

# Legally Yours



*By Ahmad J. Tahboub*

## *Mediation in Jordan ... Legal Process or Solution?*

The concept of third party intervention goes way back in history. From a neighbor's fight to a company's take over, the classic route of litigation exists as well as other ways of settling a conflict.

In Western countries, financing legal disputes exhausted conflicting parties along with local governments. With time, alternative dispute resolution mechanisms settled in the form of mediation and arbitration. Whereas, the later (arbitration) is similar to litigation (but shorter time wise), there exists a different system called mediation.

An old Arab mechanism of solving disputes, mediation channels down to the heritage of Tribal Judges and was mentioned as well in the Holy Quran. Shari' Courts (civil status courts) have it as a pre-judgment phase in most cases. In 2003, the Jordanian civil law enacted mediation as a solution mechanism in three ways: private, contractual and judicial. While the code invoked privacy on all mediation sessions, it briefed the different phases and left a lot of procedures unattended. Since the process is up for further legislation, we can only talk about mediators' selection mechanism and qualifications.

By law, the Minister of Justice appoints mediators based on pre-nomination from the Head of Judicial Council. A concept that I find strange, since mediation is an outcome of professional qualifications and accumulated experience. The Jordanian Mediation law failed to indicate mediator's personal and professional qualifications. Moreover, the law did not include articles about professional liability. What if a mediator violates his/her discretion obligation in a multi million dollar conflict? As far as negotiation would help end the dispute, leaking information about one party's weaknesses definitely harms the legal outcome if mediation fails!! Especially when the local insurance market did not offer well developed tools for professional indemnity.

In absence of a detailed text, and since the Minister gets to nominate, I find myself wondering: "are mediators born? & who takes the professional blame in case of a breach?"

We reach a bizarre conclusion when we consider that by law, a judge has the right to transfer an ongoing legal dispute to a mediator. A set of question arise: "What can we call the procedures then ... judicial or mediation?" When both (private mediators) and (judicial mediators) lack authority to force attending sessions over conflicting parties. It becomes weirder when we think about a judge's role in mediation. If we consider the mediation process as part of litigation, then there is no way for private mediators work. Since we know that this is not the case, how are judges permitted to undertake non-judicial roles? To say the least, if a mediating judge blunders: "would the Judicial Council or Ministry of Justice assume responsibility?"

It does not seem right to transfer ongoing litigation to mediation, since the parties or one of them at least decided to go to court. From one side, it might be too late for amicable intervention. On the other, judges "as humans" become prisoners of their own habits. The sense of authority and ability confiscates flexibility. Nothing to do with fairness, a mediator is required to look for weak points in each party's defense and turn it into a positive negotiating point (all for a successful session). As such, if experienced as a judge, may mean ill prepared as a mediator! Whether you share the same view with me us or not, experience will tell. It will not be long to discover the tendency among conflicting parties, and whether they chose judicial or private mediation.

As for level of services, mediators have no specific level of professional liability. A reasonable outcome for not having a specific authority to regulate their services. Since its enactment in 2003, mediators have no collective representation and there is no supervising authority over mediation process. In the U.S. and many western countries, arbitration and mediation exist under the same household (or associations). If the Ministry and the Judicial Council look for cutting numbers of litigation, they should both work for creating such association. A mediators' professional gathering would help promote their services, and create a safer "well regulated atmosphere" for parties of any dispute.

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