resolution of legal disputes was a particularly high priority, or even an expectation.

3 Middle eastern and UAE legal systems

Within the MENA and GCC regions, it is possible to classify legal systems into three categories: (1) those which followed Western models such as Lebanon, Syria and Egypt; (2) systems with codified laws based primarily on *Sharia* law,

⁴ L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, 2002).

⁵ R. A. Miller, *Apostates and Bandits: Religious and Secular Interaction in the Administration of Late Ottoman Criminal Law*, 97 *Studia Islamica* (2003), 155–178.

such as Saudi Arabia, Oman and Yemen; and (3) countries with hybrid systems.⁶ The UAE falls within the third category. It is comprised of seven emirates (Abu Dhabi, Ajman, Dubai, Fujairah, Ras al-Khamah, Sharjah and Umm al-Quwain) operating under a federal structure based in Abu Dhabi. Each emirate has a court hierarchy divided between Courts of First Instance, Court of Appeal and a Court of Cassation. Some commentators suggest that countries adopting a hybrid legal system are less likely to be targets of foreign direct investment.⁷ However, the UAE today is one of the fastest growing economies driven by oil and global finance, yet it has also adopted some Western legal and commercial practices.⁸ The most notable adoption is the *Dubai International Finance Centre* (DIFC) which has implemented a court system modelled on the English common law.⁹ In adopting the hybrid legal model, the UAE has become an especially dynamic developing legal system and shows continued signs of reform, including in the area of civil case delay with a new case management system in 2014.¹⁰

4 The role of court delay in economic development

It is important to examine the problem of court delay within the context of building capacity in developing nations. Nineteenth-century social theorists such as Max Weber were particularly interested in this relationship between efficient adjudication within the courts and the broader social transition from a feudal to a modern industrial economy.¹¹ But Weber was also fascinated by

⁶ N. Kobeissi, *Impact of Governance, Legal System and Economic Freedom on Foreign Investment in the MENA Region*, 8 *Journal of Comparative International Management*, no. 1 (2005), 20–41, at 24.

⁷ S. Globerman and D. Shapiro, *Governance Infrastructure and U.S. Foreign Direct Investment*, 34 *Journal of International Business Studies*, no. 34 (2003), 19–39.

⁸ K. Aljifri, *Annual Report Disclosure in a Developing Country: The Case of the UAE*, 24 *Advances in Accounting*, no. 1 (2008), 93–100.

⁹ See A. Carballo, *The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage Within the UAE?*, 21 *Arab Law Quarterly* (2007), 91–104. See also E. K. Zanelidin, *Construction Claims in United Arab Emirates: Types, Causes and Frequency*, 24 *International Journal of Project Management*, (2006), 453–459.

¹⁰ Dr Abdullah AbdulRahman Al Janahi Al Khatib, *Legal Regulation for Case Management Office & Its Role in Reducing: Slow Litigation Settlement Problem*, paper given at UAE University (UAE, 26–27 September 2016).

¹¹ M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Simon and Shuster, 1954), p. 353.

what he called the “England problem” that undermined his general thesis that efficient courts that heard and resolved commercial disputes quickly were essential, if not a precondition, for economic development. Nineteenth-century England in fact had a court system that was anything but efficient, as immortalised by Dickens in *Bleak House* (1852–1853) and the fictional case of *Jarndyce v Jarndyce*, a case that outlasted generations of litigants and consumed their estates to the economic advantage of the legal profession. According to Weber, “... England achieved capitalistic supremacy among the nations not because but rather in spite of its judicial system.”¹² To what extent is an efficient legal system necessary for economic development? In the 1960s, US bodies such as the Ford Foundation and the Agency for International Development sponsored various law reform initiatives and projects in developing countries. There was an attempt to quantify how many courts, judges and lawyers a developing country needed. Legal scholars from leading US law schools wrote several articles evaluating the contribution of law reform to social and economic development. This research involved the interdisciplinary study of law and economics and its impact on social development and eventually mutated into what became known as the “law and development movement.” This movement examined critically how law might be used as an instrument to promote economic development, democracy and human rights. However, by the 1970s, the movement was written off as having failed.¹³ Nevertheless, modern scholars continue to explore these relationships linking law and economic development in order to give voice to legal and political needs in the developing world.¹⁴

The situation in the modern Arab world is perhaps a case in point and, at least in certain areas, particularly commercial litigation, there appears to be a pressing need for fast and efficient court procedures if economic development is not to be frustrated. Where courts are slow and inefficient, this can be an impetus for initiating alternative methods of dispute resolution (ADR), particu-

¹² *Ibid.*, p. 231. For further discussion of the “England problem” see A. Hunt, *The Sociological Movement in Law* (Macmillan, 1978), pp. 122–128; D. M. Trubek, *Max Weber on Law and the Rise of Capitalism*, *Wisconsin Law Review* (1972), 720–753, at 746–748; See also, R. M. Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (Free Press, 1976).

¹³ D. M. Trubek and M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, *Wisconsin Law Review* (1974), 1062–1104; J. H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 *American Journal of Comparative Law* (1977), 457–491.

