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EGYPTIAN CIVIL JUSTICE PROCESS MODERNIZATION: A FUNCTIONAL AND SYSTEMIC APPROACH†

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INTRODUCTION ........................................... 866
I. BACKLOG AND DELAY IN GENERAL ...................... 871
A. The Backlog and Delay Problem ..................... 871
B. General Solutions to Backlog and Delay ............. 872
1. Litigation Prevention ............................... 874

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The expansion and liberalization of national and transnational commerce have placed increasing pressure on national court systems to modernize their legal processes. This growth in commercial activity has resulted in ever greater numbers of increasingly complex civil and commercial disputes. Yet, nations attempting to maintain or create market-based economies have focused legal modernization efforts on substantive, rather than procedural, reform. Thus, most countries have been slow to adopt effective and feasible procedural mechanisms designed to administer civil justice for this larger and more complex caseload.
Recent reports from countries as diverse as the People's Republic of China, Mexico, the Russian Federation, and the United Kingdom sound a common plea for civil process modernization. Critical commentators have noted the importance of procedural reform and its

1. For example, the correlation between economic liberalization in pursuit of a "socialist market economy" and an increase in civil and commercial caseloads is evident in the People's Republic of China. See, e.g., Zhang Huanwen, Excerpts of Address Before the Third Session of the Eighth Provincial People's Congress in Liaoning Ribao, March 7, 1995, at 3, translated and reprinted in Liaoning Provincial Higher People's Court Work Report, BBC SUMMARY OF WORLD BROADCASTS, June 30, 1995, Part 3 (quoting Zhang Huanwen, President of the Provincial Higher People's Court as noting an 18.6 % increase in the number of cases overall, including a 58.6 % increase in economic criminal cases and an increase of 27 % in economic dispute cases. "[T]he number of economic dispute cases grew, the amount of money involved in cases increased, the legal relations became complicated and the difficulty of trying cases multiplied ... "). See also Bin Xue Sang, China's Civil Procedure Law: A New Guide for Dispute Resolution in China, 26 INT'L LAW. 413, 414 (1992) ("The Chinese Government's focus on procedural law, and particularly civil procedure, seems directly attributable to the ongoing process of modern economic reform and its by-product, the so-called 'open door policy,' which has generated numerous civil disputes. As a result, a civil procedure law has become a necessary adjunct to reform.").

2. See, e.g., John E. Rogers & Adrian Z. Arriola, Reforming the Lending Policy, BUS. MEX., Jan.–Feb. 1995 (noting that the unique Mexican procedure of amparo "is brought solely as a delay tactic and in the hope that the creditor will give up in frustration over the legal costs and management time involved in the proceeding.... In order to minimize the potential for abuse inherent in the procedural laws, they need to be amended to require the courts to resolve such defenses or proceedings more quickly.").

3. Preliminary research in Russia indicates that rising numbers of civil and commercial disputes are expected to clog the courts' dockets and overwhelm the administrative and managerial capacities of the courts, as well as requiring substantial investments in judicial and professional legal training to handle this new caseload.

4. Courts Caught in the Time Warp, TIMES, July 6, 1993, at 35 (noting that 1873 was "the time of the last reforms of civil procedure" and that "the technological revolution has largely bypassed civil litigation," and "costs have escalated, delays have increased, trials have become more complex and they take longer"); The Ups and Downs of the English Legal System, FIN. TIMES, May 9, 1989, at 22 ("The ever-more-insistent complaints of unnecessary delays and costs, together with the increasing case-loads of the courts, produced by the expansion of business as well as by the economic betterment and increased aspirations of the people, had made such reform unavoidable.").

5. Procedural reform measures are under consideration in many European countries, including: the European Union generally, see APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (Marcel Storme ed., 1994); Switzerland, see Claudia Schoch, Verwesentlichung der Bundesgerichtsbarkeit, Bundessrat Kolm at schweizerischen Juristentag, Neue Zurcher Zeitung, Oct. 2, 1995, at 13; United Kingdom, see Lord Chancellor's Department—Reform of Civil Procedure Means Cultural Change, REUTER TEXTLINE HERMES—UK GOVERNMENT PRESS RELEASES, Feb. 10, 1995 (discussing intended reforms of civil procedure) [hereinafter UK Reform]; and Hungary, see Lawyers Recommend Comprehensive Review of the Current Legal System (Hungarian Radio broadcast, Apr. 26, 1992) (discussing nation's intention to reform its civil and criminal procedure).

6. Reform objectives may have either a purely domestic or transnational dimension. See, e.g., Alfred W. Cortese, Civil Justice Reform in America: A Question of Parity with Our International Rivals, 13 U. PA. J. INT'L BUS. L. 1 (1992) ("While the calls for reform have focused primarily on the need to reduce costs and delay as a means of improving the delivery of justice, recently some have raised the secondary argument that costs must be contained or reduced in order to vitiate the detrimental effect of the current system on American competitiveness.").
integral relationship\(^7\) to substantive legal reform efforts.\(^8\) Failure to keep pace with increases in the number and complexity of civil disputes limits the effectiveness of substantive legal reform. Accordingly, many nations have begun to realize that they must modernize their civil dispute resolution processes in order to deliver justice\(^9\) in the implementation of their economic liberalization programs.\(^{10}\)

Despite the importance of civil process modernization, new proposals are frequently ineffective or slow to develop for four primary reasons. First, as noted above, reform efforts generally focus on substantive legal reform; process modernization is then considered of secondary importance. Second, process modernization proposals tend to emphasize procedural reform without sufficient attention to the necessary and concomitant adjustments of institutional and professional development.

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7. See, e.g., Hal S. Scott, The Impact of Class Actions on Rule 10b-5, 38 U. CHI. L. REV. 337 (1970) (challenging the assumption that no change in substantive securities law will result from introduction of the class action procedural device).

8. See Ibrahim F.I. Shihata, Judicial Reform in Developing Countries and the Role of the World Bank, 1994 WORLD BANK CONFERENCE ON JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 368 (noting the tendency in legal reform efforts to assume that once appropriate changes are made in modernizing the substantive rules, “the legal system as a whole will be more responsive to the demands of modernization and development” and stressing importance of processes and institutions: “Without such processes and institutions, rules may remain abstract concepts which do not always reflect the law in force.”). See also Kathryn Hendley, The Spillover Effects of Privatization on Russian Legal Culture, 5 TRANSNAT’L L. & CONTEMPT. PROBS. 39, 58 (1995) (“the increased incidence of contracts does not necessarily translate into a reliance upon them in defining the parameters of business relations. . . . [M]anagers remain skeptical about contractual compliance and feel the need to anticipate the worst case scenario. . . . The reluctance of managers to resort to the arbitrazh courts when contracts are breached most vividly reflects this skepticism.”); see, e.g., Alfred E. Mottur, The European Product Liability Directive: A Comparison with U.S. Law, 25 L. & POL. IN INT’L BUS. 983, 1018 (1994) (“it is the litigation consciousness and the legal procedural structures within a society that determine in large part the effect of its legal doctrines”); Japan, see Eugene A. Danaher, Products Liability Overhaul: Strict Liability is Coming to Japan, NAT’L L. J., Feb. 7, 1994, at 25, 28; Algeria, see Danemene Ben Abderrahmane, New Algerian Legislation on International Arbitration, MIDDLE E. EXECUTIVE REP., Dec. 1993, at 9; Mexico, see Roxana Alvelais, Mexican Mine Law Reformed, AM. METAL MARKET, Oct. 1, 1990, at 2; Modification of Mexican Arbitration Law, MEXICO TRADE & L. REP., Feb. 1, 1992, at 21; Egypt, see Labour and Economic Reform, MIDDLE E. EXECUTIVE REP., Feb. 1993, at 8; Argentina, see Argentine Senate Passes Key Social Security Reform (Reuter European Business Report, Sept. 23, 1993); and France, see Laetitia Felici, Litigation: France Improves Protection for Creditors, INT’L CORP. L., Apr. 1993, at 22 (“Until recently, the 1807 Code of Civil Procedure was still in force, which was itself largely inspired by the Colbert Order of 1667.”). France introduced a new procedural code in 1976. See C.N. Ngwasiri, The Role of the Judge in French Civil Proceedings, 9 CIV. JUST. Q. 167, 168 n.12 (1990).

9. UK Reform, supra note 5 (proposals to reform civil procedure will “reduce[e] cost, complexity and delay,” creating a more “fair and cost-effective system of civil justice.”).

10. Former Prime Minister Rao of India, for example, has noted that the economic liberalization program he initiated four years ago brought in a fresh need for speedy justice.” REUTER, Oct. 6, 1995.
Alternatively, they anticipate systemic changes which require large investments of unavailable resources. For example, common recommendations for an increase in judges to meet new systemic demands are seldom implemented because of lacking funds. Third, the opportunity to draw on comparative legal experience is often lost due to superficial and static comparative legal analysis. Based on parochial presumptions of non-comparability, countries commonly ignore the potentially valuable lessons to be learned from a functional and systemic comparison with both successful and failing measures adopted in other countries and, accordingly, rely exclusively on isolated domestic thinking. Alternatively, some countries recognize the value of drawing on foreign models, but pursue their adoption without sufficient attention to the distinctive functional and systemic features of the local legal culture. Finally, whether proposals are procedural or systemic, whether based on domestic, foreign, or new models, in many countries the government has had exclusive responsibility for the evaluation of reform. The absence of a significant role for non-governmental experts inhibits the potentially dynamic process of a creative dialogue aimed at the effective design of functional and systemic reforms.

To provide helpful assistance to other nations currently in pursuit of civil process reform, this Article introduces a model of civil justice modernization developed through a functional and systemic approach. Addressing the common weaknesses of many other reform efforts, this approach is first motivated by the conviction that process modernization is a necessary component of effective substantive legal reform. Second, in its critical assessment of the problems and its creative recommendations for reform, this Article integrates the design of procedural, institutional, and professional development measures, without requiring large investments of unavailable financial resources. Third, the Article presents a long-term and rigorous collaborative study that drew on a comparison of Egyptian and U.S. law, as well as other foreign legal experience. The study candidly assesses the major causes of backlog and delay in Egypt and creatively designs a set of cost-effective recommendations for immediate implementation. Finally, the dialogue that produced final recommendations benefited from the expertise and informed judgment of both public and private sector experts.\[11\]

11. The study described in this article culminated in a civil process modernization conference on January 3-4, 1996 in Cairo, Egypt, (the “Conference”), attended by senior members of the Ministry of Justice and the parliamentary legal council, as well as judges, prominent commercial lawyers, and law professors. The Conference concluded with resolutions to prepare legislation in order to implement the reform proposals. The Conference also resolved to study further the development of a private mediation center, based on U.S.
The recommendations presented in this Article involve two civil process modernization measures soon to be adopted in Egypt: (1) Case Management, a judicial streamlining function designed to reduce delay by separating managerial from adjudicatory functions; and (2) Judicial Mediation, a consensual dispute resolution mechanism, designed to offer parties alternatives to adjudication, created to reduce backlog by encouraging consensual settlements of civil cases.

This Article is organized according to a problem/solution sequence. Section I illuminates the international breadth of the backlog and delay problem and the generally available reform approaches. Section II then introduces the functional and systemic comparative approach that spawned the design of the Egyptian reforms. Section III describes in detail the application of this approach in Egypt. Specifically, Part A provides a history of the study; Part B assesses the primary causes of backlog and delay addressed by the reforms; and Part C discusses in detail the functional and systemic design of the recommendations. In conclusion, this Article reflects on the broader significance of these potentially adaptable solutions to one of the most critical and widespread problems currently hindering the effective administration of civil justice.


I. BACKLOG AND DELAY IN GENERAL

A. The Backlog and Delay Problem

Though difficult to measure and evaluate, backlog and delay are among the most critical legal problems reported around the world, from countries as diverse as Chile, Switzerland, Cambodia, Italy, the United Kingdom, India, Japan, and the United States. Currently accepted methods for measuring delay assume that cases are decided in the order in which they are filed. This assumption does not apply to many countries, due to the absence of a docketing and case tracking system. Even when delay can be measured, judgment as to how much time is too much will involve a certain level of individual or collective subjectivity. However, some court systems which lack both a method and threshold of measurement are so slow that no legal experts deny backlog and delay create a serious problem. For a discussion of these points and the methodological issues they raise, see Oscar G. Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 41 (1988).

This article confines its discussion to the civil litigation area. Backlog and delay at least equally affect the criminal justice system as well. The consequences of backlog and delay to those accused of crime who are awaiting trial are extremely grave. See, e.g., Lewis R. Katz, *Justice Is the Crime: Pretrial Delay in Felony Cases* (1972). In many countries, it is not uncommon for those accused of a crime to serve the full term of punishment commanded by a guilty verdict before coming to trial.

In the U.S., some see the delay problem to be sufficiently serious to raise constitutional concerns. See David Hittner & Kathleen Weisz Osman, *Federal Civil Trial Delays: A Constitutional Dilemma?*, 31 S. TEX. L. REV. 341 (1990) (exploring several theories to be advanced in support of an argument that backlog and delay have deprived litigants of their constitutional rights). See also R.E. McGarvie, *Judicial Responsibility for the Operation of the Court System*, 63 A. L. J. 79 (1989) ("A system... which keeps people waiting for years before recovering money due to them, is not providing applied justice.").


See Neuer Anlauf für die Verfassungsreform, Neue Zürcher Zeitung, May 5, 1995, at 13 (pointing out the chronic problems of work overload).

See Delores A. Donovan, *Cambodia: Building a Legal System from Scratch*, 27 INT’L LAW. 445, 450–53 (1993) ("In recent years the upsurge of contract disputes and civil litigation has been tremendous. ... [t]he privatization of industry and commerce can be expected to generate even more civil disputes. The formal legal system is still too underdeveloped to bear the increased burden of these civil disputes. The conciliation system is likewise unprepared to handle the new influx of cases.").

See Maria Rasaria Ferrarese, *Civil Justice and the Judicial Role in Italy*, 13 JUST. SYS. J. 168, 169–74 (1988–89); Chase, supra note 13, at 55–56. Both Ferrarese and Chase cite lack of judicial control as a major factor in causing backlog and delay in the Italian courts.

See UK Reform, supra note 5 (addressing "delay and wastage" in civil cases).

Robert Moog, *Delays in the Indian Courts: Why the Judges Don’t Take Control*, 16 JUST. SYS. J. 19 (1992). Moog cites various structural constraints, including a three-year judicial rotation system, and an imbalance of power between judges and attorneys, in favor of the attorneys, as the major impediments to case management approaches in India. Id. at 22–30. See also India Considering Revised Arbitration Law, WORLD ARB. & MEDIATION REP., Mar. 1995, at 51, 52 (gearing new arbitration law to provide "inexpensive and speedy justice," conforming to the broader goal of "globalization and liberalization" of India’s trade and investment laws).

