# AN EVALUATION STUDY IN MEDIATION:
# A COMPARATIVE STUDY BETWEEN AUSTRALIA AND JORDAN

A Thesis submitted by

Wesam Faisal Al Shawawreh

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# ABSTRACT

This thesis investigates the process of mediation as a Dispute Resolution (DR) process within the Australian and Jordanian legal systems. Mediation is an alternative solution for the traditional adversarial judicial proceedings. This study broadly defines mediation as a structured process, which engages a third party to help the disputants to address their dispute and hopefully prevent future problems from arising. The study focuses on the model of mediation used and the role of the mediator in controlling the process.

Australian mediation has been operating for much longer than in Jordan. Consequently, this thesis aims to learn from the Australian experience and thus gain knowledge that can assist with the growth and development of a fledgling mediation system in Jordan. The study discusses the challenges that mediation faces in Jordan. The development of the mediation system in Australia has been a largely successful experience. Drawing on this experience, the thesis explores the process in both countries in a comparative manner to learn of possible efficiencies, and to improve the delivery of mediation in Jordan. The research adopts a comparative methodology using a contextualised approach that requires an understanding of the legal and cultural differences and similarities between Jordan, as a civil law country, and Australia as a common law country. It demonstrates the differences between the Australian and Jordanian legal systems together with cultural differences in order to provide context for the operation of mediation. It explores, in particular, the mediation models utilised and the influence of different cultural considerations relevant to this process. Evaluating the pros and cons of mediation in Australia and Jordan provides new insights into an important area of civil procedure and dispute management in both countries.

# CERTIFICATION OF THESIS

This Thesis is the work of Wesam Faisal Mahmoud Al Shawawreh except where otherwise acknowledged. The work is original and has not previously been submitted for any other award.

Principal Supervisor: Pauline Collins

Associate Supervisor: Bakr Abdel Fattah Al-Sarhan

Student and supervisors' signatures of endorsement are held at the University.

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# ABBREVIATIONS

| Abbreviation | Explanation |
|---|---|
| **AAT** | Administration Appeals Tribunal |
| **ACDC** | Australian Commercial Disputes Center |
| **ACDC** | Australian Commercial Dispute Center |
| **ADR** | Alternative Dispute Resolution |
| **ADRAC** | Australian Dispute Resolution Advisory Council |
| **AIDC** | Australian International Dispute Center |
| **ATSI** | Torres Strait Islander |
| **Cth** | Commonwealth |
| **DR** | Dispute Resolution |
| **HCC** | High Context Communication |
| **IAMA** | Institute of Arbitrators and Mediators Australia |
| **JOR** | Jordan |
| **LCC** | Low Context Communication |
| **LEADR** | Lawyers Engaged in Alternative Dispute Resolution |
| **NADRAC** | National Alternative Dispute Resolution Advisory Council |
| **NMAS** | National Mediator Accreditation System |
| **NTA** | Native Title Act |
| **QCAT** | Queensland Civil and Administrative Tribunal |
| **QLD** | Queensland |

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# Chapter 1: Why Research Mediation in Jordon and Australia

## 1.0 Aims and Objectives of the Research

This thesis investigates the process of mediation as a dispute resolution method used within the Australian and Jordanian civil legal systems. Mediation embedded in the civil and commercial disputes in Jordan is recent. It first occurred in 2003 with the passing of the *Law of Mediation* and was replaced by the *Mediation for Settlement of Civil Disputes Act*, 2006 which has been further amended in 2017. This research investigates both countries' experience, the types of mediation used, and in particular what has worked well and what can be improved. This knowledge will assist with the growth and development of a fledgeling mediation system in Jordan. The study brings knowledge to both countries through investigating the details of mediation as practised and acknowledging areas where improvement can be made.

Mediation is a valuable method to manage disputes for all types of legal systems, including adversarial systems as practised in both Jordan (a civil law country) and Australia (a common law country). This thesis provides a comparative analysis by addressing the similarities and differences in the jurisdictions of Jordan and Australia. It explores mediation as a structured process used to help the disputants manage and possibly resolve their dispute. The thesis focuses on the role of the mediator, and their powers and abilities to achieve their task in this process. More specifically, it investigates a particular type of mediation known variously as court-mandated, directed, approved or appointed mediation. For the purpose of this thesis, the term court-mandated is used. This term means a judge has the power to refer the case to mediation with or without the parties' consent.[1]

Mediation is regarded as a different approach from adversarial dispute resolution, which occurs through a litigious process. It differs distinctly from the traditional adversarial judicial proceedings in which a third party makes a decision,

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[1] Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35 *University of New South Wales Law Journal* 929.

and usually, one party is seen as the winner. Mediation is generally conceived as a voluntary, non-mandatory process for dispute resolution, in which a neutral person assists the parties through a communicative process to try and resolve their own dispute to reach a negotiated solution.[2] Variations of the basic facilitative approach exist and are explained further in the thesis. These include models such as facilitative, settlement, evaluative, and transformative mediation.

The primary objective of carrying out the mediation process is to assist the disputing parties in creating an atmosphere of understanding; contribute to the promotion of a culture of dialogue and social peace; urge the parties to participate positively in the creation of compromises, and bring their understanding of each other closer.[3] Mediation operates within a legal framework to try to mutually resolve a dispute before an independent third party decision-making process is used. Mediation is a primary method for managing disputes in the Australian civil litigation arena.[4] It ensures the parties have access to justice in conditions that can be reassuring and empowering to them, as they are encouraged to determine the outcome to their own issues and can learn to resolve their disputes more successfully. In Australia, mediation is so ubiquitous that the movement now prefers to use the label Dispute Resolution (DR) rather than the initial phrase, Alternative Dispute Resolution (ADR). Considered to be an established part of the mainstream environment for legally addressing disputes in Australia, this thesis will adopt the label Dispute Resolution (DR).

Mediation experienced a number of developments in Australia which have contributed to the increase in its developement. Boulle [5] has noted that Australia has a wealth of experience in using mediation in different disciplines such as labour, commercial, civil and family disputes, with a now strong acceditation system for

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2 See, e.g., Nadja Alexander, 'What's Law Got to Do with It-Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) *Bond Law Review* 2; Bryan Clark, *Lawyers and Mediation* (Springer 2012) 15; Kairy Al Btanouny, *Mediation as Alternate Dispute Resolution in Civil and Commercial Disputes* (Dar Al Nahda, 2012) 30; Leonard Riskin, 'Decision Making in Mediation: The New Old Grid and the New New Grid System' (2003) 79(1) *The Notre Dame Law Review*.

3 Laurance Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2 ed, 2012).

4 Alexander (n 2) 2; David Hill and Peter Waters, 'Alternative Dispute Resolution in Australia for Insurance Related Disputes' (1994) 6(2) *Insurance Law Journal*, 2.

5 Laurance Boulle, *Mediation Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 349.

mediators.[6] Mediation was initially advanced in the Australian Commercial Disputes Center (ACDC), established in New South Wales in 1986, to solve commercial disputes in that state, and it then spread to other states.[7] This experience has helped to resolve immeasurable minor commercial disputes informally outside the court, to save time and promote commercial goodwill. Clark[8] states that Australia is 'a trailblazer'[9] in developing mediation, and it has become a part of all Australian jurisdictions at least from the mid-1980s.[10]

In 1995 the Commonwealth Attorney-General established the National Alternative Dispute Resolution Advisory Council (NADRAC) as a powerful independent advisory body to assist the government by generating research and publications advancing the pursuit of mediation. NADRAC was described as an independent institution,[11] devised to develop the DR system in Australia. This body advanced mediation through various valuable reports, for example *The Resolve To Resolve Report,*[12] and by developing a training and accrediation system.[13] The latter development was important to the achievements of DR in Australia, as it led to the establishment of the National Mediator Accreditation System (NMAS) in 2007 (updated in 2015) to create a standard for regulating practitioners in mediation.[14]

Commonwealth legislation was introduced as a result of the NADRAC report *Resolve to Resolve* in 2009,[15] which aimed to clarify the main features of DR, identify current issues for DR, and suggest suitable approaches for 'consistency [in] the DR

6 Ibid.
7 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002).
8 Clark (n 2) 12.
9 Ibid.
10 Alexander (n 2) 2.
11 Clark (n 2) 14 ; Lillian Corbin, Paula Baron and Judy Gutman, 'ADR Zealots, Adjudicative Romantics and Everything in between: Lawyers in Mediations' (2015) 38 *University of New South Wales Law Journal* 492; Tania Sourdin, 'Disputes Against Professionals' (Conference Paper, National Alternative Dispute Resolution Advisory Council (NADRAC) Business Conference, 2003).
12 National Alternative Dispute Resolution Advisory Council (NADRAC), 'The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction ' (2009).
13 Clark (n 2) 14.
14 Tania Sourdin, Alternative Dispute Resolution (Thomson Reuters, 4th ed, 2012) 2; David Spencer and Tom Altobelli, 'Dispute Resolution in Australia' (2005) 139 Cases and Materials, 1. See, National Mediator Accreditation System) NMAS updated in July 2015. <https://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>.
15 See, (NADRAC) (n 12).

practice and supporting innovation, flexibility and creativity in DR'.[16] The *Civil Dispute Resolution Act* 2011(Cth) came about as a result of NADRACs report, and it has imposed on parties a requirement to show to the court that they have taken 'genuine steps' to resolve their dispute before a court will hear the matter.[17] This has been a top-down approach by government, legislating to create a cultural shift within an adversarial dominated legal culture.

On the other hand, mediation in Jordan is a more recent phenomenon in civil and commercial disputes. Jordan has adopted legislative instruments introducing mediation in the law of magistrate courts, civil status laws and labour law, as an alternative method to litigation for resolving disputes before a court makes a third party determination.[18] Mediation was mooted in 1995 in a conference in Amman between the Jordanian Bar Association and the American Bar Association.[19] In 2003, Jordan adopted its first mediation legislation offering an alternative way of managing disputes. This was done through a limited pilot in the area of Amman, Jordan. The initial law of 2003 was amended with new laws introduced three years later, and then again in 2017.[20]

Mediation as a method of dispute resolution has a deep-rooted tradition in Jordan, in the form of Beoudin tribes holding a special council to solve their dispute.[21] Through this tradition, parties use a tribal elder, who is a high ranking third party held in high societal esteem, to bring them together in settlement of disputes without violence. This is particularly when crimes have been committed when crimes have been committed, or compensation is required due to criminal damage. This

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[16] National Alternative Dispute Resolution Advisory Council, 'ADR Terminology : A Discussion Paper' (2002) *Commonwealth of Australia* .

[17] See, e.g., Lukas Wiget, 'Compulsory Mediation as a Prerequisite before Commencement of Court Proceedings-Useful Requirement to Save Resources or Waste of Time and Money?' (2012) *University of South New Wales Law Research Paper* < *https://ssrn.com/abstract=2157385* >

[18] This study focuses on addressing mediation process in Jordan under the mediation Act, which was introduced in 2006. This thesis will not cover earlier reconciliation law in the Magistrates court, which gave the Magistrate a role in bringing the parties together through reconciliation which is not the mediation process addressed in this thesis.

[19] Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010) 33; Ayman Masa'deh, 'Mediation as a Means of Settling Civil Disputes in Jordanian Law' (2004) 20(4) *Yarmouk Research Journal* 44.

[20] *The Mediation for Settlement of Civil Disputes Act, and its amendment (No 12) 2006* (Jor) ('*Jordanian Mediation Act 2006*').

[21] Mohammad Abu Hassan, 'Tribal Judiciary in Jordan ' *Publications of the Jordan History Committee*; Gassan Al-Tall, *Tribal Reconciliation between Theory and Practice* (1st ed, 1997).

process is well known as Wassata or Al Suleh.[22] While this is often referred to as a form of mediation, it is really better described as an arbitration by a tribal elder after holding an inquisitorial-like process. This customary approach will be addressed further in chapter 4. Australia[23] and Jordan, through legislation, now encouraged parties to attempt mediation as a more efficient mechanism for managing disputes pre-litigation.

Limited research has been carried out evaluating the law of mediation in Jordan in the last decade.[24] Insufficient attention has been given to defining the process, explaining the features of mediation and explaining the procedure in general.[25] Al Qatawneh[26] has addressed mediation as the new Dispute Resolution in Jordan and has focused on the analysis of the mediation system, suggesting that this law may need more attention from the Jordanian legislator because the roles of the lawyer and mediator are not operating as well as anticipated.[27] According to Rashdan,[28] the mediation system in Jordan needs administrative and legislative restructuring because there are significant possibilities to improve the uptake of mediation.[29] Just one of the major problems for mediation in Jordan explored in this thesis, for example, is the lack of educational awareness of the possibility of using mediation by citizens.

By studying the development of mediation practice in Australia and Jordan it is anticipated the mechanisms that will assist with the experience and in improving its future delivery, for Jordon will be unearthed. Issues that remain part of mediation practice in Australia are also investigated in order to refine awareness of ways to assist in the development of further growth in mediation in Jordan.

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22 See, e.g., Abdallah Hamadneh, 'The Role of Mediation in Conflict Resolution, the Jordanian System as a Model, Comparative Study' (2016) *Center for Doctoral Studies (CED)*, 50.

23 Patricia Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia' (2013) 2(49) *Journal of Civil Litigation and Practice*.

24 Bakr Abd-Fatah Al-Sarhan, 'Mediation on the Hands of the Mediator Judge: The Concept, Importance and Procedures' (2009)(1) *Jordanian Journal in Law and Political Science* 57.

25 Alsaleeby (n 19) 50.

26 Mohammad Ahmad Al-Qatawneh, 'Mediation in Settlement the Civil Disputes ' (LLM Thesis, Mutah University, 2008) 55. See also, Adel Allouzy, 'Mediation in Settling Civil Dispute in Jordanian Legal System ' (2006) 2(21) *Mu'tah Journal for Research and Studies*, 261.

27 Al-Qatawneh (n 26) 55.

28 Ali Mahmoud Al-Rashdan, *Mediation in Settlement the Disputes* (Dar Al-Yazoury Scientific for Publishing, 2016). See also, Masa'deh (n 19) 44; Alllouzy (n 26) 261.

29 Al-Rashdan (n 28) 15.

## 1.1 Literature Review

Mediation has been suggested as one of the most useful processes for managing disputes in both Australia[30] and Jordan.[31] Mediation has several advantages over litigation: savings in the costs of using litigation, quicker resolution or management of disputes, greater options development owned by the parties for managing a dispute leading to increased party satisfaction and empowerment, and improved interaction between parties assisting in maintaining their relationships.[32] Crucial pillars of mediation philosophies are key to understanding their workings. These are outlined, along with the models generally used in mediation through this literature section.

### 1.1.1 *Mediation Hallmark Philosophies*

The following identifies the philosophical hallmarks that play a vital role in supporting the success of mediation. These hallmarks are confidentiality, voluntariness, empowerment, neutrality and parties providing their own solutions.[33] These philosophies are applicable in both Australia and Jordon.

Confidentiality generally means that any evidence or discussions that occur during mediation may not be used in any subsequent court proceedings. The intention is to create an environment that aims to encourage parties to communicate freely without any potential for damage in later court cases.[34] Confidentiality secures information disclosed in the mediation to reduce the fear that it could subsequently be used against a party. This is based on a public policy principle that encourages

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[30] Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators Around the Globe : An Australian Prespective' (2014) 45 *Washington University Journal of Law and Policy*.20, 144.

[31] Alsaleeby (n 19) 26.

[32] Noone and Ojelabi (n 30) 144; Jacob Varghese and Lee Taylor, 'Mediating Australian Class Actions' (2015) 2(2) *Australian Alternative Dispute Resolution Law Bulletin* 3.

[33] David Spencer, *Principles of Dispute Resolution* (Thomson Reuters, 2nd ed, 2016) 84-101.

[34] See e.g. *The Evidence Act 1995* (Cth) s 131 ( *Evidence Act* ').

disputes to be settled quickly and with the least disharmony and disruption.[35] Protecting open and honest discussions and disclosure can ensure the best opportunity for settlement. However, this public policy is in tension with another public policy, which is the right of the court to have all the evidence that is needed to enable the court to reach a fair decision through the process of disclosure. Pryles[36] summarised the tension between the importance of mediation confidentiality to encourage disclosure of the information and to encourage settlement, and the ability of courts to have all relevant evidence:

> Mediation confidentiality is seen as important in order to encourage disputing parties to negotiate with each other and achieve a settlement of their dispute. This is regarded as a matter in the public interest to avoid litigation … The second consideration is one which inclines against confidentiality in mediation. It rests on the importance, in a trial before a Judge … of having all the relevant evidence produced so that a fair decision can be reached.[37]

In Australia, this granted privilege is secured by the court according to which it can refuse any evidence discussed in the mediation session to support the mediation process between the parties. Spencer[38] states that generally 'Australian courts have prevented evidence being introduced of matters discussed at mediation pursuant to confidentiality agreements in contracts and confidentiality provisions in statutes.'[39] The *Evidence Act* 1995 (Cth) s 131 provides an example of a legislative statement, setting out the general principle that it is not allowed for the disputants to present any information or documents in court that were presented in an attempt to mediate the matter in dispute.

However, there are a number of grounds that require disclosure of otherwise confidential information. These include where the parties choose to disclose

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35 *Williamson v Schmid* (1998 ) 2 Qd R 317 ('*Williamson v Schmid*'). See, Vicki Vann, 'Confidentiality in Court-Sponsored Mediation: Disclosure at your own Risk?' (1999) 10(3) *Australian Dispute Resolution Journal* 195-205.

36 Michael Pryles, 'Mediation Confidentiality in Subsequent Proceedings' (Conference Paper, International Congress and Convention Association (ICCA) Conference, 2004) quoted in Joe Harman, 'Mediation Confidentiality: Origins, Application and Exceptions and Practical Implications' (2017 ) 28 *Australasian Dispute Resolution Journal* 106, 109.

37 Pryles (n 36) quoting in Harman (n 36) 109.

38 Spencer (n 33) 86.

39 Ibid.

information that has not been treated as confidential, or where it may be used to qualify other evidence, may prove a deliberate abuse of power, or in a dipsute as to costs in the matter. For instance, it is allowed to use a document that has been disclosed in the mediation process as evidence in the court if the disputants have expressed or implied consent to use it. Arthur[40] adds that in this case, the parties can waive the privilege of confidentiality, 'by stating that part of their conversation is off the record while the rest is not.'[41] Also, this law allows for the viewing of any document, which has been disclosed in the mediation process by the court, when this document relates to the commission of an act that results in a civil penalty on the person,[42] oris necessary to determine liability for costs.[43] Therefore, confidentiality cannot always be assured as stated, due mainly to the public policy exception requiring the discovery of evidence in courts.

The case law is varied and depends on the facts of individual cases and the type of dispute attracting the application of specialised legislation. While case law is related to the different dispute areas where mediation is used and relies on interpretation of the specialised legislation, the focus in this thesis is not in the different families of law but rather approaches mediation from a helicopter view in the civil law arena. So, consideration is given to case law thatis releavnt to the mediation process acknowledging it may nevertheless be specific to the disputing circumstances.[44] For instance, a number of cases have allowed evidence from mediation when a question of costs arises and a party raises prior offers made during the mediation.[45] Boulle[46] has noted that the court is the adjudicator between the two public policies and the cases, on balance tend to favour discovery of evidence. This is understandable as the court is the adjudicator on the matter and may require the evidence for it to be able to decide a matter.[47] Thus, even though the public policy in Australia respects the confidentiality of the mediation process to support settlement,

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40 John Arthur, 'Confidentiality and Privilege in Mediation' (2015) *Australian Alternative Dispute Resolution Law Bulletin* 91.

41 Ibid.

42 *Evidence Act,* s 131 (2) (J).

43 *Evidence Act,* s 131 (2) (H).

44 Spencer (n 33) 87.

45 See e.g. *Westren Areas Exploration Pty Ltd v Streeter [No 2] (2009) WASCA 15 ('Westren Areas Exploration Pty Ltd v Streeter [No 2]').*

46 Boulle (n 5) 714.

47 Ibid.

the court is able to discover the best evidence to make a determination. This involves the court in an act of balancing public policy tensions and it is really decided on a case by case basis, taking account of the relevant civil procedure and applicable case law and legislation.

Jordanian law has also addressed this philosophy clearly with the law stating that the parties can reveal any document or information, that will help them to settle their dispute peacefully, without fear of it being used subsequently in the court.[48] As in Australia, the mediator also may reveal some information to the court as they are required to provide a report to the court to say that the parties attended and attempted the mediation of their dispute. Usually this report will not disclose any detail or sensitive information.[49] The Jordanian legislature has not specified what is to be contained in this report other than whether the process succeeded or failed.[50] In both countries, a contract written up as part of a mediation settlement is not confidential because if a dispute arises out of it, the court will have to see the terms of the agreement to decide whether it has been breached.[51] Just how assured confidentiality is for parties remains open to interpretation and as such will remain an issue of complexity in both countries.

Voluntariness is a second hallmark philosophy, meaning that parties enter into the process in good faith with a genuine desire to participate in the process.[52] This hallmark is seen as an essential pillar in the mediation process because it guarantees entry by parties wishing to genuinely settle their dispute. The parties can leave voluntarily without any negative consequences and take up the option of litigation at any time.[53] The voluntary philosophy underpins empowerment of parties involved.

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48 *Jordanian Mediation Act 2006,* art 8.

49 See e.g. *The Family Law Act 1975 (Cth)* div 3 s 10H *('The Family Law Act').*

50 *Jordanian Mediation Act 2006,* art 7.

51 See generally, Peter Condliffe, *Conflict Mangement: A Practical Guide* (LexisNexis Butterworths, 5th ed, 2016).

52 See, e.g. Jennifer David, 'Designing a Dispute Resolution System' (1994) 1(26) *Commercial Dispute Resolution Journal* at 32-33; Richard Ingleby, 'Compulsion is not the Answer' (1992) 27(17) *Australian Law News*. See, e.g., Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1996) 15(3) *Australian Bar Review*, 1; Allan Barsky, *Conflict Resolution for the Helping Professions: Negotiation, Mediation, Advocacy, Facilitation, and Restorative Justice* (Oxford University Press, 2016) 241.

53 Teresa Moore, 'Mediation Ethics and Regulatory Framework' (2017) 4(1) *Journal of Mediation and Applied Conflict Analysis* 543-551.

However, Australian courts can order mediation with or without the consent of parties if they consider it necessary.[54] Mandatory mediation presents as a discrepancy to voluntariness because the court requires the parties to participate in mediation. Astor and Chinkin[55] state that when the parties are obliged to attend mediation, this hallmark may be compromised or even destroyed.[56] Dearlove,[57] on the other hand, suggests that this philosophy 'prevents the mediator from being intrusive by continually reminding the parties of the spirit of the process.'[58] Mahoney[59] also points out that mandatory mediation may not contradict this hallmark.[60] These arguments suggest the overarching purpose of voluntariness in mediation is not jeopardised because any settlement is still optional.[61] In contrast, a Jordanian court cannot force the parties to use the process unless the parties indicate that they have a desire to use mediation.[62] This is a clear difference between the two countries.

Empowerment, is a third hallmark of mediation. It ensures the parties have greater control over their dispute, that power imbalance is addressed so they can bring all theirconcerns to the dispute, generate options, and control the outcome.[63] Empowerment is described as the parties choosing to take responsibility for working on their own solution.'[64] This means the parties have control over both the input and output of their dispute management because it is a voluntary process. Ensuring any power imbalance is addressed enables the parties to determine, create and develop

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54 See e.g. *Queensland Civil and Administrative Tribunal Act 2009* (Qld) div 3 s 75(1) ('*Queensland Civil and Administrative Tribunal Act* '); *The Civil Dispute Resolution Act 2011* (Cth) pt 2 s 6 ('*The Civil Dispute Resolution Act*'); *Farm Business Debt Mediation Act 2017* (Qld) div 3 s 17 (2) ('*Farm Business Debt Mediation Act* '); *The Civil Procedure Act 2005* (NSW) s 26 (1) ('*The Civil Procedure Act* '); *The Civil Procedure Act 2010* (Vic) pt 2.3 s 19 ('*The Victorian Civil Procedure Act* ').

55 Astor and Chinkin (n 7) 273.

56 Ibid, 273.

57 Grant Dearlove, 'Court-ordered ADR: Sanctions for the Recalcitrant Lawyer and Party' (2000) 11 *Australian Dispute Resolution Journal*, 16; Michael Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) 7 *Australian Dispute Resolution Journal* 138.

58 Dearlove (n 57) 16.

59 Krista Mahoney, 'Mandatory Mediation: A Positive Development in Most Cases' (2014) 25 *Australasian Dispute Resolution Journal* 120.

60 Ibid.

61 Ibid, 121.

62 *The Civil Law Act 1976* (Jor) ('*Jordanian Civil Law Act*'); Black (n 57) 138.

63 Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner' (2008) 8 *Queensland University of Technology Law and Justice Journal* 158.

64 Albie Davis and Richard Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) *Mediation Quarterly*, 17.

their mutually satisfactory resolution and to preserve their future relationships.[65] It also models a communication that can lead to a more harmonious approach to any future disputes. The issue for this hallmark philosophy occurs when the mediator adopts a model other than the facilitative model, described below, and uses the model and process in a way that makes the parties feel they have not reached their own solution. Where party power imbalance is not countered they may feel compelled to comply with the mediators' persuasion.[66] This can occur in court-mandated mediation if a less facilitative model [67] is used such as an settlement model,[68] in which limited options are generated that rely heavily on monetary settlement or an evaluative model that relies heavily on the meditors advice.[69] Therefore, both the model of mediation and mediators' styles can affect just how much empowerment the parties experience. Certain models allow greater intervention in the substance of the dispute to move it to settlement and this model can be deliberately chosen by the parties. If this is freely done then perhaps there is still some empowerment, but the parties then choose to give over some of their ability to suggest options for an outcome.[70] Douglas [71] contends the empowerment requires that no advisory or determinative role should be adopted and instead mediators should assist in managing the mediation process whereby the participants agree upon outcomes.[72] A meditor can support a weaker party through appropriate communication techniques that enables the party to negotiate mutually so the parties power is balanced.[73] Empowerment, therefore, varies depending on how parties are assisted in achieving a suitable outcomes.

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65 Jacob Bercovitch and Scott S Gartner, 'Is there Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation' (2006) 32 *International Interactions* 329.

66 Bornali Borah, 'Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice' (2017) 28 *Australasian Dispute Resolution Journal* 98.

67 See Chapter I, p. 20 for a description of this model.

68 See Chapter 1, p. 19 for a description of this model.

69 See Chapter 1, p. 24 for a description of this model.

70 See further, Rachael Field, 'Mediation Ethics in Australia-A Case for Rethinking the Foundational Paradigm' (2012) 19 *James Cook University Law Review* 41; Susan Douglas, 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19-40; Laurence Boulle and Rachael Field, 'Re-appraising Mediation's Value of Self-determination' (2020) 30 *Australasian Dispute Resolution Journal* 96.

71 Douglas (n 70) 37.

72 Ibid

73 See further, Angela Cora Garcia, Kristi Vise and Steven Whitaker, 'Disputing Neutrality: When Mediation Empowerment is Perceived as Bias' (2002) 20(2) *Conflict Resolution Quarterly* 205-230.

A fourth hallmark is neutrality, more recently considered impartiality, which means there can be no procedural inequality or 'bias, prejudice, or favouritism toward any party.'[74] As a term, neutrality has been abandoned in Australia in favour of the phrase impartiality, because demanding a mediator to be neutral is an unrealistic demand of any human, and it is considered a more realistic demand to require an impartial approach.[75] The mediator has considerable power in mediation and cannot be purely neutral because 'they are human beings with their own perspectives and biases.'[76] Impartiality is identified as 'the absence of bias due to the more subtle impact of a mediator's personal values, preferences, and preconceptions.'[77] This requires enabling the parties to be free of partial influence in reaching their mutual solutions. Spencer and Hardy[78] state that impartiality is 'ensuring that any outcome reached is one that is self-determined by the parties.'[79] The concept of impartiality requires the mediator's opinion not affect the mediation's outcome. Instead, the mediator must protect the process such that their personal values, preconceptions, and preferences do not distort the outcome.[80]

Impartiality is crucial because it is a source of mediation credibility, as the mediator ensures the parties can feel confident with the process and so have a conducive environment to help reach a lasting solution.[81] However, often the practice challenges the reality of this expectation as humans also have unconscious bias, and

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74 Carol Izumi, 'Implicit Bias and Prejudice in Mediation' (2017) 70 *SMU Law Review Journal* 681.

75 Jonathan Crowe and Rachael Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *Australasian Dispute Resolution Journal* 273-280; Robert Bush and Sally Pope, 'Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 67; Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law and Policy* 71; Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248.

76 Crowe and Field (n 75) 273.

77 Susan Douglas, 'Constructions of Neutrality in Mediation' (2012) 23 *Australasian Dispute Resolution Journal* 80-88, 81.

78 David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2014) 42.

79 Ibid.

80 See especially, Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice - Part 1' (2000) 11 *Australian Dispute Resolution Journal* 73; Rachael Field, 'The Theory and Practice of Neutrality in Mediation' (2003) 22 *The Arbitrator and Mediator* 79-89; Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221-239; Ronit Zamir, 'The Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic' (2010) 11 *Pepperdine Dispute Resolution Law Journal* 467.

81 Shyam Kishore, 'The Evolving Concepts of Neutrality and Impartiality in Mediation' (2006) 32(2) *Commonwealth Law Bulletin* 221-225.

so it is difficult to achieve this perfection in reality. As Sharma[82] argues, '[t]he problem is one of competing principles, between party autonomy and empowerment, and third-party intervention.'[83] Gorrie[84] states that the mediator may work, possibly unconsciously, against agreements that they consider to be unfair, inappropriate or abusive, instead directing outcomes according to their own preferences.[85] Mediators are required to be conscious of offering 'sufficient opportunities for voice, justice, vindication, validation or impact.'[86] This is based on a philosophy that aims to enable the mediator to assist the parties to craft their own resolution.[87] Certain models, such as the evaluative and settlement models, outlined further below, tend to work against this key philosophy. Where such models dominate, as is the case in Jordon, then this hallmark is weakened.

The final hallmark is that parties can reach their own solutions. This means not only that parties are empowered but importantly, that they can create their own solutions and that this is more likely to be honoured by parties than an imposed solution, which often favours one party over the other.[88] The parties can do best when the mediator assits them to generate their own options and then helps those parties 'reality test' these options in a non-influential manner without imposing their values upon the parties.[89] This aspect is the natural result of applying the previous philosophical hallmarks of impartiality and empowerment. The parties' right to craft their own solutions is limited only by their own creativity and any legal boundaries. The mediator's role is to guide the parties through the process. If this hallmark is not achieved, there is a risk the success of the mediation process and any agreement will not be sustained.

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82 Neha Sharma, 'Mirror, Mirror on the Wall, Is there no Reality in Neutrality after all? Re-Thinking ADR Practices for Indigenous Australians' (2014) 25 *Australasian Dispute Resolution Journal* 231.

83 Ibid, 231.

84 Arthur Gorrie, 'Mediator Neutrality: High Ideal or Scared Cow?' (Conference Paper, National Mediation Conference, 1995), 34-35.

85 Ibid.

86 Bernard Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (John Wiley & Sons, 2004) 29.

87 Donna Cooper, 'The Family Law Dispute Resolution Spectrum' (2007) 18(4) *Australasian Dispute Resolution Journal* 234-244, 243.

88 Spencer (n 33) 100.

89 Russell Thirgood, 'Mediator Intervention to Ensure Fair and just Outcomes' (1999) 10 *Australasian Dispute Resolution Journal* 142.

This overview of the hallmark philosophies suggests that each can be challenged by practical realities. It is found that legislatures, courts and mediators respond to these issues in various ways.[90] This research explores these challenges and issues in both Australia and Jordan to identify best practices in addressing the integration of mediation into the respective legal systems, while maintaining loyalty to the hallmark philosophies of mediation. It is clear that the philosophies have varied success and influence depending on the different models by which mediation can occur and which are now outlined.

## 1.2 Mediation Models

Jordanian law describes the process of mediation as court-mandated mediation. This process is activated after a case is brought before a Magistrate judge or a judge of Case Management.[91] Generally, the judge will decide if the case needs to be referred to mediation or not taking into account the parties' consent. Also, the disputants can inform the judge that they want to solve their dispute via mediation. This is is regulated by the *Mediation for Settlement of Civil Disputes Act, 2006* art 3, as amended. In such a situation, the mediator can be a mediator judge, or the dispute can be refered to a private mediator through the mediation administration system.[92] The private mediator, who could be a lawyer, professional dispute management practitioner, psychologist, or retired judge, may still prefer to use the more directive evaluative model, based on their expertise in the dispute field and focus on the disputants' rights.[93] This court-mandated mediation tends to be based on the evaluative model.[94] According to art 6 of the *Jordanian Mediation Act*, the mediator can take the appropriate measures to bring the disputants' views closer in order to reach a mutually acceptable solution. Furthermore, this article gives the mediator the

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[90] John Woodward, 'Reflections on a Work in Progress: Some Observations from the Field' (2016) *The Australian Dispute Resolution Research Network*.

[91] See, Steven Gensler, 'Judicial Case Management: Caught in the Crossfire' (2010) 60 *Duke Law Journal* 669-744. This case management judge plays an important role in encouraging the disputants to refer their dispute to one of the dispute resolution processes that is available in Jordan such as mediation, reconciliation, or arbitration to put an end to their disputed matters. See *Jordanian Civil Procedures Act*. art 59.

[92] *Jordanian Mediation Act 2006*, art 3.

[93] Khaled Ta'amneh, 'Mediation as an Alternative Commercial Disputes Resolution in Jordanian Law' (LLM Thesis, Jadara University, 2011) 10.

[94] Al-Rashdan (n 28) 50; Alsaleeby (n 19) 81.

power to express his or her opinion, evaluate the evidence, present the legal evidence, case law and other procedures that facilitate the mediation.[95]

However, as there is no accreditation system in Jordan as in Australia, there is no clear guidelines as to which model private mediators use.This means that they could use their expertise in solving the dispute through advising the parties what they would likely get if their rights in the case were to be decided by the judge. This may lead to bringing an adversarial tone into the mediation process. However, some flexibility and credibility remains in this process given the disputants still have the right to appoint their own private mediator and resolve a matter in confidence.[96] The lack of education of the citizen in the different models, nevertheless, impacts on their ability to make informed choices.

These challenges also remain for the process in Australia. They 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. The mediator may practice a range of styles depending on the case and may use a number of them within the one mediation session. These styles draw on the different models and vary between the level of mediator intervention in influencing the parties' resolution. Boulle [97] has identified four models of mediation: settlement, evaluative, transformative and facilitative models. Other models exist, such as creative solutions used through adopting critical race theory, and developing a one-text document that allows the parties to integrate their version of a dispute into one mutualised story that can then be addressed as a problem to solve.[98] The latter is sometimes referred to as the narrative mediation model.[99] Creative dispute management practitioners are evolving new ways of approaching mediation. The main models are outlined here, in order to conceptualise these across a spectrum of possibilities. Alexander's meta-model approach is probably the best example of the range of possible models and as such is adopted in this thesis.

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95 *Jordanian Mediation Act, 2006* art 6.

96 *Jordanian Mediation Act, 2006* art 3(A).

97 Boulle and Alexander (n 3)15.

98 Rauf Garagozov and Rana Gadirova, 'Narrative Intervention in Interethnic Conflict' (2019) 40(3) *Political Psychology* 449-465; John Winslade, Gerald Monk and Alison Cotter, 'A Narrative Approach to the Practice of Mediation' (1998) 14(1) *Negotiation journal* 21-41.

99 Condliffe (n 51) 293.

Alexander[100]classifies models of mediation according to two dimensions, intervention and interaction, each describing the relation between the mediator and parties (see figure 1).[101] The interaction dimension focuses on the way parties interact in using negotiation and bargaining to manage their dispute. This dimension consists of a range of positional discourses from bargaining, and interest-based negotiation, to dialogue. Each category has unique objectives and can produce different results. The aim of positional bargaining discourse is 'to achieve a mutually acceptable settlement of the dispute as defined in legal or positional terms … in which parties move from opening positions in ever-decreasing incremental concessions towards compromise.'[102] Interest-based negotiation discourse aims to concentrate on disputants' interests and needs, rather than their claims and legal rights, by engaging them in negotiation about future-focused issues,[103] dialogue discourse aims to focus on the nature of the interaction between the disputants through encouraging them to change their communication patterns and to thus heal their relationships at a deeper level.[104]

The intervention dimension concentrates on the way the mediator intervenes in the process, and how much and what style of assistance they offer the parties in addressing their dispute.[105] The mediators intervention forms the basis for identifying the model being adopted. The mediator intervention may, in a settlement or evaluative model, include providing technical, legal or general advice to the parties or evaluating the parties' position and even suggesting options for agreement within the mediation.[106] If they choose to direct the process and empower the parties to make their own decisions in the dispute, it reflects a facilitative model. Alexander's meta-model will be referred to in this research to demonstrate which model of mediation is practised, and what advantages and issues a model may bring, and how

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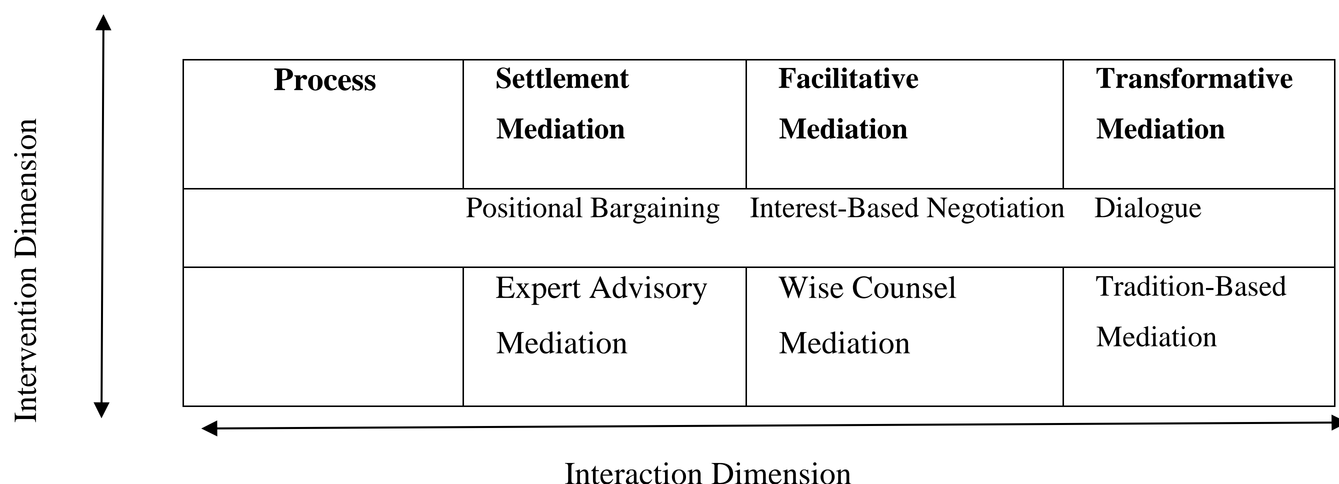
100 Najda Alexander, 'The Mediation Metamodel: Understanding Practice Around the World' (2008) 26(1) *Conflict Resolution Quarterly*, 20.
101 Ibid.
102 Ibid 5.
103 Ibid 6.
104 Ibid.
105 Najda Alexander, 'The Mediation Metamodel: Alternative Methods Of Delivering Justice' (2008) 26(1) *Dispute Resolution Quarterly*, 1; John Michael Haynes, Gretchen Haynes and Larry Sun Fong, *Mediation: Positive Conflict Management* (Suny, 2004).
106 Nadja Marie Alexander, *Global Trends in Mediation: Riding the Third Wave in Global Trends in Mediation* (Kluwer Law International 2006).

they are addressed. This, in particular, is considered from the perspective of the hallmarks of mediation outlined in Figure 1.

Figure 1 : Alexander’s Mediation Meta-Model[107]



| Process | Settlement Mediation | Facilitative Mediation | Transformative Mediation |
| --- | --- | --- | --- |
| | Positional Bargaining | Interest-Based Negotiation | Dialogue |
| | Expert Advisory Mediation | Wise Counsel Mediation | Tradition-Based Mediation |



The mediation meta-model, as presented in Figure 1, breaks down into six practice models of mediation: settlement mediation, facilitative mediation, transformative mediation, expert advisory mediation, wise counsel mediation, and tradition-based mediation. The meta-model provides useful constructs for the mediator that guide them in assessing the flexibility and creativity that their mediation is said to offer. Hybrid mediation may occur, for instance, if the mediator starts with expert advice, which aims to deliver efficient dispute management and access to justice through encouraging distributive negotiation discourse by giving advice to the parties.[108] The mediator may discover that the parties want to focus on settling the dispute instead of pursuing protection of a future relationship, as they will not be having an ongoing relationship.[109] In that case, the mediator can move to settlement mediation to efficiently enable parties to reach a satisfying confidential settlement.[110] If the mediator starts with a facilitative mediation model by empowering the parties and focusing on their needs and interests, the mediator may discover that the parties seek more guidance and can move to the style of wise

[107] Alexander, (n 100) 20.

[108] See: Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7.

[109] Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley and Sons, 2014).

[110] Astor and Chinkin (n 7) 137.

counsel mediation. The mediator may in this manner move between models by providing  greater intervention in the form of advice. The wise counsel mediation will provide advice on the problem in terms of identifying interests, options, and solutions, but the final decision remains with the parties.[111]

Alexander also describes the tradition-based model and this makes Alexander's meta-model appropriate in this thesis, as it addresses the Indigenious cultures in both Australia and Jordan. If the mediator is hired to solve a dispute between parties from an Indigenous community, the mediator may use the tradition-based model, which aims to restore stability and harmony to the community, industry or group, based on a concept referred to as restorative justice.[112] Tradition-based mediation is used in communities that are characterised by strong kinship ties, which preference the community's values, interests and needs over the individual's needs and interests. The mediator will lead a process of open-ended dialogue among participants, while acknowledging necessary ritualised ceremony in front of the community members.[113] Accordingly, Alexander's meta-model offers a useful framework for the mediator to reflect and inform on the appropriate mediation practice to utilise in each particular dispute.

The Australian National Mediator Standards, first established in 2007 and modified in 2015, provide mediators with a framework around models of practice.[114] In 2007 the standards applied the facilitative model as the most supported approach to an interest-based mediation. However, by 2015 the standards had widened to acknowledge that there was a range of models of mediation in use across Australia. The 2015 Standards refer to a facilitative or blended process.[115] The blended process means that mediators may use a combination of styles from different models in the

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111 Alexander, (n 100) 20.
112 Ibid.
113 See generally: Nabil Antaki, 'Cultural Diversity and ADR Practices in the World' in Jean-Claude Goldsmith, Arnold Ingen-Housz and Gerald Pointon (eds), *ADR in Business: Practice and Issues across Countries and Cultures* (Kluwer Law International 2011).
114 Barbara Wilson, 'Mediation Ethics: An Exploration of Four Seminal Texts' (2010) 12 *Cardozo Journal of Conflict Resolution* 119, 120.
115 Samantha Hardy and Olivia Rundle, 'Applying the Inclusive Model of Ethical Decision Making to Mediation' (2012) 19 *James Cook University Law Review* 70-89, 72.

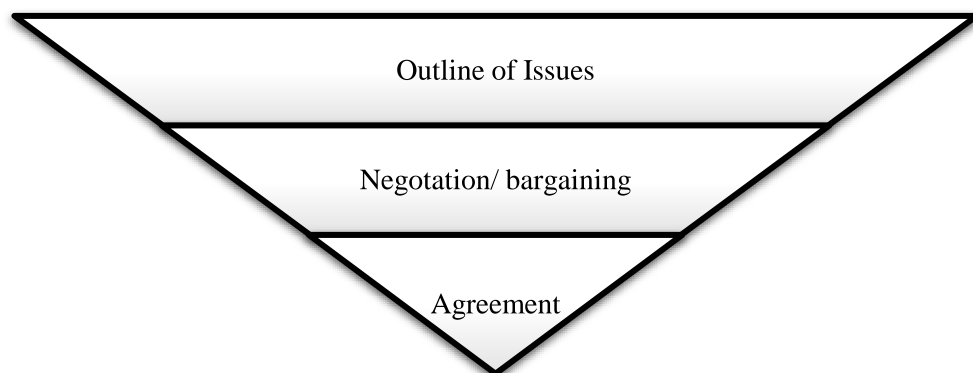
same mediation.[116] As Sweify[117] states, 'mediators might begin the process using facilitative techniques to enhance the disputants' negotiation, and once the parties are about to reach an impasse, they might shift to an evaluative style.'[118]

Both Boulle and Alexander refer to four well-accepted models. Each of these is now described in greater detail, as these will be the most referenced throughout this thesis.

### 1.2.1 *Settlement Mediation Model*

The settlement model, as illustrated in Figure 2, is often adopted by lawyers, based on a simple limited outcome, and based on monetary compensation in a bargaining process. This model can engender reality testing of parties' positions to move them to compromise through various forms of subtle, or not so subtle, persuasion from the mediator, as well as through the parties practising bluff and haggling approaches. Ultimately, the parties are still considered to be in control of accepting or rejecting an outcome.[119] Settlement mediators are often legal practitioners whose expertise is in their use of skills to produce offers, concessions, and agreements.[120]

Figure 2: Settlement Model[121]




[116] Australian National Mediator Standards, Practice Standards, 2007, ('ANMS Practice Standards').
[117] Mohamed Sweify, 'Mediator's Proposal and Mediator's Neutrality: Finessing the Tension' (2017) 28(2) *Australasian Dispute Resolution Journal* 129-134.
[118] Ibid.
[119] Boulle and Alexander (n 3)15; Condliffe (n 51) 279; Riskin (n 2) 3; Chris Lenz, 'Is Evaluative Mediation the Preferred Model for Construction Law Disputes?' (2015) *Thomson Reuters* 134.
[120] Alexander, 'The Mediation Metamodel: Understanding Practice Around the World' (n 100) 11.
[121] Researchers own interpretative model of settlement mediation.

### 1.2.2 *Facilitative Mediation Model*

The facilitative mediation model is the most commonly supported and adopted model in Australia.[122] The mediator may use this model when the disputants prefer to protect their future relationship, whether it be business, social or family-related.[123] In this model, the mediator controls the process and the parties control the content.[124] In other words, facilitative mediators will not advise the disputants about how they solve their problem nor provide them with legal information about what a court would do in their particular case. The mediator uses communication techniques to help the parties express their underlying interests in order to generate a wide array of options from which a creative solution can then arise.[125] The mediator uses this model to guide the disputants through a process that supports a productive conversation to settle their dispute.[126] Thus, the facilitative mediator will be selected for their communication skills rather than their expertise in the dispute area. Disputants will generally have their own legal representatives who will be partisan advisors to assist parties in reaching their own solution.[127] This model follows a seven-stage process, as illustrated in Figure 3. The stages include: mediator statement, parties' opening statement, agenda-setting, exploring the issues and interests, private sessions, negotiation, and finally reaching agreement.

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122 Judith Herrmann and Claire Holland, 'Co-Creating Mediation Models: Adapting Mediation Practices When Working Across Cultures' (2017) 28 *Australasian Dispute Resolution Journal* 43-50.

123 Alexander, 'The Mediation Metamodel: Understanding Practice Around the World' (n 100) 12.

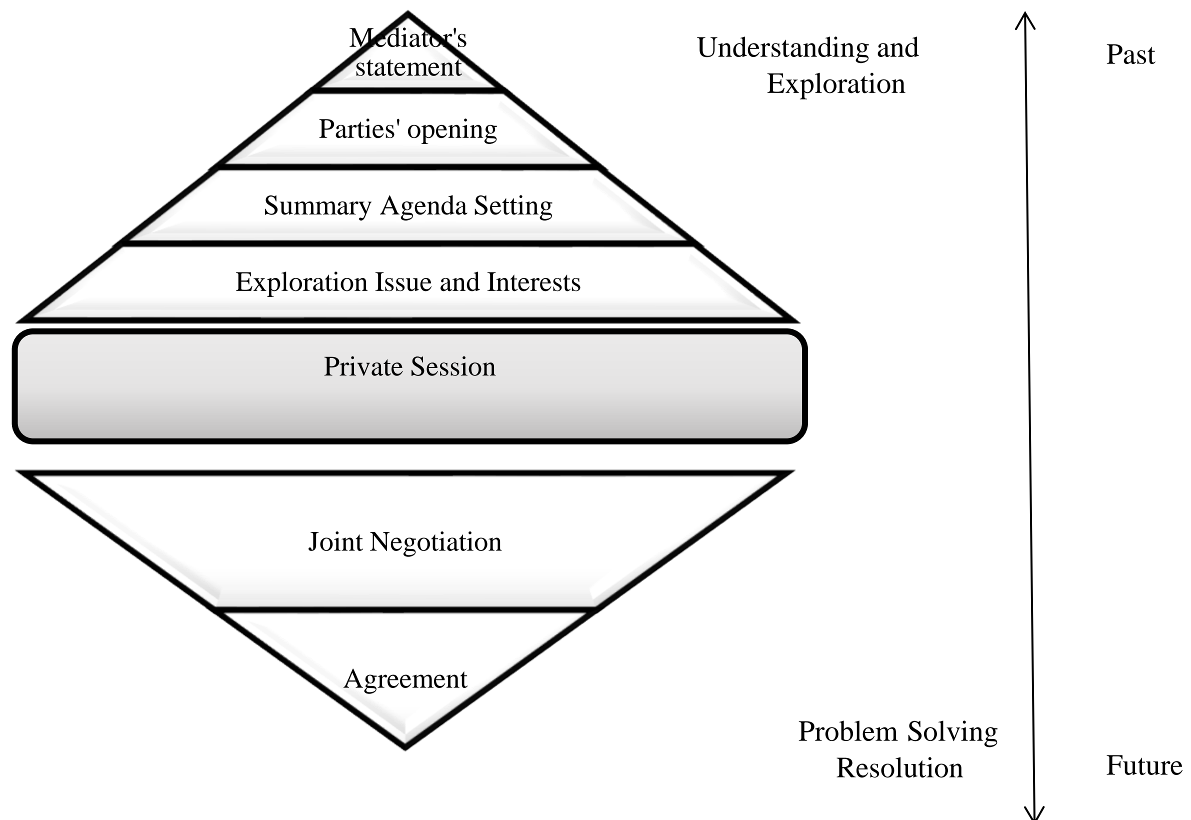
124 Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' (2019) *Mediate.com*, 1.

125 Susan Nauss Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2008) 42(3) *University of San Francisco Law Review* 577-620; Tony Bogdanoski, 'The Neutral Mediator's Perennial Dilemma: To Intervene or Not to Intervene' (2009) 9 *Queensland University of Technology Law and Justice Journal* 26.

126 Sweify (n 117) 132.

127 Alexander, 'The Mediation Metamodel: Understanding Practice Around the World' (n 100) 12; Bernard Mayer, 'Facilitative Mediation' in Jay Folberg, Ann Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques, and Applications* (Guilford Press, 2004) 29-52.

Figure 3: Facilitative Model [128]




The mediator in the opening stage explains the essential aspects of the process to the parties, for instance the consensual nature of mediation, mediator impartiality, the process's confidentiality, parties' empowerment, and the time constraints of the session. This step aims to check the parties' understanding of the process and to help them feel confident in the process, while building comfort and rapport with the mediator.[129] For example, the mediator will explain their role as an impartial intervener who helps the parties to communicate with each other to discuss the issues and concerns they wish to discuss. Then, the process will move to the next stage in which each disputant gets the right to state their story, without interruptions from the other side.