¹⁴ See W. Twining (ed.), *Human Rights, Southern Voices* (Cambridge University Press, 2009).

larly mediation and international commercial arbitration.¹⁵ ADR occupies a particularly important position in Islamic Law systems, including in the UAE, due to the *Quranic* endorsement of negotiation, mediation, compromise (*sulh*) and arbitration (*takhim*).¹⁶ It appears that the modernisation and adaptation of the legal system in the UAE has not been without complications and the process of harmonisation between traditional and more modern approaches to adjudication is not always in tune with the changing social and economic needs.¹⁷ Taking the UAE as an example, only 10 % of business contracts are in Arabic, even though all proceedings before courts in the UAE are in Arabic, except for the English language proceedings in the DIFC.¹⁸

Delay is a serious problem in the UAE due to large caseloads and civil cases may take between 3 and 4 years in UAE courts, though these lengthier cases can be seen as exceptions to a more general trend of speedy judgments.¹⁹ In the Commercial Courts of First Instance in 2014, the average judgment time from the date of registration of the case was 155 days and 129 days from the date of the first hearing.²⁰ However, first instance cases continue to be problematic due to elaborate preparatory proceedings. By contrast, the DIFC procedure is relatively efficient and expeditious. The biggest cause of delay appears to be the absence of oral pleadings and reliance on elaborate written process at the pre-trial stage.²¹ However, once cases go to trial, adversarial procedures follow the common law tradition, with advocates orally presenting their case before the judge who acts as an impartial arbiter. Skeleton arguments may be served just before a hearing takes place to both the other side and the court.

¹⁵ S. Naim, "Mediators and the Mediation Process in the Boulak District of Cairo", in M. Cain and K. Kulcsar (eds.), *Disputes and the Law* (Budapest, 1983), ch. 3; R. B. Ferguson, *The Adjudication of Commercial Disputes*, 7 *British Journal of Law and Society*, no. 2 (1980), 141–157; Y. Dezalay and B. G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996).

¹⁶ S. Khalid Rashid, *Peculiarities and Religious Underlining of ADR in Islamic Law*, paper given at Asia Pacific Mediation Forum (Kuala Lumpur, 16–18 June 2008), p. 1.

¹⁷ See BSBA. Al-Muhairi, *The Development of the UAE Legal System and Unification with the Judicial System*, 11 *Arab Law Quarterly* (1996), 116–160.

¹⁸ See Carballo (2007), *supra* note 9. See also Zanelidin (2006), *supra* note 9.

¹⁹ See AbdulRahman (2016), *supra* note 10.

²⁰ *Annual Report 2014* (Dubai Courts. UAE. 2014), p. 45.

²¹ See M. Cappelletti, *Procédure Orale et Procédure Écrite. Oral and Written Procedure in Civil Litigation* (Dobbs Ferry New York: Giuffrè, 1971); See also M. R. Damaska, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Yale University Press, 1986), pp. 61–62.

5 Understanding the nature of delay

In order to understand and explain delay in GCC and MENA jurisdictions, I present an approach that seeks to explain the underlying causes with reference to factors that are both internal and external to the legal systems.

That courts are “untimely” institutions is something rarely questioned by the public, lawyers or policymakers. Delay is expected. The old adage “justice delayed is justice denied” (sometimes juxtaposed with “justice hurried is justice buried”) has been a stick wielded against legal systems at least since the time of Magna Carta, while over a century ago Pound optimistically looked forward to “when our courts will be swift and certain agents of justice.”²²

Part of the problem in pursuing a more scientific understanding is defining accurately the concept of “delay”: how long should it take to resolve a dispute in court? Indeed, the assumption that there is as an *objective, proper* or *ideal* length of time to resolve a dispute ignores anthropological insights and appears naive. A dispute is a dynamic unpredictable human phenomenon that can travel in numerous directions: through legal proceedings apparently complex cases will crystallize into simple disputes, while simple straightforward claims over small sums can explode in legal complexity.²³ Moreover, party interests and objectives may change, and the appetite for confrontation may itself wax or wane.

The advantages that delay offers, for parties and institutions, in deferring decisions are often overlooked. Litigants view delay differently: a party seeking to alter the legal status quo – a plaintiff chasing a debt, or seeking compensation – may desire rapid resolution, while a party resisting the claim – a defendant seeking to retain title, or a parent wishing to retain custody of their child – may actively seek procrastination that maintains current conditions. While one party may express frustration at the other’s “delay tactics” – voluminous discovery requests, interlocutory applications and other time-consuming legal manoeuvres – another party may defend such tactics as appropriate zealous representation. Delay may also be entirely justifiable, even desirable, within an adversarial system. Factually or legally complex cases demand more extensive preparation and deliberation than simple cases, and inevitably absorb more time. However, some sources of delay are more suspect: ill-prepared lawyers seeking unnecessary adjournments; overloaded

²² R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Annual Report of the American Bar Association (1906), 395, 417; See also R. Hazell and J. Melton (eds.), *Magna Carta and Its Modern Legacy* (Cambridge University Press, 2015).

²³ K. Economides, *Small Claims and Procedural Justice*, 7 British Journal of Law and Society (1980), 111–121.

court facilities that are overbooked, causing postponed trials and defendants with hopeless cases striving improperly to fend off the inevitable.

