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RESEARCH ARTICLE

Practice Insight: Court-connected mediation in Jordan—Considerations for choosing a mediator

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Abstract

A model of court-connected mediation following Western practice was adopted in Jordan in 2003. Its success has been limited. This practice insight addresses the current mediation legislation in Jordan in relation to civil and commercial disputes. The law allows the parties three options in choosing a mediator, one being a judge mediator. This raises important considerations for parties when they are choosing a mediator. The practice insight addresses these considerations with a view to improving party awareness when exercising their choice of mediator. It also takes the opportunity to suggest legislative changes to improve the uptake of mediation.

1 | INTRODUCTION

Mediation is deeply rooted in Jordan having existed as a conflict resolution tool in traditional tribes. Tribe is a term used to signify the belonging to a kinship group (Gregory, 2003). As a general rule, every Jordanian citizen, whether Muslim or Orthodox Christian, is considered as belonging to a tribe. Even the Royal Family, who are believed to have descended from the Prophet Muhammad, came from the Hashemite clan of the tribe of the Quraysh (Bin Muhammad, 1999). Each tribe has a male leader, who is chosen from one of the Nobel families

in the tribe, and he is called "*Al-Sheik*." *Al-Sheik* is a leader holding the power to settle the problems that may arise in the tribe and to maintain and achieve social harmony among the tribe's people (Al-Serhan & Furr, 2007). If disputes arise between the members of a tribe, *Al-Sheik* will try to settle the dispute using amicable means through a process that is often referred to as mediation.

In addition, Islam, which is the main religion of Jordan, also supports and adopts a form of mediation to ensure the smooth running of Muslim affairs (Zahidul-Islam, 2012). In Islam, the court of law not only constitutes the ultimate truth-finding mechanism, but also provides dispute resolution known as *Sulh* a form of peacemaking (Pely, 2010). This Islamic approach to mediation in family divorce and separation disputes was recognized in the *Ottoman Family Rights Law* 1917. Under this law a judge is bound to refer the spouses to a mediator/arbiter, who is subsequently obliged to help the parties amicably solve the dispute to hopefully maintain the marital union. This special process has existed historically and is based directly on the Quran (Surah An-Nisa/verse 35) which requires that two arbiters be appointed in such a dispute, one each from both the husband's and wife's family. It is believed if the couple seek peace Allah will bring them reconciliation, for Allah has full knowledge, and is acquainted with all things. If reconciliation cannot be reached, they will be separated.

Both the religion of Islam and tribal culture prevailing in Jordan have crafted the current form of mediation used by most Jordanians. The process parallels an evaluative mediation model, in which the third party (mediator) follows the principles of Islam in a more direct advising of the parties, including suggesting a solution (Alsaleeby, 2010).

Since Jordan's independence in 1946 many legal and economic reforms have occurred, including privatization of certain government institutions. This has been influenced by the World Bank and International Monetary Fund, to create a competitive global market (Harrigan et al., 2006). The signing by Jordan of the United Nations Convention on International Settlement of Agreements Resulting from Mediation (2018) (the "Singapore Convention") on August 7, 2019, is an indication of the legal reform enabling business growth and economic prosperity. The Singapore Convention provides a globally recognized enforcement mechanism to solve cross-border commercial disputes through mediation (Eunice, 2019; Schnabel, 2019). Jordan is one of the earliest Arab countries to move in this direction (Koleilat-Aranjo & Nair, 2019), thus demonstrating Jordan's attempt to embrace the movement toward non-litigious dispute management.

Conscious of this long history, this insight turns to the current regulation of mediation in Jordan in relation to civil and commercial disputes, where the legislature of 2003 has, as in many other countries, formally legislated for mediation as a legitimate method of dispute resolution in civil and commercial disputes. This law allows the parties to choose from three categories of mediators, including a judge. The legislation raises several points that touch the hallmarks of mediation as practiced in different mediation models internationally. This insight addresses the legislated options for parties and the considerations parties should keep in mind when choosing the most suitable mediator and model for their dispute. Finally, it presents options for legislative improvement.