Takeshi Kojima, *Civil Procedure Reform in Japan*, 11 Mich. J. INT’L L. 1218 (1990) (reporting that the "average delay between filing and judgement for cases that require at least a minimum level of proof-taking or an evidentiary hearing is 27 months").
States. In many countries, an excessive number of legal disputes languish unresolved in the courts.

Procedural causes of backlog and delay include (i) free access to the courts without disincentives sufficient to prevent frivolous litigation processes (including initiation without cause, extension without excuse, motions without merit, etc.); (ii) discontinuity, repetition, and fragmentation of the legal process, without efficient court administration or case management techniques; and (iii) limited opportunity or incentive for consensual settlements early in the legal process. Systemic causes derive generally from insufficient investments in human and institutional resources to perform efficient procedural functions.

B. General Solutions to Backlog and Delay

General solutions to the problems of backlog and delay are easy to articulate. Many countries have incorporated the right to speedy legal determinations into their procedural and constitutional law. However, efforts to turn this principle into practice quickly encounter both ideological opposition and practical obstacles.


24. The Chief Justice A.M. Gleeson of New South Wales articulated the easy access problem well: "[w]e are not speaking of something that will expand automatically to accommodate any increase in the numbers of those who have access to it. The citizens of Sydney would not be likely to give uncritical acclaim to a policy of increasing access to the Sydney Harbour Bridge. All that would be achieved would be an increase in congestions on the bridge. . . . Proposals to increase access mean little unless they involve proposals to increase, in one way or another, the capacity of the system itself." A.M. Gleeson AC, Access to Justice, 66 A. L. J. 270 (1992).

25. This is not meant to be an exhaustive list. For example, in the United States, commentators have linked the phenomenon of local procedural rules to an inefficient administration of justice. See, e.g., William H. Erickson, Reducing Court Costs and Delay: Colorado’s Answer to the Local Rules Problem, 16 U. Mich. J.L. REFORM 493, 494 (1983).


27. See, e.g., FED. R. CIV. P. 1; FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION (Mauro Cappelletti & Denis Talon eds., 1973); Kojima, supra note 22, at 1220 n. 10 (noting that a "speedy hearing is guaranteed by constitutional provisions in Spain, Turkey, and South American countries. Such guarantees can also be read through the interpretation of constitutional law in Japan, West Germany, the United States and Greece.").

28. See, e.g., Gleeson, supra note 24, at 272 (arguing that "alternative dispute resolution . . . overlooks the role of the courts as the instruments of the sovereign, enforcing legal rights and obligations as an alternative to self-help and the private redress of grievances").

29. See, e.g., Kojima, supra note 22, at 1233 ("Several attempts in the past to achieve speedy justice [in Japan] have proved to be a failure.").
but unrealized plea for more judges,³⁰ national court systems tend to pursue three general, process-oriented strategies: litigation prevention, procedural streamlining and case management measures, and alternative dispute resolution.³¹ Critics warn that these measures deny access, exacerbate party resource disparities, and commodify justice.³²

If one assumes a perfectly functioning legal system, then such objections to the various reform strategies may be persuasive. However, when compared to the stark realities of the actual operation of many

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³⁰ See HANS ZEISEL, DELAY IN THE COURT 4 (1959) (identifying “additional judgeships” as “the one certain remedy for delay in the court system”).

³¹ See generally AMERICAN BAR ASSOCIATION, American Bar Association Action Commission to Reduce Court Costs and Delay: Attacking Litigation Costs and Delay (1984). See also UNITED STATES DISTRICT COURT, NORTHERN CALIFORNIA DISTRICT, Dispute Resolution Procedures in the Northern District of California (1993) (describing case management and alternative dispute resolution mechanisms); Chase, supra note 13, at 59 (discussing judicial administration and case management and alternative dispute resolution as the two primary directions of procedural reform in the U.S.); BRITAIN’S ANTIQUATED COURTS, THE ECONOMIST, Sept. 16, 1995, at 20 (discussing Lord Wolf’s proposals of “sensible changes designed to streamline civil-court procedures and to encourage mediation and arbitration, which are less costly ways of settling dispute than suing, and recommending the reform that “the loser pays the cost of both sides in a civil action”) [hereinafter BRITAIN’S ANTIQUATED COURTS]; UK REFORM, supra note 5 (proposing raise in small claims limit, fast-track procedure with “streamlined processes,” “more judicial intervention,” and “court-annexed” alternative dispute resolution); Arthur Taylor Von Mehren, Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 NOTRE DAME L. REV. 609, 615 (1988) (noting reform measures giving German courts “greater directive powers and responsibilities” moving from “a principle of party prosecution” toward the “principle of official prosecution” or “official management”). The German fact-finding process has been the focus of much U.S. scholarly debate since Professor Langbein’s provocative article, noting advantages in German process, and trends of convergence within the U.S. See John H. Langbein, The German Advantage in Civil Procedure, 82 U. CHI. L. REV. 823 (1985) [hereinafter Langbein, German Advantage in Civil Procedure]; Samuel R. Gross, The American Advantage: The Value of Inefficient Litigation, 85 MICH. L. REV. 734 (1987); John C. Reitz, Why We Probably Cannot Adopt the German Advantage in Civil Procedure, 75 IOWA L. REV. 787 (1990); John H. Langbein, Legal Institutions: Trashing the German Advantage, 82 NW. U. L. REV. 763 (1988) [hereinafter Langbein, Legal Institutions]. See also Cappalli, supra note 16, at 307. Cappalli reports that Chile has attempted to reduce delay through edicts and sanctions that impose express and infeasibly short time limits on civil processes, e.g., three days for responses to civil complaints, eight days of proof-taking, sixty days for judicial determinations on the merits. Also, in 1988, Chile shortened the time for cases to be considered abandoned and for appeals to be taken from final judgments. Id. at 309. See also SHIHATA, supra note 8, at 370–82 (discussing elements of judicial reform, including simplification and streamlining of procedures, judicial management, imposition of fees and costs, and the availability of arbitration and other alternative facilities); REUTER, Oct. 6, 1995 (reporting India’s plan to “make major changes in its judicial system to reach out of court settlements in some of its [25 million] cases pending in its courts”).

³² Depending on the reform itself, complaints of expense and delay may persist. For example, in Kuwait, such complaints have been made about arbitration. See, e.g., Anis F. Kassim, Arbitration in Kuwait: Practical Problems, MIDDLE E. EXECUTIVE REP., May 1987, at 8 (noting that “A speedy resolution of disputes, however, is often frustrated, and expensive and time-consuming required steps make arbitration less viable.”) He also notes “restrictions that dilute its effectiveness,” delay in submitting to arbitration, poorly trained arbitrators, and absence of procedural safeguards as undesirable features of Kuwaiti arbitration.)
legal systems, the same objections must be raised in greater force against tolerance of the backlog and delay problem. If left unattended, the backlog and delay problem discourages meritorious litigation, provides defendants with undue advantages, and forces plaintiffs to bear alleged losses or seek alternative measures of retribution. Access is only valuable if it includes the prospect of a timely legal determination of the issues at hand. Defendants generally benefit from backlog and delay, forcing plaintiffs to suffer alleged losses and incur litigation costs for several years. Thus, the failure to achieve timely remedies increases the cost of doing business. To the extent settlement is pursued, knowledge of the defendant's economic advantage, enhanced by delay, reduces both the interrelated value of and incentive for civil claim settlement. Attention to these realities motivates serious consideration of alternative solutions that otherwise might appear unjustified.

1. Litigation Prevention

The first approach to reducing backlog and delay is to prevent disputes from being litigated. Litigation prevention measures include reducing the competence of the courts to adjudicate smaller claims, disincentives such as higher user fees or cost- and fee-shifting, and sanctions against frivolous litigation and motion practice. However, litigation prevention measures are often undesirable due to their perceived limits on both access to the courts and the full realization of procedural rights. Therefore, they have been approached with caution and, where implemented, have been modest.

2. Procedural Streamlining and Case Management

The second general approach to reducing backlog and delay is

33. See, e.g., INST. FOR STUDY & DEV. OF LEGAL SYS., PALESTINIAN LEGAL STUDY, June 30, 1995 (assessing legal process problems in Palestinian territories, following Cairo Accords, and noting practice of self-help retribution as alternative to the courts).


36. Although it has no cost- or fee-shifting rules, Chile allows judges to sanction the parties who lack plausible justifications for their positions and for "dilatory" actions. Cappalli, supra note 16, at 308. Additionally, Chile employs a "two-time" rule, forcing a party who has lost two motions to deposit a fee determined by the judge, within a fixed range, into the court; if the party loses a third motion, the fee is taken by the court as a penalty. Id. at 309.

37. See Shihata, supra note 8, at 382 ("fees and costs can act as a barrier to the access of the poor to the judicial system").
implementation of procedural streamlining and case management measures. Some countries approach this statutorily through the establishment of rigorous deadlines for answering complaints, filing evidence, and rendering decisions, or by shortening the process itself. Many others have allocated resources to court administration, transformed in-court processes into out-of-court processes, or increased judicial intervention in processes primarily controlled by the parties, regardless of whether party control is by procedural design or operational default. Judicial intervention or case management functions in the United States are


39. The comparative historical experience with rigidly established deadlines has not always been positive. See, e.g., Ngwasiri, supra note 8, at 173 ("The system [of fixing periods by statute] did not work because of its inflexibility."). Delay-reduction as a result of early court control in the scheduling of procedural events has been more significant. See John A. Goerdt, Explaining the Pace of Civil Case Litigation: The Latest Evidence from 37 Large Urban Trial Courts, 14 JUST. SYMS. J. 289, 302 (1991).

40. See, e.g., Cappalli, supra note 16 (describing Chilean reforms); Kojima, supra note 22, at 1221 (describing a "three-session" model, in which the first session (similar to a case management session) is designed to weed out cases not in dispute, direct cases to the proper venue, including mediation and settlement, clarify the issues and make arrangements for evidence to be presented in later sessions, requires full pleading of claims and facts, and orders defendants to prepare).


42. See Steven Flanders, Court Administration in Colombia: An American Visitor's Perspective, 71 JUDICATURE 36, 37 (1987) (noting surprising usefulness of U.S. court administration models in Colombia in order to reduce non-discretionary tasks performed by judges).

43. See, e.g., Jeffrey Pinsler, Adducing Evidence by Affidavits and Witness Statements: A Comparison of the Singapore and English Processes, 12 CIV. JUST. Q. 92 (1993) (comparing recently adopted pre-trial procedures in Singapore and England designed to allow disclosure and affidavits and their use at trial). The British procedure was appraised to reduce "delay, costs and the opportunity for procedural technicalities and obstruction towards the trial." Id. at 92 n.3. See also J.A. Jolowicz, Comparative Law and the Reform of Civil Procedure, 8 LEGAL STUD. 1, 6-7 (Mar. 1988) (discussing new procedures adopted and proposed in England that "will enable the court to take an active role in the preparation of the case and we may be on the way towards an English model of the continental idea that a case should be prepared for decision rather than for trial").

44. See, e.g., Civil Justice Reform Act Working Well in Eastern District, LEGAL INTELLIGENCER, Aug. 10, 1993, at 1 (reporting that expense and delay reduction plan was working well in U.S. Federal Eastern District of Pennsylvania); Paul L. Friedman, Speeding
frequently referred to as "managerial judging," departing from a traditionally passive to a more active judicial role in controlling the preparation phases of litigation. Case management frequently coordinates utilization of alternative dispute resolution mechanisms, as well.

Critics fear that managerial judging sacrifices impartiality. Some argue further that case management has made pre-trial procedures more complex while failing to control abuse. However, supporters argue that managerial judging employs resources in a more sensible and effective way.

Many studies of the effects of case management reforms have demonstrated reductions in delay. But critical doubts linger from an ambiguous historical record and recognition of a complex combination of

Up Justice at the District Court, LEGAL TIMES, Apr. 19, 1993, at 30 (summarizing as centerpiece of 48 recommendations "better management, control, and participation by the trial judge from start to finish." Friedman also notes that "Strict discovery and other deadlines, certain trial dates, and an environment designed to encourage early settlement are the essential components to ensuring that less judicial time and less money are spent.").


46. See, e.g., Kojima, supra note 22, at 1231 (discussing proposals for one- or two-track system for judgment and settlement procedures, stating preference for the latter); Lawson & Howard, supra note 38, at 580; Hudzik, supra note 38, at 569.


variables that affect court congestion levels.\textsuperscript{51} Notwithstanding arguably mixed results in the United States, foreign judicial functions comparable to U.S. case management measures have been promoted by other experts as particularly advantageous.\textsuperscript{52}

3. Alternative Dispute Resolution\textsuperscript{53}

The third general approach to reducing backlog and delay\textsuperscript{54} is to require or encourage alternative means of dispute resolution.\textsuperscript{55} Alternative dispute resolution mechanisms include those that are employed only with the consent of the parties, but render binding decisions (e.g., arbitration), and others that proceed by court order (or agreement), but do not require the parties to reach a resolution of the dispute (e.g., non-


\textsuperscript{52} See also Langbein, \textit{German Advantage in Civil Procedure}, supra note 31, and references to the debate it sparked. Controversy over case management in the U.S., where private parties have broad rights of discovery, is less applicable to judicial systems where the taking of evidence is not only comparatively narrow in scope but also a primarily judicial responsibility. U.S.-based concerns are also less applicable to judicial systems in which judges are under greater institutional supervision, in which managerial functions are specialized and separated from adjudicative processes, and in which managerial functions are performed with limited discretion.


\textsuperscript{55} See Geoffrey C. Hazard & Paul D. Scott, \textit{The Public Nature of Private Adjudication}, 6 Yale L. & Pol'y Rev. 42, 43 (1988) ("When the public system of justice no longer functions effectively, there are powerful incentives to create private systems of justice.").
binding arbitration, mediation, early neutral evaluation, and judicial settlement. In the first category, the parties consent to enter the process, but do not necessarily agree to a binding result. In the second, the parties agree or are required to enter the process, but do not necessarily reach a final resolution of the dispute.

Critics of alternative dispute resolution generally oppose the notion of "privatizing" justice. However, some of the specific problems cited by the critics, such as party resource disparities are at least as prevalent in normal litigation processes, especially in the context of serious backlog and delay. So-called "adversarial" legal processes, in which the parties and their legal representatives bear the burdens of gathering evidence and developing legal argumentation, tend to exacerbate resource disparities more than processes in which a neutral judge or panel is responsible for these functions. The less expensive the process, the less resource disparities risk prejudice in the outcome. Finally, disputing parties may at times turn to other forms of private resolution or retribution when backlog and delay significantly reduce the effectiveness of litigation.