Some researchers favour rejecting the term “delay” altogether, arguing instead that more neutral terms such as “timeliness,” “case processing time” or “pace” better reflect the standard to be measured.²⁴ Chief Justice Wayne Martin of Western Australia draws a crucial distinction between “lapse of time” and “delay,” noting that “some lapse of time is inevitable and unavoidable and that there will be some cases in which a significant lapse of time is essential for the proper administration of justice.”²⁵ While “delay” can be ambiguous, little is gained by rejecting the term entirely. As with the elephant difficult to define in the abstract, delay *does* have a clear core meaning and, in my view, should be retained. However, as with the concept of “need,” the concept of “delay” has an inherent subjective and value-laden dimension, making it hard to measure empirically. Therefore, it is preferable to focus on the more measurable notion of “timeliness” of civil proceedings, and seek to identify the range and impact of factors that influence case progression.²⁶ A broader framework for understanding “timeliness” needs to be constructed, along with measurement and evaluation tools that would involve time standards.²⁷ These factors include those falling within a traditional “narrow” conception of delay – the obstructive litigant, underfunded courts or poor case management. But they also include more acceptable factors that can slow down proceedings such as a beneficial pause to let tempers cool or extended time to prepare properly a complex case, not to mention other relevant factors, such as broader economic, social and cultural context and practice, or the substance of the dispute. Through focusing on the identification and impact of factors that influence the duration of proceedings, subsequent analysis and evaluation can be better targeted to produce more meaningful reform.

24 J. B. Grossman *et al.*, *Measuring the Pace of Civil Litigation*, 65 *Judicature*, no. 2 (1981), 86–114.

25 W. Martin, *Timeliness in the Justice System: Because Delay is a Kind of Denial*, paper no. 16 given at the Australian Centre for Justice Innovation, Monash University Conference on Timeliness in the Justice System: Ideas and Innovations (Melbourne, 2014), available at: <<http://www.civiljustice.info/timeliness/16>>, 22

26 See Australian Centre for Justice Innovation, *The Timeliness Project: Background Report* (Melbourne: ACJI, 2013), ch. 2.

27 See Commonwealth Attorney-General’s Department, *Draft Objectives for the Civil Justice System* (Canberra, 2012), available at:

<<https://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx>>.

By introducing context and taking account of disputants' experiences from the inception of a grievance through to enforcement of judgment one can locate court delay in the overall dispute process,²⁸ and see whether case progression time has an overall neutral, or adverse, impact on total dispute duration. This total duration will be of more significance to disputants.²⁹ Moreover, narrow conceptions of delay can blinker reforms in a manner that perversely "aggravate rather than alleviate the related problems of cost and accessibility."³⁰

6 Procedural delay in civil trials: General hypotheses

In the same sense that it is futile to introduce foreign legal models which fail to adapt to local conditions,³¹ an analytic framework to assess delay must be capable of accounting for local variations in development. In this section, I identify a range of factors that explain the causes of delay. These factors broadly relate to both the demand and supply of litigation services.

6.1 Judicial structures and resourcing

Judicial resources may not be quite as important as first appears. Although it seems intuitive that increasing numbers of judges and courtrooms inevitably produce faster case processing,³² research by Church suggests otherwise and judicial shortages need not impact on delay.³³ Relevant factors may include the following:

28 R. Dingwall and T. Durkin, "Time Management and Procedural Reform: Some Organizational Questions for Lord Woolf", in A. A. S. Zuckerman and R. Cranston (eds.), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, 1995), pp. 371–2.

29 As Dingwall and Durkin observe, what matters to the parties is not the time spent processing the case through a particular stage of legal proceedings, but 'the duration from a plaintiff first seeking legal advice to the resolution of the case': *ibid.*, p. 372.

30 *Ibid.*

31 See YS. Lee, *Call for a New Analytical Model for Law and Development*, 88 Law and Development Review, no. 1 (2015), 1–67.

32 H. Zeisel, H. Kalven, and B. Buchholz, *Delay in the Court – An Analysis of the Remedies for Delayed Justice* (Little, Brown and Company, 1959), pp. 206–207.

33 See T. Church *et al.*, *Justice Delayed – The Pace of Litigation in Urban Trial Courts* (Virginia: National Center for State Courts, 1978), p. 23.

6.1.1 Number of judges

The availability and allocation of human (judicial) resources may affect the capacity of courts to process disputes. The most obvious of these is the number of judges available to resolve disputes relative to the number of cases (caseload per judge). The correlation between judicial caseload and case duration needs be neither direct nor linear. Indeed, some research indicates an inverse relationship between the number of judges and judicial productivity.³⁴ However, any drop in individual productivity may be compensated by systemic gains in output due to other factors.

6.1.2 Availability of courtrooms

A trial can progress only if courtrooms are available to hear the matter. Anecdotal evidence suggests that timetabling and shortages of courtrooms can cause substantial delays.³⁵ While increasing investment in court infrastructure – the number of court buildings or court rooms within buildings and support staff – should improve efficiency; this will not automatically be the result, though it does seem probable that where infrastructure falls below a certain threshold a detrimental impact on case duration will occur.

6.1.3 Allocation of judicial resources

The allocation of judicial resources within the judicial system may impact upon case duration. For example, the number of courtrooms may be less important than the geographic distribution of courthouses to ensure that they are located in regional or rural centres with a sufficiently high caseload density.³⁶ For this

³⁴ M. Beenstock, *The Productivity of Judges in the Courts of Israel*, 35 *Israel Law Review* (2001), 249–265, at 253; M. Beenstock and Y. Haitovsky, *Does the Appointment of Judges Increase the Output of the Judiciary?*, 24 *International Review of Law and Economics* (2004), 351–369, at 365–367.

³⁵ Often the remedial measures required to deal with this problem, such as “double-booking” courtrooms in the hope that one case may settle or be adjourned, will themselves create ongoing complications and delay.