2 | THE COURTS AND LAW OF MEDIATION

Parallel to economic development and legislative reforms, the Ministry of Justice reviewed and reformed its court proceedings to enhance their efficiency, by creating and establishing new

forms of legislated dispute management such as arbitration and mediation (Hammouri et al., 2007). Jordanian courts follow the inquisitorial style, according to which the judge plays a vital role in preparing evidence, questioning witnesses to establish the truth, and then deciding a matter. Impressed with the international movements for managing disputes other than through litigation, Jordan was attracted to the successful American experience of adopting mediation in that country. The legislature chose this process, as Jordan already had a traditional acceptance of a process referred to as mediation (Al-Qatawneh, 2008). Thus, in 2003 the Jordanian legislature implemented mediation law as a pilot, restricted to the District of Amman in the first instance. The first law of mediation was the *Mediation in Resolving Civil Disputes Act*, (No 37) 2003, which was replaced with the *Mediation for Settlement of Civil Disputes Act*, (No 12) 2006 ("the Act") as further amended in 2017.

The Act created an independent department named the Mediation Department, which was established in Jordan on June 1, 2006, to operate within the court structure (Art 2). The first Mediation Department was at the Amman Court of First Instance, perhaps providing no surprises in leading in the number of matters going to mediation, reported to be 498 cases in 2021 (Judicial Council Annual Report on the Performance of Courts, 2021, p. 63) ("Report 2021"). The department now specializes in applying mediation processes in civil cases in every first instance court in Jordan (Art 2). More than 40 judges and lawyers initially received training by the American Bar Association in the facilitative mediation model in which the mediator controls the process but does not offer advice or options, instead leaving the parties to control the content. Judges and lawyers were trained over a 40-h mediation course and then accredited by the minister of justice to work in the Mediation Department as judge mediators and specialized mediators (Cole et al., 2008, p. 8). The list of approved mediators is maintained by the Ministry of Justice. Alternative to these two types of mediators, parties are free to nominate their own chosen mediator. These can either be Jordanian nationals or foreign mediators (Art 3B). There are no specific training or accreditation requirements for mediators in this category apart from the person being known as "honest and neutral" (Art 2B).

The United States Agency for International Development (USAID, 2011) April 2011 ("Report 2011") indicates that "[a]lternative dispute resolution (ADR) services are effective yet underutilized" in Jordan (6). The report goes on to note that "[w]hile high caseloads can be mitigated by an effective system of mediation, this still has not caught on in Jordan ...less than 1 percent of all cases go to mediation" (Report 2011, p. 22). The reasons why mediation in Jordan has seen a slow growth can only be speculated upon. Certainly, further promotion and education would address a lack of awareness of the availability and benefits of using mediation among the public and lawyers. The 2021 Report states that of the 113,276 first instance civil cases, only 1129 were referred to mediation (958 reaching settlement) (p. 63) and only 905 matters were referred in 2020 (pp. 42, 45). One may surmise from these figures that where parties agree to mediation, they will be more ready to reach a settlement. Mediation has gained little promotional coverage with citizens having a low awareness of their legal options (Report 2011, p. 13). Jordanian lawyers can overcome a fear of receiving less money for their services by helping their clients see the benefit in attempting mediation to settle disputes and thus promote it to their clients.