4. Reform Versus the Status Quo

Whereas managerial judging and alternative dispute resolution have developed relatively quickly in the United States, they have been slow

57. See, e.g., Walter Horn, A Guide to Allocating Resources between Mediation and Adjudication, 15 Just. Sys. J. 824 (1992) (arguing for mixed system, which refers some, but not all, cases to mediation).
58. See Menkel-Meadow, For and Against Settlement, supra note 54, at 485 (differentiating mandatory and non-mandatory processes). For a balanced discussion of recommended judicial settlement in Japan, see Kojima, supra note 22, at 1229.
59. See, e.g., Jerold S. Auerbach, Justice Without Law? 124-26 (1983) (treating alternative dispute resolution as a "conservative political backlash" that preserves court adjudication for commercial litigation while eliminating access for those with fewer resources).
60. See Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1076 (1984); Andrew W. McThenia & Thomas L. Schaffer, For Reconciliation, 94 Yale L.J. 1660 (1985) (responding to Fiss); Owen M. Fiss, Out of Eden, 94 Yale L.J. 1669 (1985) (responding to McThenia & Schaffer); Menkel-Meadow, For and Against Settlement, supra note 54, at 486 (differentiating between mandatory and non-mandatory consensual dispute resolution processes: "Whether and when settlement is a good thing is one question; whether settlement conferences should be mandatory is another."); see also Hazard & Scott, supra note 55, at 43 ("justice' is an inherently public activity.").
61. See Hittner & Weisz Osman, supra note 15, at 343 ("Such delays can have a devastating effect on the financially insecure civil litigant.").
62. See id. supra note 15, at 343 ("Forced settlements could result, with the outcome being determined, not by justice, but by which party is financially best able to weather the court-imposed delay.").
63. See generally Flanders et al., supra note 49; Barry Mahoney et al., Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts
to develop in many other national court systems for a variety of structural and ideological reasons. For example, one assessment concluded that case management strategies have not been pursued in India partly because of a judicial rotation system and control by advocates over the pretrial process. Similarly, one commentator has explained that Italy has not pursued obligatory alternative dispute resolution processes based on the constitutional value of access and prohibitions against the creation of non-judicial bodies entrusted with dispute resolution capability. However strong the opposition to such reform, commentators should acknowledge that the failure to address the problems of backlog and delay in many court systems tends itself to deny access, exacerbate resource disparities, and divert cases to private forms of resolution. A protracted litigation process of several years provides a strong disincentive to using the courts, thus denying access. The ability of defendants to delay the litigation process with impunity strengthens their comparative economic strength in litigation. Finally, if the courts are not a feasible option for a timely judgment, parties either ignore their disputes or resolve them by other private strategies. Thus, the concerns raised in opposition to reform are equally, if not more, applicable to deliberate or inattentive preservation of the status quo.

II. A Functional and Systemic Approach to Backlog and Delay

The commonality of the backlog and delay problem, its causes, and the general approaches taken by nations to reach solutions all suggest a

(1985); see generally AMERICAN BAR ASSOCIATION, supra note 31; Chase, supra note 13, at 59 (discussing judicial administration and case management and alternative dispute resolution as the two primary directions of procedural reform in the U.S.). See also Edward F. Sherman, A Process Model and Agenda for Civil Justice Reforms in the States, 46 STAN. L. REV. 1553 (1994).

64. See Moog, supra note 21, at 22-32.

65. See Chase, supra note 13, at 79 (citing concern by Italy that diversion programs will be used to "divert low income persons from the judiciary into less powerful fora, thus resulting in a denial of equal access to the courts").

66. See id. at 77-79 ("drafters of the 1948 Constitution had seen the Fascists use jurisdiction curbing devices and the creation of special adjudicative bodies as a means of avoiding judicial interference with their assaults on liberties").

67. See Alschuler, supra note 48, at 1823 ("To the extent that delay produces settlements... it does so unfairly.").

68. See, e.g., Britain's Antiquated Courts, supra note 31, at 20 (describing fee-shifting and cost-shifting, streamlining, and alternative dispute resolution as "radical stuff," but admonishing that the alternative is worse: "[t]o right this wrong [ossification, soaring legal aid budgets, and exclusion of millions from access to the courts], nothing less than radical action will do").
topic ripe for comparison. But how should nations conduct such comparisons, and which methods will lead to fruitful results instead of wasted resources and sustained frustrations?

Comparative legal scholars frequently cheer "the comparative method" without sufficient explanation of what such a method or set of methods specifically should entail. Some have posited explanations for the inability to explicate a comparative methodology; failure to do so has been viewed ironically either as a strength or as a result of the

69. Currently available literature on the practical operation of legal systems is thin. Even when available, the illumination of problems and recommendations for reform are even more faint. See, e.g., Y.A.A. Tan Sri Dato' Abdul Hamid Omar, *Administration of Justice in Malaysia*, 1987 *DENNING L. J.* 19–22. The value of comparative analysis in solving contemporary problems, however, has not gone unnoted. See, e.g., Per Henrick Lindblom & Gary D. Watson, *Complex Litigation—A Comparative Perspective*, 12 *Civ. JUST. Q.* 33, 89 (1993) ("In the search for practical and pragmatic solutions to handle and process complex litigation, scholars, as well as legislators and practitioners, will have to rethink traditional procedure and well established norms of litigation. An unprejudiced approach and an open minded eagerness— to make use of national experience (administrative, civil and criminal procedure and A.D.R.) and international comparative knowledge, as well as experiences from the ongoing internationalisation and integration— will probably be the best strategy to meet this challenge.").

70. In contrast to the strong connotation of only one method, some scholars define the comparative method as "a variety of methods of looking at law." Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 *L. Q. REV.* 40, 41 (1966); *MARY ANN GLENDON ET AL.*, *COMPARATIVE LEGAL TRADITIONS* 11 (1985).

71. See *ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 1 (1993) (emphasizing the absence of discussion on the topic of what the comparative method is: "What is this method or technique? The student will find that the question tends to remain unanswered."). Watson criticizes other comparative endeavors for lacking an answer to the question, what method?, but offers no method himself for comparing systems in the relationship he narrowly defines as worthy of scholarly attention. See Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 *NW. U. L. REV.* 198, 198 (1977) ("the specific question of how the law maker should employ [comparative method in the sense of German Rechtsvergleichung] remains"). Myres McDougal complained over forty years ago that the "greatest confusion continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques." Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 *AM. J. COMP. L.* 24 (1952). McDougal, too, called for (1) "a clear and realistic notion of what is being compared"; (2) "an understanding of an interest in the purposes of the comparison sufficient to guide and sustain it"; and (3) "techniques of comparison adequate to yield knowledge relevant to and sufficiently precise for the purposes established." Id. at 29–30. However, McDougal's fertile mind only offered "a few preliminary and tentative observations." Id. at 30. He recommends a comprehensive focus on "decisions" (id., at 30) (the what) to serve the development of "democratic values in a peaceful world" (id. at 34) (the why) through a "comprehensive guiding theory" id. at 35 and "adequate . . . techniques" (id., at 36) (the how). However, McDougal admittedly does not pretend to describe these techniques in any detail. Id. at 37. Again, one is left without any explication of how to conduct comparisons of complex phenomena in pursuit of these ambitious purposes.

72. See *KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW* 29 (Tony Weir trans., Oxford Press 1987) (quoting *GUSTAV RADBRUCH, EINFUHRUNG IN DIE RECHTSWISSENSCHAFT* 253 (12th ed. 1969) ("sciences which have to busy themselves with their own methodology are sick sciences").
discipline’s youth (just short of one century old!). Others raise the issue in the context of the uses, misuses, and non-uses of comparative legal studies, without exploring the relationship between the purpose served by the comparison and its methodology.

The legal experts charged with the task of solving the problem of backlog and delay in Egypt found no comfort in the absence of an explicit comparative methodology. Skeptical and vexing questions had to be addressed. What, after all, does U.S. legal experience have to offer the Egyptian legal process? Which comparative method could possibly bridge the gap between these two distinctive legal cultures? Which approach distinguishes this cross-national effort from the failures of “law and development” programs in the 1960s or dilemmas confronted in more recent, U.S.-sponsored “rule of law” programs?

73. ZWEIGERT & KÖTZ, supra note 72, at 29 (arguing that failure to explicate a methodology indicated no weakness in the discipline because “comparativists are perfectly unembarrassed about their methodology, and see themselves as being still at the experimental stage.”).

74. Notwithstanding his wealth of insights, Stein discusses the comparative method without describing it in any detail. For example, he writes that the “debate on the relative ease of transplants” makes “little sense without a tacit assumption that a law maker does in fact use the method and considers foreign law models.” Stein, supra note 71, at 209–10 (emphasis added). Stein does not describe any method for comparison; he only raises the question of whether comparisons are in fact made. Later he notes the absence of any “broadening of interest in the systematic use of the comparative method.” Id. at 215 (emphasis added). One explanation for the non-use of comparative method is the lack of common understanding about what it entails; conversely, there may be so few academic-practitioners of any, no less the, comparative method, comparisons of the sort contemplated by these writers have not evolved sufficiently in order to become explicitly or systematically methodological.


76. See, e.g., Jose E. Alvarez, Promoting the ‘Rule of Law’ in Latin America: Problems and Prospects, 25 GEO. WASH. J. INT’L L. & ECON. 271 (1991). This project bears some resemblance to the Administration of Justice Program (“AOJ”) thoroughly described by Professor Alvarez. It has focused on “practical assistance to those involved in the actual day-to-day administration of justice” (id. at 299), and (in contrast to the “grand intellectual design” of “law and development” projects (see Gardner, supra note 75, at 16) is a “pragmatic... problem-solving approach” (Alvarez, supra at 301) that does not focus exclusively on the courts. However, it also differs in several critical respects. First, though funded entirely through participating agency grants from United States agencies, the relationship between ISDLS and the Ministry is direct and independent. Id., at 306. Second, the Ministry and the Study Groups established by the project are prepared to carry out implementation by themselves following initial training assistance. Id. Third, care has been taken in the reform design to avoid creating another set of problems that will undermine the goals of the project. Id. at 307. Fourth, consistency and continuity of participation on both the ISDLS and Ministry sides have been achieved. Id. The independence of the ISDLS-Ministry relationship alleviates concerns about interference and delay caused by the involvement of U.S. or Egyptian bureaucracies. Id. at 313. Finally, although this project also assumes that “expediting the
A. Qualifying the Civil/Common Law Distinction

Skeptical reactions to the comparative enterprise described in this Article are likely to stress the differences between the British "common law" and French "civil law" traditions from which the contemporary U.S. and Egyptian legal processes have evolved.

Differentiating between legal systems based upon traditional classifications is common, but also of limited value. Reflective scholars acknowledge that classifications of systems into groups or "families" do "not correspond to a biological reality," but rather serve merely as a "didactic device." Because legal systems arguably have so many features that may be considered to be shared or not shared by other systems, and because classification schemes tend to place systems into exclusive (not overlapping) categories, most classifications of legal systems have been forced to focus on single-feature theories to justify the classification.
Because the distinction between the common and civil law traditions has been traditionally cast in dichotomous terms, many scholars have searched for the single differentiating feature that can explain all others. These scholars have placed exclusive focus on features such as recognized legal sources (judicial precedent versus legislative code), forms of legal process (adversarial versus inquisitorial), ideal structures of institutional authority (coordinate versus hierarchical), or more general sociological or historical notions framed in terms of culture or tradition. Even those who explicitly object to single feature theories ironically fall into the trap of employing them. Concentration on these...
Michigan Journal of International Law

features raises important sets of distinctions; however, these distinctions require substantial qualification. After four years of collaborative comparative study, U.S. and Egyptian legal experts no longer view these classifications as posing any real obstacle to solving the backlog and delay problem.

One of the most frequently applied distinctions between civil and common law processes is the distinction between inquisitorial and adversarial legal processes. The process in civil law systems is characterized as inquisitorial, i.e., the judge, rather than the parties, is responsible for investigating factual claims and developing approaches to apply the law to such claims over the course of many discontinuous proceed-

ZWEIGERT & KÖTZ, supra note 72, at 61–62. Even those, such as Alan Watson, who object to classification as a valid pursuit, emphasize the relationships (mostly historical) between systems. This emphasizes a focus on historical development rather than contemporary problems. Watson’s view, in itself, poses equally difficult problems: the finding of a relationship creates a presumption of similarity, which may bias the analysis, and the statement that one must compare similarities and differences remains without content. In Watson’s view (“where there is no relationship there is no comparative law”), WATSON, supra note 71, at 6. For Watson, a relationship may include a direct or common derivation or even influence. Whether this would also include prospective influence is unclear.

To choose a frequently cited example, consider the distinction made between French civil and U.S. common law based on the primacy of different legal sources. Although judges in the civil law tradition have no explicit law-making authority similar to their common law counterparts, judicial decisions of appellate courts are an important source of authority in both systems. Formally speaking, the civil law system of France does not recognize precedent, or the doctrine of stare decisis as binding on the courts; however, in practice, Court of Cassation decisions are reported and widely considered by lower courts, forming a body of doctrine, “la jurisprudence,” which has a significant influence over judicial interpretations of law. Moreover, absolute emphasis on judicial law-making in the United States would underemphasize the growth of statutory and regulatory law and limits on the common law authority of the courts. Finally, modern “civil law” systems generally acknowledge the existence of gaps (or lacunae) in legislative enactments. Such gaps must be filled by judicially created analogies to other rules or by interpretations of broad equitable principles, themselves contained in civil codes. The identification of civil law counterparts to common law judicial powers is not difficult. See David S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtstaat, 61 S. CAL. L. REV. 1795, 1847 (1988) (“The role of judges in filling in gaps that the legislature has left or in giving specificity to general clauses is part of the responsibility that judges share for the evolution and modernization of law. Judge made law in Germany occupies large areas in the corpus of legal rules. In some ways German judges are just as bold and innovative as their common law colleagues.”). See also Cappalli, supra note 16, at 251–52 (noting as “curious in light of civil law’s customary insistence that no lacunae exist in its codes” the Chilean constitutional provision directing judges that “an absence of a law to resolve the dispute or issue subject to their decision” cannot justify judicial inaction. CHILE CONS. art. 73, par. 2.). The recognition of limits on judicial power in the U.S. system and the extent of judicial power in the French system narrows the difference and allows for a more accurate and nuanced comparison. See, e.g., Clark, supra at 1847 (after having stressed the comparability of German and common law judicial powers, Clark notes: “But the range of choice available to [German] judges is limited.”). Recognition of nuance allows for perception of change over time and forms the basis for comparing national approaches to judicial interpretation and rules of decision.