³⁶ F. Calvez, *Length of Court Proceedings in the Member States of the Council of Europe based on the Case Law of the European Court of Human Rights* (European Commission for the Efficiency of Justice, 2006), p. 36, quoting Committee of Ministers, *Resolution Concerning the Judgments of the Court of the European Court of Human Rights of 19 February 1991 and 10 February 1993 in the Case of Zanghi against Italy*, Res DH(95) 82 (Council of Europe, Meeting of the Ministers’ Deputies, 6–7 June 1995).

reason, geographic research using location–allocation models has been used to determine the optimum sites for court buildings.³⁷

6.1.4 General court infrastructure

The effectiveness with which judicial resources can be deployed to quickly resolve disputes may depend upon more general court infrastructure,³⁸ including the availability of sufficient numbers of well-trained support and administrative staff.³⁹ Similarly, the availability and utilisation of well-resourced information technology systems may increase judicial productivity by allowing faster research and judgment production. Further, the availability and utilisation of technological innovations, including video-conferencing and electronic submissions, may expedite trials. Conversely, such innovations may, through technical failures or shortcomings, actually increase trial length.

6.2 Institutional practices

A second broad category of factors that can influence case duration concerns institutional practices (both judicial and administrative) of the court. These practices control the way in which court structures are organised, cases are managed, and the time of judges utilised. Given that such practices present an opportunity to effect visible (if not effective) change, they are commonly the focus of reform initiatives. Unfortunately, such reforms are rarely based on sound empirical findings, nor are they commonly subsequently studied to assess

³⁷ R. W. Thomas, B. T. Robson and R. D. Nutter, *County Court Workloads: A Location-Allocation Analysis* (Working Paper no. 7, University of Manchester: Centre for Urban Policy Studies, School of Geography, 1979).

³⁸ A. Marfording and A. Eyland, *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* (Research Paper no. 2010-28, University of New South Wales, 2010), pp. 105–109.

³⁹ Anecdotal evidence suggests staff training, turnover and job satisfaction can have a major impact on court efficiency. Short-term strikes by court staff in New Zealand during 2009 shut down court operations and temporarily paralysed the country's courtroom operations. The aftereffects of the Canterbury earthquakes also had an effect displacing litigation elsewhere, as well as on court buildings throughout the South Island, six of which were deemed unsafe following safety inspections: M. Stewart, T. Hunt and M. Forbes, *Quake Risk Could Close Public Buildings* (New Zealand, 2 December 2011), available at: <<http://www.stuff.co.nz/national/6073112/Quake-risk-could-close-public-buildings>>.

their impact.⁴⁰ While the impact of these practices seems to have been overplayed, there remains clear potential for these institutional practices to impact upon the duration of cases. Such factors include the following:

6.2.1 Case management methodology

The rapid and expanding adoption of judicial case management techniques over the last 30 years has largely been justified in terms of reducing delay. While the impact of these reforms on duration, cost and quality of resolution remain under-researched, the clear potential for such impact makes this an important factor to analyse.

6.2.2 ADR methods

A closely related reform in the common law world has been the rapid expansion, particularly since the 1980s, of ADR mechanisms. Increasingly, courts have, in the interests of more quickly resolving disputes, actively engaged with these alternative mechanisms either by sanctioning or by mandating parallel ADR. The availability and utilisation of such mechanisms may lessen judicial workload and the demand for formal adjudication in court, though again the impact on case duration is not always clear. For example, a mandatory mediation that fails may act only to increase the cost and duration of the dispute.

6.2.3 Decision-making requirements

The use of multi-judge benches where there is a willingness to deliver joint judgments may reduce duration by allowing judicial resources to be more effectively utilised. Similarly, the willingness of judges to deliver *ex tempore* decisions, rather than reserving judgment to provide written opinions, can affect the duration of cases.

⁴⁰ M. Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 Case Western Law Review (1999–2000), 813–849, at 848.

6.2.4 Judicial specialisation

The use of specialised courts and judges as well as workload allocation practices can impact upon duration. The creation of specialist “streams” allows judicial expertise to increase speed, volume and efficacy of dispute resolution⁴¹; for example, divorce litigation is fastest where judges primarily handle contested divorce trials, leaving other work to quasi-judicial staff.⁴²

6.2.5 Judicial training and competence

The training, age and experience of the judge can also be a factor, with more experienced, competent or better-trained judges able to reach decisions more speedily. Furthermore, the assessment of “competency” or imposition of training regimes may call into question judicial independence and accountability and so give rise to controversy. This need to ensure a skilled judiciary which is also independent and free from bias can create competing demands and controversy.

6.2.6 Extra-curial judicial activities

The way in which judges manage time and work–life balance is likely to have an impact on the duration of cases. For example, at least one European study noted delay caused by judges’ participation in extra-judicial activities such as crime prevention advisory committees.⁴³

6.3 Court attitudes and behaviour

Another broad category of factors influencing case length, within an overall culture of adversarialism, concerns embedded attitudes and behaviours amongst judges, lawyers, litigants and defendants. Church *et al.*, for example, argue that a trial court’s speed in processing cases and its backlog of unresolved cases is determined in large part by “local legal culture,” which they described as “the

⁴¹ J. Tutton, *Litigation in the South Australian Fast Track Streams* (LLB/LP (Hons) Dissertation, Flinders University, 2016).

⁴² J. A. Goerd, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation in 16 Urban Jurisdictions* (National Centre for State Courts, 1992), pp. xiii, 6, 13–14.