The Act empowers parties to consent to mediation either conducted by judges, or for judges, with party consent, to send cases to private mediators. The judge's role has not been as active in this encouragement as was anticipated (Report 2011, p. 30). The legislation does not set forth a clear mediation process adopting a particular model to be followed, leaving it largely up to the individual judge or mediator. Along with the lack of promotion of mediation in Jordan, there is

no legislative encouragement requiring mandatory or quasi-mandatory mediation as a first step before proceeding to litigation as occurs in some countries (Waye, 2016). Jordanian lawyers do not have an obligation to inform their client about the benefits of using mediation in their disputes as, for instance, occurs in Australia (*Civil Dispute Resolution Act* 2011 (Cth)). The *Civil Dispute Resolution Act* 2011 provides an example of encouragement to utilize mediation or dispute management other than litigation that is not as directive as a mandatory requirement. It does this through a mechanism requiring notice being given of the genuine attempts made to resolve a dispute before resorting to litigation and imposes cost consequences not only on the parties but also their legal advisors if they do not make such genuine attempts (Gormley, 2013, p. 111).

Despite the initial training being in a facilitative model, the evaluative model tends to dominate practice in Jordan. Perhaps this relates to the cultural acceptance of *Sulh* which is a directive process. It also appears the mediation may take days.

> ...the average of the duration in general was 13 days, starting from the date of receiving the case at the Mediation Administration until the date of its completion. Out of which about (4) days is spent in the preparation stage, and about (9) days spent in the mediation sessions' stage along with the finishing process (Report 2021, p. 63).

As a general rule, a case is brought before either a magistrate judge or a case management judge. The Act states that after meeting the parties and their representatives, the chosen judge can refer the dispute to a mediator if the parties consent. It describes the process of mediation as court-connected mediation. *The Jordanian Civil Procedures Act* (Art 59) provides the case management judge with the authority to refer the dispute to mediation at the request of the disputants (Gensler, 2010). This procedure follows "the multi-door courthouse," providing "a single courthouse where cases are screened and then referred to the appropriate dispute resolution doorway or portal" (Warren, 2010, p. 81). When the parties submit their dispute to the court, the judge will assess the dispute to determine if the case is appropriate for using mediation or not. Then, the judge will ask the parties if they wish to refer their case to mediation (Art 3B). The disputants can also inform the judge that they want to manage their dispute using mediation. The Act refers to more than one type of mediator. The choice is between

1. a mediator judge, who is an appointed judge nominated from the Magistrates Court or the First Instance Court by the Chairman of the First Instance Court (Art 3A), or
2. a private mediator who is appointed from a list of retired judges, lawyers, and experienced professionals known for their impartiality and integrity, put together in advance by the Head of the Judicial Council, (Art 2), or
3. a mediator chosen by the parties from outside both prior categories (Art 3B).

The mediators in option 2 may be lawyers, professional dispute management practitioners, psychologists, or retired judges and those in option 3 may be any honest and impartial person. The Chair of the Judicial Council may appoint mediators "on the recommendation of the Ministry of Justice ... even though they have not been specifically trained as mediators" (Report 2011, p. 29). Such mediators may prefer to use the evaluative model, based on their expertise in the dispute field and focus on the disputants' rights. Even if training in a facilitative mediation

model is adopted the court-connected mediation tends to follow an evaluative model, particularly where the parties take the first option of choosing a judge mediator (Al-Rashdan, 2016, p. 50; Alsaleeby, 2010). This may be induced by Art 6 of the Act, which provides a mediator can take the appropriate measures to bring the disputants' views closer in order to reach a mutually acceptable solution. Further, Art 6 gives the mediator the power to express their opinion, evaluate the evidence, present the legal evidence and case law to facilitate the mediation. As there is no accreditation system in Jordan, as exists in certain other countries (see Mediator Standards Board, Australia; https://msb.org.au/about-msb), there are no clear guidelines as to how a mediator has been trained or which model the mediator will use.

As noted in Art 2B of the Act, no mediator training standards are provided, other than a requirement they be an honest and impartial person. This means that they can use their expertise in solving the dispute through advising the parties what they would likely receive if their rights in the case were to be decided by a judge. This may lead to an overbearing tone in the mediation process with diminished party empowerment. However, some flexibility and credibility remains in this process given the disputants still have the right to appoint their own mediator and resolve a matter in confidence (Art 3A). That requires preferably that the disputing parties have some knowledge of the different models mediators can adopt.