See supra note 85 and accompanying text (regarding uses of this distinction).
ings. The process in the common law system is characterized as adversarial, i.e., the parties, rather than the judge, are responsible for factual investigation and the development of legal argumentation.

This traditional distinction may be qualified by noting common functions in processes classified as adversarial and inquisitorial and by observing modern trends of international convergence. First, the adversarial/inquisitorial distinction should not overlook the distinction between fact- and law-finding processes. In Germany, for example, law-finding is an adversarial process. In France, the principle of *contradictoire* provides another example of adversarial processes in a civil law system. The French principle requires that each evidentiary submission be freely debated at the hearing, and the judge cannot incorporate in the decision any matter that has not gone through the *contradictoire* process. Systems classified as inquisitorial incorporate many adversarial processes, such as the process of initiating factual claims through party allegations made in petitions or complaints and defending allegations through party responses or answers, themselves supplemented by the parties' compilation of documentary evidence.

In addition to recognizing the adversarial features of processes in civil law systems, it is also increasingly important to recognize international convergence in procedural trends. The growth of case management in the United States, the specialization and restoration of the managerial function in many other countries, and the expansion and

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91. Ngwasiri, *supra* note 79, at 290 ("[T]he ‘trial’ in the French sense consists of a fragmented, discontinuous series of attendances, the duration of which sometimes renders it necessary to repeat some of the investigations already conducted at the pre-trial stage of an action."). For a full description of French civil procedure, see Ngwasiri, *supra* note 8.

92. Langbein, *German Advantage in Civil Procedure, supra* note 31, at 824 (discussing adversarial German process on law-finding and application).


95. Separation of the management and adjudication functions is known to other legal systems. For example, the English system requires that all procedural issues be resolved prior to trial. It utilizes a body of "Masters" to supervise pleading, discovery, issue identification and scheduling (as well as more limited gatekeeping functions), but not settlement discussions. See Linda J. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1079–105, 1111 (1975) (noting the advantages in "keeping pretrial proceedings away from the presiding trial judge [to] prevent . . . matters arising at a preliminary stage from influencing or prejudicing the judge when he presides in the context of a full trial."). Alschuler notes, without recommending, that "separation of the trial and pretrial functions" in order to "facilitate closer judicial supervision of pretrial activities and, at the same time, [could] provide a more effective corrective for the partiality that may arise from this supervision." He continues by stating that "it would also eliminate the danger that a 'pretrial' judge might deliberately or inadvertently coerce settlement through an explicit, implicit, or even misperceived threat of retaliation at trial." *ALSCHLER, supra* note 48, at 1838–39. Strikingly, in the French system as well, pre-trial civil proceedings are conducted by special-
reinvigoration of consensual dispute settlement mechanisms, such as mediation and conciliation, provide evidence of broad convergence. Recognition of these trends, rather than primary concern with classification, encourages open-minded discussions of comparability aimed at finding new procedural solutions based on international experience with widespread problems.

B. A Functional and Systemic Approach

With these qualifications in mind, the approach taken in this Article casts the actual functions and systemic features of legal processes onto a universal model, in which differences can be seen in relative relation to one another and in terms of the broader context in which they operate. This model may be stated in the simplest terms: when disputes arise, they may be resolved by the parties themselves or their legal representatives or, when necessary, by resort to the services of a neutral third party, whether a judge, a lay assessor, a governmental official, or a private expert (or some combination of the foregoing).

ized pre-trial judges, called *juges de mise en état* (the judge charged with putting the case in a state sufficient for full judicial hearing). Ngwasiri, *supra* note 79, at 295. The powers of these French judges have been increased every decade since their introduction in 1935. *Id.* at 296. These powers include setting time limits, ordering the production of evidence, imposition of fines or striking of case for failure to produce such documents, etc. The French pre-trial judge also has a duty "to reconcile the parties." *Id.* at 297.


97. *See also* McDougal, *supra* note 71, at 29 (describing a "literature that is voluminous, obsessively repetitious, and sterile — a literature that feeds and grows, like a psychic cancer, upon logical classification and reclassification and technical refinement and sub-refinement, without limit and with a minimum of external reference and relevance.").

98. The approach employed here closely resembles that set forth by Zweigert and Kötz. They acknowledged that the process of comparison "is the most difficult part of any work in comparative law." Zweigert & Kötz, *supra* note 72, at 41. Due to the peculiarities of each problem, they claimed that "it is impossible to lay down any firm rules about it." *Id.* Nevertheless, they made several significant points. First, Because explanations of legal systems are often stated in terms used by the system itself, one must "free" these explanations "from the context of its own system." *Id.* at 42. Second, function is "the start-point and basis of all comparative law" because "different legal systems can be compared only if they solve the same factual problem." *Id.* For a discussion of function (as well as context), see Glendon, *supra* note 70, at 11 n. 11, drawing on the work of Ernst Rabel, Otto Kahn-Freund, and Max Rheinstein. Under this approach, it is misleading to compare only parts of a solution. Third, one must "build a system" with a "special syntax and vocabulary," which is flexible enough to grasp a wide variety of "heterogeneous institutions which are functionally comparable." Zweigert & Kötz, *supra* note 72, at 36. This involves finding a "higher concept," a greater abstraction of generality upon which specific differences may be cast. *Id.* at 37. Finally, the comparison should lead to a critical evaluation; otherwise, comparative legal studies will amount only to "piling up blocks of stone that no one will build with." *Id.* at 41. This last point merely underlines the importance of keeping the original purpose in mind, when classification and reform may produce inconsistent results.

99. This formulation allows a comparison of adjudication and consensual dispute resolution. Other scholars have attempted to break down the barriers between "adjudication"
Legal processes differ in the ways that responsibility is allocated to (i) the parties and/or their legal representatives, and (ii) if directed or allowed to intervene, neutral third parties, at different temporal stages in the legal process (e.g., initial accusation/response, fact- versus law-finding, dispute resolution, appeal). These functional choices of allocated responsibility presume and thus necessitate certain systemic levels of institutional and professional development.

This approach applies equally to traditional and alternative dispute resolution processes. For example, the U.S. and Egyptian evidence-taking procedures differ significantly. Whereas the U.S. discovery processes are the primary responsibility of the parties, and evidence gathering occurs out of court, in Egypt, as in many countries, judges are responsible for taking and requesting evidence in court. Dispute resolution processes also differ in the type of intervention, whether evaluation of the claims and defenses or facilitation of settlement, whether based exclusively on legal positions or on broader extra-legal interests of the parties. Thus, fair and accurate comparisons are facilitated by examining which actors are responsible for performing which functions over time.

From this perspective, the U.S. processes identified for comparative study and later creatively adapted to the Egyptian process provide excellent examples of recently shifting allocations of responsibility over different aspects of the legal process. They also highlight traditional allocations of responsibility that have encountered practical problems in the U.S. and Egyptian processes.

C. Application of this Approach to the U.S.-Egypt Comparison

Traditionally, the U.S. judge did not become involved in a civil dispute until shortly before the trial. Following the plaintiff's complaint and the defendant's answer, unless dispositive motions (e.g., lacking jurisdiction) were made, the parties pursued discovery of evidence from one another and thus controlled the progress (or postponement) and "negotiation." See ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE 105-51 (1979) (including essays by Professors Golding and Eisenberg); see Martin P. Golding, Dispute Settling and Justice in PHILOSOPHY OF LAW 106-25 (1975); Melvin A. Eisenberg, Private Ordering through Negotiation: Dispute-Sentlement and Rulemaking, 89 HARV. L. REV. 637, 638-65 (1976).

of settlement negotiation. As these features became identified with the backlog and delay problem, many U.S. jurisdictions\textsuperscript{101} adopted two of the three general approaches to backlog and delay: case management and alternative dispute resolution. These reforms were designed to provide, respectively, judicial intervention in processes previously controlled by the parties and greater opportunity for consensual settlement.

In contrast to the U.S. traditional model, traditional Egyptian civil process allocated primary responsibility to the judge or judicial panel for all aspects of evidentiary and doctrinal development of a civil claim. After the parties filed their initial claims and responses (itself an adversarial process), the judicial panel took over. Beyond the proffered evidence, only the judicial panel was empowered to request evidence, find the applicable law, and adjudicate the dispute. Unlike the U.S. system, which traditionally limited judicial involvement in managing the case and then adapted by allowing judicial intervention, the Egyptian system traditionally provided the judge with supreme preparatory powers.

However, with an increase in the number and complexity of civil disputes brought before the courts, judges in the Egyptian system found it difficult to exercise their authority in a timely manner. Discontinuity, measured by a reported average of ten to fifteen appearances per case for the handling of evidentiary matters,\textsuperscript{102} including frequent extensions for the fragmented presentation of evidence and witnesses, gradually became a system in which the judge could not promptly handle his preparatory duties. The inability to conduct an expeditious preparation of the case for judgment in effect left the progress of the litigation process to the parties themselves. Defendants and their lawyers were thus effectively empowered to use the chronic features of delay to tactical advantage. Furthermore, without the imminence of judicial decision, incentives to settle cases prior to judgment were minimal.

Based on the comparability of the problems associated with party-controlled processes, the Egyptian reforms were inspired by the U.S. approach. To the extent possible, the reforms also draw on pre-existing

\textsuperscript{101} Because ISDLS draws mainly on the experience of judges and lawyers in the Federal Northern District of California, the comparative study emphasized measures pursued in that jurisdiction. Regardless of mixed results elsewhere, judges and lawyers alike report that recent reforms have experienced success in this district court. Because the relevant U.S. reforms were used to stimulate, rather than determine, the design of the Egyptian measures, which required justification in terms of the Egyptian system, without regard to the level of success achieved in the United States, a detailed exploration and reconciliation of the varied U.S. literature is beyond the scope of this Article.

\textsuperscript{102} The daily judicial process proceeds in small steps: a piece of evidence is accepted; an extension granted; an expert appointed; an argument heard; more evidence requested; a deadline set and extended again, and so on. \textit{CONFERENCE REPORT, supra} note 12, Attachment F at 3.
features of the Egyptian process. First, the procedural streamlining function of Case Management seeks to restore judicial control over case preparation through the specialization of that function in a separate office of Case Managers. Second, the alternative dispute resolution mechanism of Judicial Mediation draws on both U.S. models of early neutral evaluation and mediation and expands contemporary Egyptian consensual dispute resolution processes used less formally in rural areas and more formally in Egyptian family and labor disputes.

Therefore, the strong Egyptian traditions of both (1) judicial (rather than party) authority and control over the litigation process, and (2) consensual dispute resolution (e.g., conciliation, mediation and arbitration)\(^{103}\) in non-commercial disputes provide an excellent foundation for the development of the Case Management function and Judicial Mediation mechanism, respectively. These measures are expected to cut delay through the imposition of judicial discipline on the preparation of the cases and to reduce backlog through greater numbers of consensual settlement.

Not only are these reforms based on a functional comparison; they also address systemic impediments to procedural reform. The reforms take into account institutional factors that directly affect the effectiveness of any procedural reform, namely the development of institutions and professional personnel to perform procedural functions and implement new mechanisms. In this regard, the recommendations draw on pre-existing professional roles and expertise. Primary court administrators, themselves judges, currently working under the Chief Judge will become Case Managers, and retired judges will become Judicial Mediators. To the extent new functions are to be performed by new actors, the reforms also necessarily call for Case Management and Judicial Mediation training. In this way, attention to functions in their systemic context proved fruitful in the design of the reforms.

Finally, this approach is motivated by the recognition of a shared challenge facing many modern legal systems: the development of commerce both domestically and transnationally and the concomitant modernization of legal systems to resolve disputes resulting from such commerce. The U.S. processes studied by the Egyptian legal opinion leaders are very popular among business people both in the United States and abroad, who have been frustrated with problems of court congestion and limitations on remedies available through legal adjudica-

\(^{103}\) Abdul Hamid El Ahdab, Arbitration with the Arab Countries 239–95 (1990); see also Samir Saleh, Commercial Arbitration in the Arab Middle East 194–228 (1984) (describing Egyptian arbitration principles, procedure, and enforceability).
Therefore, these reforms are anticipated to improve the administration of justice and intended to attract the admiration and resulting investment of the domestic and international communities. For these reasons, the functional and systemic approach to comparative legal scholarship taken in this Article is tailored to the present needs of the Arab Republic of Egypt and the society it represents.

III. THE SPECIFIC CASE OF EGYPT

Legal experts and scholars frequently assess the problems in civil litigation processes and the substantial obstacles to feasible reform. They are more rarely requested to suggest ways to assist national court systems in forming solutions that are inspired by foreign models yet well-adapted to the pre-existing local legal system — including its processes, institutions, and professional personnel. This Article provides a model for civil process modernization that incorporates case management and mediation in Egypt, a country that shares many of the functional and systemic features (e.g., a strong commitment to access, a discontinuous in-court evidence-taking process, a judicial rotation system, etc.) that have been cited as impeding reform efforts in other countries. This Section will provide a history of the process modernization effort, a tailored assessment of the primary causes of backlog and delay in the Egyptian courts, and a discussion of the resulting functional and systemic recommendations approved by the Egyptian Ministry of Justice to solve the backlog and delay problem.

104. Court-derived remedies frequently fail to take into account the importance of a continuing business relationship. See Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem-Solving, 31 UCLA L. Rev. 754 (1984) [hereinafter Menkel-Meadow, Toward Another View]. See Menkel-Meadow, For and Against Settlement, supra note 54, at 487 (defining a “polycentric dispute” as a dispute involving more than one issue in which dispute the parties “see their differences as implicating more than one aspect of their relationship”); see also Eisenberg, supra note 99; Lon L. Fuller, Mediation - Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971); Hendley, supra note 8, at 58 (“Parties who feel a need to maintain business relations shy away from going to court because it inevitably tends to rupture, or at least disrupts, their relationship.”).

105. For example, India, see Moog, supra note 21.

106. The Ministry of Justice initiates the consideration of new legislation, especially that directly related to the administration of justice. The Ministry of Justice is responsible for the administration of the regular civil and criminal courts. The judiciary is composed of two branches: courts and prosecution (or niyabh). Of the 5,000 members of the judiciary, 2,400 sit as judges. Members of the judiciary are appointed and promoted by Presidential decree; however, these decisions are made first by the Supreme Judicial Council within the Ministry and then submitted in the form of a decree to the President for his signature. The Supreme Judicial Council consists of the Chief Justice of the Court of Cassation, the two most senior deputies to the Chief Justice, the three most senior presidents of the courts of appeal and the prosecutor general. In addition to the Supreme Judicial Council, the Inspection Department is responsible for internal monitoring and quality control of the judiciary. See CONFERENCE REPORT, supra note 12, at 1.
A. History of the Comparative Process Modernization Effort

The development of specific reform measures to address the backlog and delay problem was facilitated by, first, a comparative understanding of the chosen processes utilized to solve court congestion problems in the United States and, second, a functional and systemic adaptation of these U.S. mechanisms and techniques to pre-existing Egyptian institutions, processes, and human resources. Even though the reforms were initially inspired by a functional comparison with U.S. models, they have been carefully and systematically designed by Egyptian legal opinion leaders to be adaptable to the Egyptian legal process over the course of many practical phases. The practical design of the comparative enterprise itself is a major achievement.