⁴³ Calvez (2006), see *supra* note 36, p. 36.

established expectations, practices, and informal rules of behaviour of judges” and lawyers.⁴⁴ Although this concept of “local legal culture” has been criticised as uninformative and vague, subsequent studies consistently attribute some degree of delay to individual and collective behaviours.⁴⁵ This culture is developed over time by lawyers, judges and court officials through such means as listing practices, the degree of flexibility that can be tolerated when meeting and honouring deadlines and participants’ (including judicial, lawyer and litigant) expectations of what is fair and reasonable.

6.3.1 Judicial behaviour

Empirical research shows how dominant judicial culture impacts on both the behaviour and conduct of judges and the length of proceedings.⁴⁶ The degree of managerial and legal competence of judges involved in the conduct of a trial can reflect several factors, including: length of service, geographical location, specialist knowledge of relevant legal fields, broad judicial culture and collegiality and administrative aptitude or familiarity with the context of the dispute that forms the background to the trial.

6.3.2 Lawyer behaviour

Sipes and Oram’s research noted that most judges interviewed agreed that trial length varied, at least somewhat, by lawyer preparation, knowledge, and skill.⁴⁷

⁴⁴ Church (1978), see *supra* note 33, p. 54.

⁴⁵ Grossman *et al.* (1981), see *supra* note 24, p. 93; See also K. O. Boyum, *A Perspective on Civil Delay in Trial Courts*, 5 *Justice System Journal* (1979–1980), 170; See further M. Blacksell, K. Economides, and C. Watkins, *Justice Outside the City: Access to Legal Services in Rural Britain* (Longman, 1991), pp. 12–13.

⁴⁶ D. Sipes and M. Oram, *On Trial: The Length of Civil and Criminal Trials* (National Center for State Courts, 1988), pp. 53–4. See also empirical studies of judicial behaviour both inside and outside court. Paterson’s study offers insight into the time taken by judges to circulate draft judgments in both the UK and US Supreme Courts: A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart, 2013), pp. 120–1, 129; while Darbyshire’s study reveals how two Law Lords disposed of five petitions for leave in just 15 minutes as one (Lord Hoffmann) donned lycra for cycling: P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart, 2011), p. 376.

⁴⁷ Sipes and Oram (1988), see *supra* note 46, p. 57. See also judicial attitudes intolerant of excessive and unnecessary documentation that contribute to undue delay: *Mylward v Weldon* (1596) 21 ER 136 and more recently *Re L (A Child)* [2015] EWFC 15.

Another key factor that can lengthen or shorten trials is lawyer behaviour and tactics. Lawyers both influence and respond to external social and economic forces, with considerations of the local legal culture and personal incentive mechanisms influencing choices lawyers make, thereby affecting case processing time. And interestingly, law school culture may be a contributory factor in lawyer procrastination.⁴⁸

6.3.3 Litigant behaviour

Finally, the behaviour of the litigants may impact on case duration. Although delay typically poses a costly burden on those involved in litigation, delay tactics may be strategically employed, as when a deep-pocketed corporate defendant prolongs discovery, hoping to financially overwhelm and intimidate a smaller opponent into settling by “burying them in paper.” Who the parties are will also be relevant: children and vulnerable witnesses may take up greater time and resources, while classifying the parties as a “repeat player” or “one-shotter” makes a difference in terms of how well they can play the system.⁴⁹

6.4 Dispute and legal complexity

Factual or legal complexity is likely to impact on duration of disputes coming to court. Much litigation is reactive in nature and lower courts cannot easily control the complexity of the cases coming before them. Nevertheless, courts can respond in an efficient and proactive manner. Many jurisdictions recognise the delay-inducing complications inherent in complex civil cases, and seek to address these problems by adopting differential case management techniques.⁵⁰ Furthermore, courts are both dispute resolvers and norm creators, with judicial decisions of superior courts altering the legal landscape in a way that can actively reduce legal complexity. Combined with the regulatory power of

⁴⁸ A. Acorn and J. Buttuls, *The Not Now Habit: Procrastination, Legal Ethics and Legal Education*, 16 *Legal Ethics* (2013), 73.

⁴⁹ M. Galanter, *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Society Review* (1974), 95, at 97–104.

⁵⁰ While case management techniques offer a commonsense approach to managing case complexity, more research is needed on the effectiveness of case management: D. C. Steelman, *What Have We Learned About Court Delay, “Local Legal Culture,” and Caseflow Management Since the Late 1970s?*, 19 *Justice System Journal* (1997), 145–166.

courts to set and alter Rules of Court, various measures to reduce complexity and delay may be adopted, including:

6.4.1 Legal complexity

The content and clarity of the substantive law itself can play a crucial role in determining the length of trials. The degree of legal complexity will reflect the complexity of relevant legislation and case law: ambiguous rules may prolong litigation while clear legal rules may promote settlement. Moreover, the legal complexity of the case may reflect the nature and number of legal issues raised by the parties. Some research has identified a positive correlation between the number of charges a defendant faces and the length of a case,⁵¹ though the literature is more mixed about whether the type of civil case plays a major factor in the speed of case processing.⁵² While it may be hard to measure, legal complexity clearly remains a critical factor affecting duration.

6.4.2 Factual complexity

Factors here include: the number of witnesses, number of exhibits, and the use of expert witnesses.⁵³ Such factual complexity is likely to impact upon duration both because of the logistical complications involved, and because of the sheer time involved in processing and presenting such material.

6.4.3 Technical complexity

This concerns the procedural and evidential norms that govern the conduct of the proceedings generally and the trial specifically, including the number of witnesses, expert witnesses and exhibits. All of these factors have potential bearing on how long the court takes to reach a decision.