Then, the mediator will move to the next stage, which is agenda setting. This stage allows the mediator to draw up an agenda from the concerns raised by the parties. This step is vital in providing a visible structure for the whole process. It

128 Linda Fisher and Mieke Brandon, *Mediating with Families* (Thomson, 4th ed, 2018) 25.
129 Condliffe (n 51) 316.

creates a neutral and mutual single list of concerns to problem solve in a manner that helps separate the issues from the person.[130]

In the next stage, the exploration of the issues and interests, the mediator assists the parties through their first direct communication to discuss their understanding of the issues and to guide them in better understanding each other's perspectives.[131] The facilitative mediator uses a number of communication techniques, such as open and hypothetical questioning, reframing and detoxifying language, active listening and summarising or parahrasing. These techniques assist to 'frame these issues in a genuine meaningful and constructive manner to find a formulation of the issues that all parties can accept.'[132] The mediator directs dialogue between the parties to encourage the developing of options without reaching solutions at this point. The dialogue aims to engage the parties in collaborative behaviours to generate a number of possible options based on their creative problem solving that may lead to reaching a win-win solution.[133] The mediator is not only listening to the parties but will also help the parties to communicate effectively by allowing them to respond in a constructive way to each other.[134]

A particularly useful part of facilitative mediation is using the private session.[135] In this session, the parties are given time out separately with the mediator. This stage is important because it allows each party time to privately reflect on what has been occurring and whether they are achieving what they had hoped to in the session. The mediator can also help the party reality-test any options that may have been suggested, and check if they have matters they have not raised yet but would assist the mediation if they were. The added cloak of confidentiality in this session makes the parties feel confident to raise issues they felt they could not in the presence of the other party. This stage focuses on the future relationship and addressing potential options generated in the exploration as possible ways to manage the issues in dispute.

[130] Boulle (n 5) 239.
[131] Fisher and Brandon (n 128) 23-24.
[132] Mayer, 'Facilitative Mediation' (n 127) 40.
[133] James Alfini, 'Evaluative Versus facilitative Mediation: A Discussion' (1997) 24(4) *Florida State University Law Review* 919-935.
[134] Condliffe (n 51) 331-3.
[135] Boulle and Alexander (n 3) 143.

In some circumstances, the mediator may need to move to more than one private session before the parties can complete their negotiation. [136]

After this the joint negotiation session will start whereby the mediator helps the parties consider the options they have generated and helps reality-test their workability. A mediator will use different communication techniques during this phase. There may be more closed questioning, as well as clarifying or hypothetical questions.

The final stage is the agreement, which 'allows for the reinforcing of the progress made by the parties, the finalising and recording of their agreements and listing of any unresolved issues.'[137] If the parties cannot reach an agreement, they usually will have made progress and can list the issues that are agreed and those that remain. These issues can either be brought back to further mediation or proceed to litigation. An option taken at this time is often for the parties to have a trial stage for their best option, with the possibility of coming back for further refinement at a later stage. A facilitative mediator will frequently follow up with the parties some time after the mediation to see that their agreement is holding.

The mediator controls this staged process to guide the discussions between parties and to engage them in interest-based negotiations;[138] thus, they generate their own options and can reach their own resolution, without the mediator offering suggested options or settlement outcomes.[139] A facilitative mediator concentrates on parties' self-determination and allows them to direct the content within the process.[140] If a facilitative model is said to be used, then the mediator who evaluates the parties' options overtly, or who determines which solution parties should consider, is crossing over into the evaluative model.[141]

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[136] Ibid 145.

[137] Fisher and Brandon (n 128) 24.

[138] Donna Cooper and Deborah Keenan, 'A Model to Use When Representing Clients in Conciliation Conferences in the Queensland Anti-Discrimination Commission' (2018) 29 *Australasian Dispute Resolution Journal* 126.

[139] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2nd ed, 2005) 43-47.

[140] Mieke Brandon, 'Self-Determination in Australian Facilitative Mediation: How to Avoid Complaints' (2015) 26 *Australasian Dispute Resolution Journal*, 44.

[141] Exon (n 125) 592.

### 1.2.3 *Evaluative Mediation Model*

The evaluative mediation model aims to settle the dispute according to the parties' rights and legal obligations.[142] Shaw[143] states that the mediator in this model can provide 'the parties advice about strengths and weaknesses of a case … predict possible outcomes that would be a likely outcome if a court adjudication occured, and suggesting ways to resolve a dispute.'[144] Such mediations are usually conducted by mediators from a legal background and with legal expertise such as subject experts, senior lawyers and former judges. The model is chosen by parties because they seek 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. If this is less than they anticipated, they can then more quickly and privately agree on a settlement, feeling their legal rights have been satisfied. Laflin[145] holds a slightly different view in suggesting that the role of an evaluative mediator is to recommend a range of possible legal outcomes that the parties can choose from, and so this process is less directed by the mediator, using less intrusive techniques, but still providing advice.[146] Evaluative mediation involves the mediator aiming to help the parties towards a solution according to how a fair legal process would operate.

This model can often be used in court-mandated mediation.[147] In such situations, the mediator can be a judge or court registrar and the parties are often represented by lawyers.[148] The discussion focuses on the law, its interpretation, and the likely manner by which a court would resolve the dispute. Less emphasis is placed on parties expressing their emotions and interests, or being able to generate creative options for management that go beyond those available in the law. In the evaluative model, mediators may be persuasive in encouraging the parties to adopt the mediators' view on how to resolve the dispute.

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[142] Boulle and Alexander (n 3) 15.

[143] Exon (n 125) 592 citing Margaret Shaw, 'Evaluation Continuum' (Conference Paper, Meeting of CPR Ethics Commission, 6 May 1996).

[144] Exon (n 125) 592 citing Shaw (n 142) 1.

[145] Maureen Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 479, 493.

[146] Ibid.

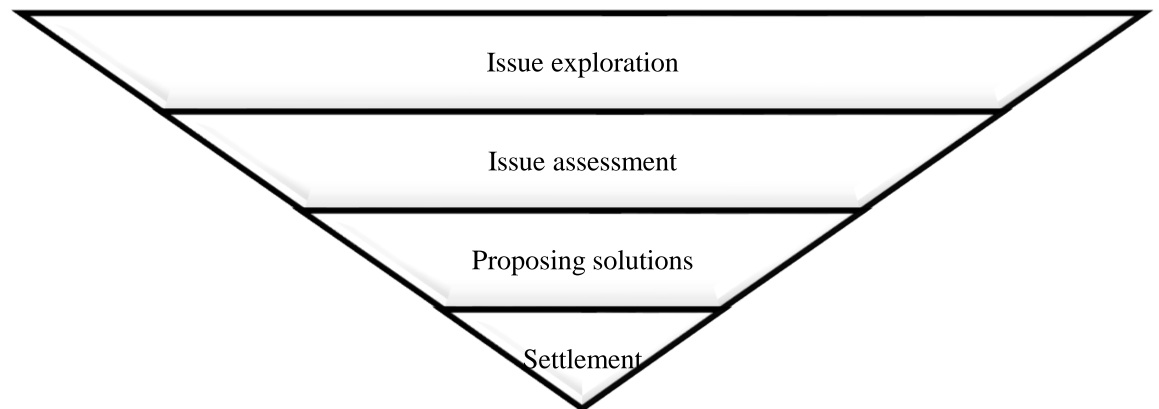
[147] John Lande, 'Toward more Sophisticated Mediation Theory' (2000) *Journal Dispute Resolution* 321.

[148] Ibid.

This model compromises many of the hallmark philosophies such as impartiality, party empowerment, and possibly party control over the resolution. In a court-mandated mediation that adopts an evaluative model, there is the added risk of compromising voluntariness.[149] Exon[150] states that when the mediator suggests a proposal or assesses the parties' options, it '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.'[151] However, if the mediators are appointed by parties, it is challenging to argue 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.[152] McDermott[153] suggests the evaluative mediation model may affect the parties' empowerment negatively for two reasons.[154] Firstly, the mediator may engage in unethical conduct if they adopt coercion and pressure in order to be seen to get a quick resolution, and secondly it may undermine the creativity in the mediation problem-solving process.[155] Indeed the parties are not reaching their settlement based on their own generated options, and a suggested one can risk unravelling and thereby generate further disputes. For this reason, mediators adopting an evaluative approach should be cautious about maintaining an impartial, unbiased approach in suggesting the potential legal options, and they should take care to give advice or recommendations without coercing a party.[156]

149 Ibid.
150 Exon (n 125) 603.
151 Ibid.
152 Sweify (n 117) 131.
153 E Patrick McDermott and Ruth Obar, 'What's Going On in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75, 81-82.
154 Ibid.
155 Ibid.
156 Sweify (n 117) 131.

Figure 4: Evaluative Model [157]




### 1.2.4 *Transformative Mediation Model*

Possibly the furthest removed from an evaluative model is the transformative model, which tends to have mediators trained in the social sciences, such as psychology and social workers, rather than law.[158] These experts can use a process model to assists parties to dig into not only their intersts but also their personalities, communication styles, and the deeper underlying causes of the dispute. To do this, the model may use psychological tools to help the parties better understand themselves and the other party.

Often this model will be used where the parties are seeking an ongoing relationship, by transforming the way they relate to each other to solve their disputes.[159] So, familial disputes, such as between husband and wife or parents and children, are ideally suited to transformative mediation. This model 'is a shift away

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157 This diagram is developed by the researcher.

158 Horst Zillessen, 'The Transformative Effect of Mediation in the Public Arena' (2004) 7(5) *Alternative Dispute Resolution Bulletin* 82. See further, Robert A Baruch Bush, 'Handling Workplace Conflict: Why Transformative Mediation' (2001) 18(2) *Hofstra Labor and Employment Law Journal* 367; Joseph Folger and Robert A Baruch Bush, 'Transformative Mediation: A Self-Assessment' (2014) 2 *International Journal of Conflict Engagement and Resolution* 20.

159 Boulle and Alexander (n 3) 2. See e.g., Mark Dickinson, 'The Importance of Transformative Mediation to the Internal Workplace Mediation Program' (2011) 22 *Australasian Dispute Resolution Journal* 95.

from the problem-solving vision … to a much more interactive, communication-based view of what a dispute is and what productive changes in a dispute look like.'[160] The model, as illustrated in figure 5, adopts an open communication style between the parties to craft their own solution through understanding their own and the other party's point of view.[161] Folger[162] confirmed this idea, stating this model 'shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness (the recognition dimension).'[163] This approach draws on the mediator's special expertise in being able to help the parties to focus on their ability to decide an outcome through better understanding one another's perspectives.[164] The transformative model can develop parties to become better human beings, which has a positive outcome for greater harmony within society.[165]

According to figure 5, this model aims to help the parties to understand their respective situation and to improve their relationship through fostering, empowering and recognition.[166] The focus of the model is not so much on achieveing an agreement or settlement, but instead a transformation in the parties' relationship through enhancing empowerment and recognition. In this model, empowering is concerned with the parties being able to identify their own issues, exploring their potential goals and seeking their own solutions to problems. This encourages them to have a sense of strength and take control of their situation. This recognition enables each party to see and understand how the other party defines the problem and why they seek a particular solution. The importance of recognition is found when the parties discover that 'they can feel and express some degree of understanding and concern for one another despite their disagreement.'[167] The empowerment and recognition play an

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160 Joseph Folger, 'Mediation Research: Studying Transformative Effects' (2001) 18 *Hofstra Labor and Employment Law Journal* 385, 393.

161 Zumeta (n 124) 1.

162 Folger (n 160) 393.

163 Ibid.

164 Cindy Fazzi, 'The Promise of Mediation: The Transformative Approach to Conflict' (2005) 60(2) *Dispute Resolution Journal* 88.

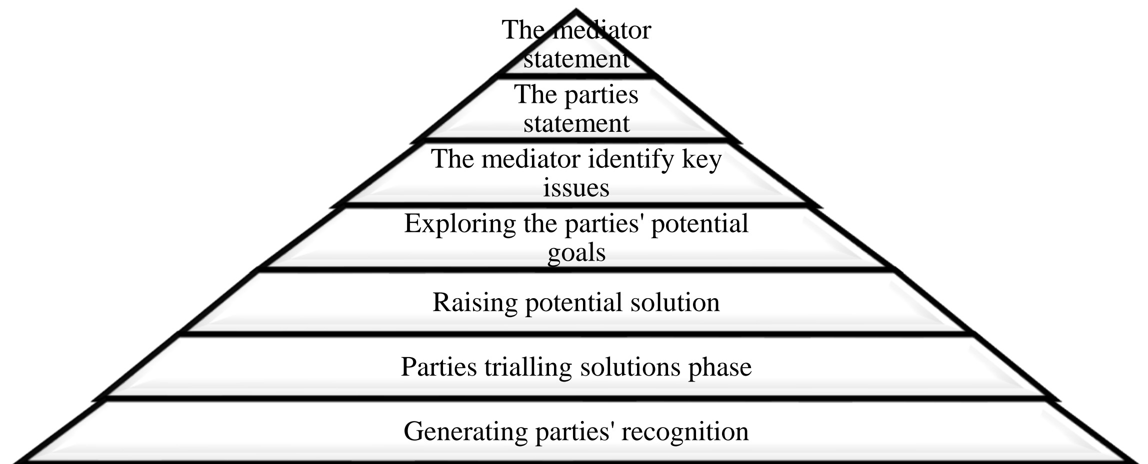
165 Robert Baruch Bush and Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons, 2004) 12.

166 Tina Nabatchi, Lisa Blomgren Bingham and Yuseok Moon, 'Evaluating Transformative Practice in the U.S. Postal Service REDRESS Program' (2010) 27(3) *Conflict Resolution Quarterly* 257-289, 261.

167 Bush and Folger (n 165) 14.

important role in formating the transformative mediation model that focus on the solving disputants'relationship issues with minimal help from the mediator.

Figure 5: Transformative Model [168]




## 1.3 The Issues Raised

There appear to be four main differences between Jordon and Australia: the first relates to the legislative approach to encourage mediation; secondly, in Jordan, mediation is not a step required before proceeding to litigation as it is in Australia; thirdly, Jordanian lawyers do not have an obligation to inform their client about the benefits of using mediation in their disputes,and fourthly, the evaluative model tends to dominate practice in Jordan. These will each be explored further in chapter 4.Increasingly in Australia, the legislature has taken the initiative to make it a

168 This diagram was developed by the researcher after considering these articles: Patricia Franz, 'Habits of a highly effective transformative mediation program' (1997) 13 *Ohio State Journal on Dispute Resolution* 1039; Robert A Baruch Bush and Sally Ganong Pope, 'Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 67; Tina Nabatchi, Yuseok Moon and Lisa Bingham, 'Evaluating Transformative Mediation in Practice: The Premises, Principles, and Behaviors of Usps Mediators' (2010) 27(3) *Conflict Resolution Quarterly Journal*.

requirement that such a process is undertaken by parties to support earlier and cheaper settlement of disputes.

Australian legislation encourages parties to use mediation as a process that can staisfactorily end their dispute. Examples include the *Civil Dispute Resolution Act 2011* (Cth)[169] and *Civil Proceedings Act 2011(Qld).*[170] each requiring disputants to take 'genuine steps' to resolve disputes before instituting certain civil proceedings. This educates the parties about the alternatives to litigation and encourages them to engage in these processes.[171] Also, the *Civil Dispute Resolution Act 2011* (Cth) section 4 provides further encouragement by imposing on lawyers a general duty to inform their clients about different dispute resolution processes that can be used before litigation. This is backed up by the threat of a cost awarded against the legal representative who does not encourage their client to take genuine steps to resolve their dispute before going straight into litigation.[172] Douglas and Batagol[173] confirm that '[l]awyers have a duty to advise and assist clients with the filing of a genuine steps statement and failure to do so may cause lawyers to be subjected personally to costs orders'.[174] Such legislation encourages the parties to try mediation, which creates a productive environment for mediation outcomes.

By contrast, the mediation in Jordan is not a step required before proceeding to litigation. The mediation legislation in Jordan provides for court-mandated mediation, when the parties consent. It means that after meeting the parties and their representatives, the judge of the Civil Case Management, or the judge or Magistrate in the matter, can refer the dispute to a mediator if the parties consent.[175] Adopting a court-mandated mediation without party consent, or as a pre-litigation requirement would improve the number of cases adopting mediation in Jordan. Further, the Jordanian law does not impose on lawyers the duty of considering the benefits in referring a case to mediation.. The judge and lawyer thus have a significant role,

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169 *Civil Dispute Resolution Act,* s 5.

170 *The Civil Proceedings Act 2011* (Qld) s 43 ('*Civil Proceedings Act* ').

171 Greg Rooney, 'The Rise of Commercial Mediation in Australia–Reflections and the Challenges Ahead' (2016) 3(2) *The Journal of Mediation and Applied Conflict Analysis*, 2.

172 *Civil Dispute Resolution Act*, s 12.

173 Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal ' ( 2014) 40(3) *Monash University Law Review* 758-792.

174 Ibid, 759.

175 Alsaleeby (n 19) 37.

individually, in supporting the parties to consider using mediation to solve their disputes. In Jordan, however, a judge cannot impose a binding obligation on the disputants to settle their disputes by mediation; rather, it is a consensual process.[176] This could be considered the main reason for the limited uptake of the option of mediation by disputants in Jordan. Chapter 4 considers this issue in details.

The evaluative mediation model is commonly used by the mediators in Jordan enabling them to promote the agreement.[177] This model may not help the disputants to improve their relationship, enhance communications through the negotiation process, or to empower parties to reach satisfying voluntary agreements by themselves. This model therefore does not support the critical philosophical hallmarks of mediation such as empowerment through letting the parties craft their own solution. In contrast, there are recognised different mediation models for the process in the Australian practice. For exmple, the facilitative mediation model is the most supported model practised in Australia. The facilitative mediation model is preferable as it is most closely aligned with the philosophical hallmarks of mediation, and addresses disputes 'through creative, mutual problem solving, not just a process of settling cases in the shadow of the expected court outcomes.'[178] It also empowers the disputants to manage their own disputes, thereby fulfilling the ideal of ensuring society becomes more harmonious in the longer term. Chapter 4 and 5 consider this issue in detail.

Several factors have also played a significant role in the development of mediation in Australia. NADRAC was a critical body that contributed to and promoted the development of mediation practice.[179] NADRAC promoted mediation as a flexible and more efficient solution to dispute resolution.[180] While the Abbott government abolished this body in 2013, its legacy remains and is now enshrined in legislation and practice standards. In 2014, The Australian Dispute Resolution Advisory Council (ADRAC) stepped up to fill the space created by NADRAC. This council is voluntary and independent, and aims to explore, research and promote

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176 *Jordanian Mediation Act 2006,* art 3.

177 Masa'deh (n 19) 12.

178 Robert Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to The Courts Over Four Decades' (2008) 84 *North Dakota Law Review* 705, 721.

179 Varghese and Taylor (n 32) 3.

180 Rooney (n 171) 3.

better dispute resolution processes in Australian.[181] No similar such bodies are in operation in Jordan.

This is a key reason to explore the two countries' experiences in introducing mediation as a method for addressing disputes.

## 1.4 Research Problem

The research problem aims to consider Australia's advanced experience and how it can contribute to understanding and improving Jordan's mediation practice. The research problems are aimed at exploring knowledge from Australia's experience to assist the system of mediation in Jordan. The specific research problems engaged with are:

1. What are the current challenges that face mediation in Jordon?
2. Are there practices and learning from the more advanced Australian system that could be adopted to enhance mediation practice within the Jordanian courts?
3. What recommendations can be made for the legal system and mediators in Jordan to respond to these challenges?

## 1.5 Overview of Methodology

In order to operationalise the research problem this thesis employs two main methodologies: firstly, a comparative study accessing primary (legislation and cases); and secondary (reports and academic literature) materials. The Australian and Jordanian legal systems are compared to provide a contextualised historical perspective for understanding the two different legal systems. Comparative analysis extends to looking at cultural differences that are relevant to the mediation process. Additionally a qualitative interview study of key figures in the field from both countries was undertaken. The qualitative investigation involved conducting 11 semi-structured interviews with mediator judges, mediators, lawyers and academics

[181] The Australian Dispute resolution Advisory Council (ADRAC), About us (March 2020) <https://www.adrac.org.au/>.

from each country to understand this process from the participants' current perspectives. This qualitative approach to data collection enabled currency of the relevant literature to be considered. The qualitative data built an 'at the moment' picture of the reality of this process as experienced by practitioners at the height of their field and expanded the information provided by the primary and secondary literature used in the comparative method. Chapter 2 expands on the research methods adopted.

## 1.6 Structure of the Thesis

This dissertation is divided into eight chapters.

Chapter I provides an introduction, background of the study and structural road map of the thesis. It provides a literature review of the philosophical hallmarks of mediation and an explanation of models of mediation. It establishes the reason for the research.

Chapter II describes the methodologies used to undertake the research and the reasons for their use. As described, the thesis adopts a comparative approach. First by investigating the literature and reports from each country, establishing a basis for understanding the comparision of the two legal systems. Second qualitative methods are used to probe interviewees' opinions about the development of mediation and the issues that this process faces.

Chapter III is a review of the two legal systems, comparing the similarities and differences of both in a contextually comparative manner. It introduces an understanding of the cultural differencesin Australia and Jordan. This chapter provides the context for the exploration of mediation undertaken in the study.

Chapter IV further explores the Jordanian culture to provide a comparison of cultural considerations. For example, the role of Indigenous dispute approaches in both countries provides a grounded contextual understanding, along with specialised considerations such as the role of the Islamic religion in Jordanian disputes. This chapter introduces the system of mediation applied within the legal system in Jordan

and its development to date. It analyses theoretical debate on the implementation of mediation in Jordan at the practical level.

Chapter V describes the dominant model of mediation developed in Australia together with other models used. It examines the cultural context and the reasons for Australian interest in using mediation and the challenges this has brought to the legal profession and the adversarial litigation system.

Chapter VI presents the data from the significant mediation figures interviewed and discusses key themes presented.

Chapter VII revisits the hallmark philosphoes after the consideration of the data prtesented in Chapter VI and provides an analysis of these in view of the data and the literature.

Chapter VIII addresses the research problem and provides recommendations for Jordanian policy considerations, based on the results of the research. The recommendations address issues still facing mediation practice in Jordan and the betterment of mediation practice taking account of lessons from the Australian experience.

## 1.7 Summary

This chapter has set out the foundations of this thesis. It has considered the literature on the hallmark philosophies and models used in mediation practice. This will assist with the research and discussion to identify best practices in addressing the integration of mediation into the Australian and Jordanian legal systems. The success in uptake of this process in Australia provides a reason for doing research into identifying the factors that would be critical for effective mediation practice in Jordan. It will help to provide a series of recommendations that may encourage Jordanian legislators to make adjustments to the laws related to mediation, at the same time providing further insight into the practice of mediation in Australia. This chapter has provided the background and the context for the research and has explained its significance. It has presented an overview of the research methodology and provided a road map for the thesis to help direct the reader through to the conclusion. The next chapter turns to the methodology used for this thesis.

# Chapter 2: Research Theory and Methodology

## 2.0 Introduction

This research reviews the practice of mediation, which has been in force for at least thirty years in Australia and thirteen years in Jordan. These two countries were selected as study sites for comparative research because Australia has a wealth of experience in this field. This may provide significant benefits to scholars and legislators in Jordan so they can identify and improve on any weaknesses in mediation practice and learn from Australia's experience. The study will also learn from any issues still facing mediators in Australian practice. For the purpose of the thesis, the mediation systems in Queensland and Amman provide the central focus. The Queensland system is a representative sample of mediation practice in Australia overall. Some variations are present between states, and this will be considered where it is essential to comparisons being made. To address any deficit in this, not all Australian interviewees are from Queensland. Jordan has applied the law of mediation in the Amman courts in the first instance, and this is also where it is most developed, so the focus is on this area.

Through exploration and comparison of the development and growth of the mediation processes in Australia and Jordan, this thesis aims to consider the main factors operating in relation to mediation practice in both countries, with a view to making recommendations for improvements in Jordan. This is done through an exploration of the differences and similarities of the legal systems through literature analysis and their respective contexts, and their cultural positions, using a comparative methodology. In addition, interviews with key stakeholders were undertaken to gauge their perceptions about mediation practices in both countries. The key stakeholders were a cross-section of mediators, lawyers, judges, and academics.

This chapter deals with the operationalisation of the research and provides an overview of the research methodology used in this study. As described in Chapter 1, this thesis is a comparative study between Australia and Jordan's mediation practice.

The thesis uses literature analysis, comparative theory and interviews in this undertaking. The literature covers primary materials such as legislation and case law, as well as secondary reports and texts, to provide a situation analysis. When doing a comparative study, the legal framework and cultural variations are essential to understand to provide a fully contextualised understanding of the similarities and differences at play within the compared systems. This approach enables informed understandings that provide an opportunity to make suggestions in answer to the focal questions being addressed by the thesis.

## 2.1 Theory

As the primary aim of this research is to find differences, similarities, problems, and possible solutions, a comparative study is an appropriate method to adopt. A comparative study is considered as an instrument that provides valuable insight into and knowledge about a topic relevant to the two legal systems. According to Eberle[1], '… the essence of comparison is then aligning similarities and differences between data points, and then using this exercise as a measure to obtain an understanding of the content and range of the data points.'[2] Bell[3] suggests that comparative law is 'a sub-branch of legal research'[4] that aims to identify the principles and features of the existing legislation of the countries studied.[5] In this, the primary role of the researcher 'is comparing his or her reconstruction of a foreign legal system with his or her reconstruction of his or her own national system'.[6] Frankenberg[7] expands this by suggesting that comparative law can be seen as 'intellectual travelling' to the different country to have an opportunity to learn about their legal system and their culture to suggest reform of the traveller's own legal system.[8] The latter represents the actual position of the researcher in this thesis, with an intellectual and researcher

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1 Edward Eberle, 'The Methodology of Comparative Law' (2011) 16 *Roger Williams University Law Review* 51.

2 Ibid.

3 John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research : Which Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, 2011), 158.

4 Ibid.

5 Ibid.

6 Ibid.

7 Gunter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.

8 Ibid.

not only travelling but indeed physically embedding herself in another country (Australia) to undertake the comparison with her home country Jordon.

As a Jordanian woman lawyer, I bring a certain perspective to my research, which is an influence I acknowledge. My belief is that the mediation process in Jordan is not activated to operate to its full potential. I worked as a lawyer in Amman for two years, and I found that lawyers have a lack of knowledge about mediation and its benefits. I found that the judges have started to ignore notifying the parties about the importance of using this process as the majority of disputants tend to not choose the mediation process. This observation is supported by Alsaleeby's study.[9] I worked as a lawyer for six months in Karak, which is a state in the south of Jordan with a strong Bedouin population. While working there, I found that the potential for a court mandated mediation was not well known by clients, lawyers and even Judges as there have been no awareness campaigns conducted within the legal and broader communities.[10] This is concerning given Bedouin traditional familiarity with the concept of privately resolving disputes.

As a researcher, I wanted, through this thesis, to evaluate the operation of the mediation law in Jordan to determine the main issues encountered in relation to its adoption. Furthermore, there is very little current literature on this topic in Jordan. Comparing it to the Australian experience helped me to identify the success factors, along with the challenges, that this process has faced in Australia, a country more advanced in its adoption of mediation. Using a qualitative methodology has helped me to explore and understand this phenomenon. I was interested in talking to the people who are involved in the process to know how to advance its operation. Thus, my outlook has influenced my choice of questions in the interviews and how I have interpreted the data to seek specific answers is related to the issues that may hinder mediation's progress.

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9 Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010).

10 See especially, *Progress Report on the Progress of Court-Related Mediation Program in Jordan between June 2007 - May 2008 Amman* (American Judges and Lawyers Association-Rule of Law Initiative, ('*The Progress of Court-Related Mediation Program Report*').

The literature on comparative methodology agrees that there are six different approaches to comparative legal research. These are referred to as the functional, the structural, the analytical, the law in context, the historical, and the common-core method.[11] After an investigation of each for this comparative study, the law in context method was adopted as the best fit for achieving the objectives of the research. The law-in-context method means contextualising the law by understanding the historical, political and legal systems in which the law operates.[12] Such a rich approach situates the main goals of the law through an understanding of the cultural dimensions. This approach is adopted as it has several advantages in providing a holistic understanding, rather than just the similarities and differences between two legal systems' legislation and case law, which approaches such as the functional, structural and common-core adopt.

When doing comparative research, caution is to be observed for as Samuel notes, comparative studies tend to cover similarities more than differences.[13] To avoid this dilemma, Hoecke's suggestion was adopted as it encourages comparatists to focus on common legal problems and solutions more than on differences and similarities.[14] This approach is appropriate in this thesis as it addresses dispute management, a common legal problem, and the specific solution of mediation as a solution process to address disputes. This thesis provides the reader with an understanding of how the solution of mediation operates in both countries, to lead to a comprehension of the challenges that mediators and legislators face, and to propose possible solutions to any issues, whilst taking account of cultural differences that can affect this process.

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[11] See, e.g., Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comperative Law* (2006); Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011).

[12] Maurice Adams and John Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012), 293.

[13] Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law before One Can Understand Methodology in Comparative Law?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, 2011), 180.

[14] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *ResearchGate* 7; Geoffery Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014) 81.

A further perceived difficulty for this contextual comparative study is that the legal systems compared differ. Australia is a common law jurisdiction, and Jordan is a civil law jurisdiction, which provides an immediate difference in legal systems. However, as Wailes et al.[15] suggest, research that applies to comparing two different cases that share the same phenomenon is vital, and certainly there is more room for comparison between their respective civil and common law systems when addressing the same phenomenon, namely the use of mediation to manage disputing.[16] Alexander[17] indicates, there are a minimal number of comparative studies in mediation involving civil law countries, no doubt because the mediation phenomenon is still in its infancy in these jurisdictions. However, both countries in this study have supported the use of mediation because it may be a cheaper, quicker and a more confidential alternative to traditional court litigation. The process of mediation is a universal one and creating a comparative study in mediation between common and civil law jurisdictions therefore provides a useful opportunity for reflection on the differences and similarities in the development of mediation in the different legal systems. It is valuable, in terms of understanding the approach of a common-law jurisdiction such as Australia, to compare and analyse it with the practice of mediation in a civil law country such as Jordan, after the concept has been introduced. Learnings from each country can provide insights that can advance the process in a way that avoids duplication of unnecessary roadblocks or a 'reinventing of the wheel.'

The comparison undertaken would not be complete without acknowledging cultural factors. On this basis, the researcher has adopted a dimensional values approach along with an etic-essentialist view for this comparative study as it is not addressing intercultural conflict,[18] but looks at cross-cultural communication/ conflict in that it is making direct comparisons. The approach draws on the high-context/low–context cultural framework, which is well known in mediation

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15 Nick Wailes et al, *International and Comparative Employment Relations : National Regulation, Global Changes* (Allen and Unwin, 6th ed, 2016) 7.

16 Ibid.

17 Nadja Alexander, 'What's Law Got to Do with It-Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) *Bond Law Review* 2, 8.

18 Dominic Busch, 'Does Conflict Mediation Research Keep Track with Cultural Theory? A Theory-Based Qualitative Content Analysis on Concepts of Culture in Conflict Management Research' (2016) 4(2) *European Journal of Applied Linguistics* 181-206.

research.[19] In addressing the big picture, the essentialist approach is appropriate given the study looks at a contextualised comparison of a geographical or country region, its history, peoples and institutions. The etic approach is taken as the researcher has engaged in comparison of Jordanian dispute management with Australia's system of dispute management – in particular mediation.

For Jordan, a more unified culture than the diverse multicultural society of Australia, this is perhaps simpler for making more overarching statements. This factor is a central consideration and has resulted in the researcher taking a dimensional values approach[20] considering individualism-collectivism, power-distance incorporating an etic essentialist approach[21] when discussing cultural considerations, in particular in Chapter 3. There are many research methods to adopt when considering culture but as this is a cross cultural comparative study the researcher is addressing the two countries through their institutions, history and legal structures, thus an essentialist consideration is appropriate when comparing Jordanian mediation practices with a Western country such as Australia. The thesis will explain the background to the development of mediation in both Australia's and Jordan's legal systems. It will analyse mediation legislation in Jordan and Australia, such as the *Civil Dispute Resolution Act 2011*(Cth) and *Mediation Law for Settlement of Civil Disputes Act 2006* (Jor). In addition, it will investigate the models of mediation used and the mediator styles. The difficulties and successes faced in both jurisdictions are uncovered.

One of the difficulties in the research is that there has been very little research on the mediation process in Jordan. However, there has been extensive research in Australia into this process as it has been in operation for longer. Within Jordanian literature, Qatawneh[22] has provided an evaluative study that criticises the Jordanian law of mediation and outlines what he considers to be a more perfect law, which was

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19 Michelle LeBaron, 'Culture and Conflict: Beyond Intractability' in Guy Burgess and Heidi Burgess (eds), *Conflict Information Consortium* (University of Colorado, 2003); Robert A LeVine, 'Anthropology and the Study of Conflict: An Introduction' (1961) 5(1) *The Journal of Conflict Resolution 3-15.*

20 Busch (n 18) 181-207.

21 Stella Ting-Toomey, 'Applying Dimensional Values in Understanding Intercultural Communication' (2010) 77(2) *Communication Monographs* 169-180.

22 Mohammad Ahmad Al-Qatawneh, 'Mediation in Settlement the Civil Disputes ' (LLM Thesis, Mutah University, 2008) 4.

initially hoped to have been adopted by the legislature.[23] For example, Qatawneh indicates that there is no continuous training program for mediators to improve and develop their skills and no accreditation certificates for those wishing to operate in this profession. Alsaleeby[24] conducted a descriptive study about the mediation process in Jordan between 2007 and 2009. Alsaleeby found that there is a need to educate the lawyers and the parties about the importance of using this process.[25] Saleeby[26] also illustrated how the modern practice of mediation in Jordan was affected by Western practices of mediation, especially the American one.[27] Rashdan[28] has examined the mediation process and noted that the process has faced several barriers, resulting in low demand for it in Jordon. Concerns Rashdan highlight include the Jordanian legislation's broad-brush approach that makes the process hard to follow at first glance.[29]There is also an absence of the mediators' codes of conduct and mediator accreditation mechanisms.[30] Sarhan[31] has provided an examination of the process of mediation practised by judge mediators under the new laws, and has suggested that clarification and amendments are required. [32] These studies provide a starting point in examining the mediation process in Jordan. However, these studies have not taken a comparative approach that can provide greater insight into what works well and what can be improved, through an outsider lens that acknowledges a cultural contextualisation.For Australia, there has been an extensive examination of mediation with many changes and adaptations over a longer period.[33] The Australian literature

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23 Ibid.

24 Alsaleeby (n 9) 22.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ali Mahmoud Al-Rashdan, *Mediation in Settlement the Disputes* (Dar Al-Yazoury Scientific for Publishing, 2016) 145.
29 Ibid.
30 Ibid.
31 Bakr Abd-Fatah Al-Sarhan, 'Mediation on the Hands of the Mediator Judge: The Concept, Importance and Procedures' (2009)(1) *Jordanian Journal in Law and Political Science* 98.
32 Ibid.
33 See e.g., Tania Sourdin, 'Facilitative Judging' (2004) 22(1) *Law in Context* 64-92; Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35(3) *University of New South Wales Law Journal* 889-913; Susan Douglas, 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19-40; Tania Sourdin, 'Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts' (2013) *Australian Institute of Judicial Administration*; Tania Sourdin, 'Resolving Disputes without Courts' (2013) 32(1) *The Arbitrator and Mediator* 25; Tania Sourdin and Naomi Burstyner, 'Cost and Time Hurdles in Civil Litigation: Exploring the Impact of Pre-Action Requirements' (2013) *Journal of Civil Litigation and Practice*; David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2014); Klaus Hopt and Felix Steffek (eds), *Mediation : Principles and*

provides a wealth of information about the development of dispute resolution in general, and mediation more specifically. Qualitative, evidence-based research is available, including observation of mediation sessions and interviews with participants to measure their satisfaction.[34] Many studies in Australia concentrate on evaluating the process of mediation by using empirical qualitative research to determine the efficiency of this process.[35] For example, Sourdin and Balvin[36] explore in their study the various mediation processes used in court related mediations in the Supreme and County Courts of Victoria, Australia.[37] Their research aimed to enhance the quality of mediation and dispute resolution practice through examining the role of legal representatives and studying mediator and litigant perceptions in the process.[38] Noone and Ojelabi[39] also address the use of mediation as a vital way to improve the access to justice for disputants.[40] Their research concludes that the quality of mediation could be measured to ensure access to justice is enhanced for the disadvantaged.[41] Lastly, as mandatory mediation has become Australia's default dispute resolution mechanism, Waye[42] also delineates how this adoption has led to widespread improvements in access to justice in Australia.[43] Thus, the Australian literature has rich information about the bright side of mediation that can be a benefit to enhance the Jordanian

*Regulation in Comparative Perspective* (Oxford University Press, 2013).; Marjorie Mantle, *Mediation: A Practical Guide for Lawyers* (Edinburgh University Press, 2017); Laurence Boulle and Rachael Field, *Australian Dispute Resolution : Law and Practice* (LexisNexis Butterworths, 2017); Susan Douglas, 'Ethics in Mediation: Centralising Relationships of Trust' (2017) 35(1) *Law in Context* 44-63.

34 Melissa Conley Tyler and Jackie Bornstein, 'Court Referral to ADR: Lessons from an Intervention Order Mediation Pilot' (2006) 16(1) *Journal of Judicial Administration* 48; Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (2009) *Report prepared for the Department of Justice, Victoria, Australia*.

35 Laurence Street, 'Mediation and the Judicial Institution' (1997) 71(10) *Australian Law Journal* 794-796; John Wade, 'Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge' (2001) 18(3) *Mediation Quarterly* 259-280; Nadja Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' (2004) 22 *Law Context: A Socio-Legal Journal* 8; Tania Sourdin and Nikola Balvin, 'Mediation Styles and their Impact: Lessons From the Supreme and County Courts of Victoria Research Project' (2009) 20 *Australasian Dispute Resolution Journal* 142; Tania Sourdin, 'Making an Attempt to Resolve Disputes Before Using Courts: We All Have Obligations' (2010) 21 *Australasian Dispute Resolution Journal* 225; Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40 *Monash University Law Review* 528.

36 Sourdin and Balvin (n 35) 142.

37 Ibid.

38 Ibid.

39 Noone and Ojelabi (n 35) 528.

40 Ibid.

41 Ibid.

42 Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2-3) *Common Law World Review* 214-235, 214.

43 Ibid.

experience in advancing the mediation process to flourish.A difficulty in contextualized comparative studies is that the literature has a lag time from conducting the research to the reporting of the findings. While this thesis analyses the literature, it has made sure it is contemporary and cutting edge by the addition of data from interviews conducted with mediators, judges, lawyers, and academics from both countries. As there has been some debate regarding the relative merits of these techniques of data collection, it is pertinent here to review the methodologies associated with those techniques before discussing the research techniques used in this study. This section commences with an overview of the qualitative methods used.

## 2.2 Qualitative Research

Qualitative research is defined as a type of research that produces descriptive data about people's experience and observable behaviour within a specific setting.[44] The research methodology for the interviews has adopted this qualitative approach using semi-structured interviews. The method seeks to understand the participants' perceptions and experiences within their lives and in specific settings.[45] In using this method, the participants could express their views about the topic of research, which relied on their perceptions of the realities that surrounded them. This then enabled the research to apply a thematic analysis that captured the perspectives as a basis to know '[w]hat is happening here, specifically? What do these happenings mean to the people engaged in them?'[46] So, the aim of the qualitative method was to discover and explore explanations that contributed to a deeper understanding of the topic of study.

The literature is considered in order to inform the research problem, and this has provided a basis to conduct an analysis of the mediation process, which informs the perspectives of the interviewees who practice this process. This aimed to provide a current perspective on key concerns around enhancing mediation performance in both countries. This thesis has not refocused interviewees' perceptions from the point of view of an existing theory or framework. Instead, this study provides an analysis

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[44] John Amos Hatch, *Doing Qualitative Research in Education Settings* (State University of New York Press, 2002) 6.

[45] Jack Fraenkel, Norman Wallen and Helen Hyun, *How to Design and Evaluate Research in Education* (New York: McGraw-Hill Humanities/Social Sciences/Languages, 2011) 505.

[46] Frederick Erickson, 'Qualitative Methods in Research on Teaching' in Merlin Wittrock (ed), *Handbook of Research on Teaching: A Project of the American Educational Research Association* (Macmillan; Collier-Macmillan, 3rd ed, 1986), 148.

of key factors perceived by interviewees with a view to formulating some recommendations for improving mediation practice in both countries.[47]

Comparative law has not only been employed as a discipline to understand foreign law, but also considered the culture through a law in context approach.[48] To do this, the underlying influences and structure of the use of mediation in both countries has been addressed in order to understand how the respective laws have been developed and how they currently influence the use of mediation within the respective societies. Therefore, the exploration has included an overview of the Indigenous cultures and their influence on dispute management practices in both countries. It also addresses key difference in cultural communication practices. This contextualised approach to cultural differences and similarities provides an understanding of the cultural influences and their level of impact on the law and its actual operation within these countries.[49] This thick level understanding of the mediation process, as now provided for in the law, along with cultural influences, has enabled this thesis to suggest reforms of mediation practices by taking into account the opinions of the interviewed key figures who use the mediation process in both countries.

After a contextual comparative and literature analysis, this study has concentrated on aspects of the mediation legislation and practices, as currently implemented in Jordan and Australia. It will focus on three levels: the nature of the models of mediation adopted; the role of the judge in mediation, particularly in Jordan; and the role of the mediator and lawyer advisors in both countries. It has considered these three aspects through factors such as the legislative mechanisms used by the government to encourage the use of mediation, mediation models used, and the evidence of the issues raised by the literature and the interviewees.

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[47] Kathleen M Eisenhardt, 'Building Theories from Case Study Research' (1989) 14(4) *Academy of Management Review* 532-550.

[48] Frankenberg (n 7) 412.

[49] Eberle (n 1) 53.

## 2.3 Data Collection – Interview Methodology

Primary materials such as legislation and case law, and secondary materials such as reports, journals and written materials, were accessed. These were sourced from the library databases to identify studies relevant to the phenomenon of mediation. The University of Southern Queensland (USQ) provides access to a broad range of academic databases that are linked to the topic, for example, LexisNexis and Westlaw. The researcher has reviewed studies published within the period from 1986 to 2019. This period was chosen to understand the more contemporary development of mediation and the dilemmas that this process has faced since its uptake in Australia and Jordan, and also to provide the research with a workable parameter.

As mentioned earlier, this thesis has conducted eleven semi-structured interviews. Qualitative interviews create a special kind of conversation between the researcher and the interviewees, and a semi-structured interview enables open-ended and expansive responses. These questions encourage interviewees to explain their unique perspectives on the specific issues, which help to reveal information to understand their world.[50] Conducting interviews in this thesis has enabled identification of the specific challenges and issues that mediation implementation and practice are facing in both countries. The interviews gathered in-depth information about the interviewees' thoughts, knowledge and experience, by asking the same semi-structured questions of each participant (see, appendix 1).[51] They provided a range of perspectives from the actors involved in mediation practice, and they were directly comparable as the different discipline and professional areas were closely represented from each of the two countries.

Five interviewees came from Australia and six from Jordan. All interviews were conducted using Skype from within Queensland, Australia. The Australian interviews were undertaken from 4 February to 8 April 2019. All interviewees resided in Queensland although a number have practised in other states. The Jordanian interviews were conducted from 4 March to 8 December 2018.

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[50] Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press, 2006) 9.

[51] Gerald Hess, 'Qualitative Research on Legal Education: Studying Outstanding Law Teachers' (2014) 51 *Alberta Law Review* 925-925, 932.

Interviewees resided in both the US and Jordan. Those interviewed included one person who had participated in introducing the mediation process in Jordan through encouraging the Jordanian legislature to adopt this process. The other five interviewees were Jordanian practitioners in the civil jurisdiction, who utilise the mediation process, and academics.

Table 1: List of professions interviewed [52]

| | **Australia** | **Jordan** |
|---|---|---|
| **Academics** | 2 | 2 |
| **Lawyers** | 3* | 3 |
| **Mediators and lawyers** | 3 | 2 |
| **Judge mediators** | 0 | 1 |

- Note Three lawyers also work as mediators. In total there were 11 interviews

Debate exists around the appropriate number of interviews that should be conducted. Some researchers argue eleven interviews are not enough for gathering information.[53] Patton,[54] however, confirms that there is no specific number of interviews that should be used.[55] Yin[56] suggests that a sample of eight to ten interviews is sufficient for qualitative research.[57] The researcher chose eleven interviewees, five from Australia and six from Jordan. Echoing Yin, Sandelowski[58] states that a '… sample size of 10 may be judged adequate for certain kinds of homogeneous or critical case sampling…'[59] In this thesis, the interviewees represent sophisticated and high-level practitioners in the specific domain of mediation. It is,

[52] There are three Australian lawyers who work as mediators and two Jordanian lawyers who work as mediator.
[53] Lisa Ellram, 'The Use of the Case Study Method in Logistics Research' (1996) 17(2) *Journal of Business Logistics* 93; Larry Hedges and Ingram Olkin, *Statistical Methods for Meta-Analysis* (Academic Press, 2014) 350.
[54] Michael Quinn Patton, 'Two Decades of Developments in Qualitative Inquiry: a Personal, Experiential Perspective' (2002) 1(3) *Qualitative Social Work* 261-283; Michael Quinn Patton, *Utilization-Focused Evaluation* (Sage publications, 2008).
[55] Patton, 'Two Decades of Developments in Qualitative Inquiry: a Personal, Experiential Perspective' (n 54) 261; Patton, *Utilization-Focused Evaluation* (n 54) 262.
[56] Robert Yin, *Case Study Research: Design and Methods* (SAGE Publications, 4th ed, 2009) 55.
[57] Ibid.
[58] Margarete Sandelowski, 'Sample Size in Qualitative Research' (1995) 18(2) *Research in Nursing and Health* 179-183.
[59] Ibid.

therefore, an effective approach to ensure currency of the information rather than relying solely on published materials, which can lose some of its currency from the time between being written and being published. It is clear from the variation in scholars' opinions that there is no clear rule that can be applied when it comes to the number of interviews. Nevertheless, considering the aim of this thesis, it is considered that the selection of ten interviewees was more than adequate, as the researcher is entitled to stop gathering information via interviews at the point where no new data is being presented.[60] The interview data collected in this thesis demonstrated that a point of data saturation was reached in the eleven interviews conducted when the same views were being repeated in response to the questions.

Recruitment was conducted via email contact, based on publicly available listings of people working in the relevant field in both countries. These listings included law school academics, Law Society member listings, and Court websites, because they provided contacts for elite specialists working in this particular domain. Interviewees were selected from the relevant domains such as judges, mediators, lawyers, tribunal mediators and academic researchers in the area of mediation practice. Selection was based on their level of participation in their respective domains of mediation. They were identified as important figures with a depth of knowledge on mediation. One-hour interviews were conducted with eleven participants. The interviews were conducted via phone or asynchronous virtual technology, such as Zoom or Skype, for flexibility, cost and time saving.

Ethical approval was obtained from the University of Southern Queensland (USQ) in 2018 to ensure that this study met the required ethical standards. University of Southern Queensland Project Code H18REA012 was provided. Several steps were taken to ensure the protection of the participants' welfare. To overcome time inconvenience to the participants, the interviews were arranged at a pre-agreed time suitable to the interviewee and breaks in the interview were offered, if required by the participant. Furthermore, the participants were informed in the participants' information sheet (See Appendix 3) that there was no obligation to participate, nor any consequences if they did not want to. Three participants did withdraw prior to

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[60] Evert Gummesson, *Qualitative Methods in Management Research* (Sage Publications, 2000) 113.

the scheduled interview due to work demands. All interview data were anonymised to protect interviewee identity.

The interviews were audio-recorded and transcribed. Transcription was done by a professional transcriber and was subject to a confidentiality agreement. Interviews were held at a convenient time nominated by the interviewee. The interview questions were designed to elicit challenges, successes and solutions, based on experience faced by the practitioners. The semi-structured interviews provided the interviewer with more freedom 'to modify the style, pace and ordering of questions to evoke the fullest responses from interviewees.'[61] The interviews started with opening questions followed by more probing question to get detailed information related to the mediation practice. The interviews provided a range of perspectives from the interviewees involved in mediation practice, and they were directly comparable between the different discipline and professional areas represented and between the two countries.

## 2.4 Qualitative Data Analysis

The qualitative data from the interviews were compared, whilst looking for the main themes raised. The researcher used NVivo software to assist in this process. NVivo is a tool that assists in managing the data and ideas from interviews, asking simple or complex questions of the data to find answers, and to visualise the data in order to represent relationships within the information as well as draw conclusions on common themes.[62]

The researcher also conducted a manual analysis of the interviews to ensure all data were covered and themes were addressed. This process involved manually comparing keywords, as well as the responses to each of the semi structured questions, for example mediation definitions, development, cultural effect, and issues that may face the progress of mediation. After finishing this analysis, the themes,

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61 Sandy Qu and John Dumay, 'The Qualitative Research Interview' (2011) 8(3) *Qualitative Research in Accounting and Management*, 246.

62 Marilyn Healy and Chad Perry, 'Comprehensive Criteria to Judge Validity and Reliability of Qualitative Research within the Realism Paradigm' (2000) 3(3) *Qualitative Market Research: An International Journal* 118-126; Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Sage, 2015).

sub-themes and examples of direct quotes were carried over into tables for the presentation of the data in this thesis.

## 2.5 Summary

This chapter has provided details about the theory and methodological approach undertaken to conduct the research. Justifications for adopting a contextual comparative approach have been addressed along with any difficulties and limitations in this approach. It has provided the details of the research design and the theoretical underpinnings in choosing this design. The chapter has also provided an explanation of how the data were collected and analysed. The next chapter starts with a comparison of the legal systems in Jordan and Australia respectively. This follows a contextualized comparative approach and is to aid the understanding of the legal framework within which the use of mediation as a dispute management mechanism is situated.

# Chapter 3: A Contextual Review of the Legal Systems

## 3.0 Introduction

In a comparative study, it is necessary to provide context by understanding the legal systems in the countries compared, in order to locate the space in which mediation operates in the overall legal structure. This chapter, therefore, provides an overview of the legal systems of Australia and Jordan. It does this in a historical manner and provides a contextualised basis for understanding just where mediation sits within each legal system. It is helpful to understand how mediation found its place in the Australian and Jordanian legal system. This aids in determining how both countries have crafted their laws, where the current mediation practices have evolved from, and system on which this relative new approach to dispute resolution has been grafted. Next, similarities and differences between the historical developments of both countries' legal systems[1] are outlined.

## 3.1 History

Many factors have shaped the nature of the Australian legal system. Since the British government first transported convicts to Australia in 1786 as a punishment for their crimes, debate has been had over the Indigenous people who already inhabited the land.[2] There were two options for Australia: either the British could claim Australia through conquest over the Indigenous people, or they could claim the land was terra nullius - vacant land, and thus open for settlement of the colony.[3]

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1 See, e.g., Pier Giuseppe Monateri, *Methods of comparative Law* (Edward Elgar Publishing, 2012); Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 165-195; Imre Zajtay, 'Aims and Methods of Comparative Law' (1974) 7(3) *Comparative and International Law Journal of Southern Africa* 321-330; Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *ResearchGate* 10.