The process of comparative study and problem-solving required nearly four years\(^\text{107}\) of unprecedented international collaboration between the Egyptian Ministry of Justice and the U.S.-based Institute for the Study and Development of Legal Systems (ISDLS)\(^\text{108}\). The study employed a wide range of practical research methods (including authoritative papers, lectures, demonstrations, public and private commentary, study groups, eight jointly written reports, seminars, conferences, and workshops). Many of these tools were utilized by the Ministry of Justice in its own deliberations, including the solicitation by the Ministry of commentary on the reforms from the private sector. The establishment of Egyptian and U.S. study groups helped to develop sufficient trust and candor in the assessment, clear responsibility for work product, and institutional expertise in the comparative analysis.

The initial study grew out of demonstrations of U.S. civil and criminal legal processes (open to the public), held in Egypt in 1992. Based on the success of this initial study, in November, 1992, the Minister of Justice, Farouk Seif El Nasr, invited ISDLS and the U.S. Information Service (USIS) to conduct an assessment of backlog and delay in the Egyptian courts and to develop in collaboration with the Ministry recommendations to address the backlog and delay problem. Egyptian commentary, gathered during extensive interviews in February, 1993, formed the preliminary basis for an accurate assessment of the backlog and delay problem.

\(^{107}\) For a more extensive history, see CONFERENCE REPORT, supra note 12, Attachment G at 1, for a copy of the case file.

\(^{108}\) ISDLS is a non-profit corporation established to assist in the study and development of legal systems. The entire project was administered by the United States Information Service.
At the completion of the initial assessment, in April, 1993, ISDLS proposed that the Ministry conduct an in-depth study of a wide variety of U.S. judicial streamlining and modern alternative dispute resolution mechanisms that were designed to solve backlog and delay problems in the U.S. system. During the summer of 1993, ISDLS prepared for the Ministry a list of six U.S. mechanisms for further comparative study (case management, judicial settlement, mediation, early neutral evaluation, arbitration, and summary judgment). At the urging of ISDLS, the Ministry also established an Egyptian Legal Study Group ("Study Group"), consisting of both senior and junior members. In November, 1993, ISDLS presented these six mechanisms in a series of seminars in Cairo and Alexandria. Through authoritative papers, lectures, and demonstrations (all related to a single case file), ISDLS presented the program to over one hundred Egyptian experts. Egyptian commentary (both in public and private sessions) reflected receptivity to some, but not all of these mechanisms. After an extensive internal study, the Ministry selected the first four of these processes for further intensive examination in the United States by a delegation of Study Group members.

Over the course of one month in September, 1994, the Study Group delegation observed dozens of these four types of civil justice processes in the United States in their practical operation. They met with judges, attorneys, and parties to discuss and evaluate the mechanisms, and later reflected upon their reactions in daily debriefing sessions, which formed the basis for a final report. This phase fine-tuned both the assessment and the direction of the Egyptian reform efforts.

Based on the delegation's final report, completed in October of 1994, the Ministry approved the Study Group's recommendations for reform. In the summer of 1995, the Ministry decided to present the recommendations to Egyptian legal opinion leaders at a conference in order to receive critical commentary from both governmental and non-governmental legal experts. In the autumn of 1995, in preparation of the conference, the Ministry (in conjunction with ISDLS) wrote a case file in

109. In addition to the mechanisms chosen for later study, ISDLS demonstrated summary adjudication ("Summary Judgment") and arbitration. See April 1993 Report, supra note 12.

110. The Study Group delegation consisted of five judges selected by the Ministry of Justice to work with ISDLS. The Study Group consists of five judges from Cairo: Omar Hafeez, Justice of the Appellate Court; Hany Hanna, Prosecutor at the Court of Cassation; Nabil Sadek, District Attorney at the Court of Cassation; Khaled Korraa, Chief Judge of the Primary Court; and Yehia Khashaba, Chief Judge of the Primary Court. Chief Judge Sameh El Torgoman, on leave from the Ministry and presently a S.J.D. student at Stanford Law School, also participated in the Study Group.

111. See OCTOBER 1994 REPORT, supra note 12.
order to simulate the reform process and developed demonstrations of the Egyptian case management and mediation processes. These processes were then demonstrated by the Study Group during the Civil Justice Modernization Conference held in Cairo, Egypt, in January, 1996.

Culminating the previous phases, the Conference was remarkable in four critical respects. First, it involved a large and diverse body of experts both within and outside the legal system, such as judges, prominent commercial lawyers, law professors, business people, and governmental officials. Second, the consideration of the reforms incorporated public floor-commentary from this diverse group of participants. Third, the commentary considered the reforms on their own merits in the Egyptian context, rather than as an adaptation of U.S. models. Fourth, the Conference used innovative techniques not only to involve all participants, but also to reach consensus on the critical decisions. During the Conference, following each demonstration of the reforms, smaller groups of attendees gave commentary in an interactive workshop run by a facilitator and recorded by a reporter who also served as a member of the Study Group. Finally, after the workshops, the reporters shared the

112. See Conference Report, supra note 12, Attachment H, for a copy of the case file.

113. The Conference was attended by over 250 senior Ministry officials, judges, lawyers, law professors, and members of the parliamentary legal council. The Conference presented the reform proposals by way of authoritative papers, lectures and simulated demonstrations, followed by workshops inviting participant commentary, which was later incorporated in the final recommendations. See id., Attachment A, for a list of the Egyptian Conference attendees. Participating from the U.S. as delegates from ISDLS were Chief Judge Clifford Wallace of the Ninth Circuit Court of Appeals, Stephen A. Mayo, Chief of the U.S. Delegation, and Professor Hiram E. Chodosh, Legal Reporter. Lectures and speeches were given by the Minister of Justice, Counselor Maher Abdel Wahed, Justices Fathi Naguib and Ali El Sadek, Ambassador Robert Walker and Chief Judge Clifford Wallace of the Ninth Circuit Court of Appeals. See id., Attachment B, for the lectures by Counselor Wahed, Justices Naguib and Sadek, and Ambassador Walker. See id., Attachment C, for the resolutions adopted by the Conference.

114. The workshops generated many comments and questions. Generally, commentators expressed concern that implementation should be gradual, and the administrative preconditions for successful implementation should be established to ensure success. One recommended method to ensure gradual development was to start with a limited category of cases (for example, commercial claims above a certain sum of money) in a specific district (for example, Cairo) before expanding the category of cases and the courts chosen to incorporate these processes. Concern was expressed about the need for careful and effective training and certification of new personnel (for example, Case Managers and Judicial Mediators). Commentators also mentioned the need for implementing legislation to modify the current procedures.

Most of the concerns raised by comments on the Case Management presentations concerned the proper balance of Case Management powers and limits on those powers, including the difference between the competence of the Case Manager and the judicial panel, the ability to take and record testimony, and the power to sanction or penalize the parties. One commentator raised the issue of how a party's constitutional rights would be protected in Case Management proceedings, including rights to appeal, and whether such appeals would be interlocutory. Suggestions were made for further consideration. These included the establish-
commentary, on which the Ministry based its final resolutions.\textsuperscript{115} The Ministry considered three proposals, accepted two, and rejected the third based on the commentary it received during the Conference. At the conclusion of the Conference, the Minister of Justice announced both the recommendations and plans for the preparation of legislation.

National and international leaders within the United States and many foreign countries, as well as international funding agencies and organizations, should consider the benefits of these practical methods. First, this approach facilitated candor in the assessment of current problems in the administration of justice. Second, demonstrations, responsive critical commentary, and interactive seminars were conducive to developing creativity in the reform-design process. Third, the reforms were designed with a strong sense of realism; they will be implemented gradually through pilot projects for a limited number of courts covering a specifically delineated category of cases, and efficient training programs have been developed to precede implementation.\textsuperscript{116} A final benefit of this approach is its replicability in other institutional efforts to broaden the reform approach (e.g., the plan to develop a private mediation capability).\textsuperscript{117} Therefore, the significance of this undertaking extends well beyond the achievements represented by the comparative methodology or the reform recommendations themselves. Without the practical effectiveness of the foregoing cross-national exchange, the functional and systemic approach could not have been successfully pursued.

\textsuperscript{115} See \textsc{Conference Report}, \textit{supra} note 12, Attachment C.

\textsuperscript{116} The approach to training is to train Egyptian judges to train themselves in the new reform functions and mechanisms. See \textit{infra} Part II.C.2, discussing the approach to training.

\textsuperscript{117} See \textit{infra} Part II.C.3, discussing the approach to develop a private mediation center, based on U.S. models.
B. The Problem: Assessing the Causes of Backlog and Delay\textsuperscript{118}

In order to explore the most practicable means to prevent, streamline, and resolve (consensually prior to judgment) a greater number of litigations in Egypt, Egyptian and U.S. legal opinion leaders endeavored to understand the interrelated functional and systemic causes of the problem. Some of the causes thus identified were either beyond the control of the Ministry (such as the growth of the Egyptian population and its urbanization)\textsuperscript{119} or beyond the scope of procedural reform (such as implementation of the privatization policies or improvements in legal education).\textsuperscript{120} Furthermore, not all causes required change; some, such as the principle of impartiality, reflected positive, central tenets of the Egyptian concept of civil justice. But many other causes were within reach of new measures, and the study focused its primary attention on those features. Accordingly, this Section concentrates on those problems that could be effectively addressed by the reforms: critical functions of the civil justice process and the systemic allocations of responsibility to different institutional and non-institutional actors to perform such functions.\textsuperscript{121}

In particular, the reforms address three related causes of backlog and delay: judicial responsibility for non-adjudicative processes; judicial impartiality and distrust of private settlement; and the judicial rotation system. As will be demonstrated in Part C, specialization and institutionalization of the case management function and the option of mediation performed by judges are responses to address these three major causes.

1. Judicial Responsibility for Non-Adjudicative Processes

In theory, Egyptian judges\textsuperscript{122} are presumed to exercise control over the entire litigation process. This includes not only adjudication, but also

\textsuperscript{118} This assessment is based on extensive interviews over several weeks with top members of the judiciary and the private bars in Cairo and Alexandria. See CONFERENCE REPORT, supra note 12, Attachment F.

\textsuperscript{119} CONFERENCE REPORT, supra note 12, Attachment F at 2.

\textsuperscript{120} Id. at 1–2.

\textsuperscript{121} Id. Specific allocations of responsibility and the presumptions upon which they are based give rise to different rules of procedure. For example, in party-controlled fact-gathering processes, the parties themselves may stipulate to certain undisputed facts. In Egypt, such stipulations must satisfy the independent factual determinations of the judge. Therefore, the requirement of judicial findings of fact, in part justified by a lack of trust in the parties to reach accurate assessments by consensual agreement, adds to the workload of the judge and thus may be an additional factor causing backlog and delay. See CONFERENCE REPORT, supra note 12, at 2.

\textsuperscript{122} For a list of constitutional provisions related to the judiciary, see Judicial Extracts from the Constitution of the Arab Republic of Egypt (1971).
the preparation of cases for decision, including evidence-gathering and ministerial functions such as the scheduling of appearances. However, given the mounting caseloads and an insufficient allocation of resources in response, Egyptian judges are not able in a timely manner to exercise in practice the power allocated to them in theory. Judges are reluctant to impose upon the advocates the requirement of more timely submissions of evidence and legal argument. Because of the large caseload, they perceive themselves to lack the necessary time to review the submissions. This is a significant factor contributing to backlog and delay in the courts.

The Egyptian legal process, unlike that in the United States, does not employ an out-of-court private discovery system. Instead, the judge or judicial panel is responsible for handling evidentiary matters in a series of discontinuous sessions, in contrast to the U.S. out-of-court, party-controlled discovery process, newly disciplined by one or two case management conferences. The preparation of evidence in Egyptian civil process thus requires a greater use of judicial time. Moreover, the Egyptian system lacks any institutional counterpart to the model of a U.S. magistrate judge or discovery referee, the British master, or the French juge de mise en état, who performs necessary managerial functions. Therefore, the judicial decisionmaker must perform all administrative functions in addition to his or her adjudicative role. Many legal experts estimate that an average first instance civil litigation in Egypt requires ten to fifteen appearances for evidentiary issues alone. A piece of evidence is accepted, an extension granted, an expert appointed, an argument heard, more evidence requested, a deadline set and extended again — this is the picture of the daily judicial process painted by legal opinion leaders in Egypt. Approximately only fifteen to twenty percent of the cases heard by a first instance court in a given day are prepared with sufficient evidence and legal argument for the judge to issue a decision. Given the heavy caseload and the institutional pressures to address some (even extremely limited) aspect, of one to two hundred

123. Justice Naguib has written that "[t]he most prominent problem that hinders the ability of the Egyptian judge, with regard to handling a large number of litigations reported to him, is the integration of the preparation and trial phases in which the judge himself assumes the tasks of both phases together." See FATHI NAGUIB, THE ROLE OF THE CIVIL PROSECUTION IN SIMPLE LITIGATIONS. See also Fathi Naguib, Civil Prosecution in CONFERENCE REPORT, supra note 12, Attachment B at 2 (calling for a separation of the preparation stage from the verdict-passing stage).