⁵¹ Sipes and Oram (1988), see *supra* note 46; M. L. Luskin and R. C. Luskin, *Case Processing Times in Three Courts*, 9 *Law and Policy* (1987), 207–232; J. Chan and L. Barnes, *The Price of Justice? Lengthy Criminal Trials in Australia* (Hawkins Press, 1995).

⁵² J. Garner, *Delay Reduction in the Federal Courts: Rule 50(b) and the Federal Speedy Trial Act of 1974*, 3 *Journal of Quantitative Criminology* (1987), 229–250; Church (1978), *supra* note 33.

⁵³ Sipes and Oram (1988), *supra* note 46; Luskin and Luskin (1987), *supra* note 51; Chan and Barnes (1995), see *supra* note 51; C. Corns, *Anatomy of Long Criminal Trials* (Australian Institute of Judicial Administration, 1997).

6.4.4 Litigation funding

The number of stakeholders and manner in which litigation is funded – whether directly by the parties, through legal aid, or some other third-party mechanism – potentially impacts on both the complexity and progress of litigation.

6.5 Environmental factors

Environmental factors may fall outside the control of the courts, yet still determine what happens inside them. The assessment of these factors in most empirical research is at best underdeveloped and in most cases absent. These “environmental” or “macro and micro socio-economic” issues would seem to have a significant indirect impact upon litigant behaviour, and therefore potentially contribute to delay. Such factors include the following:

6.5.1 Human factors

The health/illness of participants, demographic considerations and ethnic and cultural factors are likely to affect proceeding duration. For example, language barriers may exist in areas with a large portion of individuals whose mother tongue is not the same as the language used in courts. Similarly, different ethnic groups may have different attitudes towards the law and use courts more or less frequently as a dispute settlement mechanism. The way in which a system responds to “delay” caused by such considerations will have a profound effect on the way in which the participants receive the final resolution. Such factors may slow down proceedings, yet if managed well they have the potential to lead to more effective resolutions. While it may be difficult to gather personal information about the circumstances of participants, there would seem to be a causal link with the duration of proceedings.

6.5.2 Natural factors

The duration of cases may also be influenced by “natural” factors, such as floods, fires or earthquakes, which can disrupt and delay proceedings, and can even lead to a large increase in the number of cases. Though such factors are likely to be rare, their disruptive effect can be significant. However, the “one-off” nature of such events means that while they should be noted by researchers, they are unlikely to aid in identifying undue delay.

6.5.3 Economic factors

Finally, broad socio-economic factors external to the legal system can affect the volume, duration and kind of case coming to court. Factors such as global, regional and national levels of commercial activity at a time of boom, or bankruptcy proceedings, employment disputes and debt collection at a time of recession may impact on both the propensity to sue and the capacity of courts to process legal claims. There is empirical evidence that suggests a degree of inter-relatedness between economic development of a country and the operation of the legal system,⁵⁴ though it is unclear what the direction or precise causal relationship is.⁵⁵ These economic factors should also account for sub-national regional differences in the socio-economic structure. It is likely that higher national or regional income levels may indicate more resources available in society that can be used for engaging in legal disputes. Along similar lines, the health and social expenditures in a geographic area where a court is located are likely to affect the demand for legal services overall, and also the type of legal service used.⁵⁶

This broader behavioural focus may increase both the cost and complexity in data collection, potentially compounding the current problem of maintaining adequate records regarding trial duration.⁵⁷ However, a more expansive conception of “timeliness” should allow for a more nuanced interpretation of data, and thereby provide a more reliable guide for future reform. It therefore becomes ever more pressing that reforms are supported by clear, precise and comprehensive empirical evidence, as opposed to speculation.⁵⁸ To promote the gathering

⁵⁴ G. Aldashev, *Legal Institutions, Political Economy, and Development*, 25 *Oxford Review of Economic Policy* (2009), 257–270; R. E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 *World Bank Research Observer* (1999), 117–136.

⁵⁵ J. Klick, *The Perils of Empirical Work on Institutions*, 166 *Journal of Institutional and Theoretical Economics* (2010), 166–170. Klick argues that causality may run both ways, from the characteristics of the legal system to economic growth and vice versa.

⁵⁶ G. Palumbo *et al.*, *Judicial Performance and its Determinants: A Cross-Country Perspective* (OECD Economic Policy Papers no. 5, Organisation for Economic Co-operation and Development, 2013).

⁵⁷ Researchers frequently note their dependency on haphazard and unreliable record keeping: Chan and Barnes (1995), see *supra* note 51; F. Sutton and H. Barwick, *Analysing Trends in Jury Trial Length: A Scoping Study* (New Zealand: Department for Courts, 2000). The risk is that gathering more extensive data could exacerbate this problem, unless court officials are prepared to invest in better data collection and storage.

⁵⁸ B. G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 *Alabama Law Review* (1997), 103–133.

of such evidence, I propose the development of a comprehensive methodology for gathering data on delay.

7 Measuring delay accurately

I will not elaborate in detail the methodology required to enable time standards to be developed or critique previous attempts to measure accurately court delay.⁵⁹ Instead I set out below the kind of data that need to be collected throughout the GCC and MENA regions to properly assess the timeliness of proceedings in these jurisdictions. The following indicate the kind and range of information that researchers need to collect:

1. Judicial Structures and Resourcing

The first category of factors relates to the resourcing, both structural and administrative, of judicial institutions.