2 Hamish Maxwell-Stewart, 'Convict transportation from Britain and Ireland 1615–1870' (2010) 8(11) *History Compass* 1221-1242; Frank Lewis, 'The Cost of Convict Transportation from Britain to Australia 1796-1810' (1988) 41(4) *The Economic History Review* 507.

3 James Crawford, 'The Aboriginal Legal Heritage : Aboriginal Public Law and the Treaty Proposal ' (1989)(63) *Australian Law Journal* 15.

Despite many historical battles and deaths that ensued, the British claimed the latter.[4] In so doing, it was said that the convicts and settlers brought the common law of England with them, which included all English laws that were suitable and applicable to the colonial circumstances.[5] At the time, the Australian colonies were established for only one purpose, which was as a military outpost for the British Empire. These convicts populated the colonies in Australia, (except South Australia) and this shaped the nature of the legal system in Australia. They brought with them a culture of law which has influenced Australia's development as a common law country, and this impacted profoundly on the people who already lived there.[6] Britain displaced the Indigenous legal systems and effectively imposed their foreign law in Australia.

The High Court of Australia in *Mabo v Queensland (No 2)* (1992) *(Mabo),*[7] however, finally rejected the principle of *terra nullius*. This has been described as a most critical case in Australian legal history because the High Court recognised a form of native title that had previously been denied. This is now established by proof of pre-existing and ongoing native rights and interests held by traditional owner groups in different parts of Australia.[8] As a result of (*Mabo)* the Commonwealth Government introduced the *Native Title Act 1993* (Cth) (NTA),[9] which provides a framework for Aboriginal peoples and Torres Strait Islanders to seek recognition of their traditional country. They now must make an application to the Federal Court to claim their rights and interests.[10] Significantly, the *Native Title Act, 1993* (Cth)[11] determines land title via the process of mediation.[12] When the claimants submit their

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4 See e.g. Raymond Evans and Bill Thorpe, 'Indigenocide and the Massacre Of Aboriginal History' (2001)(163) *Overland Society Limited* 21; Bruce Elder, *Blood on the Wattle : Massacres and Maltreatment of Aboriginal Australians since 1788* (New Holland, 3rd ed, 2003).

5 Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 3rd ed, 2013) 3.

6 David Neal, *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales* (Cambridge University Press, 1991) 1-5.

7 *Mabo v Queensland* (1992) 2 CLR 175 ('*Mabo v Queensland* ').

8 The National Alternative Dispute Resolution Advisory Council (NADRAC), 'Indigenous Dispute Resolution and Conflict Management ' (Report 2006), 9.

9 *The Native Title Act 1993* (Cth) ('*The Native Title Act* ').

10 Kingsley Palmer, *Australian Native Title Anthropology : Strategic Practice, the Law and the State* (Australian National University Press, 2018); Leah Cameron and Cassie Lang, 'The importance of Mabo Day and the 'Native Title Act' 1993' (2018) 38(5) *The Proctor* 18-19; Tim Rowse, 'How we Got a Native Title Act' (1993) 65(4) *The Australian Quarterly* 110-132.

11 As amended by the *Native Title Amendment Act* 1998.

12 Kevin Dolman, 'Native Title Mediation: Is It Fair? ' (1999) 4(21) *Indigenous Law Bulletin* 8-10. Patricia Lane, 'Mediation Under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal*, 327.

application to the Federal Court, this court must refer the application to the National Native Title Tribunal. It aims to assist parties to reach agreement via mediation, unless the Court makes an order that there is no need for mediation.[13] The Indigenous practice of dispute settlement is described in more detail in Chapter 5. However, Indigenous influence in dispute settlement exists in Australia through restorative justice projects such as circle sentencing, victim offender mediation and Murri Courts.[14]

For the colonial settlers between 1855 and 1890, the British Parliament granted a limited right to set up a local system of government in each of the British colonies within Australia, usually referred to as granting ‘responsible government.’ As each of the colonies (New South Wales (1787), Tasmania (1803), Queensland (1824), and Western Australia (1850)) was granted this right, they were able to develop their own laws and legal systems to deal with their particular situations. Thus, the law and legal system in each colony began to develop separately from British law.

During the late 19th century, Australia had a series of Constitutional debates moving towards creating a central government. The first Convention was attended by Australian colonies and New Zealand in 1891, but it ended because New Zealand decided to remain separate from the Australian colonies. In 1899 at the third Convention, a referendum was held among the six colonies (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia). The Third Convention was successful in moving toward a federal system of government with the colonies gaining Statehood. Ultimately, the British Parliament passed the Act of the Australian Federal Constitution, Queen Victoria gave the Royal Assent, and Australia became a federal system with effect from 1 January 1901.[15]

The Australian Constitution sets down the powers of the states and territories and the Commonwealth or Federal Parliament. This is provided for through

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13 *The Native Title Act* (n 9) s 86/A and B; see further, Graeme Neate, Craig Jones and Geoff Clark, 'Against All Odds: The Mediation of Native Title Agreements in Australia' (Conference Paper, Second Asia Pacific Mediation Forum 2003); Lane (n 12) 322.

14 Chris Cunneen, 'Reviving Restorative Justice Traditions?' in D. Van Ness (ed), *Handbook of Restorative Justice* (Willan Publishing, 2007) 135-153; Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.

15 See: Peter Hanks, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012). 6-13.

enumerated powers for the Federal Parliament in s51 of the Constitution, which specifies topics for the creation of legislation. An ability to deal with overlapping powers, giving precedent to Commonwealth legislation, is provided by s109 of the Constitution. A separation of powers is implied by the organisation of the Constitution into chapters, one each dealing with the Legislature - Chapter 1, Executive - Chapter 2 and Courts – Chapter 3.[16]

The Australian Constitution was the beginning of a more independent Australian legal system from the British. It created a federal system with the six colonies becoming states and two colonies becoming territories (Northern Territory and the Australian Capital Territory). However, Australia is still not entirely independent, as the Queen, through her representative the Governor-General, is head of the Executive. Joske[17] describes the Australian Federal system as 'a partnership in government with a central authority to look after matters of national and international import, and localised governments to deal with the differing conditions of the local communities.'[18] In the Australian federal system, there are thus two primary sources of constitutional law: the Commonwealth Constitution and the States' individual Constitutions.[19] This means all Australians are subject to a layered legal system comprised of the federal laws, and the laws of the state or territory in which they reside.

In contrast, the genesis of Jordan's legal system has even more mixed legal roots, starting with Bedouin, then moving to Islam, the Ottoman Empire, the Hashemite dynasty, and the British mandate and monarchy. Each have played an essential role in modelling this country. Like Indigenous Australians, the Bedouin people in Jordan have occupied their respective territories for many thousands of years.[20] Jordan, as a Middle Eastern country, was also administered by the Ottoman Empire for over 400

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16 Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 1.

17 Vines (n 5) 214 quoting Percy Ernest Joske, *Australian federal government* ( Butterworths, 1976) 25.

18 Vines (n 5) 214, quoting Joske (n 17) 25.

19 See e.g.: *The New South Wales Constitution Act 1902* (NSW) ('*The NSW Constitution*'); *The Northern Territory (Administration) Act 1910* (NT) ('*The Northern Territory (Administration) Act*'); *The Constitution of Queensland Act 2001* (Qld) ('*The Constitution of Queensland Act*').

20 Chris Clarkson et al, 'Human Occupation of Northern Australia by 65,000 Years Ago' (2017) 547(7663) *Nature Journal* 306; Ruth Kark and Seth J Frantzman, 'Empire, State and the Bedouin of the Middle East, Past and Present: A Comparative Study of Land and Settlement Policies' (2012) 48(4) *Middle Eastern Studies* 487-510, 488.

years. After World War 1, the Ottoman influence was terminated, and the Hashemite royal family established their system of rules.[21] From 1922, the British, through mandated representatives, started to administer Jordan.[22] This mandate period ended in the spring of 1946 when the United Nations recognised Jordan as an independent state. Bedouin lifestyle was maintained throughout these periods, but less so after Jordan's independence in 1946. Successive governments of Jordon have minimised Bedouin influence by encouraging the people to settle in the cities and by offering employment in the military, industry, and the service and trade sectors.[23]

The current Constitution was enacted in 1952. Like Australia, it was influenced by the British and follows the principle of the rule of law, which underpins the democratic principles of society. This means all citizens are ruled by the prescribed law and the Constitution is central, as 'the nation is the source of all powers and the Nation shall exercise its powers in the manner prescribed by the present Constitution.'[24] The formal name for Jordan is the Hashemite Kingdom of Jordan. It is divided into 12 governorates (Irbid, Ajloun, Jerash, Mafraq, Balqa, Amman, Zarqa, Madaba, Karak, Tafilah, Ma'an, and Aqaba), each one headed by a governor. Governors are appointed by the King through the Minister, and they maintain law and order at the local level. Jordan's population of Sunni Muslims comprise 92 per cent of the population, and Christians comprise 6 per cent.[25] Unlike Australia, Jordon is a unitary State, with one central government.

## 3.2 Civil Law and Common law Legal Systems

Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages

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21 Awad AlLaimon, *The Evolution of the Jordanian Constitutional System, an Analytical Study* (Dar Wael 2015) 21.

22 Ali Shetnawi, *Constitutional Law System* (Dar Wael for Publishing and Distribution 1ed, 2013) 13.

23 Amira El Azhary Sonbol, *Women of the Jordan: Islam, labor, and the law* (Syracuse University Press, 2003) 22.

24 *The Constitution of The Hashemite Kingdom of Jordan 1952* (Jor) art 24 (' *Jordanian Constitution'*).

25 Tariq Hammouri, Dima Khleifat and Qais Mahafzah, 'Chapter 4: Jordan' in Nadja Alexander (ed), *Arbitration and Mediation in the Southern Mediterranean Countries* (Kluwer Law International 2007), 69.

and was applied to British colonies across continents.[26] The civil law tradition is the oldest and most widely distributed legal system, which developed in continental Europe.[27] The common law and civil law systems have influenced the development of legal systems in countries around the world, with the civil law tradition coming to dominate through its uptake in many countries. Still some countries, often known as the Commonwealth countries, follow the English common law traditions, and their roots are based in this system. These Commonwealth countries were conquered or colonised by the British Empire. Australia is one such country. Over time, these countries have come to adopt their own unique mix of characteristics often in a plurality of legal traditions. Jordon follows a civil legal family tradition, which holds a mix of plural legal systems. The essential difference between common law and civil law countries is that the common law comes not only from Parliamentary-created legislation, but also from Judge-made laws in the courts. In civil countries, the separation of powers is more rigid, with only Parliament enabled to legislate the written law; judges apply the law but do not make law. Civil codified written laws play an essential part in civil law countries.

Thus, the Australian common law legal system is significantly influenced by English heritage. In this tradition, judges have an essential role in shaping the law through the development of judge-made law. Law is developed from the cases decided by the judges, and through a process of *stare decisis*, precedent is created in the case law. Precedent develops over time through the judge's decision making, which is recorded in law reports. The process of *stare decisis* operates such that a case that relates to the same or similar facts will follow a prior decision on the same point from a higher court in the same court hierarchy. This means that when a court decides on a case it may make law, the decision in such a case not only decides the matter for the parties but may apply to others in future relevant cases, unless it should be overridden by Parliament's legislation [28]

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[26] See especially: Vines (n 5) 3; See generally: Gary Slapper, *The English legal system 2013-2014* (Taylor and Francis, 14th ed, 2013); John Baker, *An introduction to English legal history* (Oxford University Press, 4th ed, 2007); Augusto Zimmermann, 'Christianity and the Common Law: Rediscovering the Christian Roots of the English Legal System' (2014) 16 *University of Notre Dame Australia Law Review* 145-177.

[27] Robert French, 'United States Influence on the Australian Legal System' (2018) 43(1) *University of Western Australia Law Review* 11-29.

[28] See: Vines (n 5) 5-6.

This is just one source of law in Australia. The primary source of law is legislation or statute law, which is created by the parliaments, both Federal, State and Territories. Australia adopted the British Westminster system with regards to the separation of powers between the legislature, executive and judicature. This means that instead of a strict three-way separation it resembles a two-way separation, with the courts being one limb and the legislature and executive being aligned. The latter occurs through Ministers, as part of the Executive, also sitting in Parliament and making law. For this reason, the independence of the Courts is essential to support the rule of law. Vines[29] has observed that 'Australia's law developed from the traditions of the English common law, but it is not a mere outcrop of English law.'[30] This means the Australian system and English legal system have developed differently, even from the beginning, because Australian heritage was pragmatically focused on a penal colony rather than the English system, which had evolved over many centuries to accept greater entitlements for its citizens.[31]

The Jordanian legal system, by contrast, has been influenced by the civil law system in which the primary source of the law is parliamentary legislation, and large areas of this law are codified systematically. The judge in this system does not have any role in creating the law, as in a common law system, and therefore is much less influential. However, secondary sources of law exist, including Islamic law (*Sharia*), which is derived from Islamic religious teachings that have legal implications for its adherents.[32] Another source of law is the Bedouin customary law, which existed before Islamic law, even though some aspects of this law have been affected by the rising Islamic religious laws.[33] This law is only activated among the people who have Bedouin background to solve problems related to incidents of bloodshed and issues regarding women.[34] In this way, Jordan can be described as having a plurality of legal traditions that operate in tandem with the state system.[35] In contrast, the Australian

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29 Ibid.
30 Ibid.
31 Ibid.
32 See further, Noel James Coulson, *A history of Islamic law* (AldineTransaction, 2011) 3.
33 Muwafaq Al-Serhan and Ann Furr, 'Tribal Customary Law in Jordan' (2007) 4 *South Carolina Journal of International Law and Business* 17.
34 Ibid.
35 See, e.g., Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review Journal* 869; John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) *The Journal of Legal Pluralism and Unofficial Law* 1-55; Caroline Roseveare, 'Rule of Law and International Development' (2013) *Department for International Development, 39*.

Indigenous customary law was not generally acknowledge in the legal system of Australia. It was allowed practise in remote or isolated communities until John Howard, as the Prime Minister of Australia, legislated in 2007 for its non-operation in bail and criminal sentencing.[36] However, the customs are still practised in some of the remoter and wholly Indigenous communities. Besides, influences exist from Indigenous customs in Australia. For instance, acknowledgment of restorative Indigenous justice principles can be found in the adoption of circle sentencing approaches to deal with underage Indigenous criminal offenders, and some states using specialist Murri Courts for adult offenders.[37]

## 3.3 The Legal System

### 3.3.1 Federal and Unitary Legal Structure

The outline so far shows that while this thesis is comparing a civil law and a common law system, there are many structural similarities. A clear difference exists in that Australia has a federal system under a Federal Constitution 1901,[38]while Jordan has a unitary system.[39] This comparison is useful for this thesis because it 'can provide insights into the reasons behind the rapid expansion of mediation in common law jurisdictions and the comparatively hesitant development of mediation in civil law jurisdictions.'[40] This can be important to determine both the legal forces and the political forces behind the modern mediation movements in Australia and Jordan.

The federal system provides the institutions of law and government in duplicate. There is a Federal legislature, situated in Canberra and composed of an Upper House (Senate) and the Lower House (House of Representative) (Chapter I). The Executive is composed of the Governor-General, the Prime Minister and Ministers of Cabinet (Chapter II) and, the courts separately, in the Federal courts (Chapter III). Each of

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36 See e.g., *Northern Territory National Emergency Response Act 2007* (NT) ('*NorthernTerritory National Emergency Response Act* '); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* (Cth) ('*Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill* ').

37 Queensland Courts, 'Murri Court (March 2020) <https://www.courts.qld.gov.au/courts/murri-court>; See further, Neate, Jones and Clarke (n 13) 1; Lane (n 12) 322.

38 Vines (n 5) 7.

39 Shetnawi (n 22) 10.

40 Nadja Alexander, 'What's Law Got to Do with It-Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) *Bond Law Review* 2.

the six states and two Territories also has the full complement of institutions (legislative, executive, and judiciary) under their own Constitutions.[41] Even though the Australian Constitution does not mention the role of Prime Minister, the primary source of his or her power is found in the practices and customs that have developed over hundreds of years in the British Parliament.[42] These are often referred to as constitutional conventions.

Jordan's unitary system under the Constitution of 1952 gives central government supreme power, and the administrative divisions exercise only powers that the central government delegates to them. There is thus one source of legislative power for all provinces provided by the Upper House (Senate), and the Lower House (Chamber of Deputies) (Chapter V). The executive power is held by the national executive, the King, Prime Minister and Council of Ministers (Chapter IV), and the judicial power resides in one court system (Chapter VI). Unlike the Australian Constitution, the Jordanian Constitution determines clearly the role of Prime Minister.[43] It gives the Council of Ministers the power to create a law that must be ratified by the King, to describe the duties of the Prime Minister and the Council of Ministers.[44]

The Constitution of Jordan creates a parliamentary structure, with a hereditary monarchy, like Australia, and it is described as a Constitutional Monarchy. However, King Abdullah II,[45] as the head of the three branches of power, the executive, legislature, and judiciary, is present in the country and arguably is seen as more influential. While the Commonwealth Constitution has structured the Australian ruling system with the Queen of England, Elizabeth II, as the Queen of Australia, and the Queen is part of the government as the head of the state, she is represented in the Commonwealth and states by the Governor-General and Governors respectively. Consequently, while the King has direct power over the three arms without any representatives, this is different from the role of the Queen in Australia.

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41 James Miller, *Getting into Law* (LexisNexis Butterworths, 2002) 164. Although note exceptionally Qld only has one house of Parliament, it abolished its upper house and so is not a bicameral system like the other States and Territories.

42 The Parliamentary Education Office, Fact Sheet – Prime Minister (March 2020) <https://www.peo.gov.au/learning/fact-sheets/prime-minister.html>.

43 *Jordanian Constitution* ch 4 pt 2 art 47(ii).

44 *Jordanian Constitution* ch 4 pt 2 art 45.

45 *Jordanian Constitution* art 28.

### 3.3.2 Separation of Powers

All countries require a system of laws to function correctly and to regulate society, particularly as regards managing disputes. The law is a complex phenomenon, which is created by society as ‘a prevalent social fact; it has endured throughout history and is a weighty presence in all contemporary societies.’[46] Many legal philosophers have attempted to define the law, and these definitions have been profoundly influenced by the political, economic, religious, and moral considerations of the philosopher and the society in which they lived.[47] Merryman[48] has identified the legal system as,

> a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.[49]

The current system in most countries relies on three essential arms to create, administer, and interpret the law. These arms are the executive, legislature and courts, and they have specific tasks, which is guided by a principle of the separation of powers. Montesquieu formulated the separation of powers doctrine in 1748, in his work the *Spirit of the Laws*,[50] as a functional concept to ensure liberty.[51] The doctrine’s presence is necessary for the state to secure democracy and justice. This doctrine exists in its purist form when the government is divided into three branches, and each branch must practice its own functions without encroaching upon the other branches’ functions.[52] At its simplest, when the legislative branch creates laws, the executive puts the laws in action, and the judicial power enforces its observance through the courts, each branch acting independently. This includes the courts

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46 Miller (n 41) 1.

47 Roger Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 2nd ed, 1992) 1.

48 John Henry Merryman, *The Civil Law Tradition* (Stanford University Press, 1969) 2.

49 Ibid.

50 Gerard Carney, 'Separation of Powers in the Westminster System' (1993) *Parliamentary Education and Training Services, Queensland Parliament*.

51 M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998) 3.

52 Aileen Kavanagh, 'The Constitutional Separation of Powers' (2016) *Philosophical Foundations of Constitutional Law*, 223.

providing justice and assistance in protecting the citizens from the abuse of government powers.[53]

However, the reality is often different from this pure model. As Vile[54] states, the separation of powers has 'rarely been held in this extreme form, and even more rarely been put into practice.'[55] In Australia, the main factor is that Australia follows the Westminster system of responsible government, which is based on the executive arm (Cabinet and Ministers) also being part of the legislature.[56] The executive, through the Ministers in Cabinet, also has considerable influence in the appointment of the senior judiciary through their selection and formal appointment process, and ultimately through the Governor-General. At the state level in Australia, the separation of powers doctrine is not entrenched but implied in the States' constitutions, because they mention the three arms, the legislature, executive and judiciary,[57] to secure democracy and justice.[58] Most important is that the state courts are under the Federal court in hierarchy, and the doctrine of precedent has been a basis for implying their independence and some level of separation of powers.[59] This provides for some separation of powers, at least at the judicial level, from the executive and legislature.[60]

After Federation, Chapter 3 of the *Commonwealth Constitution* set out the ultimate source of the power of Australian courts.[61] The Australian courts are free to exercise power without interference from the legislative and executive branches of government.[62] The independence of Australian courts is guaranteed in accord with

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53 John Alvey, 'The Separation of Powers Between the Executive and the Judiciary ' (Conference Paper, Australasian Study of Parliament Conference, 2017), 2.

54 Vile (n 51) 13.

55 Ibid.

56 Alvey (n 53) 2.

57 Rebecca Ananian Welsh and George Williams, 'Judicial Independence From the Executive: A First-Principles Review of the Australian Cases' (2014) 40(3) *Monash University Law Review* 603.

58 Haig Patapan, 'Separation of Powers in Australia' (1999) 34(3) *Australian Journal of Political Science* 391-407, 396.

59 See: the *Kable* full citation of case here case quoted in Vines (n 5) 4; see further, Kathleen Foley, 'Australian Judicial Review' (2007) 6 *Washington University Global Studies Law Review* 281-747.

60 See generally: Robert French, 'Essential and Defining Characteristics of Courts In an Age Of Institutional Change' (2013) 23(1) *Journal of Judicial Administration* 3-13; Anthony Gray, 'Constitutional Right of Access to Courts In Australia: The Case of Prisoners' (2015) 24(4) *Journal of Judicial Administration* 236-264.

61 See: David Jackson, 'The Australian judicial system : Judicial Power of the Commonwealth' (2001) 24(3) *The University of New South Wales Law Journal* 737-746.

62 *The Commonwealth of Australia Constitution Act 1901* (Cth) s 71 (' *Constitution* ').

the doctrine of the separation of powers[63] because s 72 of *Commonwealth Constitution* protects the position of those who are appointed to judicial office. The appointment of a judge is only by the Governor-General in Council, and they work in the Judiciary until reaching their retirement age, which is 70 years. Australian Judges enjoy security of tenure, and only the Governor-General can remove a judge, if they prove the judge’s misbehaviour or incapacity before both the House of Representatives and Senate, in the same session.[64] The best example of this is the infamous case involving the attempted removal of Justice Lionel K. Murphy (a former Labor Attorney-General) from the High Court in the mid-1980s.[65] Remuneration is set by Parliament, but they cannot cancel or reduce this amount during the judges’ time in office. [66]

In Jordan, the situation with the separation of powers is similar to Australia as the Constitution acknowledges the separation of powers, and that the three branches operate independently.[67] The law-making power is exercised by the legislative members in the same manner as in Australia. The King's role is to ratify the laws, and he promulgates and signs off on legislation in a very similar manner to the Queens representative, the Governor-General, in Australia. The executive power rests with the King and his Minister in the cabinet. This is the same as Australia in that the Ministers in Cabinet and Prime Minister are part of the Executive branch.

As with Australia, the Jordanian Constitution may not apply the pure form of the doctrine of separation because it offers the principle of cooperation between the legislative and executive branch, which establishes an interdependence with these powers.[68] For example, the executive arm members, the Ministers, can submit a draft of a law to the House of Representatives, who can then reject, amend or pass the draft. The executive arm is responsible, through the legislative arm, due to the adoption of a Westminster system of responsibility. This is similar to Australia, as a

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63 See generally, Peter Gerangelos, 'Separation of Powers in the Australian Constitution: Themes and Reflections ' (2017) 29 *Singapore Academy of Law Journal*, 904.

64 *Constitution* Chapter III, s 72.

65 Nicholas Cowdery, 'Reflections on the Murphy trials' (2008) 27(1) *University of Queensland Law Journal* 5-21.

66 *Constitution.*

67 Eman Frehat, 'The Seperation of Powers Doctrine in Successive Jordanian Constitutions and its Amendments 1928-2011: Historical Study' (2016) 43(2) *Humanities and Social Sciences Journal*, 784.

68 Mousa AlQaaida, 'The Separation of Powers in the Jordanian Constitution ' (2017) *Journal of the Science University of Allam and Karanak, University of Pécs* 142.

result of the British influence. Like Australia, this also includes the possibility of the executive power dissolving the parliament or postponing its sessions.[69]

The judiciary is considered independent of any influence from the other arms, as guaranteed in the Constitution of Jordan 1952. However, like Australia, there is involvement of the other branches in both the appointment and dismissal of judges through the King or Governor General.[70] The King can also remit the sentence delivered by a Court,[71] while the Governor-General in Australia has a like-Royal prerogative of mercy to remit a sentence, but this is rarely activated.[72] Thus, the separation of powers doctrine, as an essential concept to the idea of democracy, is more a two-way separation and does not exist in either Jordan or Australia in its purest form, due to the British colonial influence in both countries' legal systems.

In Jordan, the independent judicial branch is guaranteed by Articles 97 to 101 of the *Jordanian Constitution* and Article 3 of the *Jordanian Judicial Independence Act* 2014. The latter confirmed that the judiciary is independent and guarantees its impartiality and integrity. Also, judges are prohibited from assuming jobs outside the judiciary to ensure complete impartiality.[73] So, the judges in a Jordanian court are independent in exercising their judicial functions, and no authority can interfere in their functions as protected by the law.

Nevertheless, a challenge to this pure independence occurs in the process of the appointment and dismissal of a judge. The High Judicial Council is the main body responsible for looking after the judge's needs, such as appointment, training, and retirement requirements. However, it does not have its own budget to carry out its mandate independently,[74], even though the President of the Council has considerable

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[69] *Jordanian Constitution* ch 4 pt 1 art 34. See for example: The dismissal of the Whitlam government by Governor-General in 1975 and the dismissal of the parliament by the Jordan's king in 2012.

[70] Sami Alomari, 'Jurisdiction of the King in Royal Regulations: A Comparative Study' (2018) 78 *Journal of Law, Policy and Globalization* 68, 72; *The Jordanian Constitution Act* (n 24) ch 6 art 98.

[71] *Jordanian Constitution* ch 4 pt 1 art 38.

[72] *Constitution Act* s 61.

[73] *The Jordanian Formation of Ordinary Court Act 2019* (Jor) art 17 ('*The Jordanian Formation of Ordinary Court Act*').

[74] International Federation for Human Rights (FIDH), 'Judicial Councils Reforms for an Independent Judiciary: Examples from Egypt, Jordan, Lebanon, Morocco and Palestine' (2009), 12.

authority to increase wages.[75] According to 13/A of the *Jordanian Judicial Independence Act 2014*, judges are appointed by the High Judicial Council upon recommendation of the Minister of Justice, who is representative of the King.[76] Also, a decision of the Council with a High Royal Decree can dismiss, terminate the service, or lower the rank of the judge.[77] So, the method of recruitment and dismissal of judges can possibly affect their independence, as it is not conducted by an independent body, but this is similar to the appointment and dismissal of judges by the Government through the Executive in Australia.[78]

### 3.3.3 The Legislature

The Australian legislative power is present in both State and Territory parliaments and the Federal Parliament. The Commonwealth, a Federal Parliament, and State Parliaments share legal and political power within the system described as federalism.[79] The legislatures are responsible for making the written law, in the form of acts or statutes and also regulations. The system is based on two houses in a bicameral legislature, although in the state of Queensland, which is a unicameral legislature.[80] The basic structure of Federal Parliament is described in chapter one of the Commonwealth Constitution, and it consists of three elements:[81] the Queen (Governor-General in Council as her representative);[82] the House of Representatives as the lower house;[83] and the upper house is Senate.[84] The upper house is composed of senators for each State, directly chosen by the people of the State.[85] The lower house is composed of members directly chosen by the people of the Commonwealth, and the number of members in this house is twice the number of the Senators.[86] The

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75 *Jordanian Judicial Independence Act 2014* (Jor) art 3 (c) and art 20 ('*Jordanian Judicial Independence Act* ').

76 *Jordanian Judicial Independence Act,* art 13 (A).

77 *Jordanian Judicial Independence Act,* art 25.

78 (FIDH) (n 74) 21.

79 *Constitution* s 3.

80 Miller (n 41) 195.

81 *Constitution* ch 1 pt 1 s1.

82 *Constitution* ch 1 pt 1 s 2 states 'A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.'

83 *Constitution* ch 1 pt 3.

84 *Constitution* ch 1 pt 2.

85 *Constitution* ch 1 pt 2 s 7.

86 *Constitution* ch 1 pt 3 s 24.

Commonwealth House of Representatives has a three-year term, but it may be dissolved earlier by the Governor-General and Governor in the case of the state.[87] Each component of parliament has a crucial role in the lawmaking process.[88] A Bill does not become law until it has gone through both Houses and has been signed and proclaimed by the Governor-General, or Governors in the States, as the Queen's representative.[89]

The statute law in Australia must pass both houses before it becomes law. The first stage in creating the law is when a draft bill is introduced to Parliament by a Minister or member. It goes through three reading stages and is then voted on, and any amendments are made, after which it goes to the other House for the same process. When a bill has passed both Houses, it will be presented to the Governor-General for assent. If the Governor-General, in the name of Her Majesty, assents to the bill to be published in the Government Gazette, the bill becomes an Act of Parliament and part of the law of Australia.[90] The Queen, through her representative in Australia, has the ability to check any law, and according to s59, any law can be disallowed within one year from the Governor-General's assent, but this has never been acted upon.[91]

The States remain free to make laws about any topic as long as they do not cover the same area of law as a law of the Commonwealth Government. The law-making power is specified centrally in the Constitution under s51. Once a federal law is made on any of the topics covered in s51 and that law covers the field (s109), the State cannot make a competing law on that topic. If there is a dispute between the law-making powers, s109 of the Constitution provides the solution that the Federal law will take priority. The areas not covered by s51 are residual topics that the States and Territories are left free to make law.[92]

The King and the Parliament, like Australia, represent the legislative authority in Jordan. Jordan's Constitution established a bicameral council, with two houses; the upper house is the Senate and the lower house is the National Assembly. The

87 *Constitution* ch 1 pt 3 s 28.
88 *Constitution* ch 1 pt v.
89 *Constitution* ch 1 pt v s 58.
90 *Constitution* ch 1 pt v.
91 *Constitution* ch 1 pt v s 59.
92 *Constitution* ch v s 109.

upper house is formed by less than half the number of members as in the House of Representatives.[93] Unlike Australia, the King appoints the Senate, and the members must serve four years.[94] They are chosen from people who may work in senior positions in the state, such as a person who previously was Prime Minister, Minister, ambassador, former president of the Court of Cassation and the Civil and Sharia Courts of Appeal and so on.[95] This is different from the Australian Senate, which is directly chosen by the people of each Australian state through a compulsory voting system for all citizens over 18 years old.[96] The House of Representatives in Jordan is elected in a similar manner to Australia, by a secret vote in a direct general election every four years for all citizens over 18 years old.[97] As I with the Governor-General in Australia, the King in Jordan has power to suspend the period of the elected National Assembly and dissolve it.[98]

The primary source of law in Jordan as a civil law system is legislation, as the written law passed by parliament. This system is based on a tradition of codes, which relates back to Napoleon's French Codes.[99] Over the years Parliament has passed several codes, such as the civil and criminal law codes..[100] The Criminal Law Code defines prohibited conduct, applies punishment for criminal offences and regulates the court procedures.[101] The term civil law has been used in this thesis up until this point to refer to the legal system applicable in Jordon. It can also be a term used to refer to laws that do not deal with crime, but that regulate other general areas of society such as contracts, commercial business operations, and other private law domains. The Civil Codes[102] regulate the matters capable of being brought before a

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93 *Jordanian Constitution* ch 5 pt 1 art 63.

94 *Jordanian Constitution* ch 5 pt 1 art 63.

95 *Jordanian Constitution* ch 5 pt 1 art 64.

96 *Constitution* ch 1 pt 2 s7.

97 *Jordanian Constitution* ch 5 pt 2 art 67- 68.

98 *Jordanian Constitution* art 34.

99 Maria Luisa Murillo, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification' (2001) 11 *Journal of Transnational Law and Policy* 163, 164.

100 Shetnawi (n 22) 50.

101 *The Panel Code 1960* (Jor) ('*The Jordanian Panel Code 1960*'); *The Criminal Procedure Act 1961* (Jor) ('*The Jordanian Criminal Procedure Act*'). See further, Netham Tawfiq AlMajali, *Explanation of the Jordanian Penal Code* (Dar Alelim and Thaqafa for Publishing and Distribution, 2005) 5; Mohammad Sa'ed Namour, *Criminal Procedures: Explaning of the Law of Jordanian Criminal Procedures* (Dar Althaqafa for Publishing and Distribution 4ed, 2018).

102 *The Civil Law Act 1976* (Jor) ('*The Jordanian Civil Law Act*'); *The Civil Procedure Act 2017* (Jor) ('*The Jordanian Civil Procedure Act* '); *The Magistrate Courts Act 2017* (Jor) ('*The Jordanian Magistrate Courts Act* '); *The Evidence Act 1952* (Jor) ('*The Jordanian Evidence*

civil court, the applicable procedure, and the appropriate resolution of civil and commercial matters.

In general, the Jordanian courts can also apply the available Sharia principles, natural justice principles and customs if there were no written rules to use in a specific case. Moreover, the judges in Jordan also can refer to precedents as a non-binding source for legal provisions, along with jurisprudence.[103] However, all legal rules that are applied by the courts are codified. There are two dimensions in the codification system. The first, the Constitution, is considered as the highest legal instrument, and all other laws must observe its general principles and rules. The second dimension is the legislation. Just as in Australia, the laws enacted by the parliament must follow the boundaries of the Constitution; the legislated law is the primary law, and after that come the regulations which are made by the executive authority. In Australia, there is the additional common law, which is made by the Judges through the cases.

Jordan follows a very similar process to Australia in creating written law. The central role for the elected House of Representatives and Senate is to create laws essential to Jordan's people and the country's advancement. There are several stages in enacting the law. If there is a draft law and the House of Representatives and Senate are sitting, they first discuss this law.[104] After the House of Representatives has accepted, by vote, and amended, the draft law, they refer the draft to the Senate.[105] Thus, the law must pass both the House of Representatives and the Senate, and be ratified by the King to be published in the Official Gazette. As in Australia, where the Governor-General invariably will assent to the legislation, the King also invariably assents, even if both the King and the Governor-General have the right to withhold consent on the law that is passed by Parliament. If the King does not ratify the law, he will refer it back to the Parliament within six months, accompanied by a statement explaining his reasons. If a draft law, which is not approved by the King, is passed for a second time by two-thirds of both Houses, it will be considered as

*Act*'); *The Mediation for Settle the Civil Dispute Act and its amendment (No 12) 2006* (Jor) ('*The Jordanian Mediation Act 2006*').

103 *The Jordanian Civil Law Act* art 2.

104 In case the law covers urgent matters that cannot be delayed, and the House of Representatives and Senate are not sitting, or they are dissolved, the Council of Ministers, with the approval of the King, has the power to enact it. See: *Jordanian Constitution* art 94.

105 *Jordanian Constitution* arts 91, 92 and 95.

official law.[106] By comparison, the Governor-General, as the Queen's representative, also has the same authority to return the proposed law to the parliament with some recommendations.[107]

### 3.3.4 The Executive

The executive power in Australia and Jordan is not remarkably different. In Australia, the Executive consists of the Governor-General, at the federal level, and Governor at the state level as the Queen's representative. This executive tie to Britain means Australia is not yet fully independent from the British monarch. This would happen if, and when, Australia decides to become a republic. The Ministers, as heads of government departments and portfolios, the police, and military are also part of the executive power. The Ministers, as part of the executive, also sit in the legislature and participate in lawmaking, in a process reflecting the Westminster system of responsible government. Therefore, as explained previously, the independence of the courts is paramount to maintaining some separation of powers.

Similar to Australia, in Jordan, the executive is comprised of the King and his cabinet, the cabinet is formed of the Prime Minister and a certain number of ministers, as required by the public interest.[108] The King is the head of this power,[109] and he practices his executive function through his ministers. The real executive power is the cabinet; they are responsible in Parliament for the general daily political functions, and every minister is responsible to Parliament for their Ministry.[110] Hence, it is really the cabinet, not the King that is charged with the responsibility of running all internal and external affairs of the state.[111]

Unlike Jordan, the Prime Minister in Australia, as the head of executive government, is not mentioned by the Commonwealth Constitution. There is no provision for a Prime Minister in any Constitution around Australia other than the

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106 *Jordanian Constitution* art 93.
107 *Constitution* s 58.
108 *Jordanian Constitution* ch 4 pt 1 art 35.
109 *Jordanian Constitution* ch 4 pt 1 art 30.
110 *Jordanian Constitution* ch 4 pt 2 art 52.
111 *Jordanian Constitution* ch 4 pt 1 art 45.

government, when it has formed a majority, being able to elect a leader. According to Weller[112], the powers of the Australian Prime Minister are assumed rather than specified because it is not based on the law.[113] This means that the Prime Minister's choices can be influenced by external political actors.[114] In contrast, the Prime Minister is mentioned clearly in the Jordanian Constitution, in which his powers and competences are determined.[115]

### 3.3.5 The Judiciary

The third branch of government is the judiciary, which, as explained, is the most independent branch from the other branches of government, to ensure the liberty and rights of the individuals in society.[116] It is through the courts that citizens have their disputes resolved, by judges as independent third-party impartial interveners deciding the outcome of their disputes. The method for delivery of justice and dispute resolution in Australia and Jordan is different. Comparative legal scholars have classified the current global justice system into two models: the adversarial and inquisitorial system.[117] The adversarial model is followed in common law countries like Australia, whereas the inquisitorial approach, which originated in Roman law, operates in the civil law countries such as in Jordan.[118]

The adversarial legal system sees the parties, through their respective legal representatives, often barristers, argue the merits of the parties' case and attempt to undermine or discredit their opponents' case.[119] This system focuses on four

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112 Patrick Weller, 'Administering the Summit: Australia' in B. Guy Peters, Roderick Rhodes and V. Wright (eds), *In Administering the Summit: Administration of the Core Executive in Developed Countries* (Macmillan, 2000), 60.

113 Ibid.

114 See e.g., Anne Tiernan, 'Advising Howard: Interpreting changes in advisory and support structures for the Prime Minister of Australia' (2006) 41(3) *Australian Journal of Political Science* 309-324.

115 See e.g., *The Jordanian Constitution Act* (n 24) art 47 and 48.

116 Kristy Richardson, 'A Definition of Judicial Independence' (2005) 2 *University of New England Law Journal* 75, 77.

117 John Anthony Jolowicz, 'Adversarial and inquisitorial models of civil procedure' (2003) 52(2) *International and Comparative Law Quarterly* 281-295, 282; Michael Block et al, 'An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes' (2000) 2(1) *American Law and Economics Review* 170-194, 171.

118 Francesco Parisi, 'Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems Compared' (2002) 22(2) *International Review of Law and Economics* 193-216, 195.

119 Robert Thomas, 'From "Adversarial V Inquisitorial" to "Active, Enabling, and Investigative": Developments in UK Administrative Tribunals', *The Nature of Inquisitorial Processes in Administrative Regimes* (Routledge, 2016) 65-84, 70.

components: the courtroom, the judge, the lawyers (solicitor/barrister), and juries (mostly only present in criminal matters). The system sees the courtroom as a field in which the contest is between two equally situated opponents, much like a combat in which only one can win.[120] The court in this system is governed by a set of strict procedural and evidentiary rules.[121]

Furthermore, the judge's role is minimal compared to a civil law judge. The judge in an adversarial court ensures the rules of procedure and evidence are observed by the parties, and makes a final determination, on the balance of probabilities, in civil cases based on the facts and law argued before the judge. The lawyer or barrister's[122] role is to conduct their client's case, by producing witnesses and evidence, and to cross-examine and test the other side's evidence. The parties, therefore, have control over their case as they instruct their lawyers but take their independent counsel.[123] A jury, used in a criminal case, is comprised of twelve ordinary people, who do not have any legal training and attend the court session to decide on the facts of the case.[124] Juries in Australia are present in criminal matters and only used in civil cases in some jurisdictions, for instance in defamation tort cases.[125]

In contrast, the inquisitorial model provides 'less opportunity for litigants to shape their cases and control the legal narratives in the trial.'[126] In Jordan, the control over the process is shifted to the court, the judge, and judicial officials such as the police and prosecutors, all whom have a more active role in criminal justice than the parties. Prosecutors have the status of the judge, but they are considered more as an agent of the state.[127] The lawyer in this system has a minor role in the criminal trial,

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120 Jolowicz (n 117) 281.

121 Parisi (n 118) 195.

122 The basic difference between barristers and solicitors is that a barrister mainly defends people in court and a solicitor mainly performs legal work outside court. See e.g.: Koli Ori Akpet, 'The Australian Legal System: The Legal Profession and the Judiciary' (2011) 4 *Law Journal Library Ankara Bar Review* 71, 75.

123 Janet Ainsworth, 'Legal Discourse and Legal Narratives: Adversarial Versus Inquisitorial Models' (2017) 2(1) *Language and Law Linguagem e Direito*, 1-3.

124 Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69-102, 74; Michael Black, 'The Introduction of Juries to the Federal Court of Australia' (2007)(90) *Reform* 14-16.

125 *The Defamation Act 2005* (NSW) s 21 ('*The Defamation Act*'); *Federal Court of Australia Act 1976* (Cth) ss 39-40 ('*Federal Court of Australia Act* ').

126 Ainsworth (n 123) 8.

127 Namour (n 101) 75.

and their role is 'ensuring that justice is seen to be done, rather than ensuring that it really is done'.[128] However, this thesis will not focus on the difference in the criminal law arena but will instead concentrate on the civil trial process.

The primary role of the presiding judge in the inquisitorial system in civil proceedings is to take charge of the case and case management. The Judge has full control of the proceedings and governs the participation of the parties.[129] The lawyers' role in civil courts is to advise the client about the legal points and create the statement of claim or the plea statement, and submit it to the court registry.[130] This role is similar to the lawyer's role in the adversarial system; however, the lawyer in the latter system has more control over the trial than in the inquisitorial system.[131]

In a civil case where there is no jury, the judge will also apply the relevant law to the evidence, to determine the outcome and resolve the dispute by deciding a winner. The case in this system is considered to be under the parties' control. This occurs by them taking advice from their legal representative who guides them in the law and organises the case in a way that may best suit them in order to achieve a winning outcome. This process is not completely a result of the parties' efforts, and the judge reaches the decision based not only on the evidence presented by parties.[132] The judge can intervene, call witnesses, and ask for evidence directly, and they can ask more questions rather than letting the parties, through their lawyer, decide what evidence is called.

The clear distinction between the Australian adversarial and the Jordanian inquisitorial systems is shown by the different power relations in each system.[133] When the case is organised and the facts are delivered by the litigants, it is the adversarial system, but when the trial is dominated by a presiding judge, determining what evidence and the order taken to evaluate the gathered evidence, it is an

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[128] Jacqueline Hodgson, 'The Role of the Criminal Defence Lawyer in Adversarial and Inquisitorial Procedure' (2008) *The Research Gate* 45-59.

[129] Bron McKillop, 'Inquisitorial Systems of Criminal Justice' (1994) *Current Issues in Criminal Justice* 36, 50.

[130] *The Civil Procedures Act 1988* (Jor) art 56 ('*The Jordanian Civil Procedures Act*').

[131] David Weiden, 'Comparing Judicial Institutions: Using an Inquisitorial Trial Simulation to Facilitate Student Understanding of International Legal Traditions' (2009) 42(4) *Political Science and Politics* 759-763.

[132] Parisi (n 118) 5.

[133] Ibid 2.

inquisitorial system. Australian courts can only decide the outcome of a case through using the evidence that is presented in the hearing. The Judge cannot go looking for other evidence or calling witnesses, as occurs in the Jordanian courts.[134] Another important distinction is that the Judges in Australia will each, generally, write up their judgment and reasons for their decisions, as this forms the basis of any new case law. Therefore, judges who dissent from the decision of the majority will also provide detailed written reasons. This is important as the dissenting arguments may be used by lawyers in subsequent cases where they argue the facts are different, or where there are good grounds for the law to change and follow a different direction. The civil court decisions in Jordan generally only have one written decision provided, as there is no argument or dissent in the sense that they are only applying the law. They do not create new law but only interpret and apply the written law.

The judiciary through the courts are an essential source of law in the Australian legal system and have a critical role in creating and applying the laws. Australian courts, as noted previously, follow the British courts' construct of delivering case law through a process of applying precedent, in which similar cases are decided alike, thus developing a common law.

The Australian Judicial system is also a federal system with Commonwealth and State and Territory Courts, based on a hierarchical structure.[135] Most ordinary cases begin in the lowest court, which has jurisdiction and travel upward through the appellate hierarchy if they have the right to appeal.[136] The Federal courts include the High Court, which is the highest court in the Commonwealth hierarchy. Williams[137] describes the High Court's role as providing a 'unifying umbrella' over all the courts, both state and federal, providing a court of appeal from the Supreme Courts of the States, and from the other federal courts.[138] It is the final court of appeal and deals with matters relating to the Constitution and its interpretation, and in so doing it not

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134 *The Jordanian Criminal Procedure Act*, art 162(2).

135 Akpet (n 122) 85.

136 However, some cases may travel to a different direction, it may remove directly to the High Court if the law needs more interpretation. For instance, s 73(3) of the Criminal Law Consolidation Act 1935 (SA) was inconsistent with s 114(2) of the Family Law Act 1975 (Cth). See: Vines (n 5) 312.

137 Hon Daryl Williams, 'The Judicial Power of the Commonwealth' (2001) 79 *Reform* 60-63.

138 Ibid.

only addresses the limits and constitutionality of any federal law but also ultimately the common law for all the jurisdictions.[139]

While the *Commonwealth Constitution* established the High Court, in Chapter III, it also gave the Federal Parliament power to create other federal courts besides the High Court. These courts are covered in the *Federal Court of Australia Act 1976*.[140] The jurisdiction of such courts is limited to the topics covered in s51 of the Constitution, and so they cover matters such as bankruptcy and marriage law.[141] From 1988 to 1999, three federal courts were established. Firstly, the Family Court, as a federal superior court of record,[142] specialises in cases related to family disputes such as marriage, marital property, and custody of children. The second court, the Federal Circuit Court of Australia, was established as a Federal Magistrates Service to handle less complicated matters in family law[143] and administrative law.[144] Lastly, the Bankruptcy Court was established as a Federal Court or the Federal Circuit Court to handle financial debt cases.[145]

The State and Territory court hierarchies in the Australian states and territories consist of the Supreme Court, the District Court, the Magistrates Court, and other specialist courts. The Supreme courts are 'the senior court in the system [and they have] unlimited jurisdiction.'[146] These courts can hear civil cases, which are above the jurisdictional limits of the inferior courts, and the most serious criminal matters such as murder.[147] The Supreme Court can also be held as Court of Appeal to hear all appeals in cases such as defamation and murder from the Supreme Court (single

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[139] Kathy Mack and Sharyn Roach Anleu, 'Entering the Australian Judiciary: Gender and Court Hierarchy' (Pt Blackwell Publishing Inc) (2012) 34(3) *Law & Policy* 313-347, 315.

[140] *Federal Court Of Australia Act 1976* (Cth) s 5(2) ('*Federal Court Of Australia Act*').

[141] *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (*Cth*) ('*Jurisdiction of Courts Act*').

[142] *The Family Law Act 1975* (Cth) ('*The Family Law Act* ').

[143] Ibid.

[144] *The Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*The Administrative Decisions Act*'); *The Administrative Appeals Tribunal Act 1975* (Cth) s 44AAA ('*The Administrative Appeals Tribunal Act* ').

[145] *Federal Circuit Court (Bankruptcy) Rules 2016* (Cth) ('*Federal Circuit Court (Bankruptcy) Rules* ').

[146] Miller (n 41) 270.

[147] Vines (n 5) 300.

judge) and District Courts. The appeals usually go from a single magistrate or judge in the same court level to a panel of two or three judges on appeal.[148]

The District Courts are 'intermediate courts of record with jurisdiction limited by their enabling act.'[149] These courts deal with serious criminal cases with sentences under a specific limit, such as 14 years goal.[150] A judge and jury hear the criminal cases.[151] District Courts also deal with complex civil cases where the cost is generally between $150,000 and $750,000.[152] Magistrate's Courts are extremely important courts where most cases are heard and decided by a magistrate sitting alone.[153] The Magistrate's Courts hear civil cases when the claim is $150,000 or less,[154] and criminal matters will be heard in cases that carry a maximum penalty of less than two years.[155]

The Jordanian Constitution covers the judiciary in chapter 6 articles 97-110. Article 99 defines the types of courts, and it states that the courts shall be of three types: regular courts, religious courts, and special courts. Regular courts can exercise their jurisdiction on the issues related to civil and criminal matters. This includes cases brought by or against the government, except cases raising the constitution or other laws that are decided by special courts.[156] Article 100 of the Constitution gives the Parliament power to establish a special law that identifies the regular courts' categories, their divisions, their jurisdiction and their administration. A number of pieces of legislation have been passed under this power, thereby changing the court structures over time. The *Formation of Ordinary Court Law* was enacted in 1952,

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148 See e.g., *The Civil Proceedings Act 2011* (Qld) ('*The Civil Proceedings Act* '); *Supreme Court of Queensland Act 1991* (Qld) ('*Supreme Court of Queensland Act*'); *Criminal Code Act 1899* (Qld) ch 67 ('*Criminal Code Act* '); *Criminal Practice Rules 1999* (Qld) ch 15 ('*Criminal Practice Rules* '); Nicholas Aroney, 'The High Court of Australie: A Federal Supreme Court in a Common Law Federation' (2017) *Fédéralisme Régionalisme*.

149 *District Court Act 1973* (NSW) ('*District Court Act of New South Wales*'); *District Court of Queensland Act 1967* (Qld) ('*District Court of Queensland Act* '); *District Court Act 1991* (SA) ('*District Court Act of South Australia*'); *County Court Act 1958* (Vic) ('*County Court Act* '); *District Court of Western Australia Act 1969* (WA) ('*District Court of Western Australia Act* ').

150 See generally: *DPP v Shandley* (2017) VCC 279 ('*DPP v Shandley* '); *DPP v Matheas* (2016) VCC 1521 ('*DPP v Matheas*').

151 Akpet (n 122) 89.

152 Queensland Court, 'District Court' <https://www.courts.qld.gov.au/courts/district-court#>.

153 Vines (n 5) 302.

154 Queensland Court, 'About the Magistrates Court' (March 2020) <https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>.