124. See CONFERENCE REPORT, supra note 12, Attachment F at 3.

125. See supra note 95 (discussing U.S., British and French comparisons).

126. See CONFERENCE REPORT, supra note 12, Attachment F at 3.

127. Id.
cases in each court session, judges increasingly have strong institutional incentives to postpone not only a substantive consideration of critical issues but also deadlines for more insignificant matters. Indeed, many judges perceive the enforcement of deadlines to be futile, because even if deadlines could be enforced, the judges would not have time to respond adequately to cases ready for adjudication. Ironically, however, the less significant matters appear to be a more critical cause of backlog and delay. The preparation phase requires an estimated two years, whereas the adjudication phase requires an average of two months.\textsuperscript{128}

Approximately seventy-five percent of in-court time before the judge or judicial panel is dedicated to routine and ministerial functions in the preparation stages of the case, such as recording the acceptance of various forms of submitted evidence and the hearing of witnesses. Notaries, who are charged with some of these tasks, whose fees are higher than court costs, but who do not have exclusive jurisdiction over some matters, are often circumvented by parties who ask the court for an official imprimatur on an important document, e.g., a real estate contract. Thus, judges become responsible for many ministerial tasks. Burdening the judiciary in the foregoing ways with matters more suitable for the exclusive attention of judicial administrators and clerks strains valuable judicial resources and decreases the time afforded to substantive judicial decisionmaking,\textsuperscript{129} thus increasing backlog and delay.\textsuperscript{130}

2. Judicial Impartiality and Distrust of Private Settlement

Another reason given for the failure to engage in a form of case management (or other techniques that would tend to reduce backlog and delay) derives from the judicial tradition of stoic impartiality.\textsuperscript{131} In theory, any decision by the judge reached prior to a final verdict, even if of a procedural nature, would be viewed as prejudicial to the parties.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{128} See \textit{id.}.
\item \textsuperscript{129} Cf. \textsc{Flanders}, supra note 49, at 37 (noting that Colombian judges spent a great deal of time on "matters involving minimal exercise of judicial discretion, or none").
\item \textsuperscript{130} See \textsc{Conference Report}, supra note 12, Attachment F at 3-4.
\item \textsuperscript{131} This stoicism derives from the prohibition of judge-lawyer communication. See \textsc{Conference Report}, supra note 12, Attachment F at 4.
\item \textsuperscript{132} The tension between a concern with delay and the fear of prejudicing the parties by appearing partial is reflected in a lecture given in 1991 by the esteemed Dr. Ahmed Rifaat Khafagy, former President of the Court of Ethics and Vice President of the Court of Cassation. After stating that "[a]ll persons may have their cases heard without delay," he admonished: "Do not make any remarks to be misinterpreted. The judge must observe that; otherwise, he shall be blamed by the parties for lack of confidence. He must treat the two parties
\end{itemize}
Within the traditional Egyptian legal culture, judges and lawyers do not enjoy any social or professional interaction. This helps the judiciary to maintain the appropriate appearance of impartiality, but it also discourages judge-lawyer communication and inhibits judicial efforts to manage the preparation of cases for judgment and attempts to seek conciliation between the parties on preliminary matters.

This traditional distancing of the judge from the litigants is also seen as a major obstacle to judicial encouragement of settlement (in the form of a settlement conference) and to the dismissal of nonmeritorious legal claims where there is no dispute of a material fact (i.e., summary judgment). In this latter instance, resolving some issues and not others is perceived as "mutilating" a case. In other words, separating the claims would lead potentially to having some claims still in trial while others are in appellate stages of review, even though interlocutory appeals are allowed in isolated instances, such as for recusal requests. For similar reasons, dismissal standards for lack of evidence appear to be high. In other words, judges are reluctant to rule on particular claims before the full evidentiary life of the entire case is developed.

Given the practical inability of judges to fulfill their duties expeditiously, lawyers are able to prolong the litigation process by utilizing the procedural tools at their disposal, thereby earning additional fees with each substantial procedural turn of the case. The practical inability of the judiciary to keep track of these procedural developments adds considerably to backlog and delay. Moreover, procedural rights that ensure fairness are subject to excessive use by attorneys and those litigants (usually defendants) who are interested in delaying the adjudication of a dispute as long as possible. Two prominent examples were frequently cited by legal opinion leaders.

First, extensions — routinely granted by judges who wish to ensure the parties have sufficient time to gather evidence — add significantly to backlog and delay. Most judges are reluctant to impose waivers and

equally in order to realize justice between them." See Lecture Given by Dr. Ahmed Rifaat Khafagy, Nov. 13, 1991.

133. See CONFERENCE REPORT, supra note 12, Attachment F at 4. It should be noted that, despite these problems, in practice, several Egyptian judges are very effective case managers. In fact, the judges routinely request the parties to submit certain types of evidence within a certain time period; yet, few, if any, observers would interpret such acts as having even the appearance of prejudice.

134. See FED. R. CIV. P. 56.

135. See CONFERENCE REPORT, supra note 12, Attachment F at 4. See also APRIL 1993 REPORT, supra note 12, at 6.

136. See CONFERENCE REPORT, supra note 12, Attachment F at 8-9.
sanctions on the parties for their lawyers’ failure to meet deadlines and have the limited sanction power\textsuperscript{137} against attorneys of a maximum fine of twenty Egyptian pounds (the equivalent of approximately U.S. $6.70).\textsuperscript{138}

Second, requests that a judge recuse himself based on bias or conflict of interest are often made to protract the litigation. Even where the appearance of a conflict of interest is highly questionable, judges often grant the recusal requests in order to achieve an appearance of impartiality. This reflects the strong value placed on maintaining not only impartiality but also its appearance. However, the reluctance to deny summarily many of these requests, which denials are subject to appellate review, adds to the backlog and delay problem.\textsuperscript{139}

Additionally, the central role (in theory) of the judge (and hence the state) in the litigation process and the pride of the judiciary in its own integrity and expertise serve to discourage the diversion of cases outside the judicial system to forms of alternative dispute resolution, particularly those forms which would require the services of a lawyer. But again, there are notable exceptions to this distrust of alternative dispute resolution. Mediation is obligatory in labor and family disputes and, along with arbitration, is the primary method of dispute resolution in rural areas. The reluctance to expand obligatory mediation to other areas of the law and to develop urban mediation programs built on long-standing rural traditions is an additional obstacle to backlog and delay reduction efforts.\textsuperscript{140}

3. Judicial Rotation System

In Egypt, judges (i) rotate in three- to five-year periods to different

\textsuperscript{137} Other disincentives aimed at litigation prevention are also \textit{de minimus} because of the value placed in maintaining accessibility to the courts. For example, fee-shifting, in which the prevailing party is awarded reimbursement of its legal fees, does not provide a strong disincentive to litigate because assessments of fees for the prevailing party are based on minimal rates determined by the Lawyers’ Syndicate (for example, as low as ten Egyptian pounds or U.S. $3.35), not on the actual fees incurred in the case. The Lawyers’ Syndicate maintains an unrealistically low fee schedule in order to reduce the disincentive that fee-shifting is intended to impose on litigants considering nonmeritorious litigation. In addition, as part of a judgment, the losing party in a civil case must pay judicial fees (court costs) to the court. Court costs are calculated at five percent of the total judgment. However, the judgment cannot be enforced before the court costs are paid. As a result, the prevailing party usually pays the judicial fees and then seeks reimbursement for that amount from the losing party. Judicial fees may be waived by the court for indigent parties. Refusal of the unavailing party to pay may lead to another legal proceeding and may undermine the incentive structure embodied in the cost-shifting rule. See \textit{Conference Report}, \textit{supra} note 12.

\textsuperscript{138} See \textit{Conference Report}, \textit{supra} note 12, Attachment F at 9.

\textsuperscript{139} \textit{Id}.

\textsuperscript{140} See \textit{Conference Report}, \textit{supra} note 12, Attachment F at 4-5.
regions of the country\textsuperscript{141} and (ii) within each region sit on different panels, or shift between the judiciary and the prosecutors’ branch, according to assignments made by the Ministry of Justice. The system of rotating judges through different courts, based on the rationale again of maintaining a distance between the judiciary on the one hand and the private bar and greater society on the other hand, compounds the problem. This rotation system forces a judicial panel to pass its caseload directly on to the next panel. This eliminates institutional memory and continuity in the management of a caseload. New panels must freshly prepare for cases already familiar to preceding panels. This duplicates the use of judicial time, and counteracts promotion incentives aimed at the expeditious resolution of cases.\textsuperscript{142} Given the discontinuity of the process and the judicial rotation system, many cases require the attention of at least one additional judge who will need time to bring his preparation up to the level of the previous judge. This contributes significantly to backlog and delay.\textsuperscript{143}

C. The Solutions: The Features of Egyptian Process Modernization

The functional and systemic approach (described above in Section III), pursued through the practical methods (described in Part A of Section IV), generated two general recommendations designed to address the problems described in Part B. The two recommendations, denominated as Case Management and Judicial Mediation,\textsuperscript{144} are

\textsuperscript{141}. Judicial rotations to rural areas usually last three years; in Cairo and Alexandria the period is five years. Judges may not serve in the rural areas in which they grew up until they have served in the judiciary for twenty years. \textit{Id.} at 5.

\textsuperscript{142}. Promotion criteria provide limited incentives for judges to make long-term investments in individual cases by focusing on key issues and limiting the time within which evidence is gathered, legal arguments are made, and deliberations are concluded. Judges are evaluated in part on the basis of the number of cases in which they issue written judgments, and this provides an incentive to move a case to judgment. However, this also frustrates the use of conciliation. Judges do not engage in conciliation discussions with the parties before the litigation proceeds, even though, in principle, nothing prevents them from doing so. Moreover, the supervisory organ for judicial promotion reviews cases to see if the postponement resulted from the judge’s inattention to the case or the parties’ failure to respond to the judge’s orders. In the former, the judge’s review will be negative; if the latter, the judge suffers no injury to his reputation. In this regard, the judges may have an institutional incentive not to press the parties and their lawyers to be expeditious in their submissions. \textit{Id.}

\textsuperscript{143}. See \textit{CONFERENCE REPORT}, \textit{supra} note 12, Attachment F at 5.

\textsuperscript{144}. The Ministry has elected to study the possibility of private mediation (outside the Egyptian judicial process) as an ADR alternative. The Ministry is of the belief that such an addition would enhance the capability by the Ministry to encourage out-of-court settlements of civil and commercial cases. Private mediation would be available before or during the pending civil litigation and would exist totally independent of the traditional Egyptian civil process. When fully developed, it would complement the proposed Case Management and
described below in terms of their functional and systemic designs. The explication of the functional design focuses on new civil justice procedures, and the description of the systemic design covers institutional innovations as well as measures to train new professional actors. Finally, this Part sets forth the primary justifications for these reforms, based on the manner in which they address the causes of backlog and delay and their expected impact on the problem.

1. The Functional Design: Procedural Reform

First, drawing on the U.S. model of case management,145 Egyptian Case Management was designed to meet the specific needs of the Egyptian civil justice process.146 The Case Manager is not vested with any

Judicial Mediation proposals.

The Ministry, through its Study Group (composed entirely of judges) has already conducted a study of mediation. The Ministry believes that the benefits of the private mediation study should be passed on to an enlarged Study Group, that would include the original Study Group and a select number of experienced commercial lawyers and law professors. A brief study, conducted by the enlarged Study Group, would conduct the private mediation study. Upon completion of the study, the Study Group would present its findings at another Ministry of Justice conference.

The private mediation study would rely heavily upon the earlier Ministry of Justice study which included mediation and which led to the Judicial Mediation proposal. The continued study would be directed entirely toward the development of a private mediation component, completely independent of the traditional Egyptian civil process. Hence, the study would be directed at the study of the U.S.-private mediation institutes which serve as a primary ADR component outside the U.S. traditional legal process.

The two-week study would be conducted in San Francisco by four selected members of the expanded Study Group. The study would include presentation by private mediators, observation of mediations and conferences with mediators and party litigants. The study would be directed toward the practical, legal and administrative consideration of a private mediation institution. A report of the findings of this two week study would be first published and then incorporated into a more comprehensive report which includes the findings of the earlier legal study.

Following the publication of this report a series of meetings would be held in Cairo, with members of the expanded Group in order to prepare authoritative papers, lectures and demonstrations of the private mediation mechanism. An Egyptian case file would be prepared by the expanded Study Group. Practice sessions would be conducted in preparation of the private mediation conference. A two-day conference, similar to the January 1996 Conference, would present the proposed private mediation mechanism. The mechanism would be presented through authoritative papers, lecture and demonstration, followed by conference attendee commentary. The commentary would be collected and its findings presented at the end of the conference. The conference attendees would be judges, commercial lawyers, law professors, and most importantly, domestic and international business leaders.

145. See, e.g., L. SIPES 1980, supra note 49, at 6–12 (discussing (1) identification of steps in litigation process, (2) establishment of time limits, (3) modification of clerical procedure, and (4) implementation of a management system as key elements of "total case management").

146. It should be noted that the judicial panels already possess the power to perform the basic Case Management functions (for example, powers to summon the parties, request evidence, schedule hearings, impose sanctions, including dismissal for failure to appear, etc.). It would be well advised for the Ministry to hold meetings with the judiciary in order to
encourage them to exercise these powers. The effectiveness of doing so on a systematic level could be studied and then used to inform the implementation of the specialized Case Management function discussed in this Article. See CONFERENCE REPORT, supra note 12, at 3.

147. Early neutral evaluation in the U.S. involves a meeting within three to six months after the initiation of the claim between the parties, their legal representatives and a neutral, third party, who is a senior lawyer experienced in the subject matter of the dispute (the “Neutral”). Prior to each session, the lawyers prepare the legal authorities and factual evidence in support of their clients’ positions. The Neutral poses questions to each side to explore further their positions and the critical issues of disagreement. Following the joint session, the Neutral prepares an outline of the issues and an evaluation of the outcome of the case, which is then communicated to the parties either jointly or (more frequently) separately. If fruitful, the Neutral continues to meet with each party in private caucus to pursue settlement discussions. If settlement is not reachable, the Neutral then discusses case management and assists the parties in reaching agreement on a procedural plan for the case. All communications, except those expressly agreed to in the case management plan, are confidential. This process results in the parties gaining a better understanding of their respective positions and the likely outcome if they proceed with litigation.

Judicial Mediation, as established in these reforms, differs from early neutral evaluation in three key respects: (i) only retired judges will be certified as neutrals; (ii) no written presentation, other than the case summary already required, will be demanded of the parties, and (iii) the Judicial Mediator will not assist with case management, other than to help the parties stipulate to any areas of agreement between them.

148. Mediation involves a meeting at any time during the lawsuit between the parties, their legal representatives and a neutral, third party, who — whether former judge or lawyer...
Egyptian system. The Judicial Mediation process will be confidential. It will be conducted by a retired judge (the “Judicial Mediator”), who will act as the “neutral.” Judicial Mediation will be offered as an alternative to litigation shortly after the case is filed; the choice to pursue Judicial Mediation will be voluntary and consensual.\textsuperscript{149} Judicial Mediation will be attended by disputing parties and their legal representatives and conducted by the Judicial Mediator, who will be trained and certified as a trained facilitator of conflict resolution. Judicial Mediation will begin with statements from each party of the asserted claims and/or defenses, and proceed with private meetings between the Judicial Mediator and each party. Judicial Mediation will explore: the relative strengths and weaknesses of each legal claim and defense; settlement proposals that more accurately reflect the probabilities of success on the merits; the impact of these issues on the present economic value of the claim; and business solutions beyond the scope of judicial relief and not exclusively based on the legal merits. At each stage, the Judicial Mediator will try to narrow the disagreements between the parties and to encourage final agreement on settlement. If settlement is achieved, the Judicial Mediator will assist the parties in drafting a settlement agreement to

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— is a trained facilitator at conflict resolution. As in early neutral evaluation, prior to each session, the lawyers prepare the legal authorities and factual evidence in support of their clients’ positions. The mediator often allows the parties to voice their position in a joint session before meeting privately to discuss settlement opportunities. Frequently, the mediator shares with both parties or privately with each party an informed prediction of the outcome of the litigation, assuming it were to proceed. All communications are confidential. As in early neutral evaluation, mediation results in the parties gaining a better understanding of their respective positions and the likely outcome if they proceed with litigation, and it has been particularly successful in achieving significant numbers of settlements.