Influencing factor	Proxy variable	Notes
<i>Judicial resources</i>	–Number of judges	This information is readily available from Annual Reports, etc.
	–Judicial caseload per judge	
	–judicial salaries	
<i>Court resources</i>	–The number of court buildings	This information is readily available from Annual Reports, etc.
	–The number of court rooms	
<i>Court characteristics</i>	–The number of civil cases filed	Data are recorded with respect to key indicator dates.
	–The nature and characteristics of civil cases being processed	A record is kept of the nature of the principal “activity” involved – the nature of the action or charge.
	–The number and characteristics of criminal cases that a court deals with	A record is kept of the allocation of the judge’s time
	–The socio-economic characteristics of a court district	
	–The allocation of judicial resources <i>within</i> the judicial system	

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59 See Economides *et al.* (2015), *supra* note 2, pp. 419–423, 430–444.

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<i>General court infrastructure</i>	<ul style="list-style-type: none"> –The availability and number of administrative staff –The availability and number of specific judicial support staff –Access to IT systems and resources –The availability and utilisation of technology such as video-conferencing and electronic submissions 	With appropriate authorisations, this information can be gathered.
2. Institutional Practices		
The second broad category of factors involves the institutional practices of the court, both judicial and administrative, which control the way in which court structures are organised, cases are managed and the time of judges utilised.		
<i>Methods of case management</i>	–What systems are available for a case	No record is specifically kept of which (of the available mechanisms) is utilised in a given case.
<i>Alternative resolution methods</i>	<ul style="list-style-type: none"> –Availability of alternative dispute processing resources –Sanctioning or mandating parallel alternative dispute resolution 	Information may be generally available, through rules, etc., but no specific data are recorded.
<i>Decision-making requirements</i>	<ul style="list-style-type: none"> –Use of multi-judge benches –Prevalence of <i>ex tempore</i> decisions –Requirements for written opinions 	<p>A record will be kept of when multiple judges sit.</p> <p>A specific code is utilised when an <i>ex tempore</i> decision is handed down, so a record should be available of the use of this process.</p> <p>A record is kept when that written judgment is delivered.</p>
<i>Judicial experience and Specialisation</i>	<ul style="list-style-type: none"> –The number of years of experience of judges at a court –Any specialisation of judges 	<p>Years of experience could be calculated from appointment date.</p> <p>No specific record is kept of judicial specialisation.</p>
<i>Judicial training and competence</i>	–Judicial training undertaken	No information is recorded or available with respect to judicial competence.

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<i>Extra-curial judicial activities</i>	<ul style="list-style-type: none"> –Speeches given –Articles written –conferences attended –Voluntary and community work 	Some information on extra-curial activities is recorded and provided for the purposes of the Annual Report.
3. Behavioural and Cultural Factors		
The third broad category of factors examines the attitudes and behaviours of judges, lawyers, litigants and defendants involved in the dispute.		
<i>Judicial behaviour</i>	<ul style="list-style-type: none"> –Managerial and legal competence of judges –Behavioural expectations of the given judicial culture 	No record is kept on this type of information – will require the identification of relevant proxy.
<i>Lawyer behaviour</i>	<ul style="list-style-type: none"> –Managerial and legal competence of lawyers –Behavioural expectations of the given legal culture 	No record is kept on this type of information – will require the identification of relevant proxy.
<i>Parties’ behaviour</i>	<ul style="list-style-type: none"> –Behavioural expectations of the given legal culture 	No record is kept on this type of information – will require the identification of relevant proxy.
4. Dispute Complexity and Legal Factors		
The fourth category of factors examines the impact of the factual and legal complexity of a particular case.		
<i>Legal complexity</i>	<ul style="list-style-type: none"> –The complexity of legal issues raised by the parties –Complexity/simplification of legislation and case law –Nature of the proceedings – main cause of action –Nature of the proceedings – alternative causes of action 	<p>No specific record is kept on the system of the complexity of the case. The only record of the complexity of the case occurs where the case, in the Supreme Court, is entered onto the “Long and Complex” case list.</p> <p>A record of the main cause of action will be kept, and be reasonably readily accessible.</p> <p>No data are recorded as to any alternative causes of action.</p>
<i>Factual/ technical complexity</i>	<ul style="list-style-type: none"> –The number of witnesses –Use of expert witnesses –The number of exhibits 	There is no electronic record kept, but manual records are kept of the trial that will record these issues.

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<i>Litigation funding</i>	<ul style="list-style-type: none">–Party funded–Legal aid–Other external funding–Dispute among corporations, or among private individuals, or between a corporation and one or more private individuals	There is no specific record kept as to the underlying funding of litigation, though useful information that is recorded includes a record that is kept of when lodgement fees have been waived (an indicia of limited party resources) and when a party is self-represented.
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5. Environmental Factors

The final broad category of factors examines the impact of broader “environmental” factors upon the duration of the proceedings. These macro-economic factors arise from the social context in which the dispute occurs.

<i>Human factors</i>	<ul style="list-style-type: none">–Health issues–Demographic considerations–Ethnic and cultural factors	<p>Observations⁶⁰</p> <p>It is likely difficult to collect data on individual participants in civil proceedings in this category. Data in a geographical area of a court could function as a rough, though not ideal, proxy instead. Socio-economic data should look at immigration and the ethnic composition of a geographical area, as well as the health and social expenditures in that area. The United Nations has constructed a human development index for numerous countries. The components of this index are also available, such as: literacy rates, years of schooling, expenditure on health, gender equality, poverty index, life expectancy and others.⁶¹</p>
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60 Our observations are drawn from diverse sources, going beyond our conversations with South Australian court officials.