The Act confirms that the mediation process will be conducted in response to a court order. It requires that the mediator must send a report to the court noting the outcome of the mediation once they have completed the process (Art 7B and 7C). If the mediation is unsuccessful, the mediator must notify the judge with this result. The law does not suggest any specified form in which this advice is to be provided nor that specific reasons for the failure be given. However, Arts 7D and 7C do require reporting of the commitment by both parties and their legal representatives to attend, stating that if the failure of agreement is because of the parties' or their legal representatives' failure to attend the mediation sessions, then a monetary fine can be imposed. This would imply that the report must show the reason why the process has failed. Judges have a discretion to order the fine be paid by a party or their legal representative if they contributed to the failure of the process, such as failing to attend mediation (Art 7D).

This legislative mechanism never precludes the parties' option of using private mediation outside the court by appointing their own mediators, either before or after the matter reaches the courts. These private mediators may or may not have specialized mediator training. The law provides that parties may reach settlements outside the courts and have their agreement recorded in the minutes of the court session as their reconciliation agreement. If signed by both parties or their representatives, a court judgment will be recorded as such and both parties will be provided with a copy of it as if it was a court decision (Civil Procedure law of Jordan of 1988 Art 78).

The lack of education provided to Jordanian citizens in the different options and models impacts on their ability to make informed choices. The challenges revolve around issues such as differences in mediator styles and the citizens' understanding of what to expect in mediation and how the different models work. This is further inhibited by the lack of formal training provided to mediators in accountability, ethics, models and procedures to internationally recognized standards (Report 2011, p. 29). This invites mediators in Jordan to adopt a range of styles and models in a hybrid form within the one mediation session, depending on the dispute. These styles draw on the different models and vary depending on the level of mediator intervention in influencing the parties' resolution (Alexander, 2008). The next section expands on the different models available to parties.

3 | PARTY CHOICE OF MEDIATION AND THEIR DIFFERENCES UNDER THE MEDIATION FOR SETTLEMENT ACT, 2006

Differences between choice of mediator requires parties to understand the consequences of their choice. For instance, if parties choose the third option, they are required to pay for the mediator as agreed between the mediator and the parties. This is based on the law specifying the sums that are to be paid to the mediator involved (Art 9). This differs from mediation performed through a mediator judge, which is free. The judge will receive their salary regardless of their involvement in mediation activities within the mediation administration. However, if choosing a mediator judge, the Act prohibits the judge from hearing the matter at a later stage as a judge if mediation fails to reach its goals (Art 10). This restriction does not apply to other types of mediators, who may act as private arbiters in the dispute.

Despite parties being able to freely choose any of the three types of mediators, there is a tendency for parties to choose the mediator judge, especially when mediation is referred within the realm of the court. This may be because judges are thought of as impartial and non-biased decision-makers carefully selected to occupy their positions. In a society where tribal mediations look to the head "man" to resolve their dispute, a judge's authority may attract respect and trust from disputants' perspectives. Further, when the parties accept mediation to solve their disagreements, but do not know who to select to address their case, then the case management judge will mostly guide them to select a mediator judge.

Evaluative mediation involves the mediator aiming to help the parties toward a solution according to a fair legal process. Parties selecting a mediator judge or a mediator utilizing an evaluative model are seeking guidance on the possible legal solutions if the matter were to proceed to court. This way, they can evaluate their chances of success if they were to proceed to litigation. If the outcome is less than they anticipated, they can then more quickly and privately agree on a settlement, feeling their legal rights have been honored. However, some evaluative mediators may simply recommend a range of possible legal outcomes that the parties can subsequently choose from, as a less directed model of evaluative mediation, using less intrusive techniques, but still providing advice (Laflin, 2000, p. 493).