155 Miller (n 41) 270.

156 See e.g., *Administrative Justice Act 2014* (Jor) ('*Administrative Justice Act*').

then it was replaced in 2001 with *Formation of Ordinary Courts Act*, which was further amended in 2019.[157]

The regular courts exist in a four layered hierarchy: Magistrate Courts, Courts of First Instance, Courts of Appeal, and the Supreme Court.[158] Alzouby[159] states the Jordanian judicial system has two levels of courts.[160] The first level, which adjudicates on a dispute for the first time, are the Magistrate Courts[161] and the First Instance Courts.[162] Magistrate's Courts (*Sulh*) are single judge courts established in all Jordanian governorates. Much like the Australian Magistrate's Courts, they hear minor civil matters that cost approximately less than JOD 10.000, and criminal cases with a maximum penalty of two years. Magistrate's Court decisions may be appealed before the Courts of First Instance.[163] First Instance Courts are established in all Jordanian governorates, and each court is composed of a president and several judges. The First Instance Courts have jurisdiction to adjudicate all civil and criminal matters that are beyond the jurisdiction of the Magistrate's Courts.[164]

The second level is the Court of First Instance as Appellate and Courts of Appeal,[165] which hear all appeals from the first level of courts. The Courts of First Instance, as Appellate Courts, are second-tier courts with limited jurisdiction, so they are not competent to hear an appeal unless a particular provision of a Code or legislation gives this authority. For instance, the *Magistrate Court Act* 2017, section 9A gives the power to appeal a judicial decision that is issued by the Magistrate's Court in civil cases if the cost of the case does not pass JOD 1000. As an appeal court, the court is composed of one judge in civil cases and 1-3 judges in the criminal cases. If the case has two judges and they disagree during the trial or in determining the final decision, the President of the Court shall invite another judge to participate in the trial from the stage at which they reached an impasse.[166] Courts of Appeal,

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157 *The Jordanian Formation of Ordinary Court Act*.
158 Ibid art 4(2).
159 Awad Ahmad Alzouby, Brief about Jordanian Civil Procedures Law (Ethraa for Publishing and Distribution 3ed, 2016) 86.
160 Ibid.
161 See: *The Jordanian Magistrate Courts Act*.
162 See: *The Jordanian Formation of Ordinary Court Act*, arts 4-5.
163 The *Jordanian Magistrate Courts Act*, arts 3-4.
164 The *Jordanian Formation of Ordinary Court Act*, art 4.
165 See: *The Jordanian Civil Procedures Act*, arts 6-8.
166 The *Jordanian Formation of Ordinary Court Act*, art 5.

which are second-tier courts with general jurisdiction, [167] review criminal and civil sentences from any Court of First Instance and the Magistrate's Court.[168] The Courts of Appeals are established in Amman, Irbid and Ma'an. Each court is composed of three judges as a maximum, and they issue their decisions by consensus.[169]

Finally, the Court of Cassation is the final stage of litigation in Jordan. There is one Court of Cassation in Jordan, which is in Amman, and it is comprised of 5-8 judges depending on the case.[170] Alzouby[171] argues that the Court of Cassation is not considered as a subject court that is involved in litigation, but it is considered as a court of law.[172] This means that this court is not considered as a third layer in the Jordanian justice system, but as a final reference for litigation. This court plays an important role in clarifying legal points or to resolve complicated issues, or review appeal court decisions when it is considered an essential matter more generally.[173] Also, the Court of Cassation oversees courts of all types as a final appeal court to ensure the laws are applied uniformly.[174]

The role of the religious courts, which are definitely different from the Australian system, is clarified in the Jordanian Constitution Article 104-109. They exercise jurisdiction in issues related to personal matters such as marriage, and divorce. In Australia, marriage and family law is considered public law, and therefore the concern of the State, and it is dealt with by the specialist Federal Family Court. In Jordan, the religious courts are divided into the Sharia Courts for Muslims and the Tribunals of other Religious Communities (non-Muslims). Sharia Courts are subject to the *Formation of Sharia Courts Act 1972*.[175] There is a tier of two levels: the First instance Sharia Court and Appeal Sharia Court. The Jordanian Constitution demonstrates that Tribunals of Religious Communities shall be established in

[167] Alzouby (n 162) 93.
[168] *The Jordanian Formation of Ordinary Court Act*, art 9.
[169] Ibid art 7.
[170] Ibid art 9.
[171] Alzouby (n 159) 92.
[172] Ibid.
[173] *The Jordanian Civil Procedures Act*, art 191; *The Jordanian Formation of Ordinary Court Act*, art 10.
[174] Alzouby (n 159) 92.
[175] *The Formation of Sharia Courts Act 1972* (Jor) ('*The Formation of Sharia Courts Act* ').

accordance with Religious Communities provisions, such as those contained in the *Religious Communities Act 1938*.

Lastly there are special types of courts, known as Special Courts, which exercise limited jurisdiction in specialised areas such as the *Income Tax Court of Appeals*, the *Military Court*, and *National Safety Court.* In Australia there is also a separate military court martial system, but generally any specialised courts are now addressed as tribunals in Australia.

### 3.3.6 Australian Tribunals

Each Australian state has a burgeoning number of tribunals,[176]which are created by specific Acts of the State or Territory parliaments. Australian Tribunals are often designed to operate along the lines of an inquisitorial system. Developed since at least the mid-1970s,[177] tribunals are a relatively recent phenomenon that has arisen because new areas of regulation have emerged, and the change in the dominant approach to resolving or managing disputes has required a reduction in the involvement of lawyers using the adversarial approach.[178] Establishing tribunals is part of the desire to reduce costs by making the system less adversarial and rule bound, thus reducing the need for lawyers, in order to provide a quicker and cheaper decision-making mechanism.

A tribunal cannot be considered as a court for several reasons. The tribunal adopts the inquisitorial model and often a Tribunal member does not need to be a lawyer, although they can be legally trained. The Tribunal member hears matters and is responsible for the whole process such as testing the evidence, deciding what evidence is required, and questioning the witness in a less formal process.[179] Federal tribunals exercise federal power as provided for under the Constitution; for example, administrative power is addressed at the first level by the Administrative Appeals

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176 Vines (n 5) 304.

177 John McMillan, 'Administrative Tribunals in Australia: Future Directions' (2006 ) *The International Tribunals Workshop, Australian National University*, 2.

178 Miller (n 41) 271.

179 Narelle Bedford and Robin Creyke, *Inquisitorial processes in Australian Tribunals* (The Australian Institute of Judicial Administration Incorporated, 2006) 5.

Tribunal (AAT).[180] Each tribunal is created by an Act of Parliament, which determines the limits of its jurisdiction and the manner in which it will make decisions. Genn clarified that the tribunal is ‘the only mechanism provided by parliament for the resolution of certain grievances against the state and for some specific disputes between individuals.’[181] Tribunals can use a conciliation process, which is much like a mediation in which the parties and their lawyers negotiate through a process overseen by a Tribunal conciliator. These tribunals are subject to review in the administrative law jurisdiction of the Federal Court.[182]

The AAT is like a super Tribunal covering a specialised area of law, namely administrative law, as it applies across broad pieces of legislation at a Federal level. Such specialised super tribunals also exist at the State level and include a tribunal hearing and deciding disputes under a diverse array of legislation. For instance, the Queensland Civil and Administrative Tribunal (QCAT) was established under the *Queensland Civil and Administrative Tribunal Act 2009*. QCAT determines several matters that are grouped into three main jurisdictions: civil disputes, administrative and disciplinary, and human rights.[183] The Tribunal follows an inquisitorial approach, with tribunal members appointed if they have over 6 years legal experience and are experts in the relevant area of the QCAT jurisdiction. QCAT helps the parties to settle their dispute through using a dispute resolution process such as mediation and compulsory conciliation conferences.[184] Most disputes are referred to mediation prior to the Tribunal hearing a matter, in an attempt to settle the dispute at the earliest and most cost-effective manner in a confidential process. [185]

Jordan has not adopted these tribunals in their justice system. However, the Tribunals of Religious Communities appear to operate in a similar manner. They do not require a legal representative for parties, and they use mediation and conciliation as a method to solve the disputes between the spouses. Also, the third party is not a

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180 Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) *Australian Law Reform Commission Journal* 8.

181 Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393, 294.

182 Vines (n 5) 310.

183 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 11 ('*Queensland Civil and Administrative Tribunal Act* ').

184 Frances Stewart, 'QCAT - A Different Experience: A Guide for Early Career Lawyers' (2017) 37(4) *The Proctor* 20-23.

185 Bobette Wolski, 'QCAT's Hybrid Hearing: The Best of Both Worlds or Compromised Mediation?' (2013) 22(3) *Journal of Judicial Administration* 154-167.

judge, but can be one of the members of a community with religious authority in that community.

## 3.4 Cultural Considerations

Before closing this chapter, a contextually comparative situation of both countries would not be complete without also understanding the cultural differences between Australians and Jordanians, particularly as is relevant to their approaches to conflict and communication. Busch comments that cultures can affect the conflict forms and manifestations and its resolution process.[186] The culture also can influence the way people communicate, and this will influence the mediation practice in each culture.[187] This section will address the broad aspects of cross-cultural communication in order to have an appreciation that culture can effect mediation processes. This requires addressing the interpretive reality of the Australian and Jordanian communities in terms of how individuals construct meanings, context, identity , and communication when involved in disputes.

Several scholars have attempted to clarify the concept of culture to determine the importance of differentiating between several cultures for research and other purposes. Hofstede,[188] as a pioneer in studying cultural considerations, defines culture as 'the collective programming of the mind that distinguishes the members of one group or category of people from another.'[189] Avruch[190] defines culture as a cumulative experience of a particular social group that is created and learned by the society's members themselves and passed unto the next generation.[191] He also adds that this experience is crystallized by several factors such as class, occupation,

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[186] Dominic Busch, 'Does Conflict Mediation Research Keep Track with Cultural Theory? A Theory-Based Qualitative Content Analysis on Concepts of Culture in Conflict Management Research' (2016) 4(2) European Journal of Applied Linguistics 181-206.

[187] Stella Ting-Toomey, 'Applying Dimensional Values in Understanding Intercultural Communication' (2010) 77(2) *Communication Monographs* 169-180; Michelle LeBaron, 'Culture and Conflict' Beyond Intractability' in Guy Burgess and Heidi Burgess (eds), *Conflict Consortium* (University of Colorado, 2003).

[188] Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (Sage Publications, 2nd ed, 2001) 9.

[189] Ibid.

[190] Kevin Avruch, *Culture & Conflict Resolution* (US Institute of Peace Press, 5th ed, 2006) 5.

[191] Ibid.

profession, religion, or region.[192] In other words, each culture has unique features, which are particular to a specific nation or region, and which distinguishes it from others. However, it is also important to note that much of human nature is common across cultures. Cultural features influence attitudes, behaviors, and communication styles of the society's members. Therefore, it is useful to consider any cultural differences between Australia and Jordan as two different countries, particularly when addressing communication characteristics in disputes.

When considering differences between cultures, researchers such as Fletcher[193] suggest that understanding the cultural differences between two different countries provides a framework for interpreting the goals and behaviours of others in the mediation process.[194] There are a variety of theories that scholars use to explain and analyse cultural differences between societies, and their implications on cross-cultural communication. Kittler[195] confirms that 'cultures can be characterized according to their communication styles by referring to the degree of non-verbal context used in communication.'[196] This addresses the differences between cultures by exploring the way people receive and understand communicated messages, taking account of the whole interaction, including non-verbal elements.

This thesis has adopted two theories to differentiate between the Australian and Jordanian culture. These are Hall's communication style and Hofstede's cultural dimensions. Hall's[197] communication style is used to determine how people from different cultures use the context and information to create meaning in their communication.[198] Hofstede's dimensions, constructs a framework that determines the differences and common features for each society, such as how the family operates, the hierarchical structures, the communication used, and so on. This makes his work especially useful when applied to the Australian and Jordanian cultures

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192 Ibid.

193 Louise Fletcher, Mara Olekalns and Helen De Cieri, 'Cultural Differences in Conflict Resolution: Individualism and Collectivism in the Asia-Pacific Region' Working Paper No 2, The University of Melbourne, 1998, 1.

194 Ibid.

195 Markus G Kittler, David Rygl and Alex Mackinnon, 'Special Review Article: Beyond Culture or Beyond Control? Reviewing the Use of Hall's High-/Low-Context Concept' (2011) 11(1) *International Journal of Cross Cultural Management* 63-82, 65.

196 Ibid.

197 Edward Hall, *Beyond Culture* (Anchor Books, 1976).

198 Ibid

because it helps in understanding the way Australians and Jordanians negotiate to resolve their disputes. This will be explored in greater detail in chapters 4 and 5. The next section will provide an outline of these concepts and how they may apply to Jordon and Australia, recognising that Australia is a multicultural country and Jordan is more homogenous, but also has different religious groups.

### 3.4.1 High Context and Low Context Cultures

Communication style is defined as the way in which people express themselves.[199] Hall [200]classified ways of using language and context in communication in different cultures into two different styles: Low Context Communication (LCC) and High Context Communication (HCC).[201] This classification aims to understand differences in communication style between different ethnic cultural groups. In low context communication (LCC), the communication is transmitted directly or in an explicit code.[202] Dsilva and Whyte [203] clarify that the people from this type of culture 'convey meaning through words, so that meaning resides in the message, with few inferences to be drawn from the context.'[204] Thus, the people from a low context culture convey meanings through direct communication forms, such as in Westernised cultures like Australia. By contrast, high context communication (HCC) occurs when people communicate implicitly or by code.[205] Cohen[206] adds that the people from a 'high-context culture communicate allusively rather than directly.'[207] Such cultures tend to be represented by the Arabic culture, and Asian peoples. The difference is that LCCs prefer to get all the information clearly expressed in order to be able to solve a problem, while an

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199 Shoji Nishimura, Anne Nevgi and Seppo Tella, 'Communication Style and Cultural Features in High/Low Context Communication Cultures: A Case Study of Finland, Japan And India' (2008) 8 *Teoksessa A. Kallioniemi* 783-796, 786.

200 Hall (n 197) 1.

201 Ibid.

202 Ibid

203 Margaret Whyte and Lisa Dsilva, 'Cultural Differences in Conflict Styles: Vietnamese Refugees And Established Residents' (1998) 9(1) *Howard Journal of Communication* 57-68, 60.

204 Ibid.

205 Jianeng Wang, 'A Cross-cultural Study of Daily Communication between Chinese and American from the Perspective of High Context and Low Context' (2008) 4(10) *Asian Social Science Journal* 151.

206 Raymond Cohen, Negotiating Across Cultures: International Communication in an Interdependent World (United States Institute for Peace Press, 2007) 31.

207 Ibid.

HCC will gather information by less direct means and will consider the context important. Table 1 provides the characteristic differences between LCC and HCCs.

Table 2: Differences between low-context and high-context cultural communication.[208]

| LOW CONTEXT | HIGH CONTEXT |
|---|---|
| Direct and confrontational | Indirect and non-confrontational |
| Explicit in communication | Implicit in communication |
| Verbal based | Context based (more non-verbal) |
| Speaker oriented style | Listener oriented style |
| Focus on problem at hand | Focus on history |
| People say what they mean and mean what they say | People are indirect, so more information must be gained by the context |

By observing these characteristics, it appears that generally Australia and Jordan can be identified as having different communication styles. Jordan is largely HCC, as an Arab Muslim country, which is characterised by the closeness of familial relationships, a well-structured social hierarchy, and strong community and family traditions. As a result of their relationships, they assume each knows the background information they need to communicate, which therefore does not need to be made explicit.[209] The Arabic language is the official language in Jordan, and each word in this language has diverse connotations, so the listener must be capable of determining the precise meaning of a given word from the context of speech.[210] According to Hall, [211] the received messages are ambiguous in this culture, and interpreting these

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208 Anas Alabbadi, *Culture in International Negotiation: The Jordanian-Israeli Peace Negotiation* (Beyrouni for Publishing and Distributing, 2015) 18.

209 Ibid, 16.

210 See, e.g., Hassan Ajami, 'Arabic Language, Culture, and Communication' (2016) 4(1) *International Journal of Linguistics and Communication* 120-123.

211 Hall, (n 197) 91.

messages correctly requires awareness of the overall situation, which also assumes background knowledge.[212] Thus, information is not necessarily contained in words, and the listener must 'read information' between the lines.

As an HCC Jordanian's communication style, when trying to solve disputes, is likely to be focused on the future relationship outcomes. Cohen[213] observes that HCC cultures:

> decline to view the immediate issue in isolation; lays particular stress on long-term and affective aspects of the relationship between the parties; is preoccupied with considerations of symbolism, status, and face; and draws on highly developed communication strategies for evading confrontation.[214]

People from this type of culture prefer to avoid disputes to save face, their honour and reputation, from humiliation in front of their community. This culture sees disputes as intractable[215] and dangerous and as something to be avoided because it brings destruction and disorder to the community.[216] In the mediation setting, Jordanian people prefer to 'provide hints rather than direct messages especially if the topic is sensitive. Such a style is basically rooted in the norm of avoiding confrontation to save face and avoid conflict.'[217] When they try to solve a dispute, Jordanians will use indirect communication and offer tactful hints in a critical situation to avoid embarrassing someone.[218] This means that Jordanians may avoid expressing their opinion on sensitive matters in disputes because sometimes this expression is likely to impact on the progress of solving the dispute negatively. Also, keeping promises in this culture is highly significant and plays a vital role in ensuring solving the matters between the disputants. Nydell[219] states that 'an oral promise has

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212 Ibid
213 Cohen (n 206) 216.
214 Ibid.
215 George E Irani, 'Islamic mediation techniques for Middle East conflicts' (1999) 3(2) *Middle East* 2.
216 Mohammed Abu-Nimer, 'Conflict Resolution in an Islamic Context: Some Conceptual Questions' (1996) 21(1) *Peace & Change* 22-40.
217 Alabbadi (n 208) 85.
218 Margaret Nydell, *Understanding Arabs: A Guide for Modern Times* (Nicholas Brealey Publishing, 4th ed, 2006) 58.
219 Ibid 18.

its own value as a response' more so than actions in this kind of culture.[220] Jordanians believe that if someone fails to keep their word, this is a shameful position.[221] Arabic or HCC people are more likely to focus on the emotional aspects.[222] They will use shuttle diplomacy as a quiet and confidential strategy to prevent escalation in the dispute. One would expect this is conducive to using confidential mediation and this investigated further as part of a discussion of the Jordanian culture in the next chapter.

When dealing with Australia, it is generally considered a LCC, but this must be factored with it being less homogeneous than the Arabic HCC, because Australians tend to 'classify interpersonal contacts.'[223] LCC people need detailed background information when they interact with others.[224] LCC focuses on the individual's interests, positions, needs, and desires.[225] People with this communication propensity are more likely to focus on the facts instead of emotions.[226] They prefer to receive explicit verbal content and do not want to have to imply other information into the message in order to understand it. As the familial or community connections are not so entrenched, they rely on verbal communication as their main information channel.[227] Given these features, and while acknowledging the multicultural aspects of Australia, it can generally be inferred that Australians prefer using explicit messages with less emphasis on implicit messages, and with more talking than listening.

Australia as an LCC culture is strongly influenced by Anglo-Saxon legal habits,[228] which include focusing on finding solutions through 'isolating the people from the problem, and the maximisation of joint gains.'[229] Disputes are considered as natural and solvable in this culture,[230] and can bring growth for the parties'

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220 Ibid.
221 Alabbadi (n 208) 85.
222 John Barkai, 'What's a Cross-Cultural Mediator to do? A Low-Context Solution for a High-Context Problem' (2008) 10 *Cardozo Journal of Conflict Resolution* 43-89, 61.
223 Liu Qingxue, 'Understanding different cultural patterns or orientations between East and West' (2003) 9 *Investigationes Linguisticae* 22-30, 23.
224 Ibid.
225 Ronald L. Gardner and William Barcella, 'Challenging Cross-Cultural Notions of Perceptions of Interstate Conflict Resolution between Arab/Muslims and Westerners' ( 2015) 3(1) *Journal of Global Peace and Conflict* 1-21, 2.
226 Barkai (n 222) 61.
227 Qingxue (n 223) 23.
228 Cohen (n 206) 216.
229 Ibid.
230 Irani (n 215) 2.

relationships; facing the dispute is therefore a recommended strategy.[231] In summary, because of their LCC communication style, Australians tend to be more direct and this can be seen as confrontational when solving problems, as they look to solutions in terms of material gains.

In the mediation setting, Australians prefer to provide the other party with the information that they need, and the possibility of asking clarifying questions, even questions that may seem personal or offensive in an HCC culture. O'Connell[232] has stated that Australian mediators prefer unambiguous verbal explanation because they appreciate 'the honesty, colourful statements and shifts in the subject as part of conflict resolution, rather than the smooth and patterned expressions…'[233] Thus, the mediator has to be clear when they direct the disputants and say precisely what is meant in order to be understood.

The concept of high and low context communication can be applied in unity with Hofstede's dimensions to refine the understanding of cultural requirements and the impact of styles of communication when addressing disputes.[234]

### 3.4.2 Hofstede's Dimensions of National Cultures

In any comparative study that examines dispute resolution processes, cross-cultural difference must be accommodated. The empirical studies of cultural anthropologist Geert Hofstede endeavoured to collect data from seventy-four countries to situate relevant cross-cultural theories about cultural differences, and they offer a window for looking at these differences in mediation. Hofstede provided a classification matrix for cultural differences based on five primary dimensions: individualism-collectivism, power-distance, uncertainty-avoidance, masculinity-

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[231] Abu-Nimer (n 216) 22.

[232] Sean O'Connell, 'Strategies of Communication: Intercultural Workplace Communication between an Australian Expatriate and Japanese Co-Workers in Japan' The University of Queensland, 2011) 37.

[233] Ibid.

[234] See, e.g., Dorcas Quek Anderson and Diana Knight, 'Managing the Inter-Cultural Dimensions of a Mediation Effectively : A Proposed Pre-Mediation Intake Instrument' (2017) 28(2) *Australasian Dispute Resolution Journal* 89-97.

femininity,[235] and long-term-short-term orientation.[236] These dimensions have emerged as a key construct in determining differences between the underlying norms and rules in both Western and Eastern cultures.[237]

Before discussing these dimensions to determine the fundamental differences between the Australian and Jordanian cultures, it is essential to note that Hofstede provided data on the Arabic culture from six Arab countries, including Egypt, Iraq, Kuwait, Lebanon, Libya, and Saudi Arabia. As can be seen, Jordan was not one of these countries. However, Hofstede generalised the previous findings obtained to all Arab countries including Jordan.[238] This data can be valid for Jordan because its roots are deeply connected in Arab and Middle Eastern history and culture. Besides, it is confirmed that four of the six countries, Iraq, Saudi Arabia, Egypt, and Lebanon, are relatively similar to the Jordanian culture.[239] However, several Jordanian researchers have challenged some of Hofstede's claims when considering Jordanian culture.[240] It is found that generalising Hofstede's cultural values across all Arab countries is impossible because differences exist between them.[241] For instance, Jordanian lifestyle has changed through the years, with a modern culture that is influenced by the high rate of education and jobs.[242] Thus, the theories that are used to determine the cultural differences between communities can differ significantly from the actual reality. [243] This can yield a multilayered picture of the communication ideals in the same community and the actual communication practices between individuals within

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235 Geert Hofstede, *Culture's Consequences*, *International Differences in Work-Related Values* (Sage Publications, 1980) 5.

236 Geert Hofstede, 'Dimensionalizing Cultures: The Hofstede Model in Context' (2011) 2(1) *Online Readings in Psychology and Culture*, 2.

237 Deborah Cai and Edward Fink, 'Conflict Style Differences between Individualists and Collectivists' (2002) 69(1) *Communication Monographs* 67-87, 70.

238 Hofstede, (n 235) 5.

239 Alabbadi (n 208) 74.

240 Bader Obeidat et al, 'Toward Better Understanding for Arabian Culture: Implications Based on Hofstede's Cultural Model' (2012) 28(4) *European Journal of Social Sciences* 512-522, 515; Mahmud Alkailani, Islam Azzam and Abdel Baset Athamneh, 'Replicating Hofstede in Jordan: Ungeneralized, Reevaluating the Jordanian Culture' (2012) 5(4) *International Business Research* 71, 77.

241 Obeidat et al (n 240) 517.

242 Alkailani, Azzam and Athamneh (n 240) 77.

243 Ting-Toomey (n 187) 176.

the same community.[244] Thus, these differences can only ever be generalised and must always be considered with caution when it comes to individuals in dispute. [245]

Several scholars have provided various definitions for each dimension, but they are broadly individualism-collectivism, which is a dimension that measures the relationship between the individual and the group in the society.[246] Some cultures have a high rate on the individualism scale, which means they will focus on the individual's needs and rights only.[247] Other cultures have a high rate on the collectivism scale, which means they will focus on group needs and rights rather than the individual.[248] The power distance-dimension addresses how people from different societies deal with inherent inequalities that may result from status, power and wealth.[249] Thus, this dimension aims to describe people from different cultures according to their acceptance of distributed power. As Lee declares,

> cultures with high power distance tend to be comfortable with hierarchical structures and clear authority figures. Cultures with low power distance tend to be comfortable with flat organisational structures and shared authority.[250]

The third dimension is uncertainty-avoidance, which focuses on whether ambiguity and uncertainty are tolerated.[251] Some societies who have a high rate of uncertainty avoidance, will focus on following the rules, regulations and controls to minimise the amount of uncertainty. By contrast, other cultures with low rates of uncertainty avoidance will deal with fewer rules, and these cultures will deal more efficiently with change and taking risks.[252] The masculinity-femininity dimension focuses on how features of masculinity or femininity are reinforced in different societies.[253] If a particular culture is characterised as masculine, it means that this

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244 Ibid
245 Busch (n 186) 203.
246 Fletcher, Olekalns and De Cieri (n 193) 3.
247 Hofstede, (n 235) 209.
248 Ibid.
249 Hofstede, (n 236) 8.
250 Joel Lee, 'Culture and its Importance in Mediation' (2016) 16 *Pepperdine Dispute Resolution Law Journal* 321.
251 Hofstede, (n 236) 8.
252 Marina Dabić, Darko Tipurić and Najla Podrug, 'Cultural differences affecting decision-making style: a comparative study between four countries' (2015) 16(2) *Journal of Business Economics and Management* 275-289, 277.
253 Hofstede, (n 234) 5.

culture reinforces control with a high degree of gender differentiation. If another culture is described as feminine, it means that this culture reinforces co-operation between both genders.[254] The long-term/short-term orientation focuses on the degree by which each society is looking forward to the long-term objectives in solving their disputes.[255] When a particular culture rates high in this dimension, it means that this culture 'cultivates respect for tradition and looks towards future rewards.'[256] If another culture rates low on this scale it means that this culture, 'looks towards immediate results and is more amenable to change.'[257]

Based on the previous segment, we can draw certain inferences in relation to the Australian and Jordanian cultural dimensions. The cultures of Western countries, such as Australia, are typically considered individualist.[258] Barkai states that ‘individualistic cultures value self-sufficiency, personal time, freedom, challenge, extrinsic motivators such as material rewards, honesty, talking things out, privacy, and individual rights.’[259] In this culture, the individual interest and need is more valued than the needs of the group because ‘individuals are supposed to take care of themselves and those immediately connected with them.’[260] In other words, the ties between individuals are relaxed, everyone is expected to look after themselves or at most only their immediate family, and they have less regard for persons beyond this immediate circle.[261]

By contrast, people from Jordan are often associated with collectivist cultures,[262] because most of the Jordanian people belong to tribes where relationships are strong in terms of everyone taking responsibility for helping each other.[263] Barkai states that

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254 Lee (n 250) 322.

255 Geert Hofstede and Michael Harris Bond, 'Confucius and Economic Growth: New Trends in Culture's Consequences' (1988) 16(4) *Organizational Dynamics* 4-21, 6.

256 Lee (n 250) 322.

257 Ibid.

258 Mae-Li Allison and Tara M. Emmers-Sommer, 'Beyond Individualism-Collectivism and Conflict Style: Considering Acculturation and Media Use' (Pt Routledge) (2011) 40(2) *Journal of Intercultural Communication Research* 135-152.

259 Barkai (n 222) 68.

260 Whyte and Dsilva (n 203) 59.

261 Harry Triandis, 'Individualism-Collectivism and Personality' (2001) 69(6) *Journal of Personality* 907-924, 909.

262 Allison and Emmers-Sommer (n 253) 138; Harry Triandis et al, 'Individualism and Collectivism: Cross-Cultural Perspectives on Self-Ingroup Relationships' (1988) 54(2) *Journal of Personality and Social Psychology* 323.

263 Alabbadi (n 208) 74.

collectivists ‘value harmony more than honesty, and they work to maintain face. They place collective interests over the rights of individuals, and their governments may invade private life and regulate opinions.’[264] In other words, collectivism tends to be more concerned with the group’s needs, goals, and interests than with individualistic-oriented interests.[265] People from birth onwards are integrated into strong, cohesive extended families, and they often continue to protect themselves as a result of their affiliation to each other.[266]

Another important comparison is self-respect in individualistic cultures, which is similar to face saving in collectivist cultures, but it applies only to the individual.[267] Nydell[268] confirms that the individual’s ‘honor, and reputation are of paramount importance, and no effort should be spared to protect them.’[269] In collectivist cultures, face saving means the honour and reputation of the person as well as the whole community. Alabbadi[270] indicates that Jordanians believe their moral reputation or face is of more value than material possessions, reflecting its collectivist nature.[271] Thus, losing face is a severe issue in this culture. This is elaborated on in the next chapter.

In the power-distance dimension, Australia is considered as having low power distance, as individuals try their best to maintain equality in the distribution of power.[272] This means that equality is important in this culture because all people are created equal and must be treated that way.[273] People from this culture prefer consultative methods to reach their decisions, as they prefer communicating to solve their issues without expecting any guidance from a third party.[274] Jordanian culture

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264 Barkai (n 222) 68.

265 Alkailani, Azzam and Athamneh (n 240) 77.

266 Michael Minkov et al, 'A Revision of Hofstede’s Individualism-Collectivism Dimension: A New National Index from a 56-Country Study' (2017) 24(3) *Cross Cultural & Strategic Management* 386-404, 389.

267 Geert Hofstede, Gert Jan Hofstede and Michael Minkov, *Cultures and Organizations : Software of the Mind, Third Edition* (McGraw-Hill, 3rd ed, 2010) 110.

268 Nydell (n 218) 58.

269 Ibid.

270 Alabbadi (n 208) 74.

271 Ibid.

272 Geert Hofstede, ' National Differences in Communication Styles ' in Dorota Brzozowska and Wtadystaw Chtopicki (eds), *Culture's Software: Communication Styles* (Cambridge Scholars Publishing, 2015) 1.

273 Barkai (n 222) 65.

274 See, e.g., Quek Anderson and Knight (n 234) 89-97.

scores high in power distance dimensions because Jordanians accept hierarchical orders and respect the authority of their superiors.[275] This culture shows respect and deference towards elders and other high status people in the community, especially in the negotiation process.[276] When they choose a high-status person as the third party in the mediation process, Jordanians will consider this person as a leading figure in this process, and they expect guidance from them to solve the generated issues.[277] However, Alkailani, Azzam and Athamneh[278] examined the power distance dimension in Jordan, and their findings indicate that Jordanian culture may now be low in terms of the power distance dimension.[279] This has changed because of modern life in Jordan, and most people are now highly educated with good jobs.[280] As a result, Jordanian people may be more inclined to consider the decision-making process should be participatory and consultative between stakeholders, and the leader to be feeding into the cooperative philosophy of mediation.

The third dimension is uncertainty-avoidance, which determines 'how the society deals with the ambiguity and the uncertainty of the future, and how it manages to develop norms and institutions to deal with the unknown.'[281] According to Hofstede's classification, the Arabic culture is slightly higher in risk avoidance than the Australian culture because Arab people will decide based on their religion and its traditions as the primary source of truth that must be obeyed and not broken.[282] Thus, people from this type of culture will not risk breaking the rules because of the worry of losing face in front of the community.

Jordanian culture could also be considered as a high-risk avoidance culture because it has a strong tribal traditional system that is strictly followed by its people, and Jordanians prefer to avoid conflicts that might threaten the harmony of the group in the future. However, Alabbadi[283] states that Jordanian culture may contradict some

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[275] Safa Al-Sarayrah et al, 'The Effect of Culture on Strategic Human Resource Management Practices: A Theoretical Perspective' (2016) 7(4) *International Journal of Business Management and Economic Research* 704-716, 709.

[276] Barkai (n 222) 65.

[277] Quek Anderson and Knight (n 234) 95.

[278] Alkailani, Azzam and Athamneh (n 240) 77.

[279] Ibid.

[280] Ibid.

[281] Alabbadi (n 208) 74.

[282] Obeidat et al (n 240) 515.

[283] Alabbadi (n 208) 83.

characteristics of the high uncertainty avoidance cultures for two reasons: 'time and schedules are the least of concerns for Jordanians ... [and] Jordanians enjoy friendships with foreigners.'[284] People from this dimension tend to be uncomfortable with strangers and have a significant commitment to precision and punctuality,[285] but Jordanians are well known for their hospitality with foreign guests and for having less interest in time. Whether Jordanians can be considered as high-risk avoidance people is therefore contested.

On the other hand, the Australian culture rates as a low risk avoidance culture.[286] This means that Australians may show respect for people who have different opinions and are less rule-oriented. Regarding religion, 'they are empiricist, relativist and allow different currents to flow side by side'.[287] People from this culture are more tolerant, less aggressive, unemotional and more comfortable with taking risks that may reflect ambiguous future outcomes.[288]

The fourth dimension is masculinity-femininity. Some aspects of Jordanian culture can be seen as moderately feminine because men and women are meant to be modest and caring for relationships,.[289] However, Jordanian culture can be seen as a masculine culture because women are supposed to be subordinate to male leadership,[290] However, and men are more privileged in areas such as wealth creation and job hierarchy than women.[291] Australia is considered as masculine because Australians reinforce traditional male values such as achievement, competition, assertiveness and material success.[292] In the DR world, masculine cultures adopt a competitive style that allows the stronger person to win, while feminine cultures

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[284] Ibid.

[285] Nydell (n 218) 170.

[286] Hofstede, (n 236) 11.

[287] Ibid.

[288] Jenny Rapp, Richard Bernardi and Susan Bosco, 'Examining the use of Hofstede's uncertainty avoidance construct in international research: A 25-year review' (2010) 4(1) *International Business Research* 3-15, 3.

[289] Hofstede, (n 234) 297.

[290] Barkai (n 222) 72.

[291] Majd Rayyan, 'Jordanian Women's Leadership Styles in the Lens of their Masculinity-Femininity Value Orientation' (2016) 21(3) *Journal of Transnational Management* 142-161.

[292] Hofstede, (n 235) 13.

adopt a cooperative style that allows both parties to win and this fits a mediation ethos.[293]

Finally, in long-term-short-term orientation, Jordanian culture could be classified as a long-term orientation culture,[294] because people have a great respect for traditions, loyalty to social obligations, and they have a concern for saving face and self-respect.[295] Hofstede’s study also found that Australia could be considered a short-term oriented country,[296] as the culture concentrates on short-term results and having concerns about self-respect.[297]

This discussion indicates broadly that while some factors may overlap, Australia is essentially identified as an LCC with dimensions such as individualism, masculinity, low power distance, low risk avoidance and short-term orientation. Jordan, on the other hand, is an HCC with dimensions such as collectivism, femininity, low power distance, high-risk avoidance and a long-term orientation. The differences are significant for mediation practice and communication techniques used in mediation, as the different cultures will tackle disputes in alternate ways. The religion of Islam and Arab culture bring Jordanians together as one collective society, while the Australian culture encourages putting the individual's needs and interest as a priority over the community. The Jordanian culture believes that disputes are best avoided, and subtlety is used in communication to save face as a priority. In contrast, Australian culture believes that disputes, while not necessarily pleasant, are normal, and communication is informal and direct and to the point. Australia, as an individualistic society, will tend to focus on the main issue, and is masculine and goal oriented. Jordan, as a collectivist culture, will be more feminine in focusing on the relationships of the disputants, making it more tradition and rule-oriented.

This is important to consider for communication styles and mediation models in resolving disputes in both cultures. Jordan, as a collectivist culture will aim to solve disputes through consensus because they appreciate strength and harmony and quiet diplomacy. By contrast, Australia, as an individualistic society, views individuals as

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293 Barkai (n 222) 74.

294 Al-Sarayrah et al (n 275) 709.

295 Alkailani, Azzam and Athamneh (n 240) 74.

296 Hofstede, (n 236) 14.

297 See, Tony Fang, 'A Critique of Hofstede’s Fifth National Culture Dimension' (2003) 3(3) *International Journal of Cross Cultural Management* 347-368.

important and aims to ensure their disputes are resolved to their satisfaction. Jordanians tend to be less confrontational as they select their words carefully to avoid insulting others, while Australians tend to be direct and straightforward in sharing their opinions. This makes decision-making markedly different, and it is therefore relevant to the mediation process. In the Jordanian culture, decision-making is group-oriented, whereas in Australia the individual will make decisions.

## 3.5 Summary

This chapter has provided an overview and a comparison between the legal systems of Australia and Jordan. This comparison has shown that both have influences from the common law and civil law traditions. As two different legal systems, they are useful to compare, as they have surprisingly many factors in common. Australia and Jordan, like many countries, have Indigenous inhabitants from before colonization on whom a foreign legal system has been imposed. Also, the British legal traditions have influenced both legal systems to varying degrees. Their experience mean both exhibit legal pluralism, with the same legal system having multiple sources of law such as traditional law, religious law, code law, judge-made law and legislative law.

The commonality in the legal systems include that both have a constitutional monarchy with a hereditary monarchy. Both accommodate the vital role of the separation of powers doctrine to secure democracy and justice in their society, both follow the Westminster system of a more two-way separation with the legislature and executive on one side and the judiciary on the other. The difference between Australia and Jordan is mostly in the use of the adversarial and inquisitorial systems, as they are respectively a common law and a civil law country. Thus, in Australia, the importance of judge-made law is a factor of difference. In Jordan, courts can apply only the written laws and codes in their decision making, and where there are no written rules, the judge can apply Sharia principles, natural justice principles, customs, and precedents respectively.

Hall's communication style and Hofstede's cultural dimensions have been adopted in this study to better understand the Australian and Jordanian culture. Both theories help enhance understanding about the nature of decision-making processes in

these cultures. This is relevant to a consideration of how disputes are approached and managed and to the styles of mediation adopted in the two countries.

This chapter has set the frame of comparison between the legal and cultural systems in order to understand fully how mediation fits within the frame. This provides a basis from which to consider just how the mediation process operates in both countries. The next chapter further explores mediation in Jordan as a concept and practice, influenced by specific attributes of Jordanian society such as the Bedouin and Islamic influences.

# Chapter 4: The Jordanian Framework

## 4.0 Introduction to Jordan

This chapter provides a detailed understanding of the mediation background and context in Jordan. Building on the introduction of cultural considerations in the last chapter, this chapter expands on cultural contexts and provides a focus on Jordanian culture in order to understand the Jordanian people's way of communication and responding to disputes, which needs to be considered when using mediation. Jordanian dispute resolution processes are considered in three different areas. It starts with consideration of the Indigenous Bedouin culture and a description of 'mediation,' as practised by the Bedouin. This section describes the Bedouin mediation practice because it runs as a fundamental stream underlying the Jordanian culture and still infiltrates and influences the society through encouraging Jordanians to solve their disputed matters before resorting to the court. An overview of concepts, norms, and practices in Islamic dispute resolution are addressed next as Jordan is an Islamic country that is eager to follow the teachings of Islam primarily that relate to encouraging solving disputes between people peacefully. Finally, after considering some of the key influences such as these the Chapter will outline the legal system's current adoption of mediation as a dispute management system within the modern legal framework. This provides a broad contextualised understanding of how mediation is perceived and has been implemented within the Jordanian community. This will help to provide a contextual picture about the factors that play an important role in shaping the Jordanian mediation as it is currently

### 4.1 Mediation in Bedouin culture

The traditional tribes inhabited the Jordanian desert land for a long time. 'Tribe' is seen as acceptable terminology that encapsulates the sense of belonging to a kinship group.[1] Every Jordanian Muslim or Orthodox Christian citizen belongs to a

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[1] See e.g., Robert J Gregory, 'Tribes and tribal: Origin, Use, and Future of the Concept' (2003) 1(1) Studies of Tribes and Tribals 1-5.

tribe, even the Royal Family, who are believed to have descended from the Prophet Muhammad, who himself came from the Hashemite clan of the tribe of the Quraysh.[2] There are two types of tribes in Jordan: the Semi-Nomadic tribes who move only twice a year and within a limited area, and the fully nomadic tribes who move thousands of kilometers into the inner deserts. The latter are known as the Bedouin.[3] In the last century, indigenous people in Jordan were encouraged to settle in towns and villages by offering them a good education, services, and employment. Most of Jordan's people now live in a settled manner and do not live the nomadic lifestyle, but they have an indigenous background, and they keep their customs and traditions, which they pass on to the next generation. Bedouin existed in Jordan before its modern State formation, and they remain prominent today.[4] The population of Bedouin in Jordan, according to Urban and Rural Estimates as of 2012, is approximately 6,249,000.[5]

Bedouin is an Arabic word, which is derived from *badawiyin*, meaning the people who live in the desert (Badia).[6] The term Bedouin is defined broadly because it covers all Arabic-speaking nomadic pastoralists, including those people who retain a substantial part of their Bedouin culture.[7] The Bedouin are the native people of the land and can be likened in their relationship with the land to other indigenous peoples colonised in settler states, such as the Indigenous people in Australia.[8] Al-Serhan and Furr[9] describe the Bedouin tribe in Jordan as 'a structure of extended families, a patrilineal kinship structure of many generations that encompasses a wide network of blood relations descended through the male line.'[10] Bedouin beliefs infiltrate much

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2 Ghazi Bin Muhammad, *The Tribes of Jordan at the Beginning of the Twenty-First Century* (Jamʻīyat Turāth al-Urdun al-Bāqī, 1999) 9.

3 Ibid 12.

4 Nancy Allison Browning, 'I am Bedu: the Changing Bedouin in a Changing World' (Master Thesis, University of Arkansas, 2013) 10.

5 Mohammad Husni Abumelhim, 'Women and Social Change in Jordanian Bedouin Society' (2013) 4(4) *Studies in Sociology of Science* 27.

6 Muwafaq Al-Serhan and Ann Furr, 'Tribal Customary Law in Jordan' (2007) 4 *South Carolina Journal of International Law and Business* 17, 3.

7 Frank Stewart, 'Customary Law among the Bedouin of the Middle East and North Africa' in Dawn Chatty (ed), *Nomadic Societies in the Middle East and North Africa* (Brill, 2006) vol 81, 239, 240.

8 Steven Dinero, 'The Naqab Bedouins: A Century of Politics and Resistance by Mansour Nasasra (review) ' (2017) 71(4) *The Middle East Journal* 2.

9 Al-Serhan and Furr (n 6) 3.

10 Ibid 21.

of Jordan, as economic and political matters in the country are influenced by, or based on, tribal networking.[11]

The tribe is the primary building block in the Jordanian indigenous community. Each tribe member is not only traditionally committed by duties of mutual assistance to her or his immediate relatives, but also to the tribe as a whole. Tribes are further divided into clans and then into family groups (ha'mulah). Some clans can trace their ancestry back ten generations.[12] Each of these family groups consists of people who share a direct blood connection, and as such, they are responsible for each other regarding issues related to blood in marriage and in vengeance.[13] Blood vengeance, which is a deeply-rooted practice in Bedouin life, means taking revenge by killing the killer, and this is seen as the victim's family's right and duty.[14] The individual in the tribe is expected to show respect towards older males in the tribe, as they are patriarchal, and to show loyalty to the collective goals and interests of the tribe.

Each tribe has a male leader, who is chosen from one of the Nobel families in the tribe, and he is called *Al-Sheik*. This leader holds the power to solve the tribe's problems and to maintain social harmony among his people.[15] The leader's age plays an essential role in his credibility. An older leader is more respected and so has greater power in resolving disputes.[16] The leader adopts a dispute resolution process to solve issues so as to maintain coherence between the individuals and also to maintain his essential position.[17] If disputes arise between the members of a tribe, he will try to settle the dispute using amicable means, for example through a process that is often referred to as mediation.

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11 Aseel Al-Ramahi, 'Wasta in Jordan: A Distinct Feature of (and Benefit for) Middle Eastern Society' (2008) 22(1) *Arab Law Quarterly* 35-62, 39.

12 Al-Serhan and Furr (n 6) 21.

13 Browning (n 4) 5-6.

14 Alean Al-Krenawi et al, 'Psychological Responses to Blood Vengeance among Arab Adolescents' (2001) 25(4) *Child Abuse and Neglect* 457-472.

15 Al-Serhan and Furr (n 6) 18.

16 Mohammed Abu-Nimer, 'Conflict Resolution in an Islamic Context: Some Conceptual Questions' (1996) 21(1) *Peace and Change* 22-40, 31.

17 Bashar Malkawi, 'Using Alternative Dispute Resolution Methods to Resolve Intellectual Property Disputes in Jordan' (2012) 43 *California Western International Law Journal* 141, 142.

The next section provides a comprehensive image of the Bedouin dispute resolution process. It addresses customary dispute resolutions hallmarks and the elements used in these traditional approaches.

### 4.1.1 Customary Dispute Resolutions Hallmarks

Four main hallmarks rule the customary dispute resolution process: collective responsibility, honour, confidentiality and neutrality. These hallmarks can not only apply to people who are living nomadically but also to any person of strong tribal persuasion who lives in cities or villages.

The first principle is a collective responsibility approach, which can be identified as belonging to a high context culture (HCC) and according to Hofstede's dimensions can be attributed to a collective society.[18] The people from these cultures are devoted to relationship building, cooperation, trustworthiness, solidarity with others and implicit communication.[19] Collective responsibility is one of the fundamental aspects of the tribal society and requires that every member of the tribe has to support each other and take responsibility as a form of mutual obligation.[20] Al Ramahi[21] states that tribes place collective responsibility 'as the highest principle in a hierarchy of values in both dispute resolution and everyday dealings.'[22] The Bedouin community is a collective one, due to the harsh environment that it has had to face and survive in with poor desert resources.[23] This principle helps the tribe members survive together and defend each other against thieving nomads, foreign enemies,

18 As discussed in chapter 3, 77.

19 See, Rebecca LeFebvre and Volker Franke, 'Culture Matters: Individualism vs. Collectivism in Conflict Decision-Making' (2013) 3(1) *Societies* 128-146; Cem Tanova and Halil Nadiri, 'The Role of Cultural Context in Direct Communication' (2010) 5(2) *Baltic Journal of Management* 185-196.

20 Aseel Al-Ramahi, 'Competing Rationalities: The Evolution of Arbitration in Commercial Disputes in Modern Jordan' (PhD Thesis, London School of Economics and Political Science, 2008) 129.

21 Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) *London School of Economics Legal Studies*, 2.

22 Ibid.

23 Al-Serhan and Furr (n 6) 18.

and desert conditions. Without unity, co-operation, and symbolic divisions of roles, the survival of the tribe as a whole would be impossible.[24]

Collective responsibility has played a pivotal role in the management of various types of disputes between individuals and between the tribes since long before the establishment of the modern state.[25] The absence of judicial authority in the Bedouin community shows a system of justice heavily influenced by tribal solidarity and the need to protect and sustain the tribe. This solidarity is reaffirmed in the face of external disputes between tribes, which only increase the internal cohesion within the group.[26] Most studies focus on the dispute resolution processes in criminal disputes, such as murder, due to their impact on community coherence, but this does not prevent the use of these processes in civil disputes.

In the case of criminal actions, such as killing a person from another tribe, the offender’s family and his tribe have a responsibility to participate in a tribal dispute resolution process to settle the dispute immediately, and to prevent further revenge, as the offender is seen as an agent, or extension of their tribe.[27] The tribe of the victim’s family supports the victim and their family to ensure they receive justice from the other side. This occurs in two ways, either by conducting revenge in the form of killing the killer or killing a high-status person from the killer's family, or by encouraging the victim’s family to forgive and accept compensation. Compensation is offered in the form of cash or livestock such as sheep and camels. This means that responsibility is held collectively and there is a mutual obligation within both groups to prevent the negative consequences of disputes from escalating, and thereby contaminating the whole tribe. This hallmark remains an integral part of Jordanian culture, as the tribe will support their member, whether they are an offender or a victim.[28] As a collective society, this influences the HCC type of communication patterns that society follows.

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[24] Muhammad (n 2) 22.

[25] Jessica Watkins, 'Seeking Justice: Tribal Dispute Resolution and Societal Transformation in Jordan' (2014) 46(1) *International Journal of Middle East Studies* 31-49.

[26] Sadik Kirazli, 'Conflict and Conflict Resolution in the Pre-Islamic Arab Society' (2011) 50(1) *Islamic Research Institute*, 33.

[27] Clinton Bailey, *Bedouin Law from Sinai and the Negev: Justice without Government* (Yale University Press, 2014) 60; Al-Serhan and Furr (n 5) 21.

[28] WANA Institute, 'Tribal Dispute Resolution and Women’s Access to Justice in Jordan' (2016) *WANA Institute*.

The second hallmark is the honour or reputation (*Sharaf)*, which is central to Bedouin culture. As noted, this hallmark can be identified as one of Hofstede's dimensions that is attributed to face saving, which means the honour and reputation of the person as well as the whole community. Honour ensures enculturation with a common moral code.[29] According to Ozcelik,[30] honour 'is a flexible concept that can be used to legitimise feud and revenge as well as forgiveness, reconciliation, and mediation.'[31] When a violation occurs, the victim has the right to restore their honour in criminal matters through physical revenge as an honourable choice in dispute situations.[32] If the victim or their family do not do this, they become known as weak in the Bedouin community, and so can be seen as vulnerable and easy victims, particularly if living in the desert. Also, pressure applies to the offender's tribe to settle the dispute as any revenge may also result in loss of honour. As Pely[33] states, '[t]hese consequences may seem trivial to a Western observer, but in a tribal culture, honour and respect are central elements, so the threat of shame or lost honour can provide considerable leverage.'[34] In civil disputes such as financial issues, honour may be impacted heavily. Especially when someone breaches their word or does not do what they said they would in returning the money to the creditor, this will affect the debtor's honour in front of his community, as no one can trust him again.

An important aspect linked to honour is forgiveness. Forgiveness restores honour when the offender's family commences dispute resolution, as they can preserve or even enhance their honour,[35] by avoiding revenge and requesting the victim's family to forgive them through apology and acknowledgement of any wrong done. The victim's family likewise restores its reputation and enhances its power through the act of forgiving. This hallmark demands that every individual in the Bedouin tribe must be strong in protecting and maintaining their honour and stopping

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29 Andrew Shryock, 'House Politics in Tribal Jordan: Reflections on Honor, Family and Nation in the Hashemite Kingdom' (2000) *Laboratory of Social Anthropology*.

30 Sezai Ozelik, 'Islamic/Middle Eastern Conflict Resolution for Inter-personal and Intergroup Conflicts: Wisata, Sulha and Third-Party' (2006) 3(12) *Uluslararasi Iliskiler/International Relations*, 12.

31 Ibid.

32 Doron Pely, 'When Honor Trumps Basic Needs: The Role of Honor in Deadly Disputes Within Israel's Arab Community' (2011) 27(2) *Negotiation Journal* 205-225, 212.

33 Doron Pely, 'Resolving Clan-Based Disputes using the Sulha, the Traditional Dispute Resolution Process of the Middle East' (2008) 63(4) *Dispute Resolution Journal* 80, 86.

34 Ibid.

35 Pely, (n 32) 212.

any violation through resolutely ensuring that every infraction on their rights is rectified.[36] These are potent hallmarks for mediation practitioners to understand, as they can use them in the toolbox of mediation resources to help move the parties to a resolution.