61 See the range of data on human development across a large range of countries available at United Nations Statistical Commission, *Statistics Division*, available at: <<http://unstats.un.org>>.

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<i>Natural factors</i>	–Events such as floods, fires or earthquakes that may disrupt and delay proceedings	<p>The OECD provides some similar data, as do national statistical offices.⁶²</p> <p>Natural disasters such as earthquakes, flooding, droughts and fires impact on the operation of courts and the legal system in the affected areas. Such events can be accounted for statistically by including so-called dummy variables for the time periods that were affected. Searching newspapers online for such events would allow a researcher to gather data for the relevant dates. The database <i>Factiva</i> provides access to news from 200 countries and 35,000 sources.⁶³</p>
<i>Economic factors</i>	–Broad “economic” conditions external to the legal system	<p>Relevant available economic data will include income per capita, income distribution, the rate of unemployment, age distribution in the population, gross national product and the state of the economy (whether in a boom or a recession).⁶⁴</p>

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⁶² National statistical offices of numerous countries make available extensive socio-economic data. Examples include: Australian Bureau of Statistics, available at: <<http://www.abs.gov.au>>; Statistics Canada, available at: <<http://www.statcan.gc.ca>>; Stats NZ, available at: <<http://www.stats.govt.nz>>; UK Government, available at: <<https://data.gov.uk>>; Office of National Statistics (UK), available at: <<http://www.ons.gov.uk>>; Bureau of Economic Analysis (US), available at: <<http://www.bea.gov>>; United States Census Bureau, available at: <<http://www.census.gov>>.

⁶³ *Factiva* is available at <<http://global.factiva.com>>.

⁶⁴ It would be necessary to apply a filter, such as the Hodrick and Prescott filter, which separates out cyclical fluctuations from a measure of economic activity, such as the gross national product of a country or region: See R. J. Hodrick and E. C. Prescott, *Postwar US Business Cycles: An Empirical Investigation*, 29 *Journal of Money, Credit and Banking* (1997), 1–16.

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Economic data are available from a variety of sources, such as international organisations like Eurostat,⁶⁵ the International Monetary Fund,⁶⁶ the OECD,⁶⁷ the World Bank⁶⁸ and national statistical offices.⁶⁹

8 Conclusion

Assuming time standards can be established to identify undue or unreasonable delay, the question then arises what action can be taken to address “maladministration” in the management of civil justice. In the UAE, this will be particularly relevant in achieving the Dubai Courts 2016–2019 Strategic Plan’s goal of achieving “justice characterized by precision, speed, and affordable access to all legal services.”⁷⁰

65 For various member countries of the European Union, economic data are available from Eurostat, available at: <<http://ec.europa.eu/eurostat>>.

66 See International Monetary Fund, *International Financial Statistics*, available at: <<http://data.imf.org/?sk=5dabaff2-c5ad-4d27-a175-1253419c02d1>>.

67 The OECD’s Main Economic Indicators electronic database has similar data to the *International Financial Statistics* but only for OECD member countries: Organisation for Economic Co-operation and Development, *OECD.Stat*, available at: <<http://stats.oecd.org>>.

68 For example, the World Bank provides data on the ease of doing business in numerous countries, including some sub-national data, such as enforcing contracts for the quality of goods (costs, time and number of procedures involved in solving disputes), employment regulations, transparency of business regulations and business density: World Bank Group, *Doing Business 2016*, available at: <<http://www.doingbusiness.org>>.

69 It is worth noting that the International Labour Organization publishes a number of useful sources of relevant data, including the *Yearbook of Labour Statistics*, available at: <<http://www.ilo.org/stat/Publications/Yearbook/lang-en/index.htm>> and the *Key Indicators of the Labour Market* database, available at: <<http://www.ilo.org/global/statistics-and-databases/research-and-databases/kilm/lang-en/index.htm>>. Similarly, the *Penn World Table* provides economic data from national income accounts converted to international prices, based on purchasing-power-parity-based exchange rates: University of Groningen, *Groningen Growth and Development Centre*, available at: <<http://www.rug.nl/research/ggdc/data/pwt/>>.

70 *Dubai Courts Strategic Plan 2016–2019* (Dubai Courts. UAE., 2016), p. 13.

While the rule of law and separation of powers normally mean that the judicial process is not subject to external review, I would like to suggest that in certain circumstances it might be permissible to allow judicial delay to become the subject of administrative review. Should judges be allowed to shield behind the separation of powers if delay in delivering their decisions actually undermines the rule of law? Could we contemplate the prospect of a Judicial Ombudsman or a Court Agency investigating severe and repeated delays in the delivery of justice? Given the *Quranic* origins of an ombudsman (*muhtasib*) and the cultural understanding of *muhtasib*, this could be especially effective at inspiring public confidence in the judiciary.⁷¹ If independent ombudsmen are permitted to review delay by the executive and administrative agencies and can propose a range of remedies for the citizen, why should citizens be denied such a remedy for excessive judicial delay?

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⁷¹ Interestingly, the idea of a judicial ombudsman has been introduced in Israel: see T. Strasberg-Cohen, *Judicial Independence and the Supervision of Judges' Conduct*, available at: <http://www.justice.gov.il/En/Units/OmbudsmanIsraelijudiciary/MainDocs/Article.pdf>. See further Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, 13.

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