However, mediation differs from early neutral evaluation in several key respects. First, a mediator often declines to express an opinion about the value of the case. Second, the major goal of mediation is to achieve a settlement, whereas the evaluator provides an evaluation to provide the parties with the informed evaluation of an experienced, neutral third party. Third, the mediator is an expert in the art of helping people reach consensual agreements, whereas an early neutral evaluator has expertise in the legal subject matter of the dispute. Fourth, mediation may take place at any time, whereas early neutral evaluation takes place early following the filing of a claim. Finally, mediators focus their attention on the parties, whereas evaluators tend to focus on the likely views of judges and juries. Judicial Mediation, as established in these reforms, differs from U.S. mediation in three key respects: (i) it will occur very early in the litigation; (ii) only retired judges will be certified as neutrals; and (iii) no additional written presentation will be required of the parties.

\textsuperscript{149} In this way, Judicial Mediation is not designed to replace, but rather to strengthen (by reducing backlog and delay) public adjudication. Therefore, the design of Judicial Mediation renders inapposite many of the scholarly criticisms of alternative dispute resolution. \textit{See, e.g.,} HAZARD \& SCOTT, supra note 55, at 60 (“The stronger the public system, the more intensively it influences the private systems in the same social community.” Justice-based concerns about private coercion apply when there is “no public system of justice at all.”). \textit{See also} CONFERENCE REPORT, supra note 12, at 5.

\textsuperscript{150} \textit{See} Menkel-Meadow, \textit{For and Against Settlement}, supra note 54, at 487; Eisenberg, supra note 99; Fuller, supra note 104. \textit{See also} CONFERENCE REPORT, supra note 12, at 5–6.
memorialize their agreement. Furthermore, Judicial Mediation will not require written preparation other than the gathering of evidentiary support for claims and/or defenses asserted by the parties; however, Judicial Mediation sessions will begin with oral presentations by the parties or their legal representatives. The Judicial Mediator may provide his evaluation to both parties jointly or to each separately, depending on the circumstances. Because Judicial Mediation separates confidential settlement negotiations from public adjudicatory functions and draws on a retired judge’s experience in evaluating the worth of a civil claim, it is expected to encourage the settlement of civil claims.

These two procedural reforms, though independent, are integrated to support one another. First, Case Management incorporates mediation by requiring the parties to confer early in the case to determine jointly whether to pursue Judicial Mediation. By requiring the parties to prepare their cases shortly after a case is filed, requiring them to confer, and identifying the dispositive issues for adjudication by the judicial panel, Case Management is likely to lead to a greater number of consensual settlements. Second, Judicial Mediation reinforces Case Management by requiring thorough and early case preparation by the parties and concluding with an attempt to narrow the issues for judicial decisionmaking. Case Managers and Judicial Mediators will coordinate their distinct functions to achieve the maximum level of efficiency in the litigation process. Case Managers will select Judicial Mediators carefully based on the relationship between the subject matter of the litigation and

151. Mediation may be purely facilitative, for example, no evaluation is provided by the mediator, or evaluative, for example the mediator provides his evaluation of the claim on the merits, or combine both facilitation and evaluation, for example, evaluation is withheld until all efforts at facilitated settlement have been exhausted. The Ministry has not yet determined any particular blend of facilitation and evaluation in the development of Judicial Mediation. Further study and experience in adapting the mediation process to the civil and commercial setting will be necessary before Judicial Mediation can be characterized according to this distinction. See CONFERENCE REPORT, supra note 12, at 6.

152. In order to avoid overwhelming the newly designed Case Management function with additional mediation responsibilities, this Article does not recommend, at the beginning of implementation of the Case Management reform, that Case Managers mediate disputes. However, legislation prepared by the Ministry should not preclude a more mature Case Management system (comparable to U.S. Case Management) from offering a mediation option to the parties. Two features of the Case Management process, as described herein, place the Case Manager in an excellent position to mediate disputes between consenting parties: the absence of any adjudicatory responsibility and, as a result of his role in preparation of the dispute for decision, his familiarity with the evidentiary and legal positions of the parties. However, the mediation function should not be undertaken by the Case Manager until the Ministry becomes confident that training and other resource allocations are sufficient to avoid creating yet another bottleneck in the early phases of civil litigation. Furthermore, overcoming cultural restraints that currently frustrate judge-lawyer communication will require a gradual and staged adjustment, thus counseling against an immediate implementation of mediation by Case Managers. See CONFERENCE REPORT, supra note 12, at 4.

153. See CONFERENCE REPORT, supra note 12, at 11.
the expertise of the retired judge. Judicial Mediators will ensure preparation by the parties of their claims and defenses, and will assist in narrowing the dispositive issues that need to be resolved.\textsuperscript{154}

In order to demonstrate the functional operation of these processes over time, the following chronology describes the new procedures in a step-by-step summary. Each set of steps is divided into four categories: (i) filing; (ii) the first meeting with the Case Manager; (iii) Judicial Mediation, if elected, and (iv) the second meeting with the Case Manager.

(i) \textit{Filing}

Step One: The Complaint is filed with the clerk of the court,\textsuperscript{155} in accordance with Article 63.\textsuperscript{156}

Step Two: The Complaint is sent internally to the Case Managers' Office,\textsuperscript{157} where it is filed, docketed,\textsuperscript{158} copied, and distributed to the defendant parties.

Step Three: The Case Manager makes an initial determination of whether the Complaint meets the requirements of Article 63.

Step Four (optional): If the Complaint does not meet the requirements of Article 63, it is sent back to the plaintiff with a standardized form listing the requirements and a standardized notification that the requirements have not been fully met. In order to save administrative time, the clerk may merely send the forms rather than noting which of the requirements has not been met. Alternatively, the standardized notification may

\begin{quotation}
154. \textit{See Conference Report, supra note 12.}
155. For present purposes, the Ministry has limited the reforms to implementation in the Primary Court; however, some of them may be adapted to the District Courts (below) and the Appellate Courts (above). \textit{See Conference Report, supra note 12, at 17.}
156. Article 63 of the Egyptian Code of Civil Procedure provides that the complaint be filed by the plaintiff to the clerk, in which complaint the facts and legal principles of the dispute are enumerated. The complaint includes the name of the plaintiff, occupation, place of residence, the name and residence of the defendant, the date the case is filed, the name of the court being filed in, the names of counsel and their addresses. The status of the complaint is then described, including the issues of law at hand. The lawyers frequently do not refer to the law in these claims, allowing the judge more freedom to choose the law in hearing the case. \textit{Egypt Code Civ. P. 63. See also Conference Report, supra note 12, at 17.}
157. The Ministry has not yet determined the precise category of cases that will proceed under the administrative control of the Case Manager. Further study on the number of cases filed and the availability of sufficiently trained personnel will inform this determination. \textit{See Conference Report, supra note 12, at 17.}
158. Article 67 of the Egyptian Code of Civil Procedure provides in pertinent part that the clerk must file the date of filing in a special ledger to state the claim and then fix the date of trial (according to availability of the courts). \textit{Egypt Code Civ. P. 67. The complaint is referred to the Court Officer/Bailiff, who has 30 days to serve the complaint to the defendant. If the officer delays the service, a fine will be incurred upon his office. The case will not be considered by the court until service is complete. The Ministry will allow the Case Managers' Office to supervise the Bailiff's activities, and with international assistance, consider computerizing a court docketing system. See also Conference Report, supra note 12, at 18.}
\end{quotation}
have a list of requirements with corresponding empty boxes to be checked for each particular requirement that has not been satisfied.

Step Five: As soon as the clerk files and docket the Complaint and assigns a Case Manager, the clerk sends to the parties a standardized notification of (i) the date of the first meeting with, and the identity of, the Case Manager, not to exceed thirty days from the date of service of the Complaint on the defendant by the court,\(^{159}\) (ii) a standardized schedule of procedural events, including the responsibilities of the parties at each stage, including in particular the obligation to appear at the first meeting and also to gather evidence in support of the parties’ claims (including damages) or defenses in preparation of that first meeting,\(^{160}\) and (iii) a list of penalties that may be recommended by the Case Manager for imposition by the judicial panel.

These steps are designed to make filing and service procedures more effective and to inform the parties of their procedural rights and obligations as the case proceeds. This first stage should provide a foundation for a more effective docketing and administrative system of case tracking, which will be important in the future for longitudinal studies of the relative success of the reform measures. Institutionally, court administration personnel currently responsible for docketing and service procedures will come under the direct authority of the Case Managers’ Office, thus creating greater accountability in case management in the earliest stage of a civil litigation.

(ii) The First Meeting with the Case Manager

Step One: The Case Manager reads to the parties a prepared statement of his role in the case and the scope of his authority as a Case Manager.

\(^{159}\) Article 66 of the Egyptian Code of Civil Procedure currently provides that court appearances should be scheduled for 15 days after servicing of the complaint. \textit{Egypt Code Civ. P.} 66. In order to give the parties more time to gather their evidence, this time should be extended to 30 days. In addition, Article 66 allows for extensions to be granted of up to 3 months for those required to travel to appear in court. One way to limit the administrative time allocated to granting extensions would be to grant automatically an extension of two months to any defendant not residing within a specified radius of the court. \textit{See also Conference Report, supra} note 12, at 18.

\(^{160}\) This should build on pre-existing judicial authority under Article 65 of the Egyptian Code of Civil Procedure, by first notifying the parties as to their obligations and, second, the penalties that may be imposed upon failure to meet the statutory requirements. Article 65 provides in pertinent part that the plaintiff must pay all fees and submit copies of the complaint, all relevant documents and all other necessary support for his claim to the court and that the defendant must submit to the clerk a written submission of his defense. \textit{Egypt Code Civ. P.} 65. The penalties may solve the problem of non-compliance. Forcing the parties to appear with such evidence at the first meeting will eliminate the administrative problem of the courts’ obligation to copy and distribute every new document to each party. \textit{See also Conference Report, supra} note 12, at 18.
Step Two: The Case Manager provides the parties with a standard form (in simple, layperson's language) that explains the procedural rules relating to the litigation schedule, including subsequent appearances, the conditions to be satisfied for recommendation of Judicial Mediation, the Judicial Mediation schedule (if applicable), the closure of evidentiary submissions, and court hearing dates. The standard form will contain a list of penalties the Case Manager may recommend to the judicial panel for failure to comply (e.g., dismissal or default judgment for failure to appear, foreclosure of a claim or defense for failure to submit evidence or to meet a time limitation, or civil penalties for repeated violations).

Step Three: Case Managers will order the parties to confer ("Order to Confer") in their choice of Judicial Mediation or normal litigation, consistent with the case management schedule. If the parties fail to choose Judicial Mediation within ten days, the litigation will proceed in due course before the judicial panel according to the schedule established by the Case Manager. If the parties elect to engage in Judicial Mediation, the Case Manager will refer the parties to Judicial Mediation, and Judicial Mediation will proceed by court order. By means of a standardized questionnaire, Judicial Mediators will certify their opinion that the mediation process should (or should not) continue for limited periods of time beyond the initial authorization. Judicial Mediation will be confidential, and attendance by the parties will be mandatory. Accordingly, the Judicial Mediator and the parties will be required to sign formal, standardized confidentiality agreements, which stipulate penalties for breach of confidentiality.

Step Four: If at least one of the parties fails to elect Judicial Mediation within ten days, the case proceeds under the direction of the Case Manager. If both parties consent to Judicial Mediation, the Case Manager then issues a standard order (the "Judicial Mediation Order") assigning a Judicial Mediator, establishing a calendar of a maximum of sixty days for same, and provides a standardized description in simple, layperson's language of the process and obligations of the parties (e.g., attendance, preparation of evidence, and confidentiality). The Judicial

161. In order to avoid another bottleneck of procedural delay, parties should be granted only one request to remove a Judicial Mediator for an alleged conflict of interest or breach of confidentiality, which request must state and prove material grounds of the allegation. The Case Manager will make the determination as to removal, and it will be non-reviewable. See CONFERENCE REPORT, supra note 12, at 19.

162. Article 64 of the Egyptian Code of Civil Procedure allows for a judicial order to mediate. EGYPT CODE CIV. P. 64. However, due to procedural aspects of Article 64 that are outdated (for example, allocations of responsibility to political committees that no longer exist), Article 64 would require revision for court-appended mediation of the sort established herein. Id. See also CONFERENCE REPORT, supra note 12, at 19-20.
Mediation Order authorizes at least one appearance before the Judicial Mediator. Subsequent meetings may be approved only upon certification of the Judicial Mediator that the continuation of mediation will be productive. The Judicial Mediation Order contains an attachment with a standardized list of questions to be asked by the Judicial Mediator to give the parties an opportunity to prepare for said mediation sessions.

This second set of steps serves a number of important purposes. This stage allows the Case Manager to ensure proper service, to require party appearances, and to explain to the parties themselves, rather than just their legal representatives, the procedures of the courts, including the mediation option. The Order to Confer requires the parties to communicate, even if to decide not to pursue mediation, and if the parties elect Judicial Mediation, these procedures incorporate the Judicial Mediation process into the regular litigation schedule. The parties and their lawyers will receive a strong message that a judge is in charge of the administration of the case and that they will be subject to scheduled appearances by the court and sanctions for non-compliance.

(iii) *The Judicial Mediation*163 (if applicable)

Step One: The Judicial Mediator and the parties (including their legal representatives) sign a standard confidentiality agreement containing explicit reference to resulting sanctions if confidentiality is violated by the neutral or other parties. These sanctions will be applied to the parties in the sole discretion of the judicial panel upon recommendation by the Case Manager.164

Step Two: The Judicial Mediator reviews a standard questionnaire with each party. The Judicial Mediator records (for his eyes only) verbal answers to the following questions posed to each of the parties:

a. What are the relevant facts of the case?
b. What claims/defenses do you have?
c. How much in damages is the claim worth?
d. What evidence do you have to support your position?
e. Which legal authorities support your position?