One cannot understand honour without addressing the significance of women. The female capacity to reproduce makes her an essential component to the overall survival of a tribe. Therefore, marriage and the sexual lives of females is a keen concern in Bedouin societies.[37] A Bedouin woman is highly appreciated and valued as a member of the tribe because she not only secures the tribal lineage,[38] but can help maintain or establish an alliance with families of other tribes, which in turn can reduce tribal disputes.[39] Honour requires that women have a good reputation and protect their virtue in order to keep the tribe strong.

For this reason, women are held to strict obedience as any shameful behaviour weakens the power of their tribe. Consequently, any offence against a woman is also of considerable significance and may lead to revenge by the collective male kin. Sexual offending has a particularly dangerous potential to impact on the tribe's reputation and stability. Honour, as a hallmark, requires males to be responsible for protecting a woman from violation and ensuring her sexual behaviour is controlled and appropriate. If a man cannot ensure this, they will be seen as weak in Bedouin society. According to Al-Serhan and Furr,[40] 'this principle is more important in Bedouin life than life itself'.[41] Thus, honour as a hallmark places equal but different demands on males and females.[42] Any act against honour is considered to be a serious matter, which requires resolution for respectability to be restored in the community.[43]

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36 Bailey (n 27) 17-18; See also, Mohammed Abu-Nimer, 'Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities' (1996) 55(1) *American Journal of Economics and Sociology* 35-52, 48.

37 Manar Hasan, 'The Politics of Honor: Patriarchy, The State and the Murder of Women in the Name of Family Honor' (2002) 21(1-2) *The Journal of Israeli History* 1-37, 6.

38 Philip Carl Salzman, 'The Middle East's Tribal DNA' (2008) 15(1) *Middle East Quarterly* 23, 28.

39 Sarab Abu-Rabia Queder, 'Permission to Rebel: Arab Bedouin Women's Changing Negotiation Of Social Roles' (2007) 33(1) *Feminist Studies* 161-187, 164.

40 Al-Serhan and Furr (n 6) 29.

41 Ibid.

42 Hasan (n 37) 3.

43 Amira El Azhary Sonbol, *Women of the Jordan: Islam, Labor, and the Law* (Syracuse University Press, 2003) 190.

In civil matters, honour is an issue, for instance if breaching business dealings or breaching one's word to pay the price of a sale. The impact can be so severe that no one will deal with such a person again. Therefore, dispute management is aimed at restoring honour through addressing the stakeholder's needs.

A third hallmark in Bedouin dispute management is confidentiality, which is one of the vital hallmarks in the mediation dispute resolution process. This hallmark ensures protection of the conversations, information, and evidence disclosed in the delegation's private sessions with the parties.[44] However, this hallmark has an interesting difference from confidentiality as understood in modern mediation processes. In the Indigenous process, it is only applied to negative expression of emotions in the private sessions. The delegation aims to protect harmony and the public interest, which is not achieved if the other party hears about the negative feelings, or emotions that are expressed during a dispute investigation. This may complicate the issue instead of solving it.[45] The confidentiality of the information and the evidence collected in these sessions is not protected or guaranteed by the law. [46]

The last hallmark feature is neutrality, which is one of the fundamental hallmarks in all dispute management processes in Jordan.[47] It emphasises the neutral status for the intervener as a third party in this process.[48] Neutral status here does not mean a lack of familiarity or kinship but requires impartiality or non-biased participation by the third-party intervener. They must not have any interest in the honour and respect of one party over another, nor prefer any party over another during dispute management.[49] In the Jordanian Indigenous process, neutrality is essential because it guarantees a smoothness in conducting this process. The neutrality is guaranteed when the third party does not get money to participate in the process. If the disputants

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[44] John Arthur, 'Confidentiality and Privilege in Mediation' (2015) *Australian Alternative Dispute Resolution Law Bulletin* 91.

[45] Pely, (n 33) 86.

[46] Ibid.

[47] Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice - Part 1' (2000) 11 *Australian Dispute Resolution Journal* 73.

[48] Susan Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8 *Queensland University of Technology Law and Justice Journal* 139.

[49] Janet Rifkin, Jonathan Millen and Sara Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151-164, 151.

feel these interveners are unqualified or not neutral, it may prevent a satisfactory outcome.

### 4.1.2 The Traditional Elements

Each of these processes for managing disputes includes a third party, who has high community status and considerable power. The disputants will choose the third party according to 'kinship connections, political position, religious merit, previous experience, and knowledge of customs and community.'[50] The third party intervener is vital in this process because they have to use their own power position as authority to impose the process and the solution on the parties.[51] In doing this, the third party is conscious of the pressure from the community to be fair, unbiased, and peaceable. Justice demands they ensure imposing an equitable solution to end the dispute as quick as they can.[52] The disputing parties are required to respect the third party, and so they will try to maintain good relations with them. Unlike facilitative mediation, the third party role in Bedouin processes is best seen as determinative, as the third-party is directive, and also advisory in their encouragement of the parties to resolve their dispute based on the concept of justice that is accepted in their societies.

The dispute management, while generally seen as a voluntary process in that it requires the parties' agreement to participate, is really a obligatory participation imposed on the disputants by their community. The strong community-based society and associated hallmarks ensure enculturation that encourages disputants to participate in order to stop the potential cycle of revenge.[53] Unlike the LCC of Australia and other Westernised countries, where the individual holds greater significance than the community, protecting the harmony of the community is a priority in Jordan. Individual interests and personal gain are sacrificed for the general

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50 Abu-Nimer, (n 36) 48.

51 Mneesha Gellman and Mandi Vuinovich, 'From Sulha to Salaam: Connecting local knowledge with international negotiations for lasting peace in Palestine/Israel' (2008) 26(2) *Conflict Resolution Quarterly* 127-148, 136.

52 Brian Kritz, 'Palestinian Ṣulḥa and the Rule of Law' (2013) 27(2) *Arab Law Quarterly* 151-170, 155.

53 Doron Pely, 'Where East not Always Meets West: Comparing the Sulha Process to Western-Style Mediation and Arbitration' (2011) 28(4) *Conflict Resolution Quarterly* 427-440, 429.

community goal, which is protecting social harmony and stability. Thus, addressing disputes and undertaking a management process that is collaborative and confidential would appear to be a natural priority choice in these communities.

The Bedouin approach in managing disputes is deeply communally oriented in Jordan.[54] The defendant may face both the public legal justice system and Indigenous punishment. The final court decision may be affected by the *Sulha* verdict, and when the victim or their family forgive the offender, the court may decide not to impose a sentence.[55] Likewise, in civil disputes, the court may take into consideration the agreement that was reached in *Sulha*. These traditional dispute resolution processes have a paramount status in the Jordanian laws because of their success in ending disputes peacefully and quickly. Just how the Bedouin approach managing disputes is explained next.

### 4.1.3 Bedouin Approaches to Dispute Management

There are several processes used by Bedouin for managing disputes in order to maintain stability within and between tightly knit social groups. These approaches are used in disputes that entail crimes such as killing. However, the same technique may be used in civil disputes, including business and financial disputes.[56] The traditional approach consists of *Jaha, Jalwa, Sulha* and agreement, and they are each described in turn.

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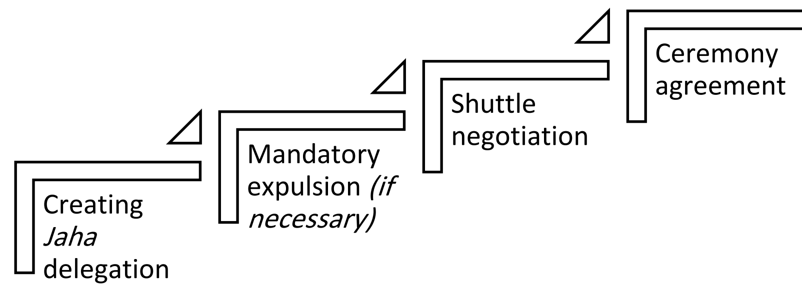
[54] George Irani and Nathan Funk, 'Rituals of Reconciliation: Arab-Islamic Perspectives' (1998) *Arab Studies Quarterly* 53-73, 21.

[55] *The Penal Act 1960* (Jor) art 52 ('*The Penal Act*').

[56] Kritz (n 52) 152.

Figure 6: The traditional Bedouin approach to all disputes[57]




When a dispute arises, the first step is *Jaha,* which means creating a deputation to help the disputants through negotiation to reach a peaceful settlement, employing compensation or forgiveness.[58] The primary purpose of the *Jaha* is not for punishment or judgment. *Jaha* cannot be organised automatically after a dispute has occurred, but rather needs several steps to be followed in order for it to occur. As Pely[59] states,

> [t]he Jaha uses shuttle diplomacy to attempt to persuade each side to cease hostilities for a while in order to allow [the shuttle] to hear witnesses, consider evidence, and craft a reconciliation agreement between the disputants.[60]

The *Jaha* delegation must be created and authorised from representatives of the stakeholder parties, such as the plaintiff, defendant, or their family, in order to successfully intervene to solve the problem.

*Jaha* starts when the stakeholder party seeks the help of a well-known, responsible, esteemed man, usually from amongst the tribal elders or leaders (*shaykhs*), religious authorities, or the Governor.[61] The stakeholder party will visit the *Jaha* members in their houses to convince them to participate in a process of shuttle diplomacy. The stakeholder party will inform the *Jaha* members that they are seeking reconciliation. Those members will participate in *Jaha* due to fear of scandal or loss of respect if they refuse to join without any reasonable reason. When the

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57 This model is constructed by the researcher after studying the Bedouin approach.

58 Nahla Yassine-Hamdan and Frederic Pearson, *Arab Approaches to Conflict Resolution: Mediation, Negotiation and Settlement of Political Disputes* (Routledge, 2014) 7.

59 Pely, (n 33) 86.

60 Ibid.

61 Paul Salem, *Conflict Resolution in the Arab World* (American University of Beirut, 1997) 163.

figures comprising those involved in the shuttle diplomacy respond by agreeing to participate, they say ‘You requested that we intervene. We, as a *Jaha*, want to hear your authorisation and to receive it in writing.’[62] So, a stakeholder party has to give the *Jaha* irrevocable written authorisation.[63] This authorisation states that ‘I … accept that my case will be in your hands and that it is now on your conscience, and I will accept any ruling you issue in this case.’[64] After that, the chosen third parties form a delegation to intervene and attempt to solve the case. The delegation party approaches the other party in the dispute to convince them to participate in this process. The delegation will visit them in their home and inform them about the authorisation and invite them to start the *Jaha*.[65] The *Jaha* may say ‘we were sent and are authorised as *Jaha* by … and we invite you to consider us.’[66] The response can be immediate or take a couple of days. However, if it takes too long to agree to the *Jaha,* then this can be taken as disrespect by the other party. If the disputant accepts then the delegation will request full permission to intervene and decide the matter.[67]

Before starting the *Sulha*, the delegation party will examine the situation between the parties to see if there is a need for *Jalwa*. Halasa[68] defines *Jalwa* as a form of mandatory expulsion. *Jalwa* has a dramatic consequence as it can require from three to five generations of the offender’s family to relocate their home through an agreement between tribal leaders and the state.[69] This may happen when a member of one tribe commits a severe crime against a member of another tribe that has lived in the same area.[70] This process results in dramatic upheaval in the offender’s family life, because they need to change their employment, accommodation, schooling, and their voting rights, as they change their electoral district.[71] Police are generally called in to supervise this process and it may be further facilitated by Jordan’s administrative governors, under *the Crime Prevention Act*

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62 Elias Jabbour, *Sulha Palestinian Traditional Peacemaking Process* (House of Hope, 1993) 31.
63 Pely, (n 33) 82.
64 Jabbour (n 62) 31.
65 Pely, (n 33) 83.
66 Jabbour (n 62) 32.
67 Pely, (n 33) 82.
68 Ayman Halasa, 'Jalwa in Jordan: Customary Law and Legal Reform', *The Legal Agenda*) <http://legal-agenda.com/en/article.php?id=565&lang=en>.
69 Al-Serhan and Furr (n 6) 24.
70 Halasa (n 68) 1.
71 Ibid.

*1954*.[72] The tribe's leaders may adopt this process as a consensus decision when the degree of the crime's seriousness calls for such a dramatic intervention. The period of the *Jalwa* expulsion depends on the type of crime; for instance, in cases of murder, the usual period is up to seven years until the wounds have healed.[73] This process is a third party determinative process, as the third party makes a decision after consideration of all the information they gather.

Once *Jalwa* has occurred, or a decision is made not to expel the offender's family, the *Sulha* process is conducted. *Sulha* is a customary justice process, dating back to the pre-Islamic period.[74] Pely[75] describes this process as a unique way of managing disputes, which uses a mix of local variants of mediation and arbitration techniques to facilitate the settlement.[76] This process is effective in managing disputes between parties when they are from the same tribe. Lang[77] states that the main purpose of *Sulha* is to 'create an environment in which people feel emotionally able to resume peaceful relations and continue living together in close quarters.'[78] The process is one of negotiation, as used by the *Jaha* delegation, to guide the parties to a peaceful dispute settlement. In the end, the delegation may impose their decision on the parties to accept their final verdict. In this sense, it moves from an assisted negotiation process to an arbitral or private decision-making process. The third party are like arbitrators who derive their power from their status and their expert positions in the community, as well as the fact that this process never operates without the explicit authorisation of the disputants. [79]

The *Jaha* delegation will start the *Sulha* process with a private intake or discussion with disputants' representatives, and any witnesses. The *Jaha* delegation will ask any witnesses questions, much like the inquisitorial evidence gathering process, to collect information about the dispute. During this stage, the third party delegation avoids face-to-face negotiations between the disputing parties to ensure

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[72] *The Crime Prevention Act 1954* (Jor) ('*Crime Prevention Act* ').
[73] Al-Ramahi, (n 20) 149.
[74] Aida Othman, 'An Amicable Settlement is Best': Sulha and Dispute Resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64–90, 64.
[75] Pely, (n 53) 80.
[76] Ibid.
[77] Sharon Lang, 'Sulha Peacemaking Process and the Politics of Persuasion' (2002) 31(3) *Journal of Palestine Studies* 52–66, 62.
[78] Ibid.
[79] Pely, (n 33) 82.

there is no risk of further escalation of the dispute. Pely[80] states that the face-to-face meeting has a negative impact on the process as the high anger levels between disputing parties may degenerate into violence if they meet face-to-face.[81] As a result, a type of shuttle negotiation occurs, and the delegation uses reframing of the disputants' narratives when speaking to the other party to remove any inflammatory or toxic language.[82] Gellman and Vuinovich[83] state that storytelling is the primary communicative technique in *Sulha*, as it allows each party to communicate privately with the third party delegation, to present their position and interests, while also avoiding antagonism.[84]

Traditionally, the third parties will meet the disputants separately and engage in reframing and detoxifying statements, by removing any aggressive statements made by a disputant and encouraging positive statements where possible. This helps develop a framework within which to manage the dispute. Next, the delegation brings to the fore the parties' previous good relationship to rebuild basic relations in order to move to reconcile them. The *Jaha* will then provide examples from precedents, describing how similar disputes have been resolved in the past. After meeting, the first party's delegation meets separately with the other party, and they follow the same process as described above except they will also tell them about the first party's claim.[85] The delegation party will go back to the claimant to talk to them about what the other party wants. These negotiations will continue until they reach a satisfactory solution for both parties.[86] If there is no agreement and reconciliation, the *Jaha* delegation, disputants and even the community all suffer a grave loss of face and offence to their honour.[87]

When the delegation has finished the previous stage, and if they have been successful in obtaining agreement between the parties about forgiveness or compensation, they then help plan a ceremony to signify that the dispute is resolved.

80 Pely, (n 53) 430.
81 Ibid.
82 Ibid.
83 Gellman and Vuinovich (n 51) 138.
84 Ibid.
85 Ahmed Saleh Suleiman Owidi, 'Bedouin Justice in Jordan: The Customary Legal System of the Tribes and its Integration into the Framework of State Polity from 1921 Onwards' (PhD Thesis, The University of Cambridge, 1982) 40.
86 Pely, (n 33) 83.
87 Pely, (n 53) 431.

The ceremony announces the result of *Sulha* publicly. The *Jaha* delegation sends invitations to family members, special guests, and the wider community. This invitation sets forth the time and place of the ceremony, which is generally the village centre because the restoration of honour relies on a public viewing. The ceremony will start with shaking hands, which acts as a public demarcation of the end of violence between the families. After that, the defendant announces that what happened was wrong and then the claimant announces the dispute has been resolved. Finally, they share a hot meal to signify the restoration of peace.[88] As can be seen, the hallmark cultural values of honour, saving face, wisdom, generosity, respect, dignity, and forgiveness operate through *Sulha*.[89]

This process, practised by Bedouins for hundreds of years, has features that are replicated in current dispute management processes. However, it combines them in a different and uniquely Bedouin manner. This process is similar to shuttle mediation in Australia, except there is a panel or committee selected based on specific attributes related to their position within the tribes. Moreover, they move between the parties rather than the parties coming to them. They also may be more coercive than would occur in a facilitative shuttle mediation. This process is not mediation, even though it is colloquially described as mediation. It follows an inquisitorial evidence gathering process, much like an arbitration or civil law country civil trial. The process starts like shuttle mediation before evolving into a private determinative arbitration by the panel of delegates. Elements of the evaluative model of mediation are also present, as the delegation may provide advice and opinion on a suitable resolution. However, they ultimately decide the matter by imposing their opinion if the parties do not readily accept possible party solutions. The similarities are present, as Wade[90] describes evaluative mediation as having a skilled mediator who can 'define topics, and create a range of options and solutions for each topic, and attempt to negotiate acceptable solutions.'[91] *Sulha* involves the third party delegation operating a shuttle between parties, and persuade each side to stop revenge, to hear witnesses, consider

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88 Gellman and Vuinovich (n 51) 138.
89 Abu-Nimer, (n 36) 35.
90 John Wade, 'Evaluative Mediation-Elephants in the Room?') <http://www.mediate.com/articles/wade-evaluative-mediation.cfm>.
91 Ibid.

evidence, and craft an agreement.[92] Moore[93] confirms this idea when he states that the evaluative model involves the third party using 'limited joint sessions, extensive separate private meetings, and shuttling between them.'[94] The granted authority to conduct the private session, evaluate the evidence, and craft the suitable solution, makes the evaluative model, together with aspects of the arbitration approach, the dominant feature of the Jordanian Indigenous dispute management process.

This approach is then layered by requirements of the culture that adhere to the religion of Islam, as Jordan is a Muslim country. When Islam arose in the middle east, it found some Bedouin practices and traditions could be adopted to suit the teachings of Islam, such as dispute management processes. These processes could help the people to put an end to their dispute in a mutually acceptable manner and as such they remain a current influence on the practice of mediation in Jordan. This influence is now addressed in the next section.

## 4.2 Mediation in Islam

The main religion of Jordan is Islam,[95] with Muslims comprising 93.8 per cent of the population.[96] The influence of Islam can be traced back to the early 7th century.[97] It establishes *Shariah* as a code to determine a Muslim's obligations, both in ethics and legally.[98] The mediation style process for managing disputes shares much with the Bedouin approach, which existed before Islam.[99] Islam encourages solving disputes peacefully to ensure the smooth running of Muslim affairs and provides a

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92 Pely, (n 33) 86.

93 Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley and Sons, 2014) 56-57.

94 Ibid.

95 *The Constitution of The Hashemite Kingdom of Jordan 1952* (Jor) ch 1 art 2 ('*Jordanian Constitution Act*').

96 CBS News, 'The Most Heavily Muslim Countries On Earth') <https://www.cbsnews.com/pictures/most-heavily-muslim-countries-on-earth/2/>.

97 See generally, Vandana Singh, 'Alternative Dispute Resolution In Islam: An Analysis' (2017) 1 *Journal of the Indian Law Institute*, 142.

98 Onder Bakircioglu, 'The Principal Sources of Islamic Law' in Tallyn Gray (ed), *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic EPublisher, 2018), 50.

99 Othman (n 74) 64.

system of courts to support this.[100] As Ramahi[101] states, the court is not only the ultimate truth-finding mechanism in Islam, but there is also a range of dispute resolution tools known as *Sulh*, that disputants can utilize.[102] The Islamic civil code, which was enacted in the late 19th century, encourages using *Sulh* as an amicable process for managing disputes. *Sulh* is defined in the Code as a 'contract removing a dispute by consent. Furthermore, it becomes a concluded contract by offer and acceptance.'[103] Muslims will use *Sulh* when a judge is not available, or if attending court would create hardship.[104]

Mediation, as a dispute management process, is known by the term *Sulh,* and has a prominent status in Islam.[105] Mediation is a term that sees little reference in Islamic jurisprudence.[106] *Sulh*, is used and refers to a flexible process that follows a combination of processes encompassing negotiation, mediation or conciliation.[107] Baamir[108] confirms that *Sulh* can be translated as mediation, conciliation, or negotiation since there is no semantic difference between them in the Arabic language.[109] Islamic history has rich examples of using this practice. *Sulh al Hudaibiyah* is the most famous dispute in Islamic history. The Prophet Mohammad adopted *Sulh* as the third party intervener to stop the war between the people of *Mecca* and *Madinah*, by engaging in the process of negotiation with the parties to achieve an acceptable settlement.[110]

The Koran encourages the disputants to adhere to peaceful tools when addressing disputes: 'If two parties among the believers fall into a quarrel, make ye peace between them . . . make peace between them with justice, and be fair: for God

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100 Md Zahidul Islam, 'Provision of Alternative Dispute Resolution Process in Islam' (2012) 6(3) *Journal of Business and Management*, 31.

101 Al-Ramahi, (n 21)11.

102 Ibid.

103 Ahmad Cevdet Pasha, *Al-Majalla al-Ahkam al-Adaliyyah* (CreateSpace Independent Publishing Platform, 2016) 176.

104 Othman (n 74) 68.

105 Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010) 25.

106 Essam Alsheikh, 'Distinctions between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'ah Law' (2011) 25 *Arab Law Quarterly Journal* 367, 380.

107 Singh (n 97) 142.

108 Abdul Rahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Sudi Arabia* (Ashgate Publishing Limited, 2010) 154.

109 Ibid.

110 Al-Ramahi, (n 21) 6.

loves those who are fair and just.'[111] Prophet Mohammad has also encouraged Muslims to adopt peaceful tools to compromise and mediate disputes, such as those between fighting clan members and private ones, including those between family members.[112] Thus Islamic jurisprudence encourages amicable dispute management.

*Sulh* is the oldest practice of dispute management in Islam, and its roots are found in Muslim tribal society. When Islam arose, the process was amended to be more in line with Islamic principles.[113] Kirazli[114] confirms this adoption from existing Arab customs being modified to suit the principle of Islam by the Prophet Mohammad.[115] According to Özçelik,[116] it is difficult to differentiate between the Islamic and Middle Eastern dispute management approach because both encourage and adopt the same procedures, which is to have a third party act as a negotiator between disputants to reach a peaceful solution for them and the community.[117]

The *Sulh* process was practised within the framework of Arab tribal society by *Shaykhs*, noblemen and soothsayers, who played an essential role as third-party mediators in all disputes within the tribe or between rival tribes.[118] These figures have continued to resolve disputes within their tribes after the establishment of the Islamic polity, but it was not for a long time. As Othman[119] notes, with 'the merging of political and adjudicative powers… [comes] the shifting of the locus of authority from the people and their longstanding customs to the representatives of the central Islamic government.'[120] This means that the dispute resolution methods, in general, and mediation process in particular, have been practised by Islamic officials, such as judges undertaking to mediate disputes or judges referring parties to mediators, instead of the elders or *Shaykhs*.[121]

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111 *Verse 9 in Sura AlHujurat (The Chambers)* ('*Sura AlHujurat*').

112 Alsaleeby (n 105) 26.

113 Nora Abdul Hak and Hanna Ambaras Khan, 'The Application of Sulh in Resolving Community Disputes' (2013) *SSRN Electronic Journal*, 16.

114 Kirazli (n 26) 26.

115 Ibid.

116 Ozelik (n 30) 9.

117 Ibid.

118 Mohammed Abu-Nimer, 'An Islamic Model of Conflict Resolution: Principle and Challenges' in Qamar AlHuda (ed), *Crescent and Dove: Peace and Conflict Resolution in Islam* (US Institute of Peace Press, 2010) 74.

119 Othman (n 74) 67.

120 Ibid.

121 Ibid 90.

To understand the *Sulh* way of managing disputes according to the Islamic concept, it is necessary to consider the role of the third party, the community and the techniques used in the process. Abdalla[122] explains that the role of the third party in the Islamic management of disputes, in general, is to restore Islam's goals of justice and equity that exist in Islamic resources such as the Koran.[123] The third party aims to achieve this by leading the disputants away from distorted beliefs and practices that have influenced their relationships with each other, and move them towards justice, compassion, and equality.[124] Shahram[125] adds that the third party aims 'to create peace and save face for both parties, the family, the community and himself within the community.'[126] The role of the intervener can be performed according to the Islamic concept if they assist the parties to reach a fair agreement for both parties, and if they do not contravene the principles of Islam or affect the common good negatively. It is noted that the Muslim community is a collective society according to Hofstede's dimensions, and they will prefer to focus on the needs and rights of the community over individual ones. Thus, the third party will direct the disputants to consider the common good and the Islamic principle when they craft their solution.

The community role in Islamic dispute management is essential as it 'can provide legitimacy, sustainability, and effectiveness to a dispute resolution process.'[127] Muslim culture is described as the culture of relatedness, and is based on the family and inter-personal relational patterns.[128] This culture puts responsibilities and duties on the community's members to support each other, such that when a dispute occurs they intervene by providing support to ensure improvement, or sustain the parties to a resolution of the dispute. For example, the family members of disputants can interfere in the dispute to convince the parties to use *Sulh* as a peaceful method, to convince them to accept the suggested solutions offered by the third party intervener, and to prevent an escalation of the dispute. The community operates as

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[122] Amr Abdalla, 'Principles of Islamic Interpersonal Conflict Intervention: A Search within Islam and Western Literature' (2001) 15 *Journal of Law and Religion*, 160-178.

[123] Ibid.

[124] Ibid.

[125] Nadia Shahram, 'A Special Approach to Mediation for Moslem Clients' (2015) 17 *Cardozo Journal of Conflict Resolution* 823, 830.

[126] Ibid.

[127] Abdalla (n 122) 175.

[128] Çiğdem Kâğitçibaşi, 'A Critical Appraisal of Individualism and Collectivism: Toward a New Formulation' in Uichol Kim et al (eds), *Individualism and Collectivism: Theory, Method, and Applications* (Sage Publications, 1994), 62.

motivation for the intervener and disputants to achieve an outcome based on the common good and Islamic principles, fitting the notions of an HCC.

Abdalla[129] states that Islamic dispute management adopts an adjustable model, meaning 'an intervention technique should best correspond to the stage of a dispute with the purpose of restoring justice and adhering to Islamic principles and values.'[130] The processes are flexible and do not always progress in a linear fashion. The third party has to adopt a suitable technique for the particular dispute in order to restore justice, by encouraging reconciliation between the disputing parties according to Islamic principles.

The religion of Islam and Bedouin culture have crafted the current form of mediation used by many Jordanians. The process parallels an advisory or expert mediation style in which the third party must be precise and carefully apply the principles of Islam in advising a suggested solution.[131] The Jordanian legislature, in adopting a mediation process, has followed some of these traditions, given its connection with the religion of Islam and the Indigenous culture, and this should makes the law of mediation more acceptable in Jordanian society.

Jordan has legislated for marital disputes to follow a mediated resolution, according to Islamic theory, in the *Jordanian Personal Status Act 2010.* Article 114 enables using amicable dispute management for disputes between a husband and wife. This may happen when one of them requests separation by divorce,[132] and the judge can then choose two mediators, one from the husband's family and the other from the wife's family, who are entrusted to assist the parties reach an amicable resolution. These mediators are known to the parties, unlike the impartiality of mediators in the West. If the family members cannot participate, the judge can choose two mediators who are well known and experienced, who may be more impartial, and who are considered as having the wisdom and demonstrated ability to mediate between the disputants. The mediators make an effort to understand the nature of the spouse's dispute. This is done by hearing each party's story in the same session or separately, and then the mediator suggests a suitable solution. The optimal goal is to

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129 Abdalla (n 122) 178.
130 Ibid.
131 Alsaleeby (n 105) 20.
132 *The Personal Status Act 2010* (Jor) art 114 and art 126 ('*Personal Status Act* ').

remove ill feelings and re-establish communication channels between the spouses. If the process does not succeed in this regard, they can then advise the judge to pronounce the divorce between the parties.[133] While Islam operates in certain restricted areas of dispute, such as family divorce, the law provides for mediation in the mainstream public system in Jordan.

## 4.3 Mediation in Jordan's Legal System

The Hashemite Kingdom of Jordan was established as an independent country in 1946 with a land area of about 92,000 square kilometers.[134] Jordan is a developing country that has faced multiple difficulties in the last century in areas such as an influx of refugees, water shortage, and economic insecurity. To overcome this, the Jordanian government has adopted ongoing necessary economic and legal reforms.[135] One such economic reform was encouraging privatization of some government institutions, as has occurred in many countries influenced by the World Bank and International Monetary Fund, in an attempt to enhance efficiency in these institutions and to create a competitive market.[136] Correspondingly, legal reforms have aimed to create a favourable environment to increase investment and sustain growth, such as the *Jordanian Investment Act 2014.*[137] This reform process has seen Jordan improving its economic circumstances to some degree in recent years.[138]

The recent signing by Jordan of the United Nations Convention on International Settlement of Agreements Resulting from Mediation (known as the Singapore Convention) on 7 of August 2019 is a sign of this progress. This Convention aims to provide a globally recognised enforcement mechanism to solve cross-border

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133 *Personal Status Act* art 132.

134 Tariq Hammouri, Dima Khleifat and Qais Mahafzah, 'Chapter 4: Jordan' in Nadja Alexander (ed), *Arbitration and Mediation in the Southern Mediterranean Countries* (Kluwer Law International 2007) 69.

135 Sonbol (n 43) 60.

136 See, e.g., Jane Harrigan, Hamed El-Said and Chengang Wang, 'The IMF and the World Bank in Jordan: A Case of Over Optimism and Elusive Growth' (2006) 1(3) *The Review of International Organizations* 263-292; Jane Harrigan, Chengang Wang and Hamed El-Said, 'The Economic and Political Determinants of IMF and World Bank Lending in the Middle East and North Africa' (2006) 34(2) *World development* 247-270.

137 *The Investment Act 2014* (Jor) ('*Investment Act* ').

138 Hammouri, Khleifat and Mahafzah (n 134) 69.

commercial disputes via mediation.[139] Jordan is one of the early Arab countries moving in this direction.[140] This signature has paved the way to facilitate the enforcement of settlement agreements in Jordan that result from mediation and recognise mediated settlement agreements that happened in other jurisdictions. It is an encouraging move but is in its early days and relates to cross border disputes. [141]

As explained in chapter 3, the current central system for dispute resolution in Jordan relies on courts following the inquisitorial style, according to which the judge plays a vital role in preparing evidence and questioning witnesses, and based on finding the truth, the judge decides a matter. Parallel to economic development and legislative reforms, the Ministry of Justice reviewed and reformed the court proceedings to enhance the efficiency of the court system, by creating and establishing new forms of dispute resolution such as arbitration and mediation.[142] Jordan was impressed with the international movements in developing alternative solutions for managing disputes other than through litigation. Primarily it was attracted to the successful American experience of adoption of mediation in that country. The legislature was encouraged to adopt this process, as the customary practice within Jordan meant that it had a traditional acceptance of a process other than litigation.[143] Thus, the Jordanian legislature implemented mediation law as a pilot, restricted to the District of Amman, to trial dispute resolution mechanisms, beginning in 2003. The first formal law of mediation was the *Mediation in Resolving Civil Disputes Act,* (No 37) 2003*,* which was replaced in 2006 with *the Mediation for*

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[139] See further, Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 *Pepperdine Dispute Resolution Law Journal* 1; Chua Eunice, 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution' (2019) 9(2) *Asian Journal of International Law* 195-205.

[140] Sara Koleilat-Aranjo and Aishwarya Nair, 'Singapore Convention Series – Mediation in the Middle East: Before and after The Singapore Convention', Kluwer Mediation Blog (Blog Post) <http://mediationblog.kluwerarbitration.com/2019/10/30/singapore-convention-series-mediation-in-the-middle-east-before-and-after-the-singapore-convention/>.

[141] See, *United Nations Convention on International Settlement Agreements Resulting from Mediation 2018* (Singapore Convention) https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf.

[142] Hammouri, Khleifat and Mahafzah (n 134) 74.

[143] Mohammad Ahmad Al-Qatawneh, 'Mediation in Settlement the Civil Disputes ' (LLM Thesis, Mutah University, 2008) 30.

*Settlement of Civil Disputes Act,*[144] which in turn has undergone further minor amendments in 2017.

*The Mediation for Settlement of Civil Disputes Act* 2006 created an independent department, named the Mediation Department, which was established in Jordan on June 1, 2006, to operate within the court structure.[145] The first Mediation Department was at the Amman Court of First Instance. The department now specialises in applying mediation processes in civil cases in every First instance court in Jordan.[146] More than 40 judges and lawyers initially received training in the facilitative mediation process by the American Bar Association, over a 40-hour mediation course.[147] These judges and lawyers were then accredited to work in the Mediation Department as judge mediators and specialised mediators.

The mediation program at the Amman Court of First Instance was a success as an effective alternative to litigation. Statistics indicated a significant improvement in referrals from June 2007 to May 2008. Six hundred and forty seven cases were referred to mediation, and these cases were resolved in a timely manner.[148] However, Ta'amneh[149] confirmed this success has declined since 2010, and he attributes the decline to lack of awareness of the availability and benefits of using mediation amongst the public and lawyers.[150] Alahmad[151] adds that even though the mediation program applied in all Jordanian courts, it was not widely promoted and so mediation in these courts was insufficiently exploited.[152] Moreover, mediation had little media coverage, and Jordanian lawyers had little interest in mediation at the time, allegedly considering it to be a waste of their clients' time.[153] Even though the law of mediation

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144 *The Mediation for Settlement of Civil Dispute Act 2006* (Jor) art 12 ('*Jordanian Mediation Act*').

145 *Jordanian Mediation Act 2006,* art 2.

146 Ibid.

147 Lynn Cole, Nancy Fashho and Ahmad Yakzan, 'Jordan Leads the Way in Mediation in the Arab Middle East ') <http://www.nadn.org/articles/ColeLynn-JordonLeadsTheWay.pdf>.

148 *Progress Report on the Progress of Court-Related Mediation Program in Jordan between June 2007 - May 2008 Amman* (American Judges and Lawyers Association-Rule of Law Initiative, ('*The Progress of Court-Related Mediation Program Report*').

149 Khaled Ta'amneh, 'Mediation as an Alternative Commercial Disputes Resolution in Jordanian Law' (LLM Thesis, Jadara University, 2011) 56.

150 Ibid.

151 Rula Al Alahmad, 'Mediation for Settling the Civil Disputes in the Jordanian Law' (PhD Thesis, Amman Arab University for Postgraduate Studies, 2008) 44.

152 Ibid.

153 Ta'amneh (n 149) 57.

empowers judges to conduct mediation, or to send cases away from the court to private mediators after getting the parties' consent, the judge's role is not as well-activated as it is supposed to be in all Jordanian courts.[154] Thus, the mediation process is not clearly set forth as a particular model to be followed in the legislation, leaving it largely up to the individual judge. Somewhat surprisingly, given the HCC and awareness of collaborative processes, mediation as legislated for in Jordan has faced several obstacles that have hindered its success.

The legislated mediation in Jordan is court-mandated, although the parties are consent is important. The mediation legislation states that after meeting the parties and their representatives, the judge of the Civil Case Management, or the judge or Magistrate in the matter, can refer the dispute to a mediator if the parties consent.[155] This procedure enhances the American concept of 'the multi-door courthouse', which is 'a single courthouse where cases are screened and then referred to the appropriate dispute resolution doorway or portal.'[156] 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 want to refer their case to mediation. However, having to consider the parties' consent as a prerequisite to referring the matter to mediation may reduce the uptake of the process. Rashdan[157] suggests that the Jordanian legislature must adopt a compulsory form of mediation to improve the referral mechanism, and to increase the number of cases referred to mediation in Jordan. This may offer one possible explanation as to why court-mandated mediation has not achieved a significant uptake in Jordan in the last ten years.

Furthermore, parties who agree to use mediation instead of litigation also have to get the judge's consent before the case can be referred to a mediator.[158] *Mediation for Settlement of Civil Disputes Act* 2006 s7/B confirms the mediation process is in

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[154] The Progress of Court-Related Mediation Program Report (n 148).

[155] *Jordanian Mediation Act,* art 3(A).

[156] Marilyn Warren, 'Should Judges be a Mediators?' (2010) 21 *Australasian Dispute Resolution Journal, 81*. See also, Michael Legg, 'Mediation of Complex Commercial Disputes prior to Litigation: The Delaware Court of Chancery Approach' (2010) 21 *Australasian Dispute Resolution Journal* 44.

[157] Ali Mahmoud Al-Rashdan, *Mediation in Settlement the Disputes* (Dar Al-Yazoury Scientific for Publishing, 2016) 80.

[158] *Jordanian Mediation Act*, art 3(B).

response to a court order, when it states that the mediator must send their report to the Court after finishing the process, irrespective of whether it was successful or not.[159] In case the mediation is unsuccessful, the mediator has to clarify the reason for this failure to the judge (See appendix 5), and if successful, the mediator must also report the successful outcome (See appendix 6). Judges can order costs be paid by a party if they are identified in the mediator's report as contributing to the failure of the process.[160] This legislative mechanism never precludes the parties from using private mediation outside the court by appointing their own mediators.

The Jordanian legislature has recognised two types of mediators. One is a mediator judge, who may be nominated from the Magistrates Court and First Instance Court by the Chairman of the First Instance Court. The judge led mediation is subject to time constraints as the mediation has to be completed within three months and the settlements arising out of them are final. Another type is a private mediator, who is appointed by the Head of the Judicial Council from amongst retired judges, lawyers, and professionals of long experience and who are known for their impartiality and integrity.[161] Private mediations are not privy to the enforcement mechanisms that are available to the judge led mediation. These options raise several issues.

First, the judicial mediation is the more dominant, being used more often than private mediators. This may be because a judge's authority is more respected and trusted from disputants' perspectives.[162] Rashdan[163] suggests that the disputants may prefer resorting to the judicial mediator instead of the private mediator, because the disputants perceive judge mediators to have a greater capability of resolving their disputes and achieving fair and reasonable settlements.[164] However, there is no empirical research in Jordan to support this claim.[165] The second issue is the time constraints, which are regulated differently when submitting the files to a judge mediator or a private mediator.[166] While the brief memorandum of parties' claims or

159 *Jordanian Mediation Act*, arts 7 ((B) and (C)).
160 *Jordanian Mediation Act*, art 7 (D).
161 *Jordanian Mediation Act*, art 2.
162 Alahmad (n 151) 50.
163 Al-Rashdan (n 157) 40.
164 Ibid.
165 Ta'amneh (n 149) 25.
166 *Jordanian Mediation Act*, art 4.

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. Alsaleeby[167] suggests that this step may be to ensure the seriousness of parties when they participate in private mediation.[168] A likely cause may be that such pleadings are available in the case file in the court's hands, where the mediator judge can easily access this file to start his/her work. In addition, the enforcement of the agreement is more assured through the judge led mediation.

The *Mediation for Settlement of Civil Disputes Act* 2006, supports the evaluative model of mediation through the legislations wording.[169] Levin[170] states that the role of the third party in this model is giving advice and providing opinions on the merits of arguments and the relative success of each party's case, by predicting the outcome of the case if it was decided by a court.[171] Boulle[172] contributes that such mediations provide a role for the intervener in which they can provide advice according to the facts, evidence, law and the parties' rights, and entitlements; the objective is to settle within an anticipated range of likely outcomes if the matter was to be decided before a court or within an industry arena.[173] Riskin[174] describes this role as a third party who is qualified to give advice, firmly guiding the parties to an appropriate settlement.[175] Moore[176] states that this process is a specific kind of advisory model; it focuses on evaluating the legal issues and legal rights of the parties.[177] After comparing these definitions with the Jordanian model, it would appear the Jordanian law of *Mediation for Settlement of Civil Disputes Act* adopts the evaluation model when it states that the mediator can express their opinion, evaluate

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167 Alsaleeby (n 105) 100.

168 Ibid.

169 *Jordanian Mediation Act*, art 6.

170 Murray Levin, 'The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion' (2000) 16 *Ohio State Journal on Dispute Resolution* 267, 269.

171 Ibid.

172 Laurance Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2 ed, 2012) 2.

173 Ibid.

174 Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7, 24.

175 Ibid.

176 Moore (n 93) 46-59.

177 Ibid.

the evidence, present legal evidence and precedent cases, and adopt other procedures that facilitate the process of mediation.[178]

The evaluative model is preferred when the disputants are not able to understand their situation through self-reflection, analysis, and problem-solving skills. Wade[179] states that, clearly, not all people can decide wisely and that this process 'requires some basic information and direction about normal behaviour, guessed judicial outcomes, market rates, and forms of power.'[180] The Jordanian legislature preferred this style of mediation, giving the mediator an apparent ability to promote the agreement.[181] This model is also suited where it is a legal context in which the mediator is legally trained and capable of giving the requisite advice, as it 'provides disputants with enough information to make decisions confidently in mediation and to avoid subsequent feelings of loss or disappointment.'[182] This selection of the evaluative model in preference over a facilitative model more closely aligns with Jordan's experience of the wise elder giving advice and directing outcomes which is part of traditional mediation processes in Jordan.

The Jordanian legislature seems interested in giving the mediator broad power to bring the disputants' views closer and resolve the dispute, instead of empowering the parties so they can come to an agreement based on their own generated options.[183] The Jordanian evaluative model, in which a mediator can propose solutions, could lead to parties feeling disempowered or even exploited.[184] To convince the parties about the proposed solution, the mediator will likely outline the weaknesses of the parties' cases and evaluate the cost of pursuing a litigated resolution. When this happens, the mediator risks seeming biased as they support an outcome that may favour the case of one side, which will affect the mediator's perceived impartiality

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178 *Jordanian Mediation Act*, art 6.

179 Wade (n 90) 2.

180 Ibid.

181 Alsaleeby (n 105) 81.

182 Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette Law Review* 155, 167.

183 Bakr Abd-Fatah Al-Sarhan, 'Mediation on the Hands of the Mediator Judge: The Concept, Importance and Procedures' (2009)(1) *Jordanian Journal in Law and Political Science* 57, 84.

184 Jeffrey Stempel, 'Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role' (1996) 24 *Florida State University Law Review* 949, 972.

and may conflict with balancing the parties' power.[185] As Waldman[186] says, the evaluative mediator may ‘vitiate this neutrality and destroy the rapport necessary for truly productive interactions.’[187] If the mediator cannot assist the parties to reach a successful settlement for both, then the agreement may not hold, or one party may subsequently choose to pursue litigation further.

Adopting court-mandated mediation using an evaluative model does provide some benefits. Otis and Reiter[188] state that ‘the presence of a judge provides the ideal foil to agency costs and efficiency losses between the parties and their attorneys, by providing an experienced supervisory presence during the negotiations.’[189] 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, as it also resolves disputes quickly, which saves court resources as well as litigants’ time and money. The traditional respect by parties for judges and wise elders ensures the cooperation necessary to encourage a solution.[190]

This court-mandated mediation, which follows an evaluative mediation model, is very different from the Australian concept of facilitative mediation. The judge, who transforms into an evaluative mediator, may act as a private judge or arbitrator in the mediation.[191] The goal of the evaluative model is to permit the mediator to provide and suggest an amicable solution for parties. This model does not aim to help the disputants to improve their relationship, enhance communications through the negotiation process, or to empower parties to reach satisfying voluntary agreements by themselves. This model therefore does not support the critical philosophical hallmarks of mediation such as empowerment through letting the parties create their own solution.[192]

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[185] Al-Sarhan (n 183) 84.

[186] Waldman (n 182) 160.

[187] Ibid.

[188] Louise Otis and Eric Reiter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351-403, 366.

[189] Ibid.

[190] Warren (n 156) 81.

[191] Ibid 82.

[192] National Alternative Dispute Resolution Advisory Council (NADRAC), '*The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* ' (2009), s 7.24.

Facilitative mediation provides the third party with the ability to control the process, but not the resolution in which the parties adopting their own solutions must reach the agreement.[193] Court-mandated mediation in Jordan puts the parties under the judge's control and also puts them under pressure to accept the suggested solution. Still, this process is voluntary in Jordan, which means the party can refuse the process, yet the adopted role of the judge mediator will be highly influential. The law supports the authority of the judge mediator to evaluate the legal status of parties and clarify the strength and the weakness in their claim, which leads to the parties seeing the judge as authoritative and as a wise elder to be obeyed.[194] When a party hears their argument is weak, they are likely to relinquish their claim, while the other party will be unlikely to accept any solution other than that suggested by the judge mediator, as they believe they have a strong claim, as recognised by the judge.[195] So, the adopted process may not achieve the ultimate goal of mediation, which is to empower parties to reach a 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.

The adopted role of judge mediator in the Jordanian law may generate other issues, as the role of judge mediator is inconsistent with their role as a judge. Judges are supposed to apply the law, to evaluate the evidence and to decide the appropriate sentence, and they do not generally mediate, facilitate, or accommodate the parties' issues, including non-legal concerns.[196] Meeting the parties in a private session may also compromise the public role of arm's length justice and damage confidence in the judiciary.[197] Any risk that the judge is perceived as anything other than impartial risks an adverse public perception of justice as a transparent forum, and it may set up a conflict of interest.

A judge is an essential judicial resource, and this is at risk if they are instead redirected to mediations.[198] A judge who mediates a matter is ruled out from sitting on the case under article 10 of the *Mediation for Settle Civil Dispute Act* 2006. To

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193 Moore (n 93) 8.

194 Steve Lancken and Ashna Taneja, 'Judging Mediation' <https://www.lawyersweekly.com.au/opinion/11179-judging-mediation>.

195 Al-Sarhan (n 183) 84.

196 Lancken and Taneja (n 194) 1.

197 (NADRAC) (n 192).

198 Warren (n 156) 82.

overcome this resource issue, the legislature's use of private mediators may help to decrease the pressure on valuable adjudicative resources. The Mediation Department has 103 mediators who are registered as available.[199]

A major concern is that there is no provision for the Jordanian legislator requiring any accreditation, nor is there any provision of any training courses for mediators, whether they are a mediator judge or private mediator.[200] The legislation requires two conditions to practice mediation in Jordon. Firstly, the mediator must have experience in the field, for example by being a judge or a lawyer, or secondly, a non-legal mediator must have expertise in the subject of the dispute, for example by being an engineer or doctor, but without any course training requirements or expertise in mediation techniques. Thus, while the Jordanian legislature has adopted the evaluative model of mediation, the literature confirms that the evaluative mediator does not need the training. For example, Levin[201] states that it is common for evaluative mediators to be Judges, retired judges, or lawyers who have considerable legal expertise,[202] and therefore do not need training as such. Lenz[203]addresses the evaluative mediation when he claims that evaluative mediators 'need to have expertise in the substantive areas of the dispute with no necessary qualifications in mediation techniques.'[204]

However, initial training was provided by US mediators to 40 Jordanian judges and lawyers. This happened because follow up training courses would help the mediators to enhance their practical skills and to ensure a general standard in providing a common mediation process. As Etty et al. have stated, '[i]nadequately trained mediators jeopardise the status of mediation as a profession and may cause irreversible damage, eroding the public's belief in mediation as an alternative to legal proceedings.'[205] Thus, having training courses is vital, as it improves the mediators'

199 Judicial Council, 'Special Mediators') <http://www.jc.jo/mediation/private_mediators>.

200 See: Alsaleeby (n 105) 120.

201 Levin (n 170) 269.

202 Ibid.

203 Chris Lenz, 'Is Evaluative Mediation the Preferred Model for Construction Law Disputes?' (2015) *Thomson Reuters* 134, 141.

204 Ibid.

205 Etty Lieberman, Yael Foux-Levy and Peretz Segal, 'Beyond Basic Training: A Model for Developing Mediator Competence' (2005) 23(2) *Conflict Resolution Quarterly* 237-257.

performance and competency, and ensures their skills are reinforced, which leads to a guarantee in the quality and continuity of the mediation process.

The Jordanian government provides no substantive support for research or statistical observation to determine the problems facing the progress of mediation.[206] There are no national centres in Jordan that could play an important role in sponsoring the mediation program. The absence of these centres leads to the ideal of mediation not properly reaching the public.[207]

Teaching mediation as an academic subject in Jordanian universities is rare, even though it could play a vital role in raising law students' awareness, and it could offer them some skills in mediation as a dispute management process.[208] Furthermore, Jordan does not support mediation integration in any school programs that train primary and secondary school students in dispute management skills, so they can learn to deal with and reduce disputes in Jordanian culture. This approach has been taken in Australia in individual schools and has proven to be very successful in spreading the importance of mediation within the public. Boulle[209] has noted that in Australia '[t]hese programs revitalised the community dimension of mediation by re-emphasising the role in dispute resolution of peers, as opposed to professionals and administrative hierarchies, in the first instance among school children'.[210] Such programs have a positive impact on school students by developing useful skills to enable them to take responsibility for their own actions and aid in classroom management.[211] Such an approach provides a critical role in expanding the mediation system, as it makes the early generation of users understand how this solution can work in their legal system.[212] Tthe actual process model used in Jordan is outlined.

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206 Al-Qatawneh (n 143) 85.

207 Al-Rashdan (n 157) 148.

208 Alsaleeby (n 105) 175.

209 Laurance Boulle, *Mediation Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 356.

210 Ibid.

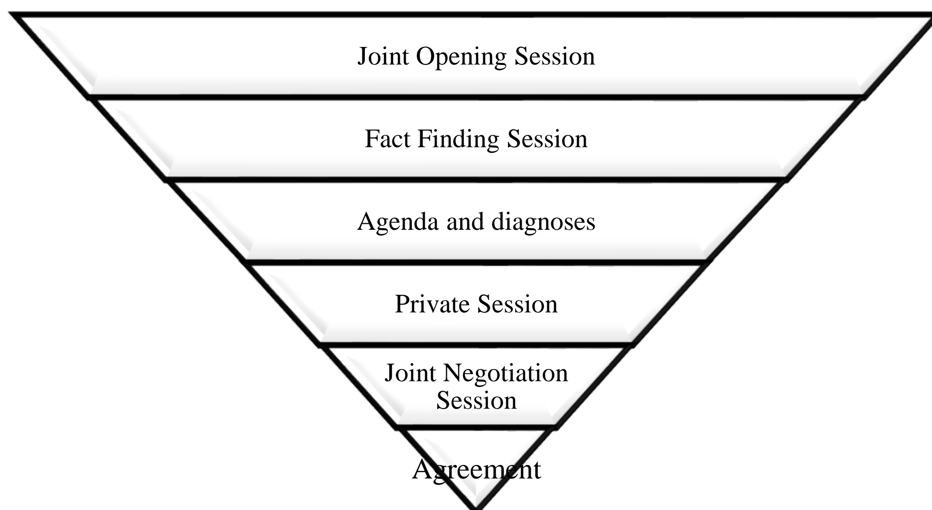
211 Paul Lindsay, 'Conflict Resolution and Peer Mediation in Public Schools: What Works?' (1998) 16(1) *Mediation Quarterly* 85-99; Gary Shaw, 'Restorative Practices in Australian Schools: Changing Relationships, Changing Culture' (2007) 25(1) *Conflict Resolution Quarterly* 127-135.