If using a judge mediator or a mediator using an evaluative model, parties ideally should have knowledge of the key philosophies underpinning mediation such as mediator impartiality, confidentiality, party empowerment, voluntariness and party control over the resolution. Exon (2008) states that when the mediator suggests a solution or assesses the parties' options, they "will, in all likelihood, favour one party to the detriment of the other. Once [impartiality] is jeopardised, so is a party's trust in the mediator" (p. 603). Indeed the parties are not reaching their settlement based on their own generated options, and a suggested option can risk unraveling and thereby generating further disputes. However, where parties jointly agree to the mediator, it is challenging to argue that mediator impartiality is required, other than to expect that the mediator would fairly assess the parties' claims and would suggest solutions based on the law, not their personal values or bias (Sweify, 2017, p. 131).

McDermott and Obar (2004) conducted research into the different models of mediation, concluding that a facilitative mediator led to higher party satisfaction with procedural due process and distributive concerns (p. 107). However, they also concluded that where evaluative mediation occurred, in which parties had legal representation, settlement payouts tended to be higher although they were conversely lower than in cases where parties had no legal representation (p. 107).

A point of concern in opting for a judge mediator is uncertainty in the way a judge will view their role as a mediator. In other words, the lofty position or occupation of a judge's authority is considered sacred and untouchable. No one is permitted to even talk in a judge's presence (while acting as a judge) without their permission. Any act that may be considered disrespectful of a judge constitutes an act of contempt of court and is subject to sanctions that may include imprisonment. This adds to the sanctity and supremacy of a judge. Meeting the parties in a private session may compromise the public perception of arm's length justice and damage confidence in the judiciary system. When acting as a mediator the judge needs to be prepared to address the parties in an amicable and friendly manner, rather than authoritatively, to assist their negotiation.

An evaluative model may compromise voluntariness (Alsaleeby, 2010) as this model places less emphasis on parties expressing their emotions and interests, or being able to generate creative options for management which go beyond those available in the law. A judge mediator may be tempted to end the process early, especially when faced with unruly or emotional parties, unless well trained in mediation practice. Parties wanting an ongoing relationship may have this improved through a facilitative mediation which enables expression of underlying emotions and assists in their learning to communicate better with each other. The potential risk is that evaluative mediators may be persuasive in encouraging the parties to adopt the mediator's view on how to resolve the dispute.

If a judge assesses a party's argument or position as strong, the party will be unlikely to accept any other solution believing they have a position supported by a formally appointed judge (Al-Serhan, 2009). Judge mediators may also have particular views on legal principles that may not yet be settled by the law, particularly in novel cases. In such mediations there is a risk they will promote a novel yet untested view of the law. So, the adopted process may not achieve the hallmark of empowering parties to reach their own fair and reasonable solution, and to adopt more collaborative communication that is acceptable to both and therefore likely to be sustained and supportive of ongoing relations.

Another point of difference between the choice of mediators is the time constraints governing the submission of the case briefs before them. While the brief memorandum of parties' claims or defenses must be submitted to the private mediator within a period not exceeding 15 days from the date of the referral, the law does not impose any period to submit the brief to the judge mediator (Art 4). It is suggested that this step may be included to ensure the parties are serious about their engagement when they participate in private mediation (Alsaleeby, 2010, p. 100). Such pleadings are kept in the case files in the court's hands giving a judge mediator access to the file from the outset (Art 4). The law does not give the private mediator access to the case file. Further regulation on access to the relevant file information may aid the process for private mediators, particularly where one or both parties fail to provide the mediator with the required information. Encouraging open disclosure may lead to faster agreements.