Step Three: After the parties have heard from each other, the Judicial Mediator meets with each party privately to discuss the party’s

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163. Given the expected lack of courtrooms and office space available for this new process, the Ministry will utilize the courts after 3 p.m., when they are not in session. See *Conference Report*, supra note 12, at 20.

164. Sanctions against the violations of confidentiality by the Case Manager are to be handled internally within the Ministry of Justice. *Id.*
settlement position and then decides whether to pursue settlement negotiations in private caucuses with the parties or to provide an early evaluation of the merits and expected outcome of the claims.

Step Four: If settlement discussions are not fruitful, the Judicial Mediator provides neutral evaluation of the case.

Step Five: The Judicial Mediator then meets with each party separately or the parties together (as appropriate) to explore possibilities of settlement.

Step Six: After the first mediation session, the Judicial Mediator certifies to the Case Manager an answer to the following questionnaire by selecting among the following statements:

a. The case has settled; settlement agreement is attached for Primary Court approval.

b. The case is likely to settle in [one or two] additional sessions.
   (i) But I need no more time beyond the authorization; or
   (ii) Thus, I need an additional thirty days of authorization.

c. The case is unsuitable for continuation of mediation at this time and is hereby sent back to the Primary Court.

Step Seven: Depending on the foregoing questionnaire answers from the Judicial Mediator, the Case Manager issues an order, as appropriate:

(i) approving the settlement agreement and dismissing the case;
(ii) authorizing an additional thirty days for the purpose of continued mediation; or (iii) recalling the case and the parties to the Case Managers' Office for the Second Meeting (see directly below) within thirty days of the last mediation session.

If elected by the parties, Judicial Mediation offers a significant opportunity for consensual settlements. Even when settlement does not result, the parties will have prepared their claims and defenses, learned more about comparative strengths and weaknesses in their legal positions, and identified the potentially dispositive issues demanding greatest attention.

(iv) The Second Meeting with the Case Manager

Step One: Assuming that either the parties do not elect Judicial Mediation, or that the mediation is not fully successful, the Case Manager meets with parties within thirty days of the first meeting or the most recent order, whichever is later, to ensure that (i) the parties reach agreement about the areas of agreement and/or disagreement, and (ii) the parties have gathered all of the necessary evidence to support their claims or defenses.
Step Two: Whether the case has gone to Judicial Mediation or not, the Case Manager asks the parties the same set of questions posed by the Judicial Mediator:

a. What are the relevant facts of the case?
b. What claims/defenses do you have?
c. How much in damages is the claim worth?
d. What evidence do you have to support your position?
e. Which legal authorities support your position?

However, the answers given in this session are not protected by confidentiality.

Step Three: The Case Manager records in writing the responses in summary fashion. This summary should be the first page of the case file to help prepare the judicial panel for later adjudication, if necessary.

Step Four: The Case Manager then invites the parties to submit any and all evidence in support of their claims and defenses, including evidence on damages. The Case Manager remains prepared to take oral testimony if the party chooses to provide it. After this second session, all submissions of evidence are disallowed, unless strong cause can be shown. Only one extension may be granted at that time; however, the specific length of time rests in the sole, nonreviewable discretion of the Case Manager.

Step Five: All submissions of evidence are then organized in the file for the judicial panel.

Step Six: A hearing date is set (according to the standardized schedule).

This stage finalizes the case preparation function, thus liberating the judicial panels from the ministerial tasks of receiving evidence and reducing the significant risks of delay present under the traditional process. In many instances, not only will the judicial panels receive files ready for a final hearing and disposition, but they will also be asked by the Case Manager to address key issues, such as affirmative defenses, that would not otherwise be heard until much later.

2. The Systemic Design: Institutional and Professional Development

The procedural reforms required systemic measures, including the creation of new institutional capabilities, structural checks on new procedural powers, and training for new professional roles. The Ministry

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165. As a conclusion of case preparation, this resembles the French process of Ordonnance de clôture, a ruling which brings the “pre-trial” phase to a conclusion. As a rule, with limited exceptions, no other evidence may be submitted after this phase. Ngwasiri, supra note 79, at 307.
identified two potential constituencies to implement the functional reform measures: (i) judges who already perform administrative functions within the court system, and (ii) retired judges who have the experience and respect necessary to conduct evaluations and mediations of civil disputes. Drawing on the Ministry’s identification of these groups as likely pre-existing resources for reform, the Ministry decided to pursue two institutional measures: the creation of a Case Managers’ Office, and the certification of retired judges as Judicial Mediators.

First, the Ministry will establish a Case Managers’ Office. The Case Managers’ Office will be led by a senior prosecutor, who will sit at the primary court level. Under him, a staff of judges will act as Case Managers at the primary court level and will report directly to the Chief Judge of the Primary Court. The staff of Case Managers will be judges of at least four years of experience and will be comprised of the pre-existing group of assistants to the Chief Judge of the Primary Court. Depending on the administrative need, the Chief Judge may appoint additional assistants. The Case Managers’ Office (at the Primary Court level) will be responsible for all new case management proceedings in

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166. The success of these reforms must be measured over time. In order to do so, the Ministry intends to develop a monitoring system to evaluate the time and expense saved by these reform processes. See Conference Report, supra note 12, at 12.

167. The Case Manager draws on the model of the criminal prosecutor in Egypt and is analogous to the U.S. Magistrate Judge. The Court of Cassation has "prosecutors"; however, they prepare cases on the legal merits. In contrast, the Case Manager will not prepare the cases on either the factual or legal merits. The Case Manager will be responsible for the procedural management of the case. Id.

168. At least in the first stages of development of this process, Judicial Mediators will be paid a modest sum by the court for their services. Later, depending on the success of this process, requiring private contributions from the parties to pay for the Judicial Mediator’s time should be considered. Id. at 13.

169. The precise number of judges serving in this capacity can only be determined after further study of the number of cases filed and the number of Case Managers sufficient to handle the caseload effectively. Such a study will allow the Ministry to avoid creating a bottleneck of backlog and delay in the Case Managers’ office itself. Id.

170. In order to maintain administrative continuity, this special body of Case Managers should not be subject to the normal rules of rotation between districts, courts and judicial panels. Id.

171. Although transferal of active judges to the newly formed group of Case Managers will reduce the number of judges available to adjudicate disputes, the Ministry believes that the specialization of this administrative function will significantly reduce the workload of the judicial panels, thus more than compensating for any short-term loss of judicial personnel. Id.

172. The scope of the Case Manager’s duties outlined in this Article has been inspired in part by U.S. case management procedures, in which the court becomes actively involved in the procedural development of a case in the early stages. Case management in the U.S. ordinarily begins by requiring the parties to meet and confer with one another shortly after the claim has been filed to: (i) discuss the merits, (ii) identify key issues; (iii) explore utilization of alternative dispute resolution; and (iv) to arrange for the efficient exchange of information. Counsel to the parties are then required to issue a joint written statement of the results of the meeting. Following this submission, the court holds a case management conference, in which
accordance with new parliamentary legislation and Ministry guidelines. Second, the Ministry will establish court-appended Judicial Mediation for all commercial and civil cases. Retired judges will be trained, certified, and selected to act as Judicial Mediators. Judicial Mediators will act in accordance with the procedures outlined above.

The procedural powers of the Case Manager are limited by several institutional measures. The reforms require that the Case Manager report to the General Prosecutor and Chief Judge of the Primary Court and that the Case Manager be certified as competently trained by the Judicial Center. Furthermore, legal checks and limits on Case Managerial powers require that (i) Case Managerial procedures must be authorized by law, where required; (ii) Case Managerial procedures and decisions must be constitutional; (iii) the Case Manager may not issue substantive rulings, indicate his views on the merits of the allegations or defenses, take testimony (unless all the parties consent), or resolve factual contradictions; (iv) the Judicial Panel may reject recommendations of the Case Manager; and (v) the Judicial Panel may seek or request evidence not gathered by the Case Manager.

No matter how well the reforms are designed, their effectiveness will depend on the competence and integrity of the new actors responsible for their operation. In this respect, training programs must be carefully designed to ensure that newly designated personnel have the requisite simulated experience prior to actual implementation. Further, in order to reduce the costs of training, future U.S. legal assistance must give priority to training the future trainers, so that the training programs are self-perpetuating. Finally, training and implementation must be constantly evaluated as the reforms are gradually implemented, first in a pilot project and then in a wider number of courts. Experience prior to national implementation should provide the basis for future training efforts and modifications to the reforms. Three steps toward the development of effective training programs have been approved by the Minis-
try of Justice. These steps involve: (i) consultation on the final determination of all case management procedures, including administrative practices, use of forms, session practices, etc.; (ii) seminars to train Egyptian judicial officers in the new processes; and (iii) development of a training course (including lecture, demonstration, and simulated clinical practice). The training programs will aim to train Egyptian trainers in order to phase out foreign assistance.


Case Management and Judicial Mediation also address the most critical causes of court congestion under the pre-reform Egyptian civil process. The Ministry anticipates that the implementation of each reform will significantly reduce backlog and delay in the Egyptian civil courts. First, Case Management specializes the responsibility for non-adjudicative processes, thus freeing the judges and judicial panels from unnecessary administrative burdens. This will also reduce the use of valuable court time for evidentiary requests, extensions, and other ministerial duties. Under Case Management, the case preparation and evidence-taking process will be shortened, consolidated, and conducted at an early stage, thus reducing discontinuity, fragmentation, and protraction. Second, because the Case Manager will not be responsible for decisions on the merits, judge-lawyer communication will be


177. An important feature of these reforms is that neither judges nor case managers will conduct the mediation or settlement discussions themselves. Empirical evidence developed in U.S. studies do not convincingly indicate that judicial settlement conferences reduce backlog and delay in the courts. See Menkel-Meadow, For and Against Settlement, supra note 54, at 493–94, and studies cited therein, such as Flanders, supra note 49 and Steven Flanders, District Court Studies Project Interim Report (1976); Menkel-Meadow notes that studies of this nature still encounter serious methodological and definitional problems. Menkel-Meadow, For and Against Settlement, supra note 54, at 494. For a more recent discussion of magistrates in a mediation role, see Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712 (1994).

178. The Ministry is well aware that through the Case Management reform it is addressing two current communication problems: lawyers in litigation do not talk to one another, and for fear of undue influence, judges and lawyers are not permitted by law to communicate at all. The order to confer will require lawyers to speak to one another, and the Case Management conference will require discussion to take place between judges (not acting in their formal capacities as members of a judicial panel) and lawyers. Concerns have been raised about the potential for abuse of the Case Management powers resulting in prejudice to the parties, without the review of the courts. The Ministry has considered these concerns and addressed them by (1) limiting the Case Management powers to purely administrative functions (for example, summoning the parties to appear, collecting the submitted documentation, ordering the parties to confer on Judicial Mediation, scheduling potentially dispositive hearings), and (2) recommending (not enforcing) sanctions. For each of these powers, the judicial panel’s review provides a check and limit. The Case Manager does not have the power to make binding judgments regarding the court’s competence or jurisdiction. Moreover,
enhanced, and the judicial power to enforce schedules and deadlines will increase. Third, Case Management will be likely to increase the number of consensual settlements by requiring the parties to face the likelihood of adverse decision more quickly. Finally, specialization of managerial functions will allow judges to avoid allegations that procedural decisions reflect prejudice in respect of the merits. By institutionalizing the Case Management function, the duplication of preparation caused by the judicial rotation system will also be alleviated.

The Ministry expects that through the availability of Judicial Mediation, caseloads themselves will decrease because a greater number of disputes will be resolved consensually. This will reduce the need for court time before the judicial panels, allowing them to focus on other cases. Second, parties that elect to pursue Judicial Mediation, even if unsuccessful at reaching settlement, will have prepared their claims and defenses sufficiently well to merit a speedier determination by the judicial panel. In some cases, Judicial Mediation may render partial settlement or stipulations of agreement on prior issues of disagreement, thereby significantly shortening the litigation process because the issues to be resolved become fewer. Third, by utilizing retired judges, Judicial Mediation will alleviate concern about the competence and ethics of nonjudicial neutrals. Fourth, by making the decision to mediate voluntary, this reform will not impede access to court adjudication. Finally, Judicial Mediation will also provide preliminary experience with the mediation of complex civil and commercial disputes. Private mediation facilities may then be designed based on that valuable experience.

CONCLUSION

With the growth of trade and the concomitant liberalization of national economies, the modernization of legal processes to resolve civil and commercial disputes more efficiently has become a pressing need. The effective implementation of substantive law reforms aimed at the maintenance or creation of market-based systems requires civil justice process modernization. This Article provides a model functional and systemic approach, applied with practical methods through a collaborative U.S.-Egyptian effort to meet this challenge. Therefore, the approach,

in the case of alleged prejudice, the Case Management function does not eliminate any rights to appeal final judgments on allegations of prejudicial error by the Case Manager. It is important to note that interlocutory appeals will not be available because to do so would allow the parties to delay interminably even the Case Management process.

179. Some U.S. legal experts believe that an early trial date is a significant cause of early settlements. See Conference Report, supra note 12, at 8.
methods, and specific recommendations adopted by Egypt may provide a useful basis for others seeking to modernize their civil justice processes.
APPENDIX A

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UNITED STATES OF AMERICA (U.S. Embassy/USIS officials): Robert Pelletreau, Assistant Secretary of State for Near-East Affairs, former U.S. Ambassador to Egypt; Edward S. Walker, U.S. Ambassador to Egypt; Wesley Egan, Deputy Consul Minister, USIS Egypt; Edmund Hull, Deputy Consul Minister, USIS Egypt; USIS Executive Officers: Robert Morris, JoAnn Quinton Samuels; USIS Political Affairs Officers: Marjorie Ransom, William Cavness, Kenton Keith; USIS Cultural Affairs Officers: Francis Ward, Gilbert Sherman, Janet Wilgus; USIS Deputy Cultural Affairs Officers: Anne O'Leary, Philip Walker, Dana Shell; Foreign Service National Magda Barsoum.

ISDLS: Executive Director Stephen A. Mayo; Chief Justice Malcolm M. Lucas, Supreme Court of California (Ret.); Justice Edward A. Panelli, Supreme Court of California (Ret.); Chief Judge Clifford Wallace, U.S. Court of Appeals, Ninth Circuit (Ret.); Judge Pamela Ann Rymer, U.S. Court of Appeals, Ninth Circuit; Judge A. Wallace Tashima, U.S. Court of Appeals, Ninth Circuit; Chief Judge Wm. Matthew Byrne, U.S. District Court, Los Angeles; Chief Judge Thelton Henderson, U.S. District Court, San Francisco; Judge Lourdes G. Baird, U.S. District Court, Los Angeles; Judge Eugene Lynch, U.S. District Court, San Francisco; Judge Fern M. Smith, U.S. District Court, San Francisco; Magistrate Judge Edward A.
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