212 See especially, Pauline Collins, 'Australian Legal Education at a Cross Roads' (2016) 58(1) *Australian Universities' Review* 30.

## 4.4 Mediation Models

As the previous discussion demonstrates the Jordanian legislature adopted the evaluative model of mediation as a preferred model, the interview results confirmed that this model is the dominant one practised in Jordan.[213] So, this section explores the six stages of the evaluative model that are followed by the mediator in Jordan. These are the joint opening session, the fact finding session, agenda and diagnoses, the private session with each party, the joint negotiation session, and the agreement. The diagram shows this process working as a funnel when conducting mediation in Jordan.

Figure 7: The Jordanian Model - Court-mandated Model[214]




At the joint opening session, the mediator begins by welcoming the parties and their legal advisors. The mediator will introduce himself/herself and explain their role as mediator, after which the parties can introduce themselves. The mediator then reads aloud the decision of referral from Judge/the Magistrate, who is referring the case for mediation. This decision clarifies and states the main issues in the dispute and determines the time required for the mediation process.[215] Then, the mediator will ask the parties their views about their participation in this process, to establish how willing they are likely to be in responding to suggested solutions without interfering. After that, the mediator confirms the principle of confidentiality and

213 See Chapter 6 p.156 within.
214 This diagram is developed by the researcher.
215 Al-Qatawneh (n 143) 100.

impartiality of the mediation proceedings.[216] The *Mediation for Settlement of Civil Disputes Act* 2006 Article 8 states that the 'mediation proceedings shall be considered confidential', which means the procedures, the evidence, or waivers that are made by the disputants in the mediation process shall not be invoked in front of any court or anybody whatsoever. Al-Qatawneh[217] notes that it is essential to explain the role of mediator during this stage, and to emphasise their impartiality in order to win the trust of the parties early on.[218] This explaining instils confidence in the parties to trust the mediation process in order to continue and participate. Thus, the opening session creates rapport by establishing a positive, comfortable, appropriate and favourable climate, which supports communication, negotiation and dialogue between the parties and the mediator. It further reduces the parties' fear of sharing the facts of their dispute, it encourages them to speak freely, and it attracts their interest in obtaining the desired assistance from the mediator.

In the fact-finding session, the mediator will define the disputants' problems to assist with the diagnosis of the dispute. The mediator will ask the claimant or their legal representative to explain their claim and views about the subject of the dispute without going into detail. This process will be repeated with the defendant and their legal representative.[219] Based on this, the mediator draws up an agenda or list of issues. The mediator summarizes the dispute as presented by the parties and will rephrase the statements of both parties, reducing any harmful words or phrases. Both the claimant and the defendant provide arguments to support their concerns. The mediator uses logic in running the meeting by attempting to address each argument, which aims to bring the parties to a closer acceptance of the concerns as presented.[220] If the mediator cannot succeed in bringing the parties' views closer, then the mediator can move to conduct a private session.[221]

The next stage is the private session. The mediator can meet the parties individually as appropriate to attempt to bring the parties closer to settlement. Al

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216 Alsaleeby (n 105) 152.
217 Al-Qatawneh (n 143) 100.
218 Ibid.
219 Alsaleeby (n 105) 152.
220 Al-Qatawneh (n 143) 100-110.
221 *Jordanian Mediation Act,* art 6.

Qatawneh[222] states that the mediator meets with the parties and their legal representative alone to allow the parties to express their concerns with the mediator, as they may not be comfortable in disclosing certain information with the other side, or they may worry that sharing some suggestions with the other party may make them appear weak.[223] This session is essential for the mediator to gain an understanding of the nature of the dispute and the parties need to disclose or discuss their concerns in private.[224] The parties are assured that this private session is a confidential session and falls within the overall cloak of confidentiality that encompasses the entire mediation. Nothing said by the parties in the private session is returned to the mediation by the mediator, unless the parties choose to introduce it in the central mediation. The private session is similar to that undertaken in facilitative mediation except that the mediator can discuss mediator suggested options for resolution.

According to the *Mediation for Settlement of Civil Disputes Act* 2006, Article 6, the Jordanian legislature has effectively adopted the evaluative style, according to which the mediator has several powers that directly influence the outcome of the mediation.[225] For example, the mediator can point out the weaknesses of parties' cases and can predict what a judge may do. Also, the mediator can advise the parties with several recommendations as to the outcome of the issues. The mediator can evaluate the parties' legal position and the costs versus benefits of pursuing litigation rather than settling in mediation.[226]

The following stage is the joint negotiation session. The mediator meets with both parties in the same place, after hearing and understanding the situation of both in the private sessions, and privately discussing with the parties any options that have arisen. This session may start when the parties show and discuss their suggested solution to settle the dispute, and if they cannot agree on a solution, the mediator can present their advice on a solution.[227] Al Saleeby[228] describes this stage as 'take and give' because each party will waive some of their rights to promote a proposed

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222 Al-Qatawneh (n 143) 105.
223 Ibid.
224 Don Bowen, 'A Critique of Private Sessions in Family Mediation' (2013) 3(1) *SAGE Open*, 1.
225 *Jordanian Mediation Act.*
226 *Jordanian Mediation Act*, art 6.
227 Al-Qatawneh (n 143) 106.
228 Alsaleeby (n 105) 150.

solution for both of them.[229] An acceptance of compromise creates a favourable climate for the final agreement.

The final phase is the agreement: if the mediator has succeeded in having the parties settle, either totally or partially, they submit to the Case Management Judge or the Magistrate Judge a report of the settlement agreement signed by both parties in the dispute, to be ratified by the Court.[230] The agreement shall be considered, after ratification, as final.[231] However, if an agreement is not reached in the report to the Case Management Judge or the Magistrate Judge, it indicates that the parties did not reach a settlement, and in this report, the parties' genuine participation and their representatives in attending the mediation hearings is also clarified.[232] During this stage, the proceedings of the mediation are still deemed confidential,[233] as the disputants may not use any information that is provided in these sessions before any court or before any other authority.[234] Also, the mediator shall return each party's documents that are submitted during this stage of the process, as the mediator bears legal responsibility for taking or keeping any photocopies.[235]

## 4.5 Summary

As with any country, cultural and political factors play an essential role in shaping the socio-political system.[236] Outlined in this chapter are the several legal roots. Jordan has Bedouin customary law, Sharia codes, and modern Western codes. Each one has adopted its unique model of mediation, although with clear similarities, and each is used by a third party intervener or group of interveners to settle the dispute and reach a solution or management for both parties. Jordan is fundamentally a collectivist

229 Ibid.

230 *Jordanian Mediation Act,* art 7 (A).

231 *Jordanian Mediation Act,* art 7(A).

232 *Jordanian Mediation Act,* art 7(C).

233 Mieke Brandon and Tom Stodulka, 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice Across Both Processes' (2008) 8 *Queensland University Technology Law and Justice Journal* 194, 261.

234 *Jordanian Mediation Act*, art 8.

235 *Jordanian Mediation Act,* art 7(E).

236 Tanja Chopra and Deborah Isser, 'Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights' (2012) 4(2) *Hague Journal on the Rule of Law* 337-358, 352.

society, represented by an HCC, which means community benefits are preferred over individual benefits.

This chapter has described Jordan's conduct of formal and informal mediations, which are common in collectivist cultures that prefer conflict avoidance strategies, and that find the direct approach to dispute resolution uncomfortable, as it may cause loss of face. The mediators may commence the private meetings with one party as shuttle diplomats who are carrying information and settlement ideas from one party to the other. Once the general outline of an agreement is reached, the disputants may agree to meet in order to negotiate the finer details. However, as noted in this chapter, the Bedouin model is an inquisitorial evidence gathering process, mixed with the evaluative mediation model, because the third party can provide advice and opinions on a suitable resolution, and they can also gather information, ask questions and hear witnesses.

The Islamic concept of mediation is a mixture between the Islamic concept of justice and tribal practice. The Islamic mediation practice follows a flexible or blended model, which means the chosen mediation technique can correspond to the type and stage of the dispute. In other words, the mediator can intervene by solving the problem or by just supervising the parties while reaching their own solution. The Jordanian legislature has adopted an Islamic concept of mediation only in marital disputes.

When the Jordanian legislature enacted the law of mediation for solving civil disputes, this process was court-mandated. The model of mediation follows the evaluative model. When the parties submit their case to the court, the judge will try to convince them about the importance of using mediation to solve their dispute. If they accept the referring of their case to mediation, the judge will send the case documents to the judge mediator or nominated private mediator from the Mediation Department.

This chapter has described the stages of the mediation process that are followed by court-appointed mediation. This chapter has further discussed the features and the drawbacks of using the evaluative model. The next chapter will elaborate on mediation practice from an Australian perspective.

# Chapter 5: The Australian Framework

## 5.0 Introduction to Australia

This chapter traces the growth and development of mediation in Australia. It addresses the development and the issues relating to mediation practice, in order to understand how mediation has evolved and is currently operationalised in Australia. In a comparative spirit, the chapter starts with an acknowledgment of the Indigenous impact on the restorative approach to dispute resolution to understand how Indigenous approaches have influenced current restorative practices in the mainstream legal system. Indigenous influence in dispute settlement exists in Australia through restorative justice projects such as circle sentencing, victim offender mediation and Murri Courts. It is relevant to a comparative study to address the historical richness where this has influenced with the current dispute management systems. Indigenous practices are discussed and their influence on modern practice are addressed. Next, this chapter outlines several factors that have contributed to developing the mediation system in Australia. These factors include organisations, legislation, the adoption of court-mandated mediation, and models of mediation.

## 5.1 Mediation in the Aboriginal and Torres Strait Islander Indigenous Culture

The Indigenous people in Australia are referred to as the Aboriginal and Torres Strait Islander peoples (ATSI). They have lived on this continent continuously for around 100,000 years.[1] Aboriginal and Torres Strait Islanders are comprised of descendants from over 500 distinct tribal groups on the Australian continent and its islands,[2] each group has its unique culture, customs and language.[3] Each group

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[1] Larissa Behrendt, *Aboriginal Dispute Resolution : a Step Towards Self-Determination and Community Autonomy* (Federation Press, 1995) 3.

[2] Richard Laurence Broome, *Aboriginal Australians, Black Responses to White Dominance 1788-2001* (3rd ed, 2001) 10.

[3] Robert Hodge, 'Aboriginal Truth and White Media: Eric Michaels Meets the Spirit of Aboriginalism' (1990) 3(2) *Continuum: Journal of Media & Cultural Studies* 201-225.

consisted of a large number of small clans, with several extended families in each clan. Each family had a strong relationship between their members, which generated extreme loyalty to the family and their clan in a similar manner to the Bedouin. This, and the fact that no prison system existed amongst semi-nomadic cultures, meant that disputes resolved quickly, as the disputants needed to maintain solidarity with their members and harmony with other tribes. This is not to say that at times no violence occurred between tribes.

The history of dispute resolution amongst the Indigenous people has been passed down to the next generation as a part of customary law. Customary law governs all aspects of life, with specific penalties if disobeyed.[4] The Indigenous people have practised consensual problem solving and developed it through the centuries. This has been highly influential and educative for Western cultures wanting to learn about restorative justice.[5] Like other Indigenous cultures and the Bedouin, the third party in the dispute resolution process is vested in the council of wise elders (men and women) who hold most knowledge of religious and ceremonial affairs.[6] Those elders are trustworthy and honest people, who are also concerned for the whole community's future.[7] The council does not just make the decision for a particular group, but may intervene in disputes between family members, if they have not been resolved.[8] Berndt and Berndt[9] state that 'although constituted courts did not exist in traditional Aboriginal Australia, there were councils which did much the same thing, although far more informally and less systematically.'[10]

4 Harry Croft, 'The Use of Alternative Dispute Resolution Methods within Aboriginal and Torres Strait Islander Communities' (2015) *Access to Justice* 36.

5 David Spencer, 'Mediating in Aboriginal Communities' (1996) 3 *Commercial Dispute Resolution Journal* 245.

6 Loretta Kelly, 'Elements of a good practice Aboriginal mediation model: Part II' (2008) 19 *Australasian Dispute Resolution Journal* 223, 224; R. Thorne, 'Incorporating ADR into Contemporary Aboriginal Society' (Conference Paper, International Mediation Conference, 1996), 11.

7 Toni Bauman and Juanita Pope, 'Solid Work You Mob Are Doing – Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia' (Report to the National Alternative Dispute Resolution Advisory Council, 2009).

8 Behrendt (n 1) 5.

9 Ronald Murray Berndt and Catherine Helen Berndt, *The world of the first Australians: Aboriginal traditional life: Past and present* (Aboriginal Studies Press, 1999) 348.

10 Ibid.

As elders have an essential role in the maintenance of order, adjoining tribal groups provide a significant role in dispute resolution for inter-clan disputes.[11] They interfere to end the dispute to protect the community's common interests.[12] The elders, with their communication skills and status, act as neutrals to encourage the disputants to settle their dispute in joint decision-making processes.[13]ATSI cultures are collectivist and prefer to support group needs above individual interests. Furthermore, these high context cultures (HCC) being dependent on community means there is community pressure to solve the problem.[14] Their priority is maintaining harmony between the community's members.

Disputes arising within communities occur when there is a failure to observe sacred law or ceremonies, breach of family obligations, accusations of sorcery, breach of marriage arrangements, commercial disputes or offences against a person, including the neglecting of children.[15] Bauman and Pope[16] state that Indigenous people deal with the dispute in order to protect the harmony in the community, by addressing the systemic sources of dysfunction.[17] ATSI people describe their dispute resolution practice as peace-making, which aims to embrace a deeper level of healing and renewal of relationships.[18] Behrendt[19] has explained the details of traditional mediation processes that are conducted by ATSI peoples.[20] It follows a process by which the disputants meet at community ceremonies because there can be no fighting at the ceremonies. The aggrieved person would be careful about the time and place of the meeting because that would affect who the audience would be. Meetings are held outdoors, in a familiar but informal place for the parties. The parties face each other in a seated circle and express their dispute publicly by shouting or yelling at each other. This releases emotions in an open display of anger in which the aggrieved person yells

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11 Helen Bishop, 'Aboriginal Decision Making, Problem Solving and Alternative Dispute Resolution – Challenging the Status Quo' (Conference Paper, Alternative Dispute Resolution in Indigenous Communities (ADRIC) Symposium, 27 July 2015), 4.

12 Broome (n 2) 28.

13 Keren Lavelle, 'Ancient Ceremony Transformed into Cross-Cultural Mediation Training' (2005) 43(2) *Law Society Journal* 22-23.

14 Behrendt (n 1) 5.

15 Broome (n 2) 34.

16 Bauman and Pope (n 7 ) 115.

17 Ibid.

18 Shirli Kirschner, 'Aboriginal and Torres Strait Islander People and ADR' (2017) *Mediate.Com*.

19 Behrendt (n 1) 50.

20 Ibid.

about the opponent and the perceived wrong. This is a difference in practice to the Bedouin, who suppress emotional expression. After that, the elders, who have jurisdiction over the disputants, can call witnesses and ask questions. The elders with their communication skills and their status act as neutrals to encourage resolutions, which are centred on joint decision-making processes.[21] In the final stage, the elders can make a statement outlining the dispute, the applicable traditional law, and suggest a solution.[22] Two features characterise this process: first, any management is done by community's consensus, and second, the outcome is announced publicly, orally, and without institutionalised procedures.[23]

Indigenous peoples, both ATSI and Bedouin share many similarities. First, affiliation and collective responsibility are appreciated principles in both communities, which are used to justify interference by elders to protect the community members from revenge. Both are collective HCCs, as they prioritise the community's goals and needs over those of the individual, which leads them to adopt Hofstede's collectivist dimensions in their negotiations. Elders as leaders in the community conduct the mediation process in an inquisitorial fact-finding manner, much like a private arbitration in which the elder's decision is enforceable. The cultural process ensures that the disputants accept the solution and end the dispute. Further, in both cultures, the result of this process is announced publicly as the community has a vested interest in the outcome. On the other hand, there are distinct cultural differences particularly around the expression of emotions. The shuttle or private sessions are considered a significant feature in Bedouin mediation to ensure face saving and a de-escalation of emotions between parties. Conversely, the face-to-face meeting is vital in Australian Indigenous mediation as it allows for a cathartic expression of emotions publicly. Finally, the mediation process in Bedouin culture is male-dominated and patriarchal, and women are prevented from participating in it, unlike the mediation process in ATSI cultures in which wise women deal with women's business.

Indigenous customary influences in the uptake of alternative dispute management techniques can be seen in the current Australian approach to disputes. Indigenous communities, where they can, implement aspects of their dispute resolution processes,

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21 David Spencer, *Mediation Law and Practice* (Cambridge University Press, 2006) 55.
22 Behrendt (n 1) 50.
23 Broome (n 2) 28.

in order to take into account traditional values and decision-making structures.[24] This has occurred in several Australian restorative justice programs, which have supported the involvement of respected Indigenous community members and elders in the dispute resolution process, such as Youth Justice Conference[25] and Justice Mediation Program[26] in Queensland. Restorative strategies used extensively in Australian jurisdictions as a dispute resolution process is rooted in Indigenous justice traditions.[27] These programs encourage the Indigenous people to be one of the members of the restorative panels on the basis the disputants may prefer the assistance of Indigenous members to mediate their issues. Also, it aims to enhance justice practices which actively involve the disputants and the community in the justice.[28]

## 5.2 Mediation in Australia's Legal System

This section provides an overview of the vital factors that have led to the growth of mediation and the development of the process in Australia.

### 5.2.1 Mediation Organisations

Mediation started as voluntary services in Australia. An early organised mediation service commenced as a pilot project in the 1980s with the opening of the New South Wales community justice centres in 1983.[29] These centres played an essential role in initiating modern Australian mediation.[30] The Centres offered

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24 Behrendt (n 1) 1.

25 Queensland Government, *Youth Justice Conference* (Aug 2020) http://www.justice.qld.gov.au/youth-justice/youth-justice-conferencing.

26 Queensland Government, Justice Mediation Program(Aug 2020) https://www.qld.gov.au/law/legal-mediation-andjustice-of-the-peace/setting-disputes-out-ofcourt/justice-mediation/.

27 Simon Little, Anna Stewart and Nicole Ryan, 'Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System' (2018) 62(13) *International Journal of Offender Therapy and Comparative Criminology* 4067-4090.

28 See eg, Carlo Osi, 'Understanding Indigenous Dispute Resolution Processes And Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods In Lieu Of Litigation' (2008) 10 *Cardozo Journal Conflict Resolution* 163,166; Dale Turner, 'Perceiving the World Differently' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2013) 59.

29 *New South Wales Legislative Council, Parliamentary Debates 1980* 5250 ('*New South Wales Parliamentary Debates* ').

30 Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (Pt LBC Information Services) (1990) 1(2) *Australian Dispute Resolution Journal* 61-68.

mediation services either free of charge or for a very low cost to members of the public.[31] They conducted mediation with ordinary community members acting as the third party neutral, following a simple mediation process to resolve matters according to community norms and the particular parties' needs.[32] These centres provided an alternative to the adversarial system to deal with problems such as neighbourhood disputes, which still can 'cause great aggravation and often lead to serious crimes.'[33] The uptake of mediation expanded in these community legal centres and was rolled out across all Australian states. The promising results in providing quick and efficient access to justice, particularly in solving problems related to neighbourhood and small debt disputes, led to the uptake of the process in other domains. In the late 1980s, mediation became popular in the commercial world as a cheaper, quicker and confidential private resolution that helped maintain business relationships.[34]

Since that time, the number of organisations offering mediation services, and institutions who have taken responsibility to develop this process, has dramatically increased. For instance, the Australian Taxation Office and Defence Force are two such organisations supporting the use of mediation. Lawyers have particularly been involved in its development. For example, the Institute of Arbitrators and Mediators Australia (IAMA), which was established in 1979, has had a significant input into the mediation process as practised in Australia. The main goal of this body was to grow the uptake of dispute resolution, and to promote and facilitate dispute settlement by using certain methods of dispute resolution, in particular mediation.. It has also aimed to provide training services in dispute resolution processes such as mediation. The Institute has further helped dispute resolution practitioners to communicate with each other to discuss matters of common interest, and to develop programs for admission to professional membership of the Institute.[35]

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[31] Nadja Alexander, 'What's Law Got to Do with It-Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) *Bond Law Review* 2, 8.

[32] Laurence Boulle and Rachael Field, *Australian Dispute Resolution : Law and Practice* (LexisNexis Butterworths, 2017) 91.

[33] Laurance Boulle, *Mediation Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 355; Carole Kayrooz et al, 'Barking Dogs, Noisy Neighbors and Broken Fences: Neighborhood Dispute Mediation' (2003) 14 *Australasian Dispute Resolution Journal* 71.

[34] Julian Riekert, 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 1 *Australian Dispute Resolution Journal* 31; Michael Redfern, 'Mediation is Good Business Practice' (2010) 21 *Australasian Dispute Resolution Journal* 53; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Lawbook Company, 3rd ed, 2008) 207.

[35] Boulle and Field (n 32) 111.

Lawyers Engaged in Alternative Dispute Resolution (LEADR) was established in early 1988. It was a prestigious organisation in Australia, and engaged in dispute resolution education, training, and services provision.[36] This body was involved in 'promoting and facilitating consensual dispute resolution, and acting as an agent of change in redefining the role of lawyers as professional problem solvers by being at the cutting edge of ADR'.[37] LEADR has now amalgamated with IAMA to become a super organsiation called the Resolution Institute.[38]

This merger of the two institutions (IAMA and LEADR) in 2015, to become the Resolution Institute, has consolidated the organisational influence and important role in promoting mediation. This new body represents and supports the community of dispute resolution practitioners and professionals, such as mediators.[39] It offers several vital functions related to mediation and other dispute resolutions, such as providing high-quality mediation training and accreditation, promoting the use of mediation to deal with business, workplaces, and families disputes. It also provides up-to-date listing of mediators on its website for the public to source mediators.[40]

Many other professional dispute resolution organisations have started up. They generally provide mediation services, training and accreditation. A very early example is the Australian Commercial Dispute Centre (ACDC) formed in 1986 by a group of lawyers, headed by Chief Justice of New South Wales, Sir Laurence Street. The Federal and NSW governments gave financial support to this centre to establish it as an international centre for commercial dispute resolution. This centre trains lawyers as mediators,[41] provides mediation services, and educates mediators and potential users about commercial mediation services.[42] Boulle and Field[43] describe this body as one of the first alternative dispute resolution providers in Australia.[44] In

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36 Alan Limbury, 'Recollections of LEADR's Beginnings' (2013) 24 *Australasian Dispute Resolution Journal* 133-135.

37 Ibid 135.

38 See, James Duffy, 'LEADR and IAMA Become "Resolution Institute"' (2015) *The Australian Dispute Resolution Research Network*.

39 Resolution Institute, 'About us') <https://www.resolution.institute/about-us/about>.

40 Ibid.

41 Joanna Kalowski, 'Mediation in Australia Through the cultural prism: mediation in Australia') <http://www.jok.com.au/publications/mediation-in-australia>.1

42 See, Ashley Limbury, 'ADR in Australia' in A Ingen-Housz (ed), *The ADR in Business: Practice and Issues across Countries and Cultures* (Wolters Kluwer, 2011).

43 Boulle and Field (n 32) 113.

44 Ibid.

2010, the Centre was renamed as the Australian International Disputes Centre (AIDC).[45]

In 1995, a significant body named the National Alternative Dispute Resolution Advisory Council (NADRAC) was established as a result of the 1994 Access to Justice Advisory Committee's Report.[46] NADRAC was an independent advisory body for the government and was populated by senior figures in the mediation field. It played a vital role in increasing the uptake of mediation in Australia. NADRAC released many reports and, through conferences and other processes, engaged in research. A significant report, 'Resolve to Resolve', released in 2009, recommended that it was necessary to enact legislation that required all parties to take 'genuine steps' to resolve disputes before commencing court proceedings.[47]

NADRAC also aimed to provide advice about the 'development of high quality, economical and efficient ways of resolving disputes without the need for a judicial decision'.[48] This body had a vital role in integrating DR processes in the Australia legal system and the community. It improved awareness and acceptance of alternative dispute resolution approaches to litigation through its research and publications. This increased the Australian DR literature on topics such as definitions of DR processes, issues of fairness and justice in DR, and the development of standards for DR.[49] However, in 2013, NADRAC was disbanded by the the Liberal National government. Since then, a group of dispute management experts have reformed a new body called the Australian Dispute Resolution Advisory Council (ADRAC), to be linked with the heritage of the NADRAC. This organisation aims to continue to explore, research and promote better dispute resolution in all areas of disputes in Australia.[50]

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45 The Australian Disputes Centre, Confidence in Alternative Dispute Resolution (March 2020) <https://www.disputescentre.com.au/>.

46 *A Strategic Framework for Access to Justice in the Federal Civil Justice System* Access to Justice Taskforce, (Attorney-General's Department ('*Access to Justice Taskforce Report*').

47 National Alternative Dispute Resolution Advisory Council (NADRAC), '*The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* ' (2009) <https://aija.org.au/wp content/uploads/2017/08/NADRAC.pdf>.

48 Ibid 607.

49 Boulle and Field (n 32) 109.

50 The Australian Dispute Resolution Advisory Council (ADRAC ), 'About us' (March 2020) <https://www.adrac.org.au/>.

These institutions and organisations have put Australia at the forefront of the establishment of mediation as an accepted part of the legal landscape. As a result of these achievements, court-mandated mediation has proliferated across Australia, and, indeed, now occupies the position of Australia's default dispute resolution mechanism: mandatory mediation schemes.

### 5.2.2 Mediation Legislation

Australian legislatures adopted mediation after various bodies were promoting and encouraging the use of this process as a cost-effective, confidential process that can lessen the delays of justice in the courts, reduce disharmony, and maintain relationships. For example, as a result of several recommendations that were proposed by NADRAC to encourage greater use of DR in civil proceedings, the *Federal Parliament introduced the Civil Dispute Resolution Act 2011 (Cth)*. Under this Act, a duty was imposed on lawyers to advise their clients about the benefits of using mediation. This duty also imposes on lawyers an obligation to assist their clients in resolving disputes via mediation, or other DR processes, before conducting litigation in Federal Courts.[51] Lawyers who fail to fulfil their obligation may be ordered to pay costs from their own pocket.[52]

Lawyers play a crucial role in increasing the uptake of the mediation process in Australia because they can provide advice to their clients about dispute resolution options and their benefits.[53] Sordo[54] has highlighted the vital role for lawyers in the mediation process as they can assess if a case is suitable for mediation or not.[55] Lawyers also play a role in preparing their clients for their sessions by helping them understand their interests and enabling them to participate in the mediation.[56] A lawyer representing their client in the mediation process 'should not engage in aggressive adversarial behaviour that belongs in a court environment such as

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51 *The Civil Dispute Resolution Act 2011* (Cth) s 9 ('*Civil Dispute Resolution Act* ').)

52 Ibid s 12 (3).

53 Michael Redfern, 'Capturing the Magic – Preparation' (2004) 15 *Australasian Dispute Resolution Journal* 119.

54 Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20.

55 Ibid 23.

56 Ibid 25.

antagonistic questioning or extreme positional bargaining.'[57] The lawyers must focus on their fundamental goal in the mediation process, which is obtaining the best possible deal for their clients, but achieving it in a collaborative manner.

Furthermore, the *Civil Dispute Resolution Act 2011* (Cth) requires the disputants to file a statement to the court, known as a 'genuine steps' statement. This law directs the disputants to attempt a resolution through processes such as mediation before filing their initial court applications. Mediation is one of several processes that can be considered as a genuine step prior to litigation to resolve the dispute, and if the disputants have not taken any steps without any reasonable explanations, they may suffer cost consequences.[58] Under the *Family Law Act* 1975 (Cth), the disputants in family disputes are required to attend mediation prior to filing parenting proceedings,[59] unless the case falls within one of the exceptions, such as issues of family violence or urgency.[60] In other words, the disputants could not reasonably refuse to participate in mediation or other dispute resolution processes, as the court will consider their objection to using one of these processes, which may then result in an order to bear the costs. Thus, litigation is an option of last resort, and legislation such as these examples, and many more legilstive enactments have assisted in creating the thriving Australian experience of using DR processes.

At the state level, mediation has adopted initiatives around civil justice reform, such as the Litigation Reform Commission in Queensland, which was established following the Fitzgerald Enquiry.[61] This commission made several recommendations, such as the Courts in Queensland should have the power to require litigants to attempt to settle their claims by DR processes.[62] As a result of the Commission's work, the *Courts Legislation Amendment Act 1995* (Qld) was introduced, which provided for court-connected mediation and case appraisal in all Queensland courts.[63] The *Uniform Civil Procedure Rules*, introduced in 1999, aim to

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[57] Donna Cooper, 'The New Advocacy and the Emergence of Lawyer Representatives in ADR' (2013) 24 *Australasian Dispute Resolution Journal* 178.

[58] *Civil Dispute Resolution Act*, s 4.

[59] *The Family Law Act 1975* (Cth) ('*The Family Law Act*'). ) s 60I; *Family Law Rules 2004* (Cth) Sch 1 ('*Family Law Rules* ').

[60] *Family Law Rules,* s 60I (9).

[61] Boulle and Field (n 32) 104.

[62] See, David Paratz, 'The History of Mediation in Queensland' (2015) 74 *Hearsay: Journal of the Bar Association of Queensland*.

[63] *The Courts Legislation Amendment Act 1995* (Qld) (' *Courts Legislation Amendment Act* ').

direct the disputants to mediation before gaining access to court hearings. This law supports solving the real issues in civil proceedings with speed and efficiency, with minimum cost, and without any delay in access to justice.[64]

In the Queensland jurisdiction, the *Civil Proceedings Act 2011* (Qld)[65] has enacted similar referrals to mediation. This Act encourages mediation in all civil disputes when the parties agree to use it.[66] The court can also refer the dispute to mediation on its own initiative, or based on the application of one party in the dispute.[67] If the court's referral order is made, the disputants are required to attend the mediation sessions, and work in good faith to solve the dispute. If one of the disputants impedes the progress of mediation within the time allowed under the referring order, the court can impose sanctions against this party. For example, the judge will take into account the non-complying party's actions when awarding costs.[68] Similar legislation can be found in all Australian state jurisdictions.[69]

### 5.2.3 Court Mandated Mediation

Mandatory mediation is widely established in Australia in two forms: court-mandated mediation, and as a pre-litigation requirement. Court-mandated mediation means that the judges have the authority to refer a case to mediation.[70] It has become a well-established mechanism in the Australian judicial system since the 2000s.[71] Legislation around Australia has allowed the court to direct the registrar to give written notice to the parties that their dispute is to be referred, by order, to mediation

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64 *Uniform Civil Procedure Rules 1999* (*Qld*) r 5 ('*Uniform Civil Procedure Rules* ').

65 *The Civil Proceedings Act 2011* (Qld) div 3 (' *Civil Proceedings Act* ').)

66 *Civil Proceedings Act* s 42.

67 *Civil Proceedings Act,* s 43.

68 *Civil Proceedings Act,* s 44.

69 *The Civil Procedure Act 2010* (Vic) s 48(2)(c) ('*The Victorian Civil Procedure Act* '); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50.07 ('*Supreme Court (General Civil Procedure) Rules* '); *The Supreme Court Act 1935* (WA) s 167 (1)(9)(i) ('*The Supreme Court Act* '); *The Supreme Court Act 1935* (SA) s 65 (1) ('*The Supreme Court Act* '); *The Alternative Dispute Resolution Act 2001* (Tas) s 5 (1) ('*The Alternative Dispute Resolution Act* '); *The Court Procedures Rules 2006* (ACT) reg 1179 ('*The Court Procedures Rules* '); *The Local Court Act 1989* (NT) s 16 ('*The Local Court Act* ').

70 Dorcas Quek, 'Mandatory Mediation: An Oxymoron-Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 481.

71 Robert French, 'Perspectives on Court Annexed Alternative Dispute Resolution ' (2009) *Law Council of Australia*, 6; Magdalena McIntosh, 'A Step Forward – Mandatory Mediations' (2003) 14 *Australasian Dispute Resolution Journal* 280; See e.g. *Civil Procedure Act 2005* (NSW) s 26 (1) and (2) ('*Civil Procedure Act* ').

and may do so with or without the consent of the parties concerned. Court-mandated mediation can encourage the disputants to settle their dispute at an early stage, which helps to save costs and time,[72] and to preserve good business relationships between the disputants.[73]

Another benefit of using court-mandated mediation is that where the disputants cannot reach a settlement, they might succeed in narrowing the issues via mediation.[74] This means that when mediation does not settle the entire dispute, the disputants will focus on the remaining issues at trial, which can still save costs and time. Where mandatory mediation can settle the dispute at an earlier stage, this helps the court to decrease the matters that are likely to reach trial. Thus, it may increase the court's efficiency. This benefit could also be found if mediation is compulsory before proceedings are commenced.

Despite the benefits, mandatory mediation is a controversial issue for several reasons. Mandatory mediation may contradict the voluntary hallmark of mediation, as discussed in chapter 1.[75] The voluntariness is a vital hallmark in the mediation process, as litigants can undertake this process without an outcome being imposed on the parties, as occurs in litigation. When the disputants are forced into pursuing mediation, this may potentially contribute to their unwillingness to solve their dispute in a consensual and collaborative manner.[76] However, this argument is easily addressed as the settlement is still optional and the parties, who participate in good

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72 But *cf*, Cameron Green, 'ADR: Where Did the 'Alternative'go? Why Mediation Should not Be a Mandatory Step in the Litigation Process' (2010) 12(3) *Alternative Dispute Resolution Bulletin* 54-60.

73 Redfern (n 34) 54.

74 David Spencer, 'Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales' (2000) 11 *Australian Dispute Resolution Journal* 237; Paul Venus, 'Court Directed Compulsory Mediation – Attendance or Participation?' (2004) 15 *Australasian Dispute Resolution Journal* 29.

75 See, David Spencer, 'Looking Backwards to Move Forwards: Reviewing Sir Laurence Street's First Scholarly Contribution to the ADRJ' (2018) 29 *Australasian Dispute Resolution Journal* 90, 92; Iyla T. Davies and Gay R. Clarke, 'Mediation: When Is it Not an Appropriate Dispute Resolution Process?' (1992) 2 *Australian Dispute Resolution Journal* 70, 72; Patricia Bergin, 'Mediation in Hong Kong: The Way Forward – Perspectives from Australia' (2008) 82 *Australian Law Journal* 196 203-204.

76 Andrew Robertson, 'Compulsion, Delegation and Disclosure – Changing Forces in Commercial Mediation' (2006) 9 *Alternative Dispute Resolution Bulletin* 58; Brendan French, 'Dispute Resolution in Australia – The Movement from Litigation to Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 213.

faith in this process, are free to leave the mediation, albeit, of course, with a reasonable explanation. [77]

Ingleby [78] argues that court-mandated mediation may threaten the rule of law because the 'the effect of compulsory mediation is to create rules against litigation, to replace the habit of settlement in professionalised justice with a rule in favour of settlement in incorporated justice.'[79] It means that litigants will be considered as components of the dispute, rather than treat them as individual bearers of rights, which in turn 'causes litigation to be seen as "deviant" as opposed to alternative behaviour'.[80] Mahoney responds to this claim, stating that mandatory mediation aims to put an end to the main issues of the dispute by breaking down the disputants' rights in order to reach a settlement.[81] Litigation always remains an option available to the disputants who are not satisfied by any possible options generated through mediation.

Redfern[82] has noted that a benefit of court-mandated mediation is that disputants, who may be reluctant to enter mediation, can become active participants when forced. Smith[83] explains this may happen because the disputants will not refer their case to mediation voluntarily, as they consider it a sign of weakness. Still, when they are required to use mediation, they will participate actively. In this case, the disputants are free to make full use of the process of mediation to try to manage the dispute in an informal way.

When a mandated mediation requirement exists, Sourdin[84] has claimed that it plays a vital role in saving time and costs, and it may achieve a better outcome.[85]

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[77] See, Tom Altobelli, 'NSW Supreme Court Makes Mediation Mandatory' (2000) 3 *Alternative Dispute Resolution Bulletin*, 44; Gary Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' (1998) 36(4) *Osgoode Hall Law Journal* 874, 848.

[78] Richard Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56(3) *The Modern Law Review* 441-451, 450-451.

[79] Ibid.

[80] Ibid

[81] Krista Mahoney, 'Mandatory Mediation: A Positive Development in Most Cases' (2014) 25 *Australasian Dispute Resolution Journal* 120, 122.

[82] See, Michael Redfern, 'ADR: Where did the 'Alternative' Go? A Response' (2011) 12 *Alternative Dispute Resolution Bulletin* 90; Smith (n 77) 874.

[83] Smith (n 77) 874.

[84] Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35(3) *University of New South Wales Law Journal* 889-913, 892.

[85] Ibid.

Gerber and Mailman[86] support this requirement as an important step before litigation, because it represents 'a philosophical shift in the way litigation is commenced and conducted … by forcing parties to fully investigate the merits of their claims and defences as a condition precedent to filing a lawsuit.'[87] However, Ackland[88] argues that it may increase legal costs and lead to forced settlements, thus excluding lawyers from exercising their important function in ensuring the observance of legal duties.[89] Others suggest that imposing mediation as a pre-litigation requirement may undermine the rule of law because not all disputes are suitable to be solved by this process.[90] Court-mandated mediation may not be suitable for all disputes. It would seem there is an argument that the approach be nuanced and disputes not all treated as the same. Black[91] confirms that a compulsory referral to mediation could be necessary in some disputes under particular circumstances.[92] Olsson[93]adds that the courts should not have a policy of ordering mediation in all circumstances, but that they assess and screen the cases to find which disputes are suitable for mediation.[94] Mahoney[95] suggests two circumstances that indicate that referring to mediation is appropriate:[96] when an ongoing relationship between the disputants is desirable,[97] and when there is unlikely to be any positive progress if the matter proceeds through the court.[98] Sourdin[99] argues that the importance of these protocols are maintained because alternatives have 'been designed to support processes within and outside

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[86] Paula Gerber and Bevan Mailman, 'Construction litigation: Can we do it better' (2005) 31 *Monash University Law Review* 237, 238.

[87] Ibid.

[88] Richard Ackland, 'Mediation More Pork for Lawyers: News and Features', *Sydney Morning Herald* (Sydney )11.

[89] Michael Legg and Dorne Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 39.

[90] Tania Sourdin, 'A Broader View of Justice?' in Michael Legg (ed), *The Future of Dispute Resolution* (Lexis Nexis, 2013) 155-166; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2-3) *Common Law World Review* 214-235, 227.

[91] Michael Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia'(7) *Australian Dispute Resolution Journal* 138.

[92] Ibid 144.

[93] See, L T Olsson, 'Mediation and the Courts: Inspiration or Desperation' (1996) 5(236) *Journal of Judicial Administration* 237, 238.

[94] See, *Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd* (2002) FCA 1134 28 ('*Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd* ').

[95] Mahoney (n 81) 122.

[96] Ibid 122-123.

[97] See e.g., *Hillig v Darkinjung Pty Ltd* (2008) NSWSC 409 3 ('*Hillig v Darkinjung Pty Ltd* ').

[98] See e.g., *O'Connor v Australian Postal Corporation* (2010) AATA 504 33 ('*O'Connor v Australian Postal Corporation* ').

[99] Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (n 84) 892.

courts and prevent the worst excesses of an adversarial system by requiring early and transparent disclosure and thus limiting opportunities for a range of more adversarial tactics.'[100] This requirement generally succeeds in encouraging the parties to 'participate in a genuine exchange whilst matters are still fresh and whilst a good business relationship maintains.'[101] Even though there may be a mandatory requirement to attend mediation in Australia, the mediation is still ultimately voluntary in nature. The disputants alone can determine whether they will settle their dispute and the terms upon which they will manage the dispute.

The court-mandated approach may still follow a facilitative model more than an evaluative one, as it helps the disputants take responsibility to create their own solutions. Brown[102] states that the goal of court mandate mediation may be achieved when the mediator facilitates the discussion between the disputants, and takes an interest-based approach to solving the dispute.[103] However, a blended (facilitative and evaluative) process is possible under the NMAS in Australia. The models adopted in Australia is now explored.

### 5.2.4 Mediation Models

There are recognised different mediation models for the process in the Australian literature. These attract different levels of expertise and corresponding insurance coverage by the dispute practitioner. The most widely practised model of mediation is facilitative mediation, as it concentrates on the disputants' interests and needs and maximises satisfaction of their own self-interests.[104] Different models were introduced and described in chapter 1. As noted, the National Mediator Practice Standards (NMAS)[105] have recognised that there are a range of different mediation models in use across Australia. Even though the facilitative, settlement and

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[100] Ibid.

[101] Michael Redfern, 'Should Pre-Litigation Mediation Be Mandated' (2012) 6 *Australasian Dispute Resolution Journal*, 9.

[102] Carole Brown, 'Facilitative Mediation: The Classic Approach Retains its Appeal' (2002) Mediate.Com.

[103] Ibid, 1.

[104] Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39.

[105] *Mediator Standards Board, Practice Standards 2007* s 1 (4) ('*Mediator Standards Board, Practice Standards* ').

evaluative mediation models are the most practised in Australia,[106] the facilitative model has been prioritised in the legislation and training of mediators,[107] as well as in community, neighborhood and family disputes.[108] This model is considered as the standard model of mediation, as mediators will traditionally adopt this model rather than the evaluative model, which focuses on the parties' legal entitlements.[109] The facilitative model is preferable as it is most closely aligned with the philosophical hallmarks of mediation, and addresses disputes 'through creative, mutual problem solving, not just a process of settling cases in the shadow of the expected court outcomes.'[110] It also empowers the disputants to manage their own disputes, thereby fulfilling the ideal of ensuring society becomes more harmonious in the longer term.[111]

Facilitative mediation is defined as a process in which an independent third party assists parties to identify the main issues in a dispute: to build a productive conversation between them in a way that helps them to reach their own solution.[112] As discussed in chapter 1, the facilitative model aims to focus on the disputants' underlying needs and interests instead of the initial demands that are brought to the mediation table.[113] It also aims to discuss and negotiate the disputants' substantive

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106 Robin Amadei and Lillian Lehrburger, 'The World of Mediation: A Spectrum of Styles' (1996) 51(4) *Dispute Resolution Journal* 62-86.

107 Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (2009) *Report prepared for the Department of Justice, Victoria, Australia*, 53.

108 Boulle (n 33) 45.

109 See, Tania Sourdin and Tania Matruglio, *Evaluating Mediation-New South Wales Settlement Scheme 2002* (La Trobe University, 2004).

110 Robert Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to The Courts Over Four Decades' (2008) 84 *North Dakota Law Review* 705, 721.

111 See e.g., Ryan Murphy and Tania Sourdin, 'Skilled Mediators and Workplace Bullying' (2019) 29 *Australasian Dispute Resolution Journal* 146; Mieke Brandon, '"I love you when, I love you if, I love you because …": Relationships Mediation' (2018) 29 *Australasian Dispute Resolution Journal* 98; A J Orchard, 'Towards a Practical Model to Improve Outcome Acceptance in Dispute Resolution' (2017) 28 *Australasian Dispute Resolution Journal* 181; Adele Carr, 'Broadening the Traditional Use of Mediation to Resolve Interlocutory Issues Arising in Matters before the Courts' 27 *Australasian Dispute Resolution Journal* 10; Michael Redfern, 'The Mediation Challenge' (1998) 9 *Australasian Dispute Resolution Journal* 206; Clair Berman-Robinson and Helen Shurven, 'ADR Process Design: Considerations for ADR Practitioners and Party Advisors' (2016) 27 *Australasian Dispute Resolution Journal* 140; Rebekah Doley, 'Working in ADR with disputants on the Autism Spectrum' (2016) 27 *Australasian Dispute Resolution Journal* 150.

112 Troy Peisley, 'Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes' (2012) 23 *Australasian Dispute Resolution Journal* 26.

113 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 77.

goals, to lead each disputant to make concessions towards reaching a mutually agreeable resolution.[114]

In contrast, evaluative mediation has been adopted widely in many mediation contexts in Australia, and is usually encountered in commercial disputes and civil claims.[115] As O'Brien states, ‘evaluative mediation works within a legal framework attempting to resolve disputes through agreements in line with results typically achieved through litigated claims.’[116] In this approach, an independent third party assists parties through evaluating the main issues in the dispute to determine the strengths and weaknesses of each side’s case, the possible outcome if the matter proceeds to litigation, as well as proposing possible settlement scenarios to resolve the dispute.[117]

Mediators may utilise this model by adopting an interventionalist and advisory approach because they have expertise in the subject matter of the dispute.[118] Evaluative mediation is not considered a preferred model because 'it does not encourage creative, mutual problem-solving, but uses mediator influence to settle.'[119] Others argue against this approach as it can potentially undermine an important mediation hallmark, namely the parties’ self-determination.[120] In other words, this

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[114] Ruth Charlton and Micheline Dewdney, *The Mediator’s Handbook* (Lawbook, 2nd ed, 2004) 45-47.

[115] Boulle (n 33) 28.

[116] Peter O'Brien, 'Solo Mediating Civil Claims' (2005) 16 *Australasian Dispute Resolution Journal* 199, 203.

[117] Peisley (n 112) 27; See eg, Donna Cooper, 'Representing Clients from Courtroom to Mediation Settings: Switching Hats between Adversarial Advocacy and Dispute Resolution Advocacy' (2014) 25 *Australasian Dispute Resolution Journal* 150; Kathy Douglas, 'The Importance of Understanding Different Generations of ADR Practice for Legal Education' (2012) 23 *Australasian Dispute Resolution Journal* 157; Robert A Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 111; Kathy Douglas, Robin Loodman and Rebecca Leshinsky, 'Models of Mediation: Dispute Resolution Design Under the Owners Corporation Act 2006 (Vic)' (2008) 19 *Australasian Dispute Resolution Journal* 95; Jonathan Rothfield, 'What (I think) I Do as the Mediator' (2001) 12 *Australasian Dispute Resolution Journal* 240.

[118] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2nd ed, 2005) 46.

[119] Katherine Douglas, 'The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy' (PhD Thesis, RMIT University, 2012) 38.

[120] Lela Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1996) 24 *Florida State University Law Review* 937; Nancy A Welsh, 'The Thinning Vision of Shelf-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization' (2001) 6 *Harvard Negotiation Law Review* 1.

model disempowers the disputants in crafting their own solutions by transferring the ultimate decision-making power away from them to the mediator. This happens because the evaluative mediator will suggest an opinion of the likely outcome of the dispute, and the risks they face if the parties prefer to litigate their dispute.

Also, as this model requires the mediator to evaluate the merits of the dispute and provide suggestions as to its resolution, it may expose mediators to greater legal liability.[121] The evaluative model appears to present the most likely process that would give rise to a duty of care in negligence. If a mediator uses his or her substantive expertise to advise the parties erroneously on their likely range of legal outcomes, then loss may be reasonably foreseeable.[122] The disputants put their trust in their mediator, and as Boulle[123] notes, there is a risk as some mediators can be seen to be in a position to 'manipulate information, distort facts and suppress evidence, and thus play a highly influential role in the process.'[124] It is believed that the mediator should proceed with a fair process by helping the disputing parties to communicate, and by empowering them to reach an acceptable mutual solution.[125] Legislation in Australia provides in many cases for the situation that no liability will arise for the mediator if they act according to the accepted standards of mediation practice.[126]

An understanding of these differences was embedded in the first National Mediation Accreditation Scheme and Standards, issued in 2007, in which Practice Standard no 2.2 stated that '[m]ediation is a process that promotes the self-determination of participants…a mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.'[127] However, the 2015 renewed standards recognised a change in how mediations are conducted, and so has enabled this by

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[121] Mary Anne Noone, 'Lawyers as Mediators: More Responsibility?' (2006) 17 *Australasian Dispute Resolution Journal* 96, 97.

[122] Melinda Shirley and Tina Cockburn, 'When Will a Mediator Operating outside the Protection of Statutory Immunity Be Liable in Negligence' (2004) 32 *University of Western Australia Law Review* 83, 90.

[123] Laurence Boulle, 'Emerging Standards for Lawyer Mediators' (1993) 23 *Queensland Law Society Journal* 575.

[124] Ibid 579-580.

[125] Anna Koo, 'Exploring Mediator Liability in Negligence' (2016) 45(2-3) *Common Law World Review* 165-185, 181.

[126] *Civil Liability Act 2002* (NSW) s 50; *Civil Liability Act 2003* (Qld) s 22; *Civil Liability Act 1932* (SA) s 41;*Civil Liability Act 2002* (Tas) s 22; *Wrongs Act 1958* (Vic) s 59.

[127] *National Mediator Accreditation System (NMAS), the Practice Standards 2015* ('*National Mediator Accreditation Standards*').

reference to a 'blended approach' in Practise Standard no. 10.2.[128] This 'blended' approach 'is not defined as mediation but as an amalgam of processes where the consent of disputants is required.'[129] In practice, a mediator may alternate between a facilitative and an evaluative model to ensure an outcome is achieved.[130] Spencer and Hardy[131] state that the blended approach in mediation is the preferred approach because it takes the best of each.[132] Thus, the mediator in Australia can move from a facilitative to an evaluative continuum, which 'is given in a manner that enhances the principle of self-determination and provides that the participants request that such advice be provided.'[133] However, whereever a mediator engages in giving advice, they open themselves up to legal challenges if the advice is inaccurate. This is why care must be taken and a higher level of insurance coverage is reguired.

Suitably qualified mediators can apply the blended model after obtaining the requisite consent of the parties. This model follows the traditional facilitative path, with opening statements for mediators and parties, analysis of the issues and risks relating to the dispute, exploration of interests and joint problem-solving. The mediator commences by actively engaging in questioning the parties, framing the issues, and brainstorming options, without proffering any suggestion on the possible outcomes. The mediator will also conduct the private sessions to further probe relative strengths and weaknesses and encourage the parties to propose solutions. This usually includes further negotiations, either directly between the disputants or through a shuttle process.[134]

In case the disputants do not agree, the mediator will move on to adopt a more directive role to break an impasse between the disputants. In other words, the mediator may give advice or an opinion about the likely outcome if the matter was to go to litigation. The mediator may also propose a suggested settlement, to attempt to bridge the gap between the parties. The mediator can negotiate with the parties in

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128 Ibid.

129 Sourdin, (n 109) 53.

130 Boulle (n 5) 43.

131 David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2014) 156.

132 Ibid.

133 Peisley (n 112) 29.

134 Ibid 33; Chris Lenz, 'Is Evaluative Mediation the Preferred Model for Construction Law Disputes?' (2015) *Thomson Reuters* 134, 145.

the form of a joint session, or alternatively by a shuttle process, to help parties find an agreement.

## 5.3 Summary

This chapter has explored the mediation process as it has evolved in Australia. Aboriginal and Torres Strait Islander communities in Australia had their customary law for around 40,000 years in dealing with disputes.[135] This, prototype of mediation existed among the Indigenous people of Australia. The council of elders would negotiate with the disputants to reach a solution that aimed to secure harmony in the community.