Making the position clear regarding confidentiality and that mediator judges cannot subsequently hear a matter that does not resolve, is also important for parties to appreciate. A further unknown is the influence of the reputation of a judge on fellow judges. If judges know each other and read a report from a judge mediator that a matter could not be resolved, it could lead to an unconscious bias in the matter. That such mediator judges cannot act as a judge subsequently in the matter, if it does not reach agreement (Art 10), may also have resource implications for the judiciary. A judge is an essential judicial resource, and this is placed at risk if they are instead

redirected to mediations. To overcome this resource issue, the legislature's encouragement of private mediators may help to decrease the pressure on valuable adjudicative resources.

On the positive side when a judge acts as a mediator, they can help guide the parties to a clearer understanding of their differences in a confidential process that gives a satisfactory outcome, resolving disputes quickly. This not only saves the court's resources, but also the litigants' time and money. The traditional respect by parties for judges and wise elders tends to ensure the cooperation necessary to encourage a solution (Warren, 2010, p. 77). Despite such an advantage, parties should exercise caution and be clear on the advantages and disadvantages for their dispute needs when selecting a mediator.

4 | RECOMMENDATIONS FOR IMPROVING MEDIATION IN JORDAN

The authors draw from the discussion in this insight to provide the following suggestions as possible ways forward to improve party uptake and understanding of mediation and its benefits in Jordan.

Judges who are supposed to deliver third-party decisions that end the disputes before them regardless of any consent made by the parties, are given another role by the mediation law in Jordan. Judges are to move away from their authoritative mission to determine a dispute and instead become engaged with the parties' feelings, emotions and futuristic relations and interests. Such a difference may be hard for judges and undermine their otherwise clear authority. This could be avoided by having only retired judges act as mediators under option one. This would lessen any chances of unconscious bias, improve concerns with lack of impartiality and parties feeling less empowered by a judge who acts in a more determinative way in mediation. It would also reduce any resource concerns regarding availability of judges to hear matters, being otherwise excluded where they have acted as a mediator.

Having to consider the parties' consent as a prerequisite to referring the matter to mediation may reduce the uptake of the process if parties are unaware of what mediation means and how it may benefit them. Should the Jordanian legislature adopt a mandatory or semi-mandatory form of mediation for referral, this would not only increase the number of cases being mediated but increase the public's awareness of the process and its benefits (Al-Rashdan, 2016, p. 80). Legislative incentivizing to adopt mediation as a dispute management method could occur by following examples such as Australia, or if need be, requiring more civil matters be mandatorily referred for mediation. For instance, parenting disputes in Australia and other commercial disputes require mandatory mediation (McNamara, 2019). While this may be perceived as offending party voluntariness, parties can still choose their level of participation in the mediation. Over time this mandatory position can change once mediation is accepted as a mainstream dispute management process.

The legislation can give clearer guidance on the model of mediation to be adopted, the process for submitting party information to the mediator and the limits and style of notifying whether a matter has been resolved or not. This would give parties confidence in the overall process and the level of confidentiality they can expect.

Finally, Jordan needs to regulate mediator training and accreditation to ensure appropriate professional standards are practiced while educating the public, so parties are aware of the processes and models in exercising their personal choice. This should also more generally assist

with making the populace aware of the benefits of choosing mediation to manage their disputes.

5 | CONCLUSION

This insight note has addressed the Jordanian law allowing parties to choose their type of mediator, including a judge mediator. It has indicated parties should be provided with awareness of the differences depending on the model of mediation used. While there are some advantages there are also possible disadvantages for a model be it evaluative or facilitative mediation.

The insight has considered the choices to be made by parties when consenting to and selecting a mediation option. It explains mediation models such as the evaluative and facilitative and their impact, so that parties can exercise their choice with greater knowledge. Lawyers assisting disputing parties are encouraged to consider the benefits and disadvantages when advising clients in choosing their mediator. Legal education in universities should include knowledge and practical training in the use of mediation and other dispute management options. This insight suggests possible ways forward through legislative adjustments. More education around what mediation offers and training and accreditation of mediators will also ensure the approach to dealing with disputes has a beneficial and lasting place in Jordan's legal system.

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