The modern uptake of mediation has been introduced to provide a context for the development of the implementation of mediation as a process, which is included in the legal framework of Australia. Australian mediation has developed and has been promoted through the coordinated actions of politicians creating legislation to encourage its use, significant individuals and organisations and the courts. Mediation may arise from a private arrangement between the parties, a legislative directive or encouragement, or as a consequence of the court's direction.[136] This chapter has also focused on three of the mediation models that are used in Australia: the facilitative, evaluative and blended process models. The pure facilitative model is the most encouraged model used in Australia and has been addressed in detail in this chapter and in chapter 1.

Australia has seen a sustained development in mediation practice, both in the form of a bottom up community approach and of a a top down legislative-supported approach. Organisations such as NADRAC have contributed significantly to its development and the establishment of the NMAS has resulted in the development of the profession of mediators.The next chapter moves to the findings from the interviews in order to understand how well the system is working and what room for improvements exists in both countries.

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[135] Croft (n 4) 6.

[136] Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38 *University of New South Wales Law Journal* 5.

# Chapter 6: The Interview Findings and Analysis

## 6.0 Introduction

Interviews were conducted with key figures who have practiced mediation in Australia and Jordan. The interviewees were chosen based on their knowledge and experience in the mediation process. They included lawyers, mediators, judges, and academics. This chapter reports on the findings, from the interviewees' viewpoint, as regards their understanding of the practice of mediation in their respective countries. Key themes and issues are drawn from the interviews for further discussion and analysis. The interviewees' comments regarding factors that may still need further attention to successfully implement mediation in Jordan are attended to under nine key themes: mediation definitional issues, the mediation spectrum, growth, improvement, need for research, cultural considerations, mediator models, parties' knowledge of the process, and mediation hallmarks and development. This chapter provides a current snapshot, through the data collected, of the opportunities and barriers for the progress of mediation in both countries. It reports on the qualitative data and discusses the themes raised.[1]

## 6.1 The Interviews

A semi-structured interview instrument was used for each of the eleven interviews to enable comparative consistency of the data collected. The semi-structured approach, while allowing for this consistency, also allows some flexibility for further information to be provided by interviewees should they wish to do so. This creates an opportunity for previously unknown information to emerge,[2] and to gain a comprehensive and adequate understanding about the issues raised during the interview. The questions used in the interview are set out in Appendix 1. Interviewees

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[1] See, Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74(8) *American Journal of Pharmaceutical Education*, 5.

[2] Hanna Kallio et al, 'Systematic Methodological Review: Developing a Framework for a Qualitative Semi-Structured Interview Guide' (2016) 72(12) *Journal of Advanced Nursing*, 11-12.

are referred to by letter and number, to protect their anonymity, for instance, J1 for an interviewee from Jordan and A1 and so on for Australian interviewees.

## 6.2 Research Context

In addressing the research problem reported in Chapter 1, this study has aimed to clarify the obstacles and opportunities that face the process of mediation in Australia, and to take learnings from this more developed practice to assist the fledgling mediation practice in Jordan. The data provided by the interviews has provided an immediate and practical response to the questions posed by the researcher with regard to mediation development in both countries. This has enabled a comparison to be made that has helped to determine different understandings and, where there are opportunities for changes, to further improve mediation as a dispute management process.

As described in chapter 4 and 5, Australia has a more advanced use of mediation in its current legal system when compared with Jordan. As previously noted, the Jordanian legislated mediation practice appears to follow an evaluative model. In contrast, the facilitative model, along with some blended processes, are encouraged in Australian practice. As described in this thesis, over the past decade, there have been a variety of efforts to move mediation into the mainstream of the court dispute handling system in Australia. The disputants are encouraged to use mediation through the court-mandated approach, as well as through legislation to adopt a pre-litigation mediation approach. Several factors have contributed to the development of this process, such as institutions having encouraged its use, federal and state legislation, and sustained research providing evidence to support the effectiveness of the mediation process.[3]

On the other hand, even though Jordan has enacted legislation supporting mediation for seventeen years, there has been no significant uptake by parties or

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[3] See, Laurence Boulle and Rachael Field, *Australian Dispute Resolution : Law and Practice* (LexisNexis Butterworths, 2017) 104; Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1(2) *Australian Dispute Resolution Journal* 61-68, 61; Cameron Green, 'ADR: Where Did the 'Alternative'go? Why Mediation Should not Be a Mandatory Step in the Litigation Process' (2010) 12(3) *Alternative Dispute Resolution Bulletin* 54-60, 54.

lawyers, nor any significant research supporting its usage. There are no training programs for mediators and using this process depends highly on the parties' acceptance. Little research has been aimed at evaluating the current mediation system. Al-Qatawneh states even though there is a mediation department in all Jordanian courts, it is not operating to its full potential,[4] which is supported by the interview data.

### 6.2.1 Mediation Definition

The interviews commenced with a preview of interviewees' understandings of what is understood by the term 'mediation' and the concept of the process used. This was an important starting point in order to gain knowledge on what the interviewees understood by the term mediation, and to identify any nuances in how it was described in the two countries. Generally, interviewees, when asked to clarify their understanding of the term 'mediation', identified a similar basic outline of a process that was common to both countries. However, on further analysis of the subtle choice of wording, the data indicates that the Jordanian interviewees did not clarify the mediator role in helping the parties achieve an agreement. In particular, was this role inclusive of giving advice, or more just controlling the process and not the content? This could also be seen in some of the Australian responses. All interviewees identified the use of a neutral third party and the assistance by that party for the disputants to reach an agreement. The Australian interviewees suggested mediation as an alternative process to litigation to facilitate the discussion between the disputants and put an end to their dispute, and some added that occurred without the input or advice of the mediator. Comments include:

> *...Mediation is about parties coming together to be able to resolve their concerns in a productive way without having to proceed down the litigation pathway... (A2)*

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[4] See, Tariq Hammouri, Dima Khleifat and Qais Mahafzah, 'Chapter 4: Jordan' in Nadja Alexander (ed), *Arbitration and Mediation in the Southern Mediterranean Countries* (Kluwer Law International 2007), 69; Mohammad Ahmad Al-Qatawneh, 'Mediation in Settlement the Civil Disputes ' (LLM Thesis, Mutah University, 2008) 25.

*...Mediation is a process in which a mediator does not give advice but clearly facilitates the communication and assists parties to come to a wise decision... (A3)*

*...Mediation is a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute... (A4)*

The Jordanian interviewees indicated a generally aligned understanding. Their answers identified that mediation is a process in which a third-party facilitates an effective negotiation between the disputants by bringing their views closer in order to settle their problem peacefully with assistance from the third party. One interviewee's comment supported the idea that the parties come to their own decisions as part of party empowerment:

*...Mediation is a process which is facilitated by a neutral and impartial person, hopefully skilled in mediation, to work with the parties to help them negotiate ... in order for the two parties to reach their own decisions .... (J1)*

Three other interviewees were ambiguous as to how the third party assists the disputants, leaving open the possibility of giving advice, as in an evaluative mediation:

*...Mediation is an informal means of resolving disputes between people ... a neutral person ... helps the parties to resolve the dispute ... (J2)*

*It is a method of alternative dispute resolution conducted by a neutral third party who ... provides a forum to bring parties' views together in an attempt to reach an amicable solution...(J5)*

*Mediation is a method ... that provides a forum for parties to the dispute, to meet in dialogue and bring together views with the help of a neutral person...(J6)*

The interview responses from both countries indicate that mediation, when described generally, can really encompass varied models of the actual process, and such a broad understanding of the term can lead to misunderstandings by mediators and the public about what mediation actually means as a process. The subtlety of just

how the mediation is facilitated, and the role of the mediator and parties, was not established by these general descriptions of mediation.

As described in chapter 1, mediation can offer a safe and supportive environment in which the disputants can negotiate openly to explore their acceptable mutual solutions in order to reach a consensus. That the interviewees' understandings of the term 'mediation' indicated a broad common understanding only suggests that further work is needed to establish a more refined definition that explains the different models, for the benefit of both the mediator and the parties involved. At the moment it would appear that the term 'mediation' can be understood to include all forms of decision making in which someone external to the dispute assists the disputants to facilitate their decision making in various ways. However, mediation should not be about imposing a decision on parties as this is for other forms of DR such as arbitration.[5]

This research indicates that when defining mediation, it should always encompass the model of mediation being addressed, so all are clearly distinguished and not just included under the broad description, which can lead parties and mediators towards uncertainty and misunderstandings as to the actual process they are applying. This will thus encourage greater understanding by the practitioners and the disputants as to what to expect when undertaking mediation. This is important as the different models of mediation vary in significant ways and, depending on parties' expectations, these may or may not be satisfied, which can potentially lead to giving 'mediation' a bad name. Furthermore, if a mediator gives advice, then they need insurance to cover the risk of negligent advice, which is not applicable in facilitative or therapeutic mediation where the mediator only controls the process and not the outcome. Not having this refined understanding will influence mediation's ability to enhance the legal system and support the delivery of justice. An accurate understanding of the process that will be utilised supports the rule of law requirement of equal treatment, at least procedurally, and generally will assist the justice system to step closer to delivering fair and appropriate outcomes for its disputants. However, knowledge of mediation models, the importance of the mediation following a

[5] See, Laurance Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2 ed, 2012) 1.

particular model, and the parties' awareness vary, as the next two sections establish. This means that if mediation is to become more nuanced in its description, more work needs to be done in both countries. The next section reveals the level of agreement or disagreement among the interviewees concerning the importance of understanding different models.

### 6.2.2 Mediation Models

The interviewees were asked whether they could describe their perspective of their role in mediating disputes. This question sought insight into the level of understanding of different models and what was considered the dominant style used by mediators in the respective countries. It appeared from the Australian interviewees that the facilitative style was preferred as the number one model: *'...I really engage in the facilitative model. And I think that is a very positive model...' (A2).* This interviewee indicated that the hybridisation and personalisation of the manner of mediation was strong in Australia. The interviewees further indicated that the model was often adapted to the type of dispute or the context in which it was taking place. This was also influenced by the disputants' ability to make their own decisions and the mediator's experience:

> *If you believe people can make their own decisions, you are probably more facilitative and if you've got a counselling background you maybe just add a bit of therapeutic in your mediation style. (A1)*

> *... the model that is taught is the facilitative model because it's a good model for training... However, the reality is different, each dispute has a different scenario...A4*

> *My style is what I bring to the mediation, what is my own experience, my own commitment, my own passion for working for people in dispute... People have to be very, very self-aware, self-critical regarding how they fit in the mediation space and whether they can make a real difference to people's lives and help people to find the win/win solution. (A5)*

One participant made a significant observation that having a preferred mediation model is not essential because there is no model better than the rest, and the mediator

should be free to offer different models in the mediation process. This interviewee believed that discussing the different models was essential only for the mediator to learn how to practice the process in order to extend their own understanding and to improve and further develop their own practice:

*I found the whole discussion about styles is not that useful. It is useful for a mediator to look at different ways of practicing mediation. In my view, mediators need to be free and need to be able to offer different styles... None is better than the other… (A3)*

Nevertheless, the same interviewee acknowledged that understanding what the model is that one is using as mediator remained important, as regards advertising and advising the party of the process:

*… this discussion is important when the mediators have to inform their client about the kind of service they offer and explain to the client what that means and then follow that [model]… (A3)*

Using different models in one mediation, while acknowledged, brought some reservations. Interviewees believed that the mediator could use different models when the parties could not reach their own solution, provided the parties were made aware of the switching between models:

*It depends on what framework you are using. If you believe people can make their own decisions, you are probably more facilitative ... and if you're an evaluative mediator, you need to say, I'm an experienced builder so when I do this builder construction mediation, I can give you some expert information. (A1)*

*… I think it's important to have a mix if it's necessary… (A2)*

*The mediators can bring several [models] in one mediation sometimes, but they have to make the parties aware ... (A5)*

However, one Australian interviewee suggested that mixing different models in the mediation process does not produce effective results because it needs an expert mediator to do that:

*... mixing the different [models] doesn't always work and it takes a fair bit of experience to be able to use different styles. It's about being quite aware of where each approach or model fits. (A3)*

Thus, it would appear Australian mediators were conscious of the different models that could be used, and the significance of using one model over another. While the facilitative model was the dominate approach, it appears mediators in Australia like to be able to adapt the model they use to fit the actual dispute they are mediating. Hence, there was a growing acknowledgment that mediators may be utilising a hybrid model, including facilitative, settlement or evaluative aspects. When this is the case, they were also aware of the importance of being clear to the parties, which model they would follow, as liability for any negligent advice could become a possibility if using the evaluative model. This is supported in the literature discussed in chapter 5 when Peisley found that the mediator must make the disputents aware that they are using the evaluative model.[6]

The interviews with Jordanian participants supported the observations in the literature (Chapter 4), which found that the evaluative model was dominant in Jordan, particularly for mediations conducted pursuant to the *Mediation Act 2006*. Al Saleeby states that art 6 of this law gives the mediator the ability to evaluate the parties' legal status and to advise them of likely legal solutions.[7] Interestingly however, in an exact reversal of the move in Australia from facilitative to evaluative models, in Jordan it appeared some mediators are preferencing first using a facilitative approach as they were trained in using this model by the American Bar Association. The interview results indicate these mediators will move to the more dominant evaluative model if the facilitative model does not produce outcomes. This then is also a hybrid approach:

*My role as a judicial mediator is evaluating the legal positions of the parties but I would not have resorted to this style unless it was the last*

[6] Troy Peisley, 'Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes' (2012) 23 *Australasian Dispute Resolution Journal* 26, 29.

[7] Bakr Abd-Fatah Al-Sarhan, 'Mediation on the Hands of the Mediator Judge: The Concept, Importance and Procedures' (2009)(1) *Jordanian Journal in Law and Political Science* 57, 84; Alsaleeby Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010)81; The art 6 of Mediation for Settlement the Civil Disputes Act 2006 states: 'the mediator can take the appropriate measures to bring the disputants' views closer in order to reach a mutually accepted solution. The mediator can also, for this purpose, express his or her opinion, evaluate the evidence, present the legal evidence, case law and other procedures that facilitate the mediation.'

*choice. I will facilitate their communication, I will ask some question to clarify their misunderstanding, I will help them to reach their own solution. (J2)*

*... Many judge mediators in Jordan used to go directly to the parties and tell them if your case goes to the court, it will be failed which is the legislature adoption model but not me ... because I prefer giving the parties the opportunity to communicate and discuss their dispute, if they cannot reach their own solution I will intervene ...(J3)*

*The two schools (evaluative and facilitative ...) exist in Jordan. The first was introduced in the law and the last introduced in the courses that were offered by the American Bar Association and Ministry of Justice for judges and lawyers more than 10 years ago. (J5)*

These observations indicate the preferable mediation model in Jordan. In the beginning, 40 judges and lawyers were trained to use the facilitative mediation model by the American Bar Association.[8] However, the Jordanian legislation is worded in an open manner that is conducive to the adoption of the evaluative style, which gives the mediator a directive role in managing the disputants in order to solve their issues and reach a solution.

The data contributes to a clearer understanding of how mediation is practised in the two countries. It was largely found to support the observations in the literature. Yet, a clearer and more nuanced understanding of how the professions see and practice mediation within their respective countries is developed with this data. All interviewees indicated that an experienced mediator could mix different models in the one process as appropriate, and provided the disputants were willing. These answers lead to asking the participants about the extent to which they felt it was essential to explain the different models to the disputants.

[8] Al-Qatawneh (n 4) 25.

### 6.2.3 Parties' Awareness of the Process

The participants were asked about their opinions on whether disputants should be educated about the different mediation models that could be used in the process. Three participants agreed that the disputants must be informed about the model or models to be followed, in case the nature of the dispute required switching between the models:

> *I believe the parties need to be informed about how you are going to do the mediation, what your framework is and what the parties need to do to prepare themselves for mediation. (A1)*

> *I think it depends on the nature of the issues and the goals to be achieved and the position of each of the parties. (A4)*

> *I think it depends on the style that the mediator uses, for example, if the mediator is facilitative, s/he does not need to explain his/her style. But if s/he is an evaluative mediator, s/he has to disclose which model they are using. (A5)*

For two participants this was considered unimportant because the parties would not pay attention to which model was used but rather, they would focus on the mediation result:

> *... I don't think they need to be necessarily aware of the [models]… (A2)*

> *For someone untrained, it's almost impossible to recall particular mediator interventions. The parties remember if they got a good outcome or a bad outcome… (A3)*

In the Jordanian interviews, all participants concurred with the observations that there was no need to make the disputants aware about the mediation models. Instead, the disputants should be able to follow the mediation stages and were likely to be more concerned with the mediator's credibility:

> *I don't think the parties probably need to be aware of the different [models] because [they] are evolving constantly. (J1)*

*As a mediator, I need to be clear from the beginning about the mediation's procedures … but I don't believe that it is necessary to clarify the [model] of mediation for the parties. (J2)*

*It is better not to be aware about the [model] or the method. By knowing the method, [the party] will try to avoid reaching a settlement. (J3)*

*I think that there is no point in making the disputants aware of the mediator [model], but the most important thing is making the disputants aware of the stages of mediation. (J4)*

*It might be too early in Jordan to discuss this, to be quite honest. It might be too early for us to consider this. (J5)*

*… there is no need to make the parties aware about the[models]. (J6)*

This data indicates a clear distinction between the two countries. Some Australian interviewees consider that using the mediation models will depend on the type of dispute being addressed, including the possibility of switching between models within a mediation. Notably, while some Australian participants did not consider it so important, none of the Jordanian interviewees considered it to be relevant. Perhaps fitting the Jordanian notion of a wise elder resolving a dispute, the authority and credibility of the mediator was considered more significant. This leads to gaining an understanding of where the interviewees see mediation fits in the broad spectrum of dispute management processes considering Alexander's meta model of the mediation spectrum.

### 6.2.4 Mediation in the Spectrum of DR Processes

The interviewees were asked where they considered mediation sat in the spectrum of available DR methods. This question aimed to determine the status of mediation in both countries. The responses from the Australian participants show that most shared the same view, namely that the place of mediation sits in the middle range of available options. For instance, three Australian interviewees suggested:

*It's somewhere in the middle…(A1)*

*It is less interventionist than processes such a conciliation, or evaluative, or expert mediation and then also certainly less interventionist than processes like arbitration or litigation. So, it fits into a facilitative communication focused way for resolving disputes. (A3)*

*I would have thought the bulk are resolved by negotiation and then the next highest resolution process would be mediation ... (A4)*

In the Jordanian interviews, the descriptions provided a different understanding from the Australia ones, and the interviewees indicated it was perceived as a judicially supported process and as more formal in nature. One interviewee placed it immediately after arbitration:

*Mediation is the number two mechanism in Jordan ... The first mechanism and the number one in Jordan ... is arbitration. (J2)*

One interviewee referred to judicial or court-mandated mediation, while only one acknowledged there was a range from unstructured and informal processes to more structured evaluative mediations:

*Mediation, as it exists in Jordan, is mostly related to the judicial process ... relies on judicial referrals coming from cases that have existed in the courtrooms ... (J5)*

*The spectrum ranges from unstructured, evaluative and informal processes to structured, evaluative and increasingly formal processes, depending on whether the parties are seeking a consensual dispute resolution process ...(J6)*

These statements show a perception that mediation was mostly considered to be a facilitative process in Australia. By contrast, the Jordanian interviewees confirmed that mediation ranged between traditional and formal means. These results are supported by the literature described in Chapter 4 and 5, which confirmed that mediation in Australia has adopted the facilitative model as the preferred model. Sourdin states that the mediator assists the disputants in their attempt to identify the issues and develop options that craft their own solution, without the mediator actually

coming up with any options themselves for the parties.[9] The facilitative mediators will not advise the disputants about how they should solve their problem, nor provide them with legal information about what a court would do in the case. Exon addresses that the mediator uses communication techniques to help the parties express their underlying interests in order to generate a wide array of options from which a creative solution can then arise.[10]

In contrast, the Jordanian interviews confirmed that mediation was practised in two forms: the formal and informal evaluative process of mediation. This result is consistent with the literature investigated in chapter 4 in which *Sulha* is the traditional process mainly practised by the Jordanian Bedouin people, and is identified as more aligned with an arbitration process, but nevertheless classified as informal. Other than this, the mainstream form of mediation is considered to be court-mandated or formal mediation. Al-Rashdan confirms that the model generally used in this type of mediation is the evaluative model of mediation.[11] This leads to exploration in how mediation has been perceived to have developed in acceptance.

### 6.2.5 Mediation Growth

Just how developed mediation has become as a process was a topic the interviewees were asked to respond to, with a view to understanding how well entrenched the process was or how it could become more so. The participants were asked to describe the system of DR that existed when they first became involved and to mention any changes, such as in legislation and practice, that they had witnessed since that time. This question explored the history of the growth of dispute resolution beyond litigation in both countries. It helped to indicate how important changes were

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9 Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (2009) *Report prepared for the Department of Justice, Victoria, Australia*, 53; Robert Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to The Courts Over Four Decades' (2008) 84 *North Dakota Law Review* 705, 721.

10 Susan Nauss Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2008) 42(3) *University of San Francisco Law Review* 577-620, 577.

11 See e.g. Ali Mahmoud Al-Rashdan, Mediation in Settlement the Disputes (Dar Al-Yazoury Scientific for Publishing, 2016) 12; Doron Pely, 'Where East not Always Meets West: Comparing the Sulha Process to Western-Style Mediation and Arbitration' (2011) 28(4) *Conflict Resolution Quarterly* 427-440, 430.

that had occurred over the years from the participants' perspective. As described in chapter 5, various factors have led to the growth and the development of the process of mediation in Australia. From the Australian perspective, the interviewees confirmed a number of significant changes that have supported the growth of the process.

| Comments by the interviewees according to themes | ID |
|---|---|
| An early history of using mediation informally to a growing professionalism | A1, A2, A4 and A5 |
| Mediation is becoming compulsory | A2 and A5 |

Firstly, four participants described the status of mediation in the early days. One participant stated that mediation practice was voluntarily, and mediation was not a profession:

> *In the beginning of using mediation, it was voluntarily, and mediators were very lowly paid, and mediation was not yet a profession. In the late 1990, early 2000, the mediators with a law background got $10,000 a year more than the mediator with a social science background… (A1)*

This interviewee spoke also about the development of a growing professionalism, culminating in the adoption of qualifications to practice as a mediator:

> *… Now, if a family mediator, you need to have either a social science or a law degree and you need to have the National Standards and you need to have training in family mediation plus 50 hours supervised practice to be able to become an accredited mediator with the Attorney-General Department, so the professionalism between the late 80s and now has changed completely. (A1)*

Another participant stated that some funding issues historically have led to a different type of service, noting a change in those practicing mediations and the impact of funding declines. Conducting co-mediation with a lawyer and other professional has become the exception, with just one mediator from either profession now generally being involved:

*When I started with Legal Aid, it was a co-mediation model with one lawyer and social worker or psychologist. That has changed, because of funding restrictions, so now there is … only one mediator. (A2)*

The enormous changes that have occurred from the early days include the growth of mediation contesting the space taken previously by processes such as arbitration. This comment also flags a possible warning for mediation not to outprice its usefulness:

*When I first became involved, there was no system of mediation as we know it. There was arbitration, but arbitration had got … more expensive than the court process ... (A4)*

One interviewee noted the expansion of mediation beyond the areas that had seen an early uptake of mediation:

*In the 90s, mediation had been operating throughout Australia in particularly in family matters and also in environmental matters and some workplace matters. (A5)*

Compulsory mediation was addressed by two interviewees who noted that a significant shift had occurred with this process becoming more emphasised, whether as a pre-litigation procedure or court-mandated process:

*The legislation has changed the mediation to become a compulsory step before litigation and in commercial areas, there are almost always agreements which provide for parties to engage in dispute resolution as a means of resolving disputes. (A2)*

*… mediation becomes mandatory the judge can refer the case to mediation. (A5)*

Based on this interview analysis, several factors have informed the growth and development of mediation in Australia. These largely confirm the discussion in Chapter 5, namely that the mediation process was started as a voluntary process by community centres.[12] The mediation process has become more supported within the legal system and has now moved to become a compulsory step before litigation

[12] Faulkes (n 3) 61.

around Australia.[13] These interviews also showed that one of the essential factors growing the adoption of mediation in Australia was that the mediator could not practice this process without the required qualifications leading to a professionalisation.

On the other hand, the Jordanian participants did not see significant changes, perhaps reflecting its early stages in development. Two comments established this reality and the impoverished state of mediation as a process in Jordan:

> *I do not believe there are significant changes happened in Jordan through the years… I heard that mediation participation is in the lowest level in Jordan. (J1)*

> *The big and sole change that I witnessed through the years is the request [for] arbitration is still number one ... mediation [is] in second place… judicial mediation is still prominent more than the private mediation. (J2)*

While legislation exists to support the practice of mediation it has seen little development with only two minor changes in the legislation occurring. Two interviewees commented these changes were related to increasing the level of mediation confidentiality and mediation encouragement by refunding fees. As two interviewees confirmed, the changes in the legislation have been attempts at increasing its uptake:

> *In 2017, we have a modification in our legislation where the court system encourages the lawyers to use mediation by refunding the fees they already paid to the courts when they settle their disputes through mediation. (J3)*

> *I don't see a growth or a major growth in the cases of mediation. The law was enacted in 2006, the first one, and …. They changed it only in 2017, where they ... increased the level of confidentiality in addition to giving more appetite to this law by refunding full fees [if] you resolved your case [within] a specific time of filling the case. (J4)*

This result indicates the fledgling stage of mediation in Jordan and an entirely different adoption process, which is shaped in a top-down legislatively imposed

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13 See chapter 5, p. 138.

manner as opposed to the bottom-up grassroots development that has occurred over time in Australia. As noted, there have not been any mediation centres in Jordan that encouraged using this process as a grassroots movement. There was just the US training of Judges and a sudden imposition of a legislated scheme. Furthermore, it seems that arbitration has a greater standing than mediation in Jordan, as it is a process that was introduced five years earlier than the legislated adoption of mediation. It is also a process more closely aligned with the traditional Bedouin 'mediation', or *Sulha*, which may give arbitration an advantage:

> *…arbitration established in 2001… is number one in Jordan to solve the commercial disputes, then in 2006 the mediation was introduced to solve the civil dispute which is considered as number two in demand. (J5)*

> *…arbitration is still number one and mediation is number two. (J6)*

In the Jordanian interviews, four participants confirmed that training and education were not supported enough, and that this was a significant factor required to develop and improve mediators' skills in Jordan. Two interviewees indicated that the last training program was held ten years earlier by the American Bar Association:

> *I'm not aware of any training sessions that were meant for the special mediators. But for the judicial mediators, their training sessions, and even abroad were held before ten years, but now I heard there are no training sessions held anymore. (J4)*

> *When applying the law of mediation in 2006, there were 40 judges and lawyers who were trained in America, after they return the process of mediation was at the highest of its success as I heard, but after that, there are no courses held, ... I believe [that is] the main reason in decreasing the demand for mediation in the last ten years. (J6)*

The finding from the interviews that shows that Australia has a rich history in using this process is supported by the review of Australian literature in chapter 5. Chapter 4 did not find any growth to the DR sector in Jordan, and this was confirmed by the interview data. Thus, the very different ways in which mediation has developed in both countries appears to have had an impact on its uptake by both. In Australia and Jordan, the interviewees identified areas for improvement, which are canvassed in the next section.

### 6.2.6 Room for Further Improvement

As a result of the previous question, I could not see any growth and significant development of the dispute resolution sector in Jordan. Thus, I asked the interviewees if they could wave a magic wand, what changes or adaptations they would create. Australian interviewees were also asked to explore whether the mediation process in Australia needed further development. After applying NVivo to the transcribed interview data to determine the interviewees' responses to this question, there appeared to be varied suggestions for improvement. For the Australian interviewee's these have been grouped under three key headings, which are identified in the table:

| **Comments by the interviewees according to themes** | **ID** |
|---|---|
| **Training program and education system** | A2, A3, A4, A5 |
| **Professionalising and Supervision** | A1, A2 |
| **Public perception, satisfaction and participation** | A1, A2, A3, A4, A5 |

Table 3: Headings related to the room for improvement of Mediation in Australia

While a training program is designed to help mediators to refine their skills and become accredited to practice this process, a good education system can also develop a clear understanding of the role of mediation as a dispute management process. In chapter 4, it was confirmed that the training program and education system assist in delivering a sound knowledge about the mediation process. If these programs are not well-established in the country, it can have a negative impact on the uptake of mediation. While strong mediation training programs are prevalent in Australia, four interviewees still advocated there was need for greater rigor in training. This included increasing the training hours for mediators to ensure mediators are competent to practise the profession and reinforce the credibility of the process:

*... more rigor with mediators having to undertake a significant number of training hours ...A2*

Another participant confirmed there is always room for improvement as they claimed there needs to be reconsideration of the structure of the training program and education system to make the training both longer and more elaborate:

> *I think it's time to probably rethink training and education in mediation, to expand it because mediation has become a lot more complex. I think it is worthwhile to actually rethink the whole training structure and to possibly make it a lot longer and more elaborate. For example, require more education and training for family mediators than civil mediators. (A3)*

Despite the fact that these programs are well established in Australia, another participant suggested the programs should be expanded to educate the legal community about the process, not only the mediator:

> *I support the education and training in mediation but not only for mediators but also for lawyers, parties and students in the school to teach them how to negotiate effectively because it may reflect to some extent on the success of mediation. (A4)*

The last comment on this theme indicated that law schools could improve their offerings of courses for students to reinforce the range of skills that are needed by mediators, particularly in multi-cultural disputes:

> *There needs to be even more education in law schools regarding the nature of accepting different cultures… (A5)*

The second theme that arose was professionalising the mediation process and training. This is important especially since mediation has become more regulated and mediators are trained and accredited. Part of this professionalisation is that mediators should be treated as having formal, professional status. One interviewee suggested that the mediator should garner respect as a professional, just like in other professions. A suggested aspect of recognition is the offering of awards acknowledging their contributions to society to encourage them to continue their vital work:

> *Mediators must be treated as a professional. And they must be given awards and they must be recognized by people as having wisdom…(A1)*

Supervision of mediators was considered an important aspect to maintaining standards and a professional ethos by ensuring that the mediator is working within the policies and procedures of the organisation:

*... the supervision of mediators needs to be quite stringent… A2*

Public perception, satisfaction and participation was another area in which there was an indication of still some room for improvement, even if one Australian interviewee was reasonably content. Four participants in the interviews suggested that the disputants' satisfaction and participation were very high in Australia, which in turn reflected the level of mediation development and acceptance:

*Generally, mediation has been much more accepted, and it still has a very high success rate in Australia, and I think the satisfaction levels with practitioners that are supervised is improving over the years. (A1)*

*…The more the public is aware of mediation and aware of the organizations conducting it, it can only be a positive thing and that can only enhance satisfaction with the process and participation … (A2)*

*The participation and satisfaction are excellent in Australia because we have people themselves ringing up saying they want to have a mediation. Mediation is seen now as a desirable process and some people simply want to be able to tell their story, they want to give themselves a chance to solve their dispute without resorting to court. (A4)*

*…The community saying, we cannot afford the more traditional legal system, we want something a bit more user-friendly, a bit less adversarial, a bit more focused on a better outcome, that will not take us through the courts for a long period of time, so that is a big cultural shift. Mediation took thirty years for understanding and awareness and acceptance, which is good. (A5)*

However, one participant flagged a concern with a less optimistic view, believing the streamlined mediation procedure had reflected negatively on the public perception and satisfaction of participants:

*I think public perception is actually kind of not necessarily becoming better. I think it is actually slowly becoming worse and that is because of*

*a trend to shorten processes, to allow less time, to bring in more and more legalistic processes, that's definitely a trend that I recognised. (A3)*

Thus, there were some divergent views regarding the improvements that were hoped for in Australia to enhance mediation's ability to solve disputes efficiently and effectively. It should be noted, however, that Australia has thrived in applying this process when compared to Jordan.

In the Jordanian interviews, all participants suggested important changes that could assist with improving the adoption of mediation in Jordon. One question they were asked sought to determine the key factors that could help Jordan to develop the uptake of mediation. It was revealed in chapter 1 that mediation is an effective alternative to litigation, due to its benefits, and that it is an effective means to ease court backlogs. Moreover, chapter 4 clarified that the mediation process was accepted culturally and religiously in the Jordanian community. One may expect that these two factors would be enough to have contributed to mediation growth, but in reality, it has not been enough. Thus, the interview findings identified several factors that need to be adopted to contribute to its growth. The researcher applied NVivo to the transcribed data and manually cross checked for clear headings:

| Comments by the interviewees according to themes | ID |
|---|---|
| **Establishing a national centre for alternative solutions and mediation** | J2, J4 and J5 |
| **Changing the minds of decision-makers and people** | J2, J4, J5 |
| **Activating the mediation process in all Jordanian courts and regulating the pre-action court procedure** | J2, J6 |
| **Marketing the mediation process, public perception, participation and satisfaction** | J1, J3, J4, J5, J6 |
| **Developing training programs and assessing mediation sessions** | J5 and J6 |

Table 4: Headings related to room for improvement in Mediation in Jordan

Firstly, the findings suggest that establishing a national centre for DR processes in Jordan may be a motivational factor for increasing the uptake of mediation. The interviewees indicated this centre could conduct training programs to raise professionalism and develop mediators' careers. The centre could also conduct research that would aim to evaluate the process and provide evidence-based solutions to issues it may face:

> *The existence of a national centre for alternative solutions and mediation specifically will help to revive the role of private mediation, and will encourage [potential mediators] to do necessary studies to improve this process ... J2*

> *... establishing an independent centre for mediation so that candidate mediators can be relied on to be trained ... J4*

> *... As long as we do not have actual active DR centres, we cannot have mediation as part of the process of solving disputes. J5*

The second category of three participants in the interview showed some preference for the need to change the minds of decision-makers and people about the mediation process. One interviewee indicated that decision-makers play an essential role in enabling practitioners to practice mediation more effectively. Typical of this is the following comment:

> *... change the minds of decision-makers... I would like to make them think more in the direction of mediation, it is miserable ... if the decision-maker does not give me as a mediator, the mechanism that will help me to practice this process, my convictions about the importance of mediation will just be convictions… J2*

The need to change the Jordanian people's mindset was made clear if the uptake of this process in Jordan is to expand:

> *… the people and lawyers' need to change, not the law …[but] the attitude towards mediation needs to be changed and to be well-established… lawyers are worried about a loss of legal fees, or they see mediation is a waste of time… J4*

*...change the mindsets for lawyer to make them encourage their clients to resort to mediation as alternative solution ... J5*

The third set of comments was around activating the mediation process in all Jordanian courts and regulating the pre-action court procedure. A failing of the mediation departments, which were established according to the Mediation Act in each First instance court around the country, was that they had not been operating as envisaged and this was seen as a definite issue:

*... activating the role of mediation in all Jordanian courts not only Amman courts (J2)*

Related was one interviewee's suggestion that the Jordanian legislature should adopt mediation as a pre-action requirement:

*Adopt the option to change the mediation law through making parties to the dispute[be] required to present the dispute to mediation before resorting to the court. (J6)*

Improving public perception, participation and satisfaction in Jordan, which appears currently to be at its lowest levels was indicated by four participants. Each indicated room for improvement:

*I believe that participation is decreased in Jordan which may reflect the unsatisfaction (sic) in the mediation process. (J1)*

*The concept of mediation is extremely accepted among Jordanians, and they like to do mediation. It's part of our culture. Nevertheless, the participation and the satisfaction and the perception is not that good, because ... the practitioners don't promote it well. (J4)*

*Public perception, satisfaction and participation, still in Jordan are not that good... (J5)*

*Public satisfaction, I think, is in the lowest level ... (J6)*

Improved marketing of the mediation process in the broader community, in order to raise awareness of the process among the people, was suggested as an essential aspect of increasing the uptake of mediation in Jordan:

*... It needs some marketing. If you will not encourage people to move to mediation, they will not use it...' (J3)*

Only two interviewees indicated that the growth and development of mediation in Jordan could be improved by imposing education and training programs on the practitioners:

*I believe that awareness of the parties about the importance of using mediation and educating or training the practitioners periodically will play an important role in increasing the ratio of participation in mediation. (J5)*

*We need to TV programmes about the bright side of mediation to educate the general audience. We need to educate the lawyer about this process because most of them ... do not know about this process and its importance, they think or believe this process is wasting ... their time. If this is done, the process will ...spread. (J6)*

Another participant added that assessment after each session of meditation was necessary to evaluate the weaknesses and strengths of this process and to measure the parties' satisfaction. This interviewee confirmed that no assessment had been conducted in Jordan since 2008:

*At the beginning of my work in the mediation department, there was an assessment of our work in a mediation process. Also, there are statistics that are hold related to parties' satisfaction and rates of settlement by American Bar Association between 2007-2008… We could determine the points that parties are satisfied with and the points that were not. but now, I do not believe there are new assessments, as much as I can say the proportion of attendance of the parties to the mediation department is so much decreased… A2*

These findings demonstrate that mediation in both countries needs to improve. For example, the findings from the Jordanian interviews showed that mediation was not recognised as part of all Jordanian courts civil justice system. This is supported by the literature review in chapter 4,[14] and it can be explained by the absence of a clear policy at the national level to raise awareness with the public about this process, which also explains why court-mandated mediation is mainly concentrated in the

[14] See e.g. Rula Al Alahmad, 'Mediation for Settling the Civil Disputes in the Jordanian Law' (PhD Thesis, Amman Arab University for Postgraduate Studies, 2008) 44.

Amman First Instance courts.[15] The Australian interviewee analysis confirmed that regardless of the advanced state of mediation in Australia, it could still benefit from changes around this process. Room for increased understanding of the mediation process is clearly present in both countries. This was put to the interviewees in the form of a question about the need for more research.

### 6.2.7 Need for Research

The participants were asked: ‘What do you consider the most critical areas for which further research is needed?’ Practitioners were in a prime position to identify what was working and what needed more development to assist them in their practice. Therefore, this question sought to draw out aspects identified as requiring more attention. In the Australian interviews, a range of concerns was uncovered, no doubt reflective of the range of interviewees' practices. While diverse, they indicated that there were no grounds for feeling that mediation in Australia was at its best or fully matured, and development supported by research would always be required.

One interviewee identified two crucial aspects that would benefit from further research. The first was evaluating the mediation system and its effectiveness in cutting the cost of justice and easing the burden on the courts:

> *…the perception of policymakers that mediation and dispute resolution are a panacea for ailing legal systems. And that they are an easy way to cut costs. I think evaluating, and researching the existing systems that are in place and their market effects is something that is quite critical for Australia at this point… (A3)*

This interviewee also believed that conducting comparative studies between Western and other cultures could lead to improved understanding, by assessing differences and similarities in theoretical underpinnings:

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15 See e.g. Khaled Ta'amneh, 'Mediation as an Alternative Commercial Disputes Resolution in Jordanian Law' (LLM Thesis, Jadara University, 2011) 57.

*I think it is also quite critical to better understand how western forms of mediation overlap and where they differ from culturally different forms of customary mediation and dispute resolution … (A3)*

Another four areas identified as needing further research included focusing more on the role of lawyer in this process, parties' active listening, the quality of decision-making, and family mediation. The interviewee's comments included:

*… studying the important role of lawyer in the process of mediation because lawyers need to be diligent that where they think it may be appropriate, refer people to mediation … A1*

*I think there needs to be a lot more research and involvement in active listening and respecting the other party's point of view. A2*

*I think … research in … better understanding of quality decision making by the parties, and what supports are necessary to assist people to make a quality decision. A4*

*Probably more research on mediation … for families to be able to move on when they are in the middle of a dispute because it involves children's matters and children become in the middle with adult conflict. A5*

In the Jordanian interviews some critical aspects needing more attention included training and accreditation (five comments), private mediation (one comment), parties' satisfaction (one comment), and legal community convictions (one comment). The majority of the interviews noted that the most critical aspect that needed to be focused on by the researchers in Jordan was training and accreditation processes. This is consistent with the literature review in chapter 4, which confirmed that Jordan does not have any training program or accreditation system that ensures raising awareness about this process or offering the candidate practitioners skills in mediation as a dispute management process:

*…research about the details and mechanisms of mediation to take its real role that it deserves to occupy in Jordan. … (J2)*

*Research on educating the candidates how to be mediators, improving their skills and explaining how to do the process step by step. J3*

*…the obstacle that needs to be covered in research is the practitioners and how they use this tool… (J4)*

*… more research in the mediation techniques, the role of mediator and about establishing guidelines for mediators. (J5)*

*… more research on how the mediator can practice the mediation …(J6)*

Two participants also referred to private mediation, legal community convictions and parties' satisfaction. Their comments included:

*… Further research to support private mediation. We need to activate its role much more… the issue of the legal community's conviction especially the community of lawyers… J2*

*… we need more statistics about the parties' satisfaction to determine the drawbacks and try to fix it… J6*

As explained in chapter 4, the Jordanian legislature allows the disputants to resort to the mediation process outside the court and to choose their private mediator. However, there is no reported research available on this private practice of mediation in Jordan. Another interviewee referred to the need to study the legal community's conviction, and lawyers' reasons for resisting uptake of this process. Parties' satisfaction, as established through statistical research, is minimal and further research is required. Explained in chapter 4 when Ta'amneh confirms that the only statistics available dealing with the satisfaction of the disputants was conducted in 2008. [16]

These findings should be encouraging for future researchers as they present a rich array of needs for future research. They also highlight current important needs across the two countries and reflect some common concerns, such as the role of the lawyer in mediation and the use of mediation techniques. They further reflect, as perhaps one would expect, the different levels at which mediation practice is advanced in both countries. Certainly, helping lawyers and mediators to understand the process much better should improve their performance in this process and

[16] See also, Ta'amneh (n 15) 56; *Progress Report on the Progress of Court-Related Mediation Program in Jordan between June 2007 - May 2008 Amman* (American Judges and Lawyers Association-Rule of Law Initiative, ('*The Progress of Court-Related Mediation Program Report*').

positively impact on its uptake, particularly in Jordan. One participant (A3) as noted above reinforced the importance of this thesis in comparing the modern form of mediation with customary mediation practices. This supports the next question that aimed to determine culture differences and how these affected the adoption of mediation.

### 6.2.8 Cultural Effects

As this thesis has reported, the early history of mediation in both countries was rooted in the cultural practices of Indigenous communities.[17] This is reflected in the practice of bringing the disputed issues to respected members in the community. Modern Australia is a multicultural country with nearly every culture in the world having a presence. Over time, this brings many influences, however, all people in Australia are subject to one system of law, under a rule of law, as described in Chapter 5. Jordanians are under the rule of law as well, but although it is a more homogeneous culture, there are different religious elements and a degree of legal plurality in its legal system. The interviewees were asked how culture may influence the operation of mediation and how it was considered and addressed in mediations. Three Australian interviewees stressed the importance of the mediator being aware of how cultural differences of disputants should be considered in the mediation process:

> *… mediators have to be very careful that they are very respectful of culture. A1*

> *In a multicultural situation, it is very important to be aware of cultural norms. And to respect them. A2*

> *Mediation is always going to operate differently in different cultures. … in China, mediators who were essentially people in the community who acted as facilitators and then made a decision and the mediator has to tell the parties how to solve their dispute. In Australia, mediators aren't supposed to tell people what to do. So, people have a different expectation*

[17] See further, Louise Fletcher, Mara Olekalns and Helen De Cieri, 'Cultural Differences in Conflict Resolution: Individualism and Collectivism in the Asia-Pacific Region' Working Paper No 2, The University of Melbourne, 1998, 1.

*in different cultures. So, culture will always have a huge impact on how mediation is perceived and conducted. A4*

Another Australian interviewee believed that culture affects a disputant's convictions; but if they find that mediation provides benefits for them, they will be adaptable to the dispute management process:

*I think most people are very accepting, if they are given the opportunity to do something that is less stressful, less emotional, less costly, the culture will work with that… (A5)*

A very interesting observation of the underlying influence of Christian beliefs, in Australia, was expressed by one interviewee who referred to the logical rational legal system, as influenced by Aristotle and other early Christian thinkers, according to which emotion is to be sidelined.This is supported in chapter 3 when Cohen confirmed this kind of culture is strongly influenced by Anglo-Saxon legal habits. [18] The interviewee suggested it brought with it a neoliberal worldview that was not aligned with mediation's hallmarks. This rational economic thinking impacts for instance in Australia on the belief that marriage and other disputes, involving perhaps many years of relationships, can be managed to agree a solution within one four-hour mediation, by cutting out the emotions and reaching a rational solution:

*… mediation in Australia is highly influenced by ideas of the Christian confessional, by ideas of rational economic thinking, and cutting out emotions or special types of knowledge and I think this goes hand-in-hand with a culture of often sort of favoring neo-liberal approaches to economy and community and the idea of mediation as a commercial service … (A3)*

These observations provide insight into the historical impact of belief systems that still carry influence today, such as in the neoliberal influence on how mediation is conducted. They also recognise the need to consider culture as a specific element, as it may influence the way parties engage, or not, in a mediation. It is therefore

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[18] See; Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* (United States Institute for Peace Press, 2007) 31; Liu Qingxue, 'Understanding Different Cultural Patterns or Orientations between East and West' (2003) 9 *Investigationes Linguisticae* 22-30, 23.

important that the mediator considers the parties' cultural standards and adopts appropriate ways to reconcile these differences.

Jordanian interviewees' responses were more aligned, as perhaps would be expected in a more homogenous culture. Their responses supported the observations in the earlier chapters of this thesis that the mediation process was deeply-rooted in Jordanian culture, which made it more acceptable:

> *…The culture has a definite and important and critical influence on how mediation is conducted locally. Specifically, in Jordan, we noticed a system which followed Bedouin culture Wassata, which is the early tradition of tribal chiefs handling family disputes or disputes within their tribes. For how we set up mediation in Jordan was to honour and respect that tradition by having Magistrates to be mediators. J1*

> *Our society, our culture believes in settling disputes via mediation instead of suit against each other in the court because it's a bad thing to file a lawsuit against someone. If you take it from a culture's viewpoint or from a religious viewpoint, they both lead you to use mediation as a tool to settle disputes. J3*

> *… in our cultural legacy, yes, the form of mediation exists strongly by having tribal mediation or having even tribal judges solve and resolve many of the …disputes in Jordan… J6*

These are interesting observations given the exploration in Chapter 4, which indicated the fundamental nature of a Bedouin 'mediation' as a process most aligned with what is now understood as arbitration. The comments also support the adoption of the evaluative style of mediation now used by the Courts. [19] One interviewee did engage with this when observing that some practitioners did not understand the differences between these concepts and the adversarial Bedouin style in solving disputes, instead of facilitating dialogue between the disputants:

> *…the evaluative model is commonly adopted by judicial mediator in Jordan as they are trained to give advice… I found a lot of confusion*

[19] John Wade, 'Evaluative Mediation-Elephants in the Room?') <http://www.mediate.com/articles/wade-evaluative-mediation.cfm>.

*between the modern concepts of mediation and tribal mediation ... some mediators misunderstood and mixed between these concepts… (J2)*

As regards the importance of the mediator taking into account the cultural differences between the disputants in order to assist them in reaching a mutually acceptable solution, two Jordanian interviewees replicated the comments by the Australian interviewees:

*The mediator must be aware the party from the south of Jordan is different from ... the north of Jordan. ... the mediator must be aware of the different cultural background of each party to guarantee the success of this process. (J4)*

*... the mediator has to be aware about the Jordanian culture, even geographically speaking language, what you may freely discuss with someone who lives in Amman might be something of a taboo to discuss with someone who lives on the Bedouin side in the east of Jordan. (J5)*

Consideration of the cultural differences between the disputants in Jordan was narrowed down to regional differences, rather than consideration of multicultural concerns. The observations that the mediation practice is firmly rooted in the Jordanian community, as influenced by the Bedouin dispute resolution process, is supported by the literature. Pely confirms that dispute resolution processes such as *Sulha,* which show the disputants the path for putting an end to their dispute peacefully, go back thousands of years in Jordan. [20] This may account for the ready adoption of the wise person, a judge or lawyer, giving advice in an evaluative model of mediation. [21] However, understanding the hallmarks of mediation and the benefits of a facilitative approach is something Jordan could no doubt benefit from in order to improve the uptake of mediation.

[20] Doron Pely, 'Resolving Clan-Based Disputes using the Sulha, the Traditional Dispute Resolution Process of the Middle East' (2008) 63(4) *Dispute Resolution Journal* 80, 86.

[21] Alsaleeby (n 7) 5; Al-Rashdan (n 11) 10.

## 6.3 Summary

The data from the interviews presented in this chapter generally provides overwhelming support for the literature and observations reported in the earlier chapters. Using a comparative lens, it flags issues in a number of areas that have not previously been highlighted. This chapter has presented the findings from 11 interviews, discussed the findings in light of the observations presented in Chapters 1, 3, 4 and 5.

The first research question explored the interviewees' understanding of the term 'mediation'. The analysis of the interviews in this chapter indicated that a similar basic understanding of mediation was typical in both countries. The participants in the interview provided a broad understanding of the term, which could lead to misunderstanding as to what the mediation actually means as a DR process. This needs refinement to start addressing a clearer understanding of the different models in order to educate the public, the parties, and the mediators and lawyers operating in the field. Although not all interviewees would agree, it is clear that at the very least the mediators and legal profession should have a clearer grasp of these differences.

The next two questions aimed to determine the use and adoption of different mediation models and parties' awareness of the models used. The interview analysis confirmed that the facilitative and evaluative mediation models were followed in both countries. These results indicated that using a blended process was not uncommon but generally requires an expert mediator for the process to be managed successfully. There was disagreement on the level of the disputants' awareness of the model followed. Some thought it was important for disputants to have clear expectations of the process, while others thought it was less important, as they were mostly just focused on getting an outcome, rather than on how they got there.

The position of mediation within the spectrum of available DR methods was considered. The Australian interview results showed that this process fits into a middle tier of processes as a facilitative communication focus for resolving disputes, while the Jordanian findings confirmed that mediation ranges between informal Bedouin type mediations to the more formal court mandated mediation, but behind arbitration.

In regard to the history of the DR system in both countries, important changes that have occurred over the years from the participants' perspectives were revealed. The analysis of the Australian interviews in the chapter indicates that there were three key factors that contributed to the development of this phenomenon: mediation becoming more compulsory, a growing professionalism as the role of the mediator becomes professionalised, and mediation becoming an accepted part of the legal system, such as being recognised as enforceable as a DR process in contract clauses. The Jordanian findings concurred with the earlier discussion in the thesis, which showed a lack of critical growth in the mediation process in this country.

The interviewees were asked what further improvements needed to be adopted in the mediation process. The Australian interviewees suggested three improvements that they hoped could be adopted in Australia: further professionalising the mediation process, supervision of mediators, greater improvements in training programs and the education system. The Jordanian interviewees suggested five improvements that they hoped would be adopted in Jordan: establishing a national centre, changing the minds of decision makers and citizens, activating this process in all Jordanian courts, marketing the process, and legislating for mediation to be adopted as a pre-court procedure.

Aspects identified as requiring more attention from researchers included from the Australian interviews: evaluating the mediation system, comparing Western and cultural forms of mediation, the role of lawyers, parties' active listening, the quality of decision-making, and family mediation. The analysis from the Jordanian interviews indicate that there were four aspects that should be considered by researchers: training and accreditation, private mediation, parties' satisfaction, and addressing the legal community's conviction.

Culture in relation to progress of the mediation process in both countries was considered. The Australian interviewees indicated that mediation has existed as a concept followed by Indigenous cultures, but also that the Christian culture has influenced a rational economic thinking in Australia. By contrast, the Jordanian interviews confirmed that its mediation process was deeply rooted in the Jordanian

culture. However, when the legislature adopted this process, even though they were impressed with the American experience in using the facilitative process, mediators tended to adopt an evaluative style. To increase the uptake of mediation in Jordan, it may be valuable to demonstrate to Jordanian citizens the mediation-rich history and its tradition in Jordanian culture. This could occur through raising educational awareness of reform measures, which could be implemented as a requirement of government programs to encourage using mediation.

The interview data largely supported what the research in the earlier chapters had flagged, but it also provided refined nuances to be considered. These are taken up in Chapter 8 in addressing the recommendations. However, before that, the next chapter separately analyses the data from the last interview question, which related to mediation hallmarks, as these are key aspects in determining how mediation should ideally operate.

# Chapter 7: Mediations Hallmarks: in Australia and Jordan

## 7.0 Introduction

This chapter continues to report on the data relating to the interviewees' opinions on how well the hallmarks of mediation are observed. These hallmarks include confidentiality, voluntariness, empowerment, impartiality, and parties providing their own solutions. This is done separately in this chapter, as the hallmarks are the foundational philosophy supporting the practice of mediation. They have been outlined and discussed in Chapter 1. This chapter revisits each of these hallmarks in light of the data obtained during the interviews, to see how well each is observed in both Australia and Jordan. The observations are focused on the area of court-mandated mediation and the different developments in Australia and Jordan. The hallmarks provide a basis by which to measure the success of mediation in both countries. The interviewees were asked to give their opinions on the observance of these hallmarks: confidentiality, impartiality, voluntariness, and empowerment.

### 1. Confidentiality

Interviewees were asked to comment on how confidentiality was observed and how important it was to the success of mediation. This question helped elicit any obstacles to confidentiality in both countries. Two Australian findings are consistent with the literature reviewed in chapter 1 which noted that protecting open and honest discussions and disclosure can ensure the best opportunity for settlement.[1] The interviewees describe confidentiality as an essential pillar in the mediation process because the disputants can speak freely during the mediation session without fear of disclosing their information:

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[1] See e.g. Vicki Vann, 'Confidentiality in Court-Sponsored Mediation: Disclosure at your own Risk?' (1999) 10(3) *Australian Dispute Resolution Journal* 195-205; Michael Pryles, 'Mediation Confidentiality in Subsequent Proceedings' (Conference Paper, International Congress and Convention Association (ICCA) Conference, 2004) quoted in Joe Harman, 'Mediation Confidentiality: Origins, Application and Exceptions and Practical Implications' (2017 ) 28 *Australasian Dispute Resolution Journal* 106, 109; John Arthur, 'Confidentiality and Privilege in Mediation' (2015) *Australian Alternative Dispute Resolution Law Bulletin* 91.

> *Confidentiality is really important. People are talking about very personal matters and they need to have the confidence that what is said in the room will stay in the room and won't be dissipated out into the community, so I think that is really critical and I think it is reassuring for parties to be told once again that the process is confidential. (A2)*

> *This hallmark is important, and it comes with occasional exceptions. For example, if somebody is at risk or property is at risk, a mediator has to let the parties know that there are some exceptions to confidentiality. (A5)*

Participants also confirmed, however, that there was a need to examine and clarify the operation of confidentiality within the mediation process. They believed that not all aspects needed to be confidential as this could work against the disputants' best interests in some circumstances:

> *Confidentiality is a very misunderstood guideline. Because people sometimes say that no one is allowed to talk about mediation ... I think it needs to be identified what part is confidential and what aspects of confidentiality don't fit with the outcome of the mediation. (A1)*

> *I [have] a fair bit of problems with the idea of confidentiality because confidentiality is used very often in settlement agreements to stifle any kind of public discussion of issues. So, I think we really need to rethink confidentiality or at least rethink the types of disputes that go to a confidential mediation. Confidentiality should be discussed with the parties as part of the mediation, but they shouldn't be forced contractually or legally to keep matters confidential. This is actually against their best interests. (A3)*

This interviewee suggested the law that governs confidentiality needs to change and stated that this hallmark should be refined, especially in court-mandated mediations:

> *... their needs to be a rethink of confidentiality and also a reworking of the laws governing confidentiality at the moment. In a time of mandated court-related compulsory mediation, confidentiality actually creates a space in which mediator performance cannot be properly assessed and managed. ...A3*

Among the Jordanian interviewees, three participants confirmed that this hallmark was a core element in the mediation process, and that it was secured by the *Mediation Act*:

> *Confidentiality is strictly enforced in Jordan; the mediator cannot come out and talk about anything that happened in the session or talk about any subject that was discussed within the framework of mediation… (J2)*

> *One of the most important things in mediation is confidentiality. The mediator will keep any information that [arises] in this process confidential, and it is assured in Jordan by the law. (J3)*

> *The law specifically states that all procedures of the mediations are confidential, and they cannot be used and relied upon. (J4)*

Two participants believed that this hallmark was not seen as a concern in Jordan because the mediation process was recently adopted, and there are no cases to suggest that this hallmark was an issue for parties:

> *Confidentiality is an important component in the mediation contract, but it is not considered as an issue in Jordan because there are no cases that give rise to this hallmark as an issue. (J5)*

> *Jordan is a small country … confidentiality might not be, believe it or not, a big concern in Jordan, as long as people do litigate and litigation records are public, parties to a dispute are not so well or so deeply concerned with confidentiality. (J6)*

The data generally concurs with the literature (Chapter 1) in that confidentiality is assured in Australia [2] and Jordan, [3] and that it is important to sustain the practice for mediation. Interestingly, however, and perhaps because it is more advanced in the practice, the analysis of the Australian interviews suggests that this hallmark needs to be further refined and reconsidered. In terms of giving the disputants the ability to decide whether it should be confidential or not, or whether to create improved guidelines on what should be confidential leaving room for the parties to

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[2] Vann (n 1) 195; Pryles (n 1) quoted in Harman (1)109; Arthur (1) 91.

[3] Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010) 62; Ali Mahmoud Al-Rashdan, *Mediation in Settlement the Disputes* (Dar Al-Yazoury Scientific for Publishing, 2016) 35.

decide whether they wish to adopt a total confidentiality. Such an approach would enable greater party empowerment. This is a refinement, suggesting that confidentiality could be further developed as a hallmark and that more research in this area may benefit the practice.

Jordanian interviewees suggested this hallmark was not considered to be a significant issue, as the Jordanian experience in this field is still relatively recent, and there was no case law on the issue. However, the Jordanian literature is perhaps more advanced in picking up areas for concern over confidentiality. One researcher flagged the requirement that the mediator submit a report to the judge about the disputants' genuine efforts if the case does not resolve. In this case, the mediator can reveal some information that could create a confidentiality issue, which must be considered by the mediator and legislature, as it may discourage parties from thoroughly engaging in the process.

## 2. Impartiality

The Australian answers about impartiality showed a range in points of views. Two Australian participants indicated that impartiality was a critical hallmark in the mediation process. These interviewees believed that this hallmark was a source of quality assurance of a mediation. In other words, this hallmark served to ensure that the parties felt confident with the process to reach their own solutions, which is consistent with the literature in Chapter 1: [4]

> *Impartiality, I think, is an extremely important part of this process to ensure parties confidence in the process, as impartiality is a quality assurance of a mediation... (A4)*

> *As a mediator, I do not experience any problem with my impartiality... I think it is very important to be impartial in terms of if there are separate sessions if I say I'm going to spend ten minutes with the other party and I need to spend more, to come back and explain that to the party waiting and make sure that there's equal time given. (A2)*

[4] See, David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2014) 42.

Two interviewees indicated that this hallmark was inapplicable because some mediators have personal experience in the field of dispute, and they cannot be purely neutral or impartial. Instead, in such evaluative mediation situations the mediator should create a safe space to construct a healthy conversation with the disputants in order to reach a satisfying result for both parties:

> *The mediator cannot be entirely impartial or entirely objective in some area of disputes. For example, you are working in the family space and you have been abused, you have been a victim of domestic violence, can you really say you are totally impartial, some people would say Yes, other people would say, No, we can't work in that space, it's too close, it is too hurtful, we have been impacted too badly by our own experience and we choose not to work in that area. (A5)*

Not surprisingly, one interviewee suggested impartiality could never truly exist. This certainly has generated a lot of literature, as the hallmark initially required was neutrality.[5] Over time, and after much debate in the literature,[6] the term has changed to impartiality in recognition that neutrality was never really possible:

> *Impartiality. I don't think it exists. Neither does neutrality. It is a social construct. I'm interpreting this, and I believe that reality is socially constructed by all of us. There is ample evidence in studies that have been made of how mediators have shown bias, even though they weren't aware of it themselves. That is not to say that we should do away with the term completely because it is also about creating a certain, I suppose, expectation and framing of a dispute in a particular way that created a kind of safe space for constructive conversation from parties, but they shouldn't be the kinds of pillars that they're often being called. (A3)*

Another interview preferred the term independent: *'I like the word independent instead of impartial. The mediator should inform the parties if*

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5 See eg, Neha Sharma, 'Mirror, Mirror on the Wall, Is there no Reality in Neutrality after all? Re-Thinking ADR Practices for Indigenous Australians' (2014) 25 *Australasian Dispute Resolution Journal* 231.

6 See, Susan Douglas, 'Mediator Neutrality: A Model for Understanding Practice' (PhD Thesis, University of the Sunshine Coast 2009).

*s/he shows any bias, they can raise that because it is better than a complaint.' (A1)*

Overall, the Australian interviews support the literature review in chapter 1 in relation to impartiality.[7] That this hallmark has been debatable, as an unrealistic demand to make on any human, raises the further question as to whether an impartial approach is possible at all.[8] Currently, the term impartial is considered as a realistic possibility. However, as the interviewees noted in some cases, such as evaluative mediation, the term impartial may not be useful.[9] Furthermore, the view by interviewees A3 and A4 confirmed that the practice challenged the reality of this expectation, as humans also have unconscious bias, which makes it difficult to achieve this perfection in reality.[10] It would not be unreasonable for the suggestion of the term 'independent' to be further investigated.

The findings from the Jordanian interviews showed varied opinions between the participants. As discussed in chapter 4, the mediation process is practised by judicial mediators.[11] When a judge practises this process, it is seen to guarantees impartiality, as a judge is highly trained in the concept because decisions must be unbiased. Furthermore, interviewees noted that the parties could stop the process at any time, if the mediator was considered not to be acting impartially. This sentiment was shared by four interviewees:

> *Impartiality is completely guaranteed for two reasons ... The first reason, mediation in Jordan is judicial mediation as a first point, who implement this process, are mediator judges who can enhance the settlement... the parties do not hesitate at all if they find the mediator not impartial and*

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7 See eg, Arthur Gorrie, 'Mediator Neutrality: High Ideal or Scared Cow?' (Conference Paper, National Mediation Conference, 1995), 34-35.

8 Jonathan Crowe and Rachael Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *Australasian Dispute Resolution Journal* 273-280; Robert Bush and Sally Pope, 'Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 67; Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law and Policy* 71; Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248.

9 See, Crowe and Field (n 8) 273 ; Bush and Pope (n 8) 67 ; Izumi (n 8) 71; Wolski (n 8) 248.

10 Arthur Gorrie, 'Mediator Neutrality: High Ideal or Scared Cow?' (Conference Paper, National Mediation Conference, 1995), 34-35.

11 Alsaleeby (n 3)62; Al-Rashdan (n 3)35.

*they will stop the proceedings and submit complaints against the mediator... (J2)*

*... it's the parties' role to choose a neutral mediator and if you have any doubt about it, you stop the whole process. (J3)*

*Impartiality, it's very important because of the judicial mediator, it's very difficult to assume that the judges are not impartial in their ruling... (J4)*

However, one participant did not agree with these comments and believed quite the contrary; that judicial mediation destroyed the impartiality as an essential hallmark in the mediation process:

*... if the parties in Jordan are conducting mediation by judicial settlement conferences, in my view, that completely destroys impartiality... (J1)*

One participant acknowledged that it was a difficult task to be impartial but felt that the ultimate control was left to the parties themselves:

*... it is difficult to be impartial, but the party can determine that, and then stop the whole process if needed (J5).*

An indication that impartiality is a challenging hallmark to observe in the pure form was reflected by one comment:

*It is difficult to achieve the pure form of impartiality in Jordan because sometimes the party may know the mediator or have someone who knows this mediator, which will be exploited negatively to press on the mediator to be biased with him. It is a really big problem! (J6)*

The Jordanian interviewees provided valuable insight into the notion of mediator impartiality in that country because there is no research published that explores how this hallmark operates in Jordan. Without the interviewees' responses, it is difficult to assess how this hallmark is observed in Jordan. The findings from the interviews confirmed that judicial mediation, being mediation that a judge has mandated under the Mediation Law, was dominant and considered to be effective as regards impartiality The interviewees suggested that the judicial mediator, because of their judicial training, was associated with impartiality in judging, which in turn made it a secured hallmark. The mediation process is voluntary in Jordan, which means the

disputants can freely participate and freely leave.[12] The interview data generally supported this. However, the interviewee that indicated the very opposite, namely that judicial mediation in Jordan could potentially destroy the value of this hallmark may be a lone voice but should not be disregarded. This may happen because judges tend to use adjudicative skills or directive styles to get the disputants to agree to a settlement, and in such a situation, the impartiality is broken as the Judge is effectively favouring the position of one party based on their interpretation of the law. Still, this has to be considered in light of the cultural approach in a high context culture (as discussed in chapter 4) in Jordan, with strong community ties, in which members of the community must support each other as a form of mutual obligation and respect their elders. In other words, the mediator is seen as an authoritative figure, irrespective of whether they are a Judge and may influence the outcome through their preferences and choices, rather than have the parties achieve their personal goals by adopting a mutually acceptable solution. This raises subtle considerations for the question of impartiality in an HCC.

### 3. Empowerment

The third hallmark covered in the interview data suggests that parties' self-empowerment needs more encouragement in the mediation process, through mediators consciously helping the disputants to reach their acceptable mutual solution:

> *... mediators must encourage the clients to be self-determined, to find their own solutions. (A1)*

One Australian participant in the interviews provided an alternative view on the use of mediation to empower parties. They noticed that there were many disputes that did not need to be mediated, and in such cases, it could disempower parties. This interviewee suggested that the reasons for this were the costs of the normal legal system, which they suggested required much reconsideration and should be reformed to reach better outcomes for disputants:

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[12] Khaled Ta'amneh, 'Mediation as an Alternative Commercial Disputes Resolution in Jordanian Law' (LLM Thesis, Jadara University, 2011) 45.

*Change the legal system ... and reform the introduction of regulations on the court and legal costs could actually create better outcomes... I have great problems with a legal system that completely over-pays judges, lawyers and so everyone connected to the legal process and then tries to overcome the incredible imbalances that this creates by sending disputes, almost any type of dispute to mediation and it is used to disempower the disputants. A3*

Still, this interviewee readily acknowledged that the mediation process did operate to empower the disputants to negotiate and to reach a mutually accepted solution:

*... the model that we practice and teach is improved into exploring a relationship, assisting parties to communicate better with each other and creating moments of recognition and empowerment between them. A3*

All Australian participants supported parties' empowerment as an important hallmark in Australia's medition development. This factor ensures the parties have greater control over their dispute, including what they bring to the dispute, generating options, and controlling the outcome.[13] This hallmark is important as it allows the parties to determine, create and develop their mutually satisfactory resolution and thereby helping topreserve their future relationships.[14] Thus, this hallmark has been a strong aspect that has assisted the mediation process in becoming accepted as a DR process in Australia.

The Jordanian interviewees also confirmed this hallmark as essential in guaranteeing the success of the mediation process in Jordan. However, the research in this thesis suggests that this hallmark is not properly in operation when the evaluative model of mediation is adopted. Furthermore, one interviewee added that Jordanians were unskilled in negotiation:

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13 Albie Davis and Richard Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) *Mediation Quarterly*, 17.

14 Jacob Bercovitch and Scott S Gartner, 'Is there Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation' (2006) 32 *International Interactions* 329.

*... when this principle is secured by the law and when the disputants are aware about this hallmark ... it can increase the uptake of mediation in Jordan... J2*

*... empowerment is an important principle in the mediation practice in Jordan, however, adopting the determinative role for a mediator cancels the activeness of this principle... J3*

*... the problem is that Jordanians do not know how to negotiate to reach their own solution... I think it is important to make an awareness campaign about the way of negotiating to help them apply this hallmark in the reality ... J5*

These findings generally establish the importance of empowerment in both countries. The Australian interview results were consistent with the literature review in chapter 1, [15] in which this hallmark was established as an important for mediation. By contrast, there is limited research examining this hallmark in Jordan. The findings raise several issues that future research can address. The training of mediators in the skills for interventions in the mediation process should focus attention on the capacity of disputants to reach their own solutions. Generally, more education around the mediation process and models could raise awareness of the Jordanian people about negotiation principles, which could help them craft their own solutions and move society in a mediational direction.

## 4. Voluntariness vs Court-mandated

Voluntariness is a clear hallmark philosophy underlying the practice of mediation. The ways on which this aspect of voluntariness arises in court-mandated mediation has attracted attention in the literature, and the interviewees were therefore asked about their opinions of its importance and operation. As discussed in chapters 4 and 5, mediation in Australia is now encouraged, and in some cases mandatory, whereas it remains optional in Jordan.

[15] See eg, Bornali Borah, 'Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice' (2017) 28 *Australasian Dispute Resolution Journal* 98.

One participant confirmed that mediation was still voluntary in Australia, even in court-mandated mediation, because the disputants could stop the process at any time, provided they could be seen to have made a genuine effort. Another interviewee believed that court-mandated mediation did not contradict the voluntariness hallmark and was necessary, because it provided the disputants with an opportunity to communicate to solve their disputed issues in a shorter and more cost effective manner:

> *I always think that mediation in Australia is voluntary because the parties can walk out, but if they don't participate in good faith or make a genuine effort, they know that they will get this certificate that says they didn't make a genuine effort which means that the court can [order] costs against them. ...Court-ordered I think it is often very good because the judges listen to them then says look, I'm ordering you to go to mediation and you can walk out any time if it is not safe. At least they have an opportunity to talk with each other rather than waiting three years for a result. (A1)*

However, two participants believed that resorting to mediation had to be optional for parties, even though the idea of court-mandated mediation was thriving:

> *A fine example in a reasonably narrow context shows that court-mandated mediation is successful and can create agreements although there is still research that is much in favor of voluntary mediation processes. Basically, the culturally appropriate way that parties have been imposed [on in] using litigation and then you come to force them to try something else! (A3)*

> *... a successful mediation occurs when people think [of] all possible options and [consider]choosing to go to court as a better option, so they shouldn't be subject to pressure to return to mediation. (A4)*

Chapter 4 identified that the judge in Jordan when referring a dispute to mediation must take into account the consent of the parties where possible. This is confirmed by the Jordanian interviews:

> *In Jordan, the mediation process is purely voluntary because the judge cannot refer the case to the mediator without getting the parties acceptance...J2*

*...we cannot go to mediation unless there is a case filed in the Court. The court cannot enforce the parties to go mediation. It's an option...J4*

*... the mediation in Jordan is still voluntary which is the pure nature of mediation process, if we adopt another approach it will be against this core. The parties have to participate voluntarily not compulsorily. (J6)*

Three participants noted that voluntariness was a barrier that hindered the progress of mediation in Jordan, and they suggested that the legislature should adopt mandated mediation to activate and adequately refresh this process:

*I wish ...this process is mandatory because it will encourage the parties to use this process. (J2)*

*The Jordanian legislature adopted the post-Court mediation, I wish... the pre-Court mediation is adopted. (J4)*

*I wish... we have court mandated mediation, the process in Jordan is still voluntary. Some parties believe that mediation ... wastes ... their time. I believe if the legislature adopts the court mandated approach the proportion of solving the dispute outside the court will increase. (J5)*

The results indicate that the Australian mediation practice remains voluntary in nature despite the fact it is mandated. In other words, the disputants can leave at any time if they find this process is not effective in solving their dispute. On the other hand, the Jordanian participants showed a desire for court-mandated mediation in Jordan, without deferring to parties' consent, as it could play an essential role in helping the process grow. The Australian view is that court-mandated mediation does not rule out voluntariness as a hallmark, given the parties' ability to leave the mediation. As discussed in chapter 4, the *Mediation Act* developed two forms of court-mandated mediation: one permits the use of private mediators, while the other is Judge-led mediation. In both forms, mediation requires the consent of the parties and is required therefore definitely voluntary. Thus, the voluntary hallmark may in fact be contributing to why court-mandated mediation has not achieved a significant uptake. These results are in line with the information presented in chapters 4 and 5. In light of these barriers, the interviewees were asked to add any suggestion they could make around overcoming the obstacles to allow for a smoother implementation of court-mandated mediation.

## 7.1 Suggestions

The analysis of the Australian interviewees was concluded by the interviewees being asked for suggestions about what they thought was essential for the advancement and proper working of mediation as a DR mechanism in Australia, which had not been covered in the prior questions prior.

One interviewee shared their belief about the need to shorten mediation procedures:

*The waiting list to solve some disputes via using mediation takes more than six weeks, it's not okay because it disillusions people. I think the mediation procedures need to be more streamlined. (A1)*

Another interviewee did not concur, and believed that streamlining was not the solution to improve this process, but suggested instead that changing the justice system should be considered as a priority when trying to develop mediation as a dispute resolution process:

> *I think mediation should and needs to be seen as a part of the justice system and it's not about how can we streamline this more and more and more and make it cheaper and cheaper and cheaper. But it's about whether it actually does fulfil its purpose, and do we need to change the justice system and not just try to change mediation. (A3)*

Another participant suggested that establishing school programs about mediation was necessary to make this process more acceptable:

> *I would just like to see much greater acceptance as it is a very valuable tool out there in the community... I think that starts in our education system and some schools are looking at introducing mediation styles and programmes with children from a young age and I think that can only be positive. (A2)*

The last central point to emerge from the interviews related to continuing training courses for students in universities:

*I think continued training and education about the mediation process for students at universities and for professionals, will help to improve this process. (A4)*

In the Jordanian interviews, the participants also suggested several factors that could improve the mediation system if adopted. The first suggestion emerging from the interviews was that the Jordanian legislature should revisit the use of the evaluative model of mediation under the *Mediation Act*. This should be changed to empower the parties to create their own decisions, as in a facilitative model:

*I have read the new law in Jordan and I'm concerned that it takes the decision away from the parties. If that's the case, then it's not mediation because the parties making their own decisions is a core element in mediation. (J1)*

Encouraging researchers to study the barriers that may face this process in Jordan is raised in one comment:

*I hope that, as long as there are researchers who are interested in this topic, and try to study it, to solve the problems that face this process it will return the beauty and attention to this process… (J2)*

Establishing marketing campaigns to promote mediation processes throughout the country was identified as the most important factor to encourage a more widespread use of mediation in jurisdictions other than Amman. Marketing would assist in selling the idea to the public and to make them aware of mediation as another means to resolve disputes other than through litigation:

*It's the most important thing is to market mediation more in Jordan and to have more training and awareness of the importance of mediation. (J3)*

One participant suggested it was important to adopt the mediation process as a pre-court step and to establish a mediation centre. These factors were recognised as key to developing the uptake of mediation:

*I hope that we can enforce the mediation as a pre-court step, and to, establish a regulated, respected centre for mediation so that parties can consider going to mediation. (J4)*

This was supported by another interviewee, who suggested that the government taking the lead in providing the framework for mediation implementation was essential. This requires factors such as the government sponsoring this process financially:

> *You can't have active mediation if the government does not support this process to support its implementation. For example, support this process financially… (J5)*

The Jordanian interviewees recognised that the support of the government through its policies and legislation was vital to ensure mediation had its place in the civil justice system. The interview data suggested that mediation should be mandatory in Jordan to make it more effective as an alternative to litigation. Chapter 4 showed that this approach was taken in Australia, and now mediation is an almost ubiquitous concept. This thesis has found that the issue of mandating mediation is vital if mediation uptake is to be increased. It was demonstrated from the literature in chapter 5 that the Australian jurisdiction provides for mandated mediation and a strong impetus for pre-court mediation, which can be very effective in promoting the uptake of mediation. This is encouraged through adjustment in court costs and other means. Thus, adopting these enticements for mediation can make people aware of the usefulness of this process in solving their disputes.

Furthermore, when this process became a prerequisite to the court proceedings in Australia, it changed the attitudes of the disputants and their lawyers to consider mediation as an alternative to litigation.[16] As presented in chapter 5, the establishment of NADRAC in Australia was seen as an important development in the implementation of DR. This institution was tasked with advising the federal Attorney General on issues related to DR. The role of this institution gave the courts, the legal profession and the public confidence that mediation was an appropriate way to resolve disputes.

Part of the impetus behind increasing the uptake was also based on the suggestion that private mediation should be encouraged, and that mediators should

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[16] Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35 *University of New South Wales Law Journal* 929, 949.

be qualified, by offering training courses as an essential aspect of developing mediation in Jordan:

> *As long as we focus on the change towards private mediation and we focus on qualifying mediators from judges and other professionals, I believe that this will definitely contribute to the development of the mediation idea all in all and the general spectrum of mediation will definitely become wider. (J6)*

Training in dispute resolution alternatives also needs to be included in the law school curriculum. It is hoped that in Jordan, with the right legal framework and guidelines in place, and the adoption of some of these suggestions, that mediation's uptake may increase significantly.

## 7.2 Summary

The literature review in chapter 1, together with the interview data presented in this chapter, suggested while hallmarks support mediation in the Australian and Jordanian jurisdictions further consideration and refinement is possible for each hallmark. The interview data and some of the literature contest just how well each of the hallmarks have succeeded in achieving the claims, and how essential they are for mediation. These hallmarks are confidentiality, empowerment, impartiality, voluntariness and party choice. The interviewees addressed whether these were observed or achieved in their country. The result indicates that the claims related to these hallmarks are somewhat contested. In Australia, confidentiality needs more attention, voluntariness in mandated mediations is considered to be satisfied by the parties being able to withdraw, and impartiality remains a contested factor in terms of whether it can ever really exist. In Jordan, voluntariness is a problem when it comes to encouraging the adoption of mediation, and parties are not so empowered if an evaluative model is followed and impartiality is contested. It is clear that much work remains for researchers to investigate the claims of the hallmark philosophies, and they should always be open to ways of improving on these.

Finally, some recommendations were proposed by the interviewees to enhance the efficiency of court-mandated mediation in the civil justice systems in Australia

and Jordan. A rather radical and significant suggestion from Australia was implementing further changes in the justice system. This is ambitious and is likely to occur only through small steps. However, the role of researchers is to investigate the claims made by the justice system and propose better evidence-based research to explore ways of achieving its goals. The Jordanian suggestions adopt much of the learning from the processes already followed in Australia. These include providing the public with information, creating awareness amongst the legal community, training mediators, including training in law courses, and addressing the legal framework to mandate mediation, particularly pre-court. Jordan's biggest lag, however, is the need to establish a national mediation centre to supervise many of the suggestions made.

The next chapter draws together the main findings from this thesis, summarises the key points drawn from both the literature and the qualitative interview data, and makes some recommendations on ways to create a more successful and efficient system of mediation in Jordan.

# Chapter 8: Conclusion-Lessons for Improvement

## 8.0 Introduction

Through conducting a comparative study, this thesis has reviewed the existing literature on mediation, with a focus on court-mandated mediation in Australia and Jordan. The thesis followed a context-comparative approach. This required setting the scene, in particular the legal-political structure including the courts, in the respective legal systems of each country. This was done in the chapters that explored the legal system and cultural aspects in each country (Chapters 3, 4 and 5). Many similarities were uncovered in the two countries' systems, as even though Jordan is a unitary system of government and a civil law country, it is also a constitutional monarchy. Australia is a constitutional monarchy with a common law legal system that operates in a federal structure. Chapters 3, 4 and 5 provide the necessary background in order to locate mediation's place and role in each country's dispute resolution systems. Overall, both countries have the capability to incorporate mediation into their legal systems, as they have to varying degrees.

Continuing the theme of a contextual comparison, the thesis has also explored the historical Indigenous approaches to DR in both countries. Cultural aspects were important to understand in this comparative study. Culture affects communication and this in turn is significant for dispute management. To compare two countries without considering their cultural differences, particularly when investigating DR mechanisms, would be no comparison at all. This cultural contextual comparison showed that the influence of Indigenous cultures was present in both countries. The thesis addressed the models of DR and techniques adopted. Australian Aboriginal and Torres Strait Islander peoples follow strict rules in a restorative justice approach, which was not dissimilar to the Bedouin in Jordan. Both were found to have influences reaching into the mainstream justice system in both countries. However, it was useful to note that while the term 'mediation' is often used in relation to their approaches to DR, when looked at closely, it had much more in common with the arbitration process widely used today. Important differences in the manner and style

of communication were found. Australia is a low context culture that focuses more on the individual's needs and has a more adversarial confrontational style of communication. In Jordan, a high context culture, respect for others is observed, in particular elders and family, as community and collaboration are placed ahead of the individual's needs. These are vital communication considerations to take into account when designing DR processes and when training mediators to work through different models of mediation.

It was found in this thesis that Australia had advanced further along the mediation road and provided something of a blueprint for the younger system in Jordan. It also highlighted any pitfalls for Jordan to avoid. There have been considerable developments in the sophistication of mediation methods and training in Australia over time. How this has contributed to improvement in the adoption of mediation and in disputant outcomes, by saving time, relationships and money, is reported in this thesis.

Court-mandated mediation was only formally recognised in Jordan as a practice in the civil justice system after the *Mediation Act* 2006. The *Mediation Act* formalised the practice of judicial mediation through court-mandated mediation, which enabled referral of cases to the mediation centre. This law clarified who could act as a mediator, and how mediation would work in a loose framework with no designation of a mediation model. As mediation had long existed in a traditional customary manner in Jordan, there was hope that disputants may flock to mediation. In theory, the Jordanian people hate to resort to the courts because of the time-consuming nature of litigation and its cost, and because of the desire to put the community before the individual's needs. Jordanians therefore prefer to resort to informal methods of problem-solving, such as *Sulha*, as described in chapter 4. Despite this logic, Jordanians have yet to adopt mediation in the way it was hoped they would. This thesis found this lack of enthusiasm a puzzle worth investigating. The outcomes of the investigation are the recommendations reported below, which show ways in which the Jordanian legislature might address the many issues that hinder greater uptake of court-mandated mediation.

This chapter provides a summary of the research findings and an overview of the conclusions and recommendations arising from this thesis. The specific research problems engaged with are:

1. What are the current challenges that face mediation in Jordon?
2. Are there practices and learning from the more advanced Australian system that could be adopted to enhance mediation practice within the Jordanian courts?
3. What recommendations can be made for the legal system and mediators in Jordan to respond to these challenges?

The objectives of this thesis were to answer the research problems, which aimed to trace and assess the current challenges that face mediation in Australia and Jordon. The study investigated mediation in a country that provides an example of a successful adoption of the practice. Yet, in doing so, it also looked at issues that may still need to be addressed in Australia. The thesis then compared this with the Jordanian experience and arrived at recommendations to overcome existing barriers to its further implementation in Jordan. To answer the research problems, a comparative contextual approach was taken that involved a detailed assessment of each country's legal structure and culture, the current literature on the topic in both countries, and qualitative data from interviews. The contribution of this research, particularly to court-mandated mediation, is addressed here with a recognition of the limitations of this research and suggestions for future research.

## 8.1 The Barriers for Mediation

This thesis found that mediation in Australia still has some challenges. These are highlighted in three areas. In relation to the research problem at least five key areas were identified where Jordan could learn from the Australian experience in terms of the challenges faced. From these recommendations have been drawn for Jordan.

### 8.1.1 Australia

Three key challenges have been presented, based on the literature and comparative analysis aligned with the interview data from Australia. Interviewees, in particular considered these as areas that could be investigated or improved to further progress the practice of mediation. It was identified from the literature that lawyers are still not aware of their actual role in the mediation process. Australian law imposes a duty on lawyers to advise and assist their clients in resolving disputes before conducting litigation in the Federal Courts of Australia.[1] This legislation, the *Civil Dispute Resolution Act* 2011 (Cth), can impose costs directly on lawyers who fail to advise their clients about the opportunities to resolve their disputes by means other than litigation. This is widely reported in the literature. Woodward is one who has pointed out that lawyers prefer to frame the solution on rights-based terms, instead of facilitating a discussion between parties that supports problem solving DR.[2]

Law schools still resist core training of lawyers in DR processes such as mediation, with a slow uptake of this training and even resistance to it,, which then results in litigation remaining the dominant method of lawyer training.[3] This result confirms the critical role lawyers and lawyer training have in encouraging the adoption of the mediation process, as discussed in chapter 5.[4] The research literature has been raising this concern for some time.[5] However, without further imposition from government and legal bodies to require training in the law schools, the issue

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1 *The Civil Dispute Resolution Act 2011* (Cth) s 9 ('*The Civil Dispute Resolution Act* ').50) s 9.

2 John Woodward, 'A Fly in the Mediation Ointment' (2019) *The Australian Dispute Resolution Research Network*.

3 Pauline Collins ‘Resistance to the teaching of ADR in the Legal Academy’ (2015) *26 Australasian Dispute Resolution Journal 64.*

4 See, Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20; Michael Redfern, 'Capturing the Magic – Preparation' (2004) 15 *Australasian Dispute Resolution Journal* 119; Donna Cooper, 'The New Advocacy and the Emergence of Lawyer Representatives in ADR' (2013) 24 *Australasian Dispute Resolution Journal* 178; Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40 *Monash University Law Review* 758.

5 See further, Susan Douglas and Kathy Douglas, 'Re-imagining Legal Education: Mediation and the Concept of Neutrality' (2014) 7(1) *Journal of the Australasian Law Teachers Association* 19-30; Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18 *Deakin Law Review* 315; Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148.

will remain. As a conservative profession, resistance persists among lawyers who feel threatened by others entering into what they perceive as their domain of dispute resolution.

Second, the hallmark philosophies have been used in this thesis as a measure to gauge the success of the mediation process. The interviewees provided support in addressing these. Confidentiality has become a standard term because it is seen as crucial to enable the parties to freely speak. However, it was observed that such a stringent requirement of confidentiality in all cases is perhaps not essential, and parties may in some cases benefit from an agreed form of release of information. The laws that govern this area do not allow opportunities for empowerment of the parties to determine their position regarding confidentiality. While waivers of confidentiality are an option under the law, this is not something many parties are readily aware of. Such confidential protection of the process can also protect mediator behaviour, which may work against exposing any abuse of the process by mediators. However, the literature reviewed in chapter 1 has established that the Australian law and the courts will open up the confidentiality of the mediation space, if fraud or other unlawfulness is alleged to have occurred.[6] This flags that confidentiality remains a point of contention and is a complex area in which ongoing research can only assist with the improvement and development of the relevant law.

Third is the hallmark of empowerment of parties, which is still somewhat contested. For instance, one interviewee raised a challenge by suggesting that the existing legal system in Australia needed reform. Interestingly, perhaps as a lawyer, they suggested that mediation was not ideal in every case and did not always empower the parties. Instead, they considered that reform in the Court system to cut the costs of litigation, and the access to such a resolution, could improve the efficiency by reducing matters that are delayed by going through mediation before litigation, when there is no possibility it could be resolved other than by litigation. Such voices from the literature and the interview data raise the prospect that a balance should be observed. If governments push everyone into mediation, or paths other than litigation, as a way to cut costs of delivering justice, then the system may become unbalanced. One interviewee believed that the introduction of regulations for the

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[6] Laurance Boulle, *Mediation Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 714.

court around legal costs could actually create better outcomes, by arguing that many disputes do not really need to go to mediation. However, this view goes against much of the literature, which suggests that even court-mandated mediations result in reluctant parties being empowered by learning there is a new way to communicate, and to resolve their disputes, without destroying relationships. The freedom always remains for disputants to discontinue the mediation if it appears not to have worked for them or to be appropriate, after a genuine attempt to engage is made.

Although Australia now has extensive training courses available post-law degrees, as well as for non-lawyers, with a single system of accreditation, there is still an identified need to rethink the training and education structure to ensure it genuinely achieves a top-quality service for disputants. One interviewer suggested training needed to be longer and more elaborate. Chapter 5 has described the bodies that assure the NMAS are adopted in training, and these have played an essential role in providing high-quality mediation training and accreditation. However, due to the confidential nature of mediation, as covered above, there is possibly a greater need for stringent supervision of mediators to ensure their performance is evaluated and to maintain standards. They do operate in an isolated environment behind closed doors and therefore, establishing that mediators do what is required of them to ensure a procedural rule of law in which all are treated equally at minimum, could only improve confidence in mediation. The NMAS have played an essential role in providing high-quality mediation training and accreditation. This system does require mediators to re-apply for accreditation every 2 years, to ensure an ongoing critical review of their practice. Thus, these standards do produce reasonably high-quality mediators. However, there is always an opportunity to improve the training and accreditation requirements, in order to guarantee that parties are not exposed to any form of bullying or other inappropriate behaviour by mediators.

This research confirms the development of mediation practise in Australia has evolved to an advanced stage in which it is widely embraced as an accepted form of dispute management. While more is always possible and some pockets of resistance are essential to address, such as entrenched adversarial lawyering and conservative legal academies, the level of deficiencies are categorised more as a need for fine-tuning, than major changes. Nevertheless, the research has discovered there are

opportunities for improvement which can inform the development of mediation in Jordan.

### 8.1.2 Jordan

Mediation is not mandatory in Jordanian Courts. However, this thesis has addressed the benefits from introducing pre-court incentives, or at least an attempt at mediation, through a more mandated legislative approach. This can be a crucial starting point in increasing the use of court-mandated mediation in Jordan.

It was supported by the Jordanian interviewees suggesting that mediation should be mandatory for parties, and that they should be directed to mediation, whether or not they had consented, as a potential driver to increase the demand on mediation in the future. This is consistent with the literature reviewed in chapter 4, which confirmed the necessity of adopting mandatory mediation in Jordan. Al-Rashdan has suggested that adopting mandatory mediation in the Jordanian courts will increase mediation uptake.[7]

The most significant obstacle identified was the lack of knowledge and awareness of mediation, both amongst the public and lawyers. One of the interviewees considered that lawyers' resistance was the main factor operating against mediation being adopted more frequently. Lawyers are either worried about a loss of legal fees, or they see mediation as a waste of time. This reflects that a lack of knowledge about, and experience in, mediation may be a reason for their resistance. Even in Australia, it was noted that this is still an issue. Therefore, a concerted effort, led by the Government and legislators, is needed to turn this around.

Certainly, the Jordanian legislature has supported the presence of private mediators to be vital drivers for mediation, in order to resolve congestion in the court system.[8] Unfortunately, the private mediator's role has not been supported by a general awareness campaign to facilitate such an increase. Despite the legislative support for private mediation, the interview results confirmed that judicially

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[7] Ali Mahmoud Al-Rashdan, *Mediation in Settlement the Disputes* (Dar Al-Yazoury Scientific for Publishing, 2016) 80.

[8] *Mediation for settlement of the Civil Disputes Act 2006* (Jor) s 4(b) (' *Jordanian Mediation Act*').

mandated mediation, with parties' consent has become the dominant form of mediation used. Interviewees indicated that judicial mediation is favoured, as it adopts an evaluative mediation model and disputants may feel that the judge's involvement enhances the likely settlement of the disputes. The mediator judge adopts an advisory role to finalise the negotiation processes in order to reach settlements. The literature in chapter 4 indicates that studies have found disputants in Jordan to be more willing to mediate if the mediator is a judge.[9] However, this result may reflect some misunderstandings about the role of mediators and a misconception of the concept of mediation itself. While culturally it was seen that Jordanians respect their hierarchical elders' authority and that this would suit a Judge in an evaluative model, they have had less experience of the facilitative approach and the benefits it can bring in terms of empowering the parties and providing them with communication skills when in dispute. Jordan would benefit from more training and legislative support for a facilitative model of mediation improving party empowerment.

A further obstacle discovered in this thesis, particularly in the interview data, was the lack of effective operation of a mediation department. It was reported that mediation was unpopular among the disputants and lawyers, which in turn led to the courts reconsidering their referral of cases to mediation.[10] If the judges and the decision-makers do not foster and encourage its usage, it will not flourish. No training courses have been held in the last ten years. Legislative decision-makers could ensure that consistent training was available in a facilitative or a blended mediation model for both judge mediators and private mediators. This is particularly important when it comes to practical models and communication skills desirable for mediation. Adopting a blended process may be desirable for mediators and disputant's acceptance in Jordan, but the mediator needs to be a trained expert to understand the different models and when and how to apply them.

In the matter of hallmarks, the issue of impartiality presents a different dilemma than in cultures such as Australia. As Jordanian law has resulted in evaluative mediation being the dominant model used in the courts, in allowing a directive

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[9] Al-Rashdan (n 7) 40.

[10] Khaled Ta'amneh, 'Mediation as an Alternative Commercial Disputes Resolution in Jordanian Law' (LLM Thesis, Jadara University, 2011) 50.

advisory approach to get parties to agree to a settlement, the mediator's impartiality may be questioned. This may then result in perceptions of bias and not help the parties to reach truly productive interactions.[11] Interviewees claimed that the disputants' power in determining their own outcomes could be taken away if the mediator exercised this form of mediation. However, one of the interviewees was a judge/ mediator, and they confirmed that they preferred to use a facilitative model as first choice, even though most mediators in Jordan preferred using an evaluative model. Lack of consistency and clarity around the model of mediation used and its purpose does not help the progress of mediation in Jordan.

Significantly a lack of empirical research providing evidence and data showing the rate of settlements and parties' satisfaction in the last ten years was also raised by the interviewees. Without feedback from the lawyers and the disputants, it is difficult to measure the impact of the parties' satisfaction with the court's referral of their cases to the mediation department. It is also difficult to determine the effectiveness of the referrals, in terms of monitoring and supervising the cases referred to the mediation department or returned to the court after a failed mediation.

Most significant for Jordan is the absence of a single institution or centre that can take an effective lead to support the growth of mediation and provide appropriate training services for mediators. The interviewees identified that the absence of such centres have produced barriers in implementing a wider spread of mediation. For example, these centres could work on creating an accreditation system much like the NMAS in Australia, and thus support training centres and universities in establishing training courses for mediators to improve their skills. These centres could also support researchers and commission studies that focus on the parties' satisfaction and settlement rates, which would increase awareness and enthusiasm for using mediation. Such a centre could foster mediation by holding seminars for lawyers and advocating for its inclusion in law curricula. The interviewees confirmed that if the lawyers are inexperienced in mediation, it is highly probable that they will not encourage their clients to undertake mediation. This was confirmed in the literature review in chapter 4. Alsaleeby stated that the government had not supported this type

[11] Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette Law Review* 155, 160.

of institution before but that it should now seriously consider this.[12] The role of government and organisations in promoting the use of mediation is a significant contribution to its further uptake and this was a learning from the research findings in this thesis..

In addressing the second research problem, which was how Jordan could benefit from understanding what has worked in Australia, this research confirmed the key factors of the success for court-mandated mediation in Australia, was the high level of awareness about the benefits of mediation. This was a vital factor underpinning the thriving practice of mediation in Australia. The research from Australia supports the belief that mediation can be very effective as an alternative to litigation, and that Jordan could benefit in the same way if mediation was mandated in similar ways as in the Australian jurisdiction. Again, the role of government and organisations in promoting the use of mediation is a significant contribution to its further uptake, as the Australian experience shows. It was found that the Australian training and accreditation system was advanced compared to Jordan, and that virtually no training has occurred in Jordan since 2006. Thus, Jordan could learn much from the Australian experience in establishing new training programs and an accreditation system to improve mediation's status.

### 8.1.3 Recommendations for Jordan

The findings from Jordan confirm that the mediation experience in Jordan is still fledgling. The proposed recommendations will be helpful in considering ways the mediation experience could become more successful. Together these factors are likely to drive the interest of disputants, mediators and lawyers to use mediation, in addition to litigation, to resolve disputes in civil cases.

Recommendation 1

Jordan should adopt a more mandated approach, (not reliant on party consent) both pre- and post-court actions through legislation to increase the uptake of mediation.

[12] Basheer Alsaleeby, *Alternative Disputes Resolution* (Dar Wael Publishing and Distribution 1ed, 2010) 157; Al-Rashdan (n 1) 148.

Recommendation 2

An independent mediation centre should be established to advance mediation through supporting research and training, and through providing an accreditation system for mediators.

Recommendation 3

The accreditation system and training programs must established clear guidelines on mediation models, communication, mediator skills, and ethical standards around impartiality and confidentiality, to ensure consistency in mediation practices.

Recommendation 4

Significant efforts have to be undertaken to disseminate information about mediation, its processes, and its effectiveness with the public, mediators, judges and lawyers, in order to create an awareness of mediation, both private and court-mandated.

Recommendation 5

Legal education at University level should include mandatory courses in different DR processes.

## 8.2 Limitations of the Study and Suggestions for Future Research

While it is believed that this study makes a significant contribution to furthering mediation practices in Jordan, it is not without its limitations. The most important limitation of this study is the lack of public data and research published on mediation in Jordan.

Secondly, as mediation developments are still modest in Jordan, some issues, which were raised in the Australian literature, had not yet been experienced in the

context of court-mandated mediation in Jordan, including mediators' immunity and liability, confidentiality, and mediation models and techniques. In contrast, Australia's experience is rich in using mediation. Notwithstanding, it was found that future research in Australia needed to focus on issues such as: assessing the efficiency of the mediation process, improving training and mediator skills, better understanding the variety of mediation models, and re-evaluating the justice system- its efficiency and cost.

The third possible limitation in this thesis is that the number of interviewees was small. Nevertheless, they were representative of a cross-section of those involved at senior levels in their country's mediation practice. Further, qualitative research supports the number of interviewees as valid as discussed in Chapter 2.[13]

Future investigations could address the extent to which mediation 1) addresses the hallmark claims that underpin mediation. Are they settled and appropriate or do they need more attention? This research has flagged more refinement is possible in each of the key hallmarks of mediation; and 2) there is room for improvement in Jordan in improving the experience of mediation, as lessons from Australia could be usefully implemented.

## 8.3 Concluding Statement

In Australia, there has not only been a bottom-up grassroots development, which was supported by key bodies such as IAMA, LEADR and NADRAC, and remains supported by relevant organisation, but also a top-down support by governments passing legislation that encourages of mediation. This has been further supported by training and accreditation in a professionalisation process. However, this has not been the case in Jordan, which has largely seen a top-down legislatively-imposed adoption. The comparative study demonstrates how the Australian experience in using DR could be adopted to improve the uptake of mediation in Jordan. Having specific organisations and institutional support for the process of mediation will help

[13] Michael Quinn Patton, 'Two Decades of Developments in Qualitative Inquiry: a Personal, Experiential Perspective' (2002) 1(3) *Qualitative Social Work* 261-283; Michael Quinn Patton, *Utilization-Focused Evaluation* (Sage publications, 2008).

develop and support its growth. It will also encourage the professionalisation, through training of mediators, as more parties seek this manner of managing their disputes. Australia therefore is as an excellent example to take learnings from, as part of developing the emergent process of mediation in Jordan.

This chapter has answered the research problems raised in this thesis. The thesis has mapped the growth and development of court-mandated mediation in Australia and Jordan to investigate the key factors behind the success in Australia. It has also identified areas where further improvement is possible in both countries. This has enabled the researcher to propose recommendations to improve the success of mediation in Jordan. This thesis has added to the growing body of Australian and Jordanian literature on the main issues that hinder mediation's progress, and it has also filled a vital literature gap about these issues in Jordan.

This research identifies areas where it is clear there is a need for ongoing research. Research should be conducted into parties' satisfaction of mediation in Jordan to provide baseline data, and future research should consider the impact of adopting the recommendations of this thesis. The research in Jordan should assess whether any changes have had an effect on parties' satisfaction. Future research in both countries could provide greater data on the role of lawyers in the mediation process and in increasing its uptake. Research should also consider the perceptions of the disputants when they participate in this process. Disputants' satisfaction and participation are considered as an indicator to measure the development of court-mandated mediation. Thus, it will be essential for future research to interview disputants in the mediation process to measure and determine the issues faced during this process.

In terms of the impact of this thesis on more extensive mediation studies, it has provided a comparative study on mediation practice in Australia, and it has contrasted this with the fledgling practice in Jordan. The developments of court-mandated mediation, as reported by Australian and Jordanian studies, along with the results canvassed from the interviewees, have the potential to enhance these practices in both Australia and Jordan. From a practical perspective, recommendations arising from the study may also provide guidance to legislators, mediators and those whose ideals seek to foster a collaborative approach to dispute management.

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# APPENDICES

Appendix 1: The Semi-structured Interview Questions

1. To start - Can we clarify your understanding of the term 'Mediation'? Can you tell me in your own word what do you mean when you say 'mediation'?

2. Where do you consider mediation fits in the spectrum of available Dispute Resolution (DR) methods?

4. As a Judge; Mediator; Lawyer how often are you involved in mediating matters?

5. How would you describe your involvement? Can you explain your role?

6. What do you consider the most critical areas for which further research is needed?

7. Can you describe the system of DR that existed when you first became involved and what changes in legislation and practice you have witnessed since that time?

8. What do you see as the significant areas of growth and change in mediation in that time?

9. Do you think there is room for further changes?

10. If you could wave a magic wand what changes or adaptations would you create?

11. Do you think the culture has any impact on the way mediation is perceived and conducted in this country?

12. Turning to some more specific matters for mediation. How do you see each of the following evolving and influencing mediation?

a) confidentiality

b) impartiality

c) voluntariness v court-mandated mediation

d) Training and Education

e) regulation/ accreditation

f) public perceptions, satisfaction and participation?

13. Now some questions about your thoughts on the different styles of mediation e.g. Facilitative, expert, settlement and therapeutic.

a) Do you have any other styles you would like to mention and describe?

b) Do you consider it important to follow a particular style? Why/ why not?

c) What do you think of the idea that a mediator may follow something from each of the different styles in one mediation?

d) what are your thoughts on how much parties should be aware of the different styles.

14. Lastly is there anything further you would like to add that you think is important for the advancement and proper working of mediation as a DR mechanism in this country that has not been covered?

Appendices 2: An exemplar of the mediator's decision in Jordan when the process has failed

Case Number:

Mediation file number:

Mediator Name:

His Excellency the Magistrate judge of Amman,

On the basis of your decision dated .... in the case No. .... which includes the referral of the dispute, subject of the case, to a settlement through mediation. However, the parties of the dispute did not reach a settlement for several reasons:

1. ………
2. ……….
3. ………..

Despite the commitment of the parties to the dispute to attend all mediation sessions. Accordingly, the case file was returned to you.

The date:

The mediator signature:

Appendices 3: An exemplar of the mediator's decision in Jordan when the process is successful.

Case number:

Mediation file number:

The mediator Name:

His Excellency the Magistrate Judge of Amman

Based on your decision issued on .... in the case No. .... which includes the referral of the dispute, the subject of the lawsuit to settle through mediation. I have held several mediation sessions attended by all parties to the dispute and their representatives. Therefore, according to the provisions of Article 7/B of the Mediation Law to settle of Civil Disputes, enclose the Settlement Agreement and the Mediation File to ratify the Settlement Agreement.

The date:

The mediator signature: