Challenges Undermining the Use of Mediation in the Jordanian Civil Justice System: Lessons Learnt from England

A Thesis Submitted in Partial Fulfilment of the Requirements for the Award of Doctor of Philosophy

Division of Law and Philosophy

University of Stirling

By

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ABSTRACT

This study explores the challenges that undermine the use of mediation in Jordan, and the lessons that can be learnt from the English civil justice system. The main goals of this research are to fill in the gaps in the Jordanian literature regarding the use of mediation and, significantly, for Jordan to learn from English practices that would contribute to the uptake in the use of mediation. The study employs a qualitative approach in conducting semi-structured interviews with seventeen Jordanian judges with experience in court-based mediation, and a quantitative approach in disseminating a questionnaire to 99 lawyers to gain insight into their perspectives and experiences in engaging in the practice of court-based mediation. The findings of the empirical study identified several barriers to the use of mediation in Jordan that informed the comparative study with England, mainly the lack of a court duty or power to encourage the use of mediation, lack of statutory and professional duty upon lawyers to encourage their clients to attempt mediation before litigation, and the lack of mediation education, training and awareness among stakeholders (judges, lawyers and public). Furthermore, the study explores the concept of access to justice and mandatory mediation. The study concludes that these obstacles can, potentially, be overcome. This would involve a system based on the English experience of imposing a duty on the court to encourage the use of mediation, and vesting the court with the power to impose costs sanctions on parties for refusing to attempt mediation unreasonably. Lawyers and the parties involved would help the court to further the overriding objective of the CPR by engaging in mediation, and by increasing mediation education, training and awareness among stakeholders. Accordingly, the study presents a theoretical and practical framework to the further development of court-based mediation in Jordan.

DECLARATION

I hereby declare that this Thesis has been conducted by me for the award of Doctor of Philosophy at the University of Stirling, Division of Law and Philosophy and proper acknowledgement has been made where other sources of information have been used.

I further declare that this Thesis has not been submitted for the award of any other degree or qualification from this or any other university or institution.

Mohammad Shaher Abu Hazeem

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Yours sincerely,

On behalf of GUEP
Dr William Munro
Deputy Chair of GUEP

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BSB	Bar Standards Board
CCMJ	Civil Case Management Judge
CEDR	Centre for Effective Dispute Resolution
CJC	Civil Justice Council
CJEU	Court of Justice of the European Union
CPD	Continuing Professional Development
CPL	Civil Procedure Law (Jordan)
CPR	Civil Procedure Rules (England)
ECHR	European Convention on Human Rights
ENE	Early Neutral Evaluation
FOIA	Freedom of Information Act
HMCS	Her Majesty's Courts and Tribunals Service
HMCTS	Her Majesty's Courts and Tribunals Service
JCC	Jordanian Civil Code
LSB	Legal Service Board
SRA	Solicitors Regulation Authority
TCC	Technology and Construction Court

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- *Denton v TH White Ltd* [2014] EWCA (Civ) 906.
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- *Egan v Motor Services (Bath) Ltd* [2007] EWCA(Civ) 1002.
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- *Rolf v DE Guerin* [2011] EWCA (Civ) 78.
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- Judicial Independence Law. No (29) 2014.
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- Magistrates Courts Law. No. (23) of 2017.
- The Bar Association Law (as amended). No. (11) 1972.
- The Compulsory Motor Insurance Law No. (12) of 2010.
- The Constitution of the Hashemite Kingdom of Jordan of 1952 (as amended).
- The Mediation Draft Law for Civil Disputes Resolution of 2019.
- The Mediation Law for Civil Disputes Resolution (as amended) No. (12) 2006.
- The Provisional Civil Procedure Law No. (26) of 2002.
- The Provisional Mediation Law No. (37) of 2003.

Other Legislation

- Arab Declaration on the Independence of the Judiciary, Amman 1985.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
- Irish Mediation Act No. (27) 2017.
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CHAPTER ONE: INTRODUCTION

1.1 Introduction

The purpose of this research is to investigate the development and implementation of mediation within the civil justice systems of Jordan and England, and to answer the central question of why the use of mediation declined in Jordan while it increased in England. The research proposes to study mediation through examining the role of the court, the role of lawyers, and mediation education, training and awareness amongst stakeholders. It will be argued that studying these elements is important in reaching an understanding of how similar reforms resulted in disparate outcomes.

A review of the literature revealed a dearth of research on mediation in Jordan, and no research comparing the legal systems of Jordan and England in this area. Thus, the research will empirically investigate barriers that hinder the use of mediation in Jordan. The findings of the empirical study will be used to inform the comparative analysis with the English system. The findings of the comparative study will form the basis for recommendations for increasing the uptake of mediation in Jordan.

This chapter is divided into three sections. The first section reviews the development and implementation of mediation in Jordan and England, and the rationale for comparing these two jurisdictions is established. The second section details the importance and originality of the research. Finally, the third section outlines the aims and objectives of the research, its scope, research questions and thesis structure.

1.2 Background context

One of the greatest challenges facing the Jordanian judicial system is the increase in the number of cases registered before the courts and the length of the litigation period. This leads to a delay in justice, which in turn creates instability in the legal and economic sectors of society.[1] For instance, the number of registered cases before the Jordanian Courts of First Instance and Magistrates Courts increased between 2006 and 2019, the last year that data was available.[2] In

[1] Basher Al Sleby, *Alternative Dispute Resolution ADR* (Darwael 2010) 11-13; Abdullah Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes, A Comparative Study' (PhD thesis, University Hassan 2015) 4.
[2] Only data from the Courts of First Instance and Magistrates Courts were analysed as mediation only takes place in these courts.

2019, there were 370,929 registered cases; another 85,015 cases were pending or carried over from 2018, which represents an increase of 50 percent in registered cases and 27 percent in pending or carried over cases since 2006.[3] Over the same period, the largest number of cases were registered and pending or carried over in 2018 (412,509 and 98,670, respectively).[4] Hence, the state introduced court-based mediation into the civil justice system as an alternative to litigation to speed up access to justice and reduce the burden on the court.[5]

England faced a similar challenge at the end of the twentieth century. In the words of Genn, "the courts are too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want."[6] To overcome these challenges, Lord Woolf sought to reform the civil justice system to make it more affordable and accessible by introducing a number of changes, including the use of Alternative Dispute Resolution (ADR), mainly mediation.[7]

The Covid-19 pandemic has exacerbated these challenges, adding an additional burden on the courts, and a new sense of urgency in terms of using alternatives to lengthy litigation procedures. The pandemic and related court disruptions have increased the time taken for all claims to reach trial. For instance, small claims in the county court system took 14.3 weeks longer to get a hearing between October and December 2021 compared to the same period in 2019.[8] In England, the Ministry of Justice called for evidence to further integrate dispute resolution schemes into the culture of the legal system "as the Covid-19 pandemic has put extra pressure on the courts and the wider justice system."[9] Similarly, in Jordan the coronavirus pandemic has created a backlog of cases that will impact the work of the courts for the coming years, and will be reflected in the delay in deciding cases, the repeated postponement of

[3] Jordanian Judicial Council, Judicial Authority Annual Reports from 2006 to 2019 (Jordanian Judicial Council) <http://www.jc.jo/annual_reports> accessed 10 March 2022.
[4] Jordanian Judicial Council, Judicial Authority Annual Report of 2018 (Jordanian Judicial Council). 110 < http://jc.jo/ar/catalog/altkryr-alsnoy > accessed 7 February 2022.
[5] Al Sleby (n 1) 11-13.
[6] Hazel Genn, 'Understanding Civil Justice' in Michael Freeman (ed.), *Law and Public Opinion in the 20th Century, Current Legal Problems* vol. 50 (Oxford University Press, 1997)155.
[7] Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) s1.9 and ch1, para 7(d).
[8] Ministry of Justice, National Statistics: Civil Justice Statistics Quarterly: October to December 2021 (Published 3 March 2022) < https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2021/civil-justice-statistics-quarterly-october-to-december-2021> accessed 20 March 2022
[9] Ministry of Justice, 'Dispute Resolution in England and Wales: Call for Evidence (31 October 2021) 7. < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf > accessed 11 March 2022.

sessions and the overcrowding in the courts.[10] Yet the Jordanians have not called for an increase in the use of court-based mediation to help cope with the added cases.

Both countries sought to use mediation to help reduce the burden on the court, but with different outcomes. Since the start of court-based mediation, mediation has never taken hold in Jordan, while in England, ADR, mainly mediation, has become more embedded within the civil justice system.

Therefore, this research is investigating the challenges that undermine the use of mediation in Jordan and the lessons that can be learnt from England that could improve the uptake of mediation in Jordan.

1.3 Development of Mediation in Jordan and England

1.3.1 Development of mediation in Jordan

As a result of the increasing demand for court services due to the growth in the size of the population, economy, and trade, the Jordanian government sought to modernise its judicial system to cope with these changes, and to improve access to justice.[11] In introducing the Provisional Mediation Law to the House of Parliament, the Council of Ministers published a policy memorandum that expressed its intention to reform the civil justice system:

> The courts are the formal or the official method for solving the individual's disputes according to the Constitution. As the number of cases registered before the courts is steadily increasing, it is not enough to address the issue simply by increasing the number of judges as the number of registered cases increases. That leads to a search for other means to settle some of these cases to decrease the caseload of the courts in a way that satisfies all the disputants while offering a faster method of resolving their disputes and maintaining the relationships of the parties. The friendly settlement of disputes allows for the restoration of commercial trade and maintains the social relations between the parties to the conflict. Moreover, the encouragement of the use of mediation is deeply rooted in Arab and Islamic tradition. Therefore, it was a necessity to work toward a special law [The Mediation Law for Civil Disputes Resolution] and implement it in the Jordanian legal system.[12]

[10] Shifa Al Qudah, 'Corona Caused Court Disruption and Wastes People's Rights' *Al Ghad Newspaper* (Amman, 17 May 2020) < https://alghad.com/كورونا-تعطل-المحاكم-يهدر-حقوق-الناس/> accessed 13 March 2022.
[11] Al Sleby (n 1) 30.
[12] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law* (2006) to author (5 July 2017).

This quote underlies the Council of Ministers' concerns over the unmanageable caseloads in the Jordanian Civil Courts, its recognition that increasing staffing was not a feasible solution to decrease the caseload of the court, and the need to seek an alternative that would save time and maintain relations between the parties. As tribal mediation is rooted in the traditions of the people and practiced informally to successfully solve people's disputes,[13] the Mediation Law was introduced to the Jordanian Legal System to formalise mediation within the courts.

In accordance with the Jordanian Mediation Law, the first mediation programme in Jordan was launched on June 1, 2006. The implementation of this programme at the Palace of Justice of Amman contributed to saving time and speeding up litigation.[14] Following the success of the mediation programme at the Palace of Justice of Amman, the mediation programme was applied in several courts across Jordan.[15]

However, after the initial successful implementation of mediation within the Jordanian civil justice system, the use of mediation began to decline in 2010, while the number of litigation cases continued to increase, adding to the heavy caseloads before the Jordanian courts.

1.3.1.1 The use of mediation in Jordan

Despite the number of years that have elapsed since the passage of the Mediation Law, there has been little research published about the use of mediation in Jordan. Therefore, the researcher started by collecting secondary data from the Ministry of Justice. Table 1 shows the number of cases referred to mediation from all Mediation Departments in Jordan between 2010 and 2019. It can be noted that a disproportionate number of mediation cases were referred to the Mediation Department in the Palace of Justice of Amman as compared to the rest of the Mediation Departments. Of the cases referred to Mediation Departments in Jordan between 2010 and 2019, nearly 75 percent were referred in the Palace of Justice of Amman alone.[16]

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[13] Mohammad H. Abu Hassan, *Bedouin Customary Law: Theory and Practice* (3rd edn, Ministry of Culture and Arts, Amman 2005) 37.; Ahmad Oweidi Al- Abbadi, *Bedouin Justice: The Customary Legal System of the Tribes and its Integration into the Framework of State Polity From 1921-1982* (Darjareer Publishing & Distribution, Amman 2006) 276; and Alaa Al Bataineh, 'Mediation in Jordan' (Al Tamimi & Co, November 2012) < https://www.tamimi.com/law-update-articles/mediation-in-jordan/ > accessed 9 January 2022.

[14] Al Sleby (n 1) 34.

[15] Al Sleby (n 1)34; Hamadneh, (n 1) 9.

[16] The data from 2010 through 2016 was provided by the Jordanian Ministry of Justice to author (5 July 2017). The data from 2017 to 2019 was provided by the Jordanian Judicial Council, 'Judicial Authority Annual Reports of 2017, 2018 and 2019 < http://www.jc.jo/en/catalog/altkryr-alsnoy?page=2 > accessed 11 March 2022.

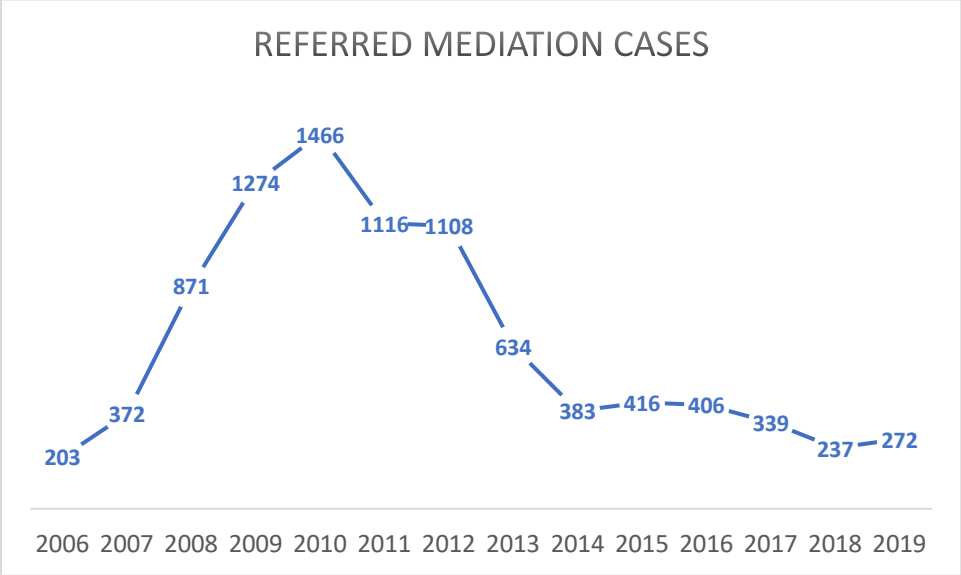
Table 1: Number of Mediation Cases Referred and Settled between 2010-2019 by Mediation Department

Mediation Department	Referred	Settled	Pct Settled
Irbid	205	172	**84%**
Zarqa	137	86	**63%**
Al–Salt	64	49	**77%**
South of Amman	582	445	**76%**
East of Amman	309	227	**73%**
North of Amman	487	365	**75%**
Palace of Justice of Amman	6376	4525	**71%**
West of Amman	328	254	**77%**
Total	**8488**	**6123**	**72%**

At the time of the analysis, data were only available from the Ministry of Justice since 2010. However, the researcher was interested in understanding the development of mediation from the start of the mediation programme. The researcher decided to focus on the Palace of Justice of Amman, because that is where the mediation pilot took place, and it is the department with the largest number of mediation cases. Figure 1 shows the number of cases referred to mediation in the Palace of Justice of Amman between 2006 and 2019.[17] Cases referred to mediation in the Palace of Justice of Amman dramatically increased from a low of 203 in 2006 to its peak of 1466 in 2010, an over 600% increase in just four years. However, since 2010, referred cases have steadily decreased to 272 in 2019. The decline in the number of cases referred to mediation and the lack of literature about the subject led to the interest for this research study, as the researcher was eager to understand the challenges that undermine the use of mediation in Jordan.

[17] The data from 2006 through 2016 was provided by the Mediation Department at the Palace of Justice of Amman to author (3 July 2017). The data from 2017 to 2019 was provided to Hazem Abu Hazeem (24 June 2021).

Figure 1. Mediation Cases Referred in the Palace of Justice of Amman between 2006-2019



1.3.2 Development of mediation in England

As mediation uptake is limited in Jordan, the researcher wanted to compare Jordan with a jurisdiction where the practice of mediation is more developed. From that point on, the researcher examined the literature on the use of mediation in England.

1.3.2.1 The Woolf Report

In 1996, Lord Woolf's final report, Access to Justice,[18] was published, which brought major reform to the English civil justice system and prompted the English lawmakers to implement Lord Woolf's proposals into the Civil Procedure Rules (hereinafter "CPR").[19] Lord Woolf highlighted the problems in the English civil justice system by stating:

> The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall

[18] Woolf (n 7).
[19] Tamara Goriely, Richard Moorhead and Pamela Abrams, '*More Civil Justice? The Impact of the Woolf Reforms on pre–Action Behaviour'* (Research Study 43, Commissioned by The Law Society and Civil Justice Council 2002) 3.

> responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.[20]

In Lord Woolf's view the drawbacks of the civil justice system – high costs, slow trials, and inequality between opponents – prevented access to justice and provided a rationale for reform of the system. To overcome these obstacles, Lord Woolf recommended a new design of the civil justice system. At the core of the reforms is the overriding objective of the court to ensure access to justice is administered fairly and at proportionate cost.[21] Its main feature was to facilitate early settlement by encouraging litigants to use ADR, mainly mediation, before resorting to litigation and to make the system 'more co-operative and less adversarial.'[22]

1.3.2.2 The use of mediation in England

The Ministry of Justice in England and Wales does not publicly report data regarding the number of civil and commercial cases that are referred to mediation. However, various government departments collect data on the services they provide. The Small Claims Mediation Service is provided free of charge by HM Courts & Tribunals Service (HMCS).[23] Upon submitting Freedom of Information Act (FOIA) requests, the researcher obtained data from the Ministry of Justice for the Small Claims Mediation Service.[24] Table 2 shows the number of claims referred to the Small Claims Mediation Service between 2013-14 and 2020-21. The uptake of mediation increased 139 percent between 2013-14 and 2020-21. During that same period, actual mediations increased 73 percent. It should be noted the single largest increase in uptake (67%) occurred between 2019-20 and 2020-21, and the largest number of cases settled was in 2020-21 during the Covid-19 pandemic.

Table 2: Number of claims referred to the Small Claims Mediation Service between 2013-14 and 2020-21

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[20] Woolf (n 7) sI.2.
[21] ibid s 1, para 9.
[22] ibid s 1.9.
[23] The UK Government, HM Courts & Tribunals Service, Small Claims Mediation Service. < https://www.gov.uk/guidance/small-claims-mediation-service > accessed 25 February 2022. It should be noted that value of the claims using this service does not exceed £10,000.
[24] The 2013-14 through 2017-18 data was provided by the Ministry of Justice through Freedom of Information Act (FOIA) Request – 190422007 to author (9 May 2019). The 2018-19 through 2020-21 data was provided by the Ministry of Justice through Freedom of Information Act (FOIA) Request – 220113001 to author (8 February 2022). It should be noted that HMCTS management information systems only hold data relating to claims referred to the Small Claims Mediation Service from 2013-14 onwards.

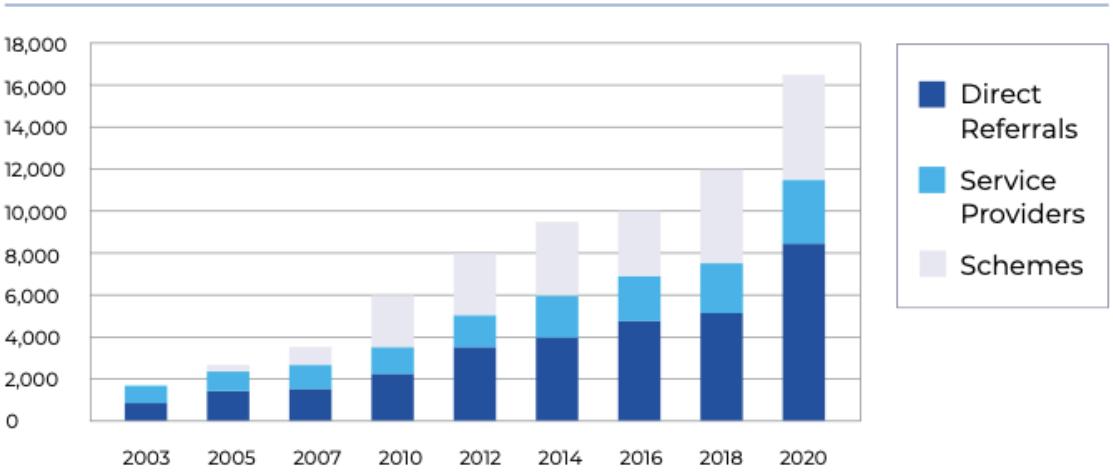
Number of claims referred to the Small Claims Mediation Service					
Year	**Total referred**	**Uptake**	**Mediations**	**Settled**	**Settlement Rate**
2013-14	NA	12,216	10,883	6,922	63.60%
2014-15	NA	14,451	12,409	7,951	64.10%
2015-16	NA	14,426	12,828	8,708	67.90%
2016-17	33,397	17,159	16,081	10,260	63.80%
2017-18	29,785	15,266	14,227	8,920	62.70%
2018-19	39,095	15,513	14,286	8,623	60.40%
2019-20	49,926	17,498	16,066	9,927	61.80%
2020-21	34,875	29,233	18,822	10,499	55.80%

To better understand the early development of mediation in England, the researcher investigated other organisations that provide private mediation services and report data regarding the size of the mediation marketplace. For example, the Centre for Effective Dispute Resolution (CEDR) provides such data.

In its most recent survey, CEDR estimated that the civil and commercial mediation marketplace has increased every two years between 2010 and 2020.[25] Figure 2 shows the estimated number of mediation cases increased from 2010 (6000 cases) to a high of over 16,000 civil and commercial cases in 2020.[26] CEDR estimated the overall settlement rate of mediation cases was approximately 93% in 2020 with 72% settled on the same day as the mediation session, and another 21% settled shortly after the mediation session ended.[27] Notably, the growth in mediation activity by direct referrals increased by 53% from 2018 and scheme-related activity such as the NHS Resolution increased by 11% since 2018. According to CEDR, scheme-related activity now accounts for over 30% of all mediation cases.[28]

[25] Centre for Effective Dispute Resolution (CEDR), The Ninth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom. (20 March 2022) 6. < https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf > accessed 13 August 2021.
[26] ibid 6.
[27] ibid 16.
[28] ibid 6.

Figure 2: Estimated Number of Civil and Commercial Mediation Cases in England and Wales between 2003 and 2020 (source: Centre for Effective Dispute Resolution, The Ninth Mediation Audit)



While the number of cases referred to mediation in Jordan continues to decline, the mediation practice in the English system is increasing rapidly. Thus, the researcher sought to learn lessons from the English practice of mediation.

1.4 The importance and originality of the research

Research in the area of mediation is important in both jurisdictions because of the role mediation plays in reducing the burden on the courts, which have been further strained by the Covid-19 pandemic. This study examines mediation related legislation, codes of conduct, education and training implemented in Jordan. By comparing these with the English practice, this research determines the elements which led to a decrease in the use of mediation in Jordan, and identifies the changes that are needed based on lessons learnt from the English system, and the implications of adopting these reforms.

In Jordan, the literature on mediation is minimal, and none explain the cause of the decline in mediation cases. Some of the research focuses on the process of mediation,[29] the role of

[29] Al Sleby (n 1); Khaled Mustafa Moussa, 'Mediation to Settle Civil Disputes' (2004) 4 (1); Hamadneh (n 1); Rolla Al-Ahmed, 'Mediation for Settling the Civil Disputes in the Jordanian Law: A Comparative Study' (PhD thesis, Amman Arab University 2008); Abhath Al Yarmouk Humanities and Social Sciences 3; Ayman Khaled Masadeah, 'Mediation to Settle Civil Disputes' (2004) 20 Abhath Al Yarmouk Humanities and Social Sciences 1935; and Adel Al-Lawzi, 'Mediation as a Means of Settling Civil Disputes in Jordanian Law' (2006) 21(2) Mu'tah Journal for Research and Studies: Humanities and Social Sciences 251.

mediators,[30] mediator liability[31] or the effectiveness of the settlement agreement.[32] Most of the research analyses the merits of the law itself, but there is little discussion of the implementation of the law and the practice of mediation. Further, no empirical research has been conducted about mediation on any subject.

In contrast to Jordan, in England there is a substantial amount of research on the topic of mediation, including articles,[33] books,[34] reports,[35] judicial rulings,[36] judiciary speeches[37] and empirical research,[38] which made England a useful comparator for Jordan. However, this is the first study of its kind to compare these two legal systems to each other in this area.

As there is no available literature and no legal sources on the issue, it was important for the researcher to conduct an empirical study to investigate the reasons for the decline in mediation in Jordan, as will be discussed in Chapter 2, and to compare both legal systems to investigate which elements are significant for successful implementation of mediation. This study will

[30] Rola Saleh Abu Rumman, 'The Role of the Private Mediator to Solve the Civil Disputes' (Master's dissertation, Middle East University 2009).
[31] Ali Mustafa Bani Mustafa, ' The Civil Liability of the Judge-Mediator' (Master's dissertation, Yarmouk University 2011) and Abdullah Fawaz Hamadneh, 'Legal liability of the Mediator' (2016) 46 Journal of Law, Policy and Globalization 102.
[32] Abdullah Fawaz Hamadneh and Youness Lazrak Hassouni, 'The Effectiveness of the Settlement Agreement Arising from the Mediation Process' (2016) 43 International Affairs and Global Strategy 18.
[33] For example, AKC Koo, 'The Role of the English Courts in Alternative Dispute Resolution' (2018) 38 Legal Studies 666;Masood Ahmed and Dorcas Quek Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice' (2019) 38(1) Civil Justice Quarterly1; Masood Ahmed and Fatma Nursima Arslan, 'Compelling Parties to Judicial Early Neutral Evaluation but a Missed Opportunity for Mediation: Lomax v Lomax [2019] EWCA Civ 1467' (2020) 39(1) Civil Justice Quarterly 1; Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31 (2) Civil Justice Quarterly 151; and Masood Ahmed, 'A More Principled Approach to Compulsory ADR' (2020) 4 Journal of Personal Injury Litigation 577;
[34] For instance, Bryan Clark, *Lawyers and Mediation* (Springer2012); Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2nd edn, Springer 2018) and Susan Blake, Julie Browne and Stuart Sime, The Jackson ADR Handbook (2 nd edn, Oxford University Press 2016).
[35] For example, Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996); Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010); Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010); Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018) and https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 26 August 2021.
[36] As an example, *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576; *Frank Cowl & Ors v Plymouth City Council* [2001] EWCA (Civ)1935; *Susan Dunnett v Railtrack Plc* [2002] EWCA (Civ) 303; *Lomax v Lomax* [2019] EWCA (Civ) 1467; and *Thakkar v Patel* [2017] EWCA (Civ) 117.
[37] Lord Justice Jackson, The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review (Eleventh Lecture in The Implementation Programme: Rics Expert Witness Conference, 8 March 2012) and Sir Henry Brooke, Mediation in the UK today: An Authoritative Review of the UK Mediation Scene Today from the CMC's Perspective' (CMC Academic Seminar, 20th January 2010).
[38] Such as, Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report*, (Lord Chancellor's Department Research Series No. 5/98, July 1998) and Margaret Doyle, *Evaluation of the Small Claim Mediation Service at Manchester County Court* (Final Report to the Better Dispute Resolution Team, Department for Constitutional Affairs 2006).

contribute to the empirical and theoretical knowledge base of information on the use of mediation.

1.5 Research aims and objectives

This research aims to investigate key elements that undermine or facilitate the uptake of mediation in Jordan and England. In particular, the focus is to identify barriers to the use of mediation in Jordan, and facilitators to the use of mediation in England.

To accomplish the aims of this research, the study was guided by the following objectives:

1. To review literature, existing research and judicial rulings on ADR, mainly mediation, in Jordan and England.
2. To examine existing laws on ADR and mediation in both jurisdictions.
3. To collect and analyse secondary data on mediation use in both legal systems.
4. To conduct exploratory empirical research on mediation in Jordan to identify barriers to the use of mediation.
5. To identify facilitators that support the use of mediation in England.
6. To consider the implications of adopting the English practice of mediation in Jordan.

1.6 Research Scope and Questions

This study is limited to the area of civil and commercial disputes and does not address mediation in family disputes nor other types of disputes. The spotlight of this research is on the role of the judges and lawyers in mediation, mandatory mediation and its implications, and the importance of mediation education, training and awareness among the court's users (judges, lawyers and disputants) in both jurisdictions. The study will seek to answer the following research questions:

1. What are the barriers that undermine the use of mediation in Jordan?
2. What are the roles and responsibilities of the court to encourage parties to use mediation in Jordan and England?
3. What are the roles and responsibilities of lawyers to encourage their clients to use mediation in Jordan and England?
4. What role does education, training, and awareness play in encouraging the use of mediation in Jordan and England?

5. Should mandatory mediation be introduced in the civil justice system in Jordan, and what are the potential implications?

1.7 Thesis Structure

This thesis is organised into eight chapters as follows:

Chapter One provides an overview of the development of mediation in Jordan and England, examines data on the use of mediation, and outlines the significance of the research, its originality, aims and objectives, research scope, research questions and structure of the thesis.

Chapter Two reviews the methodology of the thesis. This chapter discusses the research methodology and methods of the comparative study, the rationale and methods for undertaking the empirical study in Jordan, and the approach adopted to integrate the findings from the empirical study with the comparative study. This chapter concludes with the limitations of the research.

Chapter Three presents the empirical findings on lawyers' experiences and perceptions of court-based mediation in Jordan. The chapter is organised by the four hypotheses, including the role of judges in encouraging the use of mediation; the role and responsibilities of lawyers in the use of mediation; the access to and quality of justice and education, awareness and training among the court users.

Chapter Four presents the empirical findings on judges' experiences and perceptions of court-based mediation in Jordan. This chapter cross-references findings from the lawyers' questionnaire and highlights differences and similarities in the findings from the judge interviews. Similar to the previous chapter, the findings have been organised by the four themes: judges as gatekeepers; lawyers as gatekeepers; the concept that mediation improves access to justice and ensures quality of justice; and the concept that lack of education, awareness and training amongst court users hinders the use of mediation. Finally, the themes that emerged from the empirical research are identified, as they will be explored in comparison with the English system throughout the remainder of this thesis.

Chapter Five examines the role of judges as gatekeepers to mediation, comprising access to justice, the role of the judiciary, the role and the power of the court to encourage parties to use mediation, and the debate around mandatory mediation and its implications in the civil justice systems in Jordan and England.

Chapter Six explores the role of lawyers as gatekeepers to mediation. Building on the last chapter, this chapter will explore and examine the roles and responsibilities of lawyers to encourage the use of mediation, the ways in which lawyers act as gatekeepers to mediation, their conflicts of interest, and ways lawyers attempt to control mediation in both systems.

Chapter Seven evaluates mediation education, training and awareness among stakeholders in Jordan and England. This chapter compares the Jordanian and English legal systems on the extent of awareness, education and training of judges, lawyers and citizens related to mediation. This is followed by an examination of the status of mediation modules in legal education curricula in both jurisdictions.

Chapter Eight summarises the key findings and recommendations of the study, and suggests further research in this area.

CHAPTER TWO: METHODOLOGY

2.1 Introduction

The previous chapter provided an overview of the practice of mediation in Jordan and England and the available literature, and examined secondary data on the use of mediation in both civil justice systems. The central question the study is designed to answer is: Why is the use of mediation decreasing in Jordan while it is increasing in England? To address this question and the other research questions identified in Chapter 1, various strategies and methods were employed. Comparing the mediation practice in England and Jordan required a comparative approach. This chapter begins with a description of the comparative methodology. It summarises the main justifications for this comparative study, and discusses the research methods employed in comparative analysis. The chapter then discusses the rationale for undertaking an empirical study in Jordan, the research methodology and methods of the empirical study, and the approach adopted to integrate the findings from the empirical study with the comparative study. This chapter will conclude with the limitations of the empirical research.

2.2 Comparative Law

Comparative law "is the act of comparing the law of one country to that of another. Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law."[39] The researcher compares and contrasts the law of one country with the law of another to gain perspectives he could not obtain by looking at either one of them alone.[40] Moreover, the main objective of comparative law, as Hoecke states, is to 'improve one's own legal system' and find a solution from another jurisdiction.[41]

2.2.1 Why conduct a comparative study between England and Jordan?

[39] Edward J. Eberle, 'The Methodology of Comparative Law' (2011) 16(1) Roger Williams University Law Review 51. 52

[40] Geoffrey Samuel, 'Comparative Law and its Methodology' in Dawn Watkins and Mandy Burton (eds) Research Methods in Law (Routledge, 2nd edn, 2018) 101.

[41] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Boom Juridische Uitgevers 2. 2-3. <https://www.researchgate.net/publication/291373684_Methodology_of_Comparative_Legal_Research > accessed 9 August 2020.

The aim of this comparative study is to learn from the proven methods in the English civil justice system by identifying which practices have contributed to the uptake of mediation, and avoiding any mistakes that have contributed to the decreasing use of mediation practice. Bearing that in mind, the English system may also benefit from the Jordanian experience in mediation, as certain provisions in the Jordanian Mediation Law may be applicable in the English system. In doing so, the study will follow analytical methodology to get an in-depth understanding of both systems by identifying the similarities and differences between the legal systems in England and Jordan, and the provisions of mediation.[42] As Zweigert and Kötz demonstrate, comparative law provides multiple solutions for other systems' problems[43] and provides insight into the 'weaknesses and strengths' of one's own civil justice system.[44] In this regard, the study will examine the problems of mediation practice in the English and Jordanian systems, and identify how those problems are addressed differently. Most importantly, the comparative study will compare and contrast the English and Jordanian approaches to mediation to understand what caused the increase in the mediation practice in the English system. In this way, Jordan can learn from the English practice to increase the use of mediation.

2.2.2 Why use England as a comparator to Jordan?

It may be asked why England was chosen as a comparator, and not another country such as the United States. The answers lie in the complexity of the US system and the link between England and Jordan. In the United States, federal and state laws related to mediation are "a complex body of statutes, codes of civil procedure, local rules of court, specific mediation programmes and common law rules on contracts."[45] This complex legal landscape consists of the following legal sources: the US Constitution, federal legislation, federal civil procedure rules, common law jurisprudence, administrative regulation, state legislation, and private contracts, among others.[46] The complexity of the multiple systems makes the US a poor comparator for a PhD thesis with a strict word limit, whereas, England has one jurisdiction and more straightforward case-law, literature, debate and reports about mediation in the English

[42] Hoecke (n 41) 2, 13-16.
[43] Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press Oxford, 1998) 15.
[44] Jaakko Husa, *A New Introduction to Comparative Law* (Oxford and Portland, Oregon 2015) 59.
[45] Rainer Kulms, 'Mediation in the U.S.A: Alternative Dispute Resolution between Legalism and Self-Determination' in Klavas J. Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspectives* (Oxford: Oxford University Press, 2012) 1308.
[46] Carrie Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-Formal'' in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger, and Carrie Menkel-Meadow (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) 419-421.

civil justice system. Furthermore, Jordan has received grants and aid from the UK to support and develop its justice system, and learned how mediation is practiced in many systems before drafting the Jordanian Mediation Law. Therefore, for the following reasons, gaining insight into aspects of the English mediation practice may benefit Jordanian lawmakers.

Several factors justified researching England and Jordan comparatively. Firstly, according to the Jordanian Ministry of Justice, there is a joint cooperation between Jordan and the United Kingdom, enabling Jordan to take advantage of British expertise in the legal and judicial fields, especially in the field of civil and commercial mediation. In November 2013, the Jordanian Minister of Justice met with the British Ambassador to discuss the continuation of technical support provided by the British Government to Jordan to develop their judicial system.[47] Some judges interviewed confirmed the cooperation between the Jordanian and British governments, as there are training sessions for judges on mediation provided by British mediators.[48] Secondly, the Council of Ministers in the Policy Memorandum of the Mediation Law noted the success of mediation in western countries influenced the adoption of the Mediation Law in Jordan.[49] Thirdly, both countries reformed their civil justice systems during a similar time frame, and with a similar aim: that of reducing the backlog of court cases by encouraging the use of ADR, mainly mediation. The CPR was established in 1998 in England with a focus on cost savings, proportionality and timely proceedings.[50] Mediation was introduced in Jordan in 2002 with the adoption of the Civil Case Management System to reduce time, money and effort.[51] Fourthly, in the field of mediation, the English civil justice system has extensive experience in terms of practice and case law and a significant amount of research has been conducted on the subject.[52] By comparison, the modern Jordanian civil justice system has much less case law and legal research and virtually none on civil and commercial mediation. Fifthly,

[47] Ministry of Justice Bulletin No 18, 'Jordanian Minister of Justice Discusses Legal Cooperation with British Ambassador' (November 2013) 5.< www.moj.gov.jo/EchoBusV3.0/SystemAssets/PDF/AR/E-Library/18.pdf > accessed 9 August 2019.
[48] Referral Judge (6) and Judge-Mediator (8).
[49] *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law (2006*) to author (5 July 2017).
[50] CPR 1.1.
[51] The Provisional Law No. 26 of 2002 that amended the Civil Procedure Law No. 24 of 1988, in Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment to the Civil Procedure Law No. 24 of 1988* to Ashraf Abu Hazeem (31 December 2019).
[52] Dame Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray and Dev Vencappa, '*Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* '(Ministry of Justice Research Series 1/07 May 2007); Barbara Billingsley and Masood Ahmed, Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada (2016) 35(2-3) Common Law Review 186; *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576; *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm Ct).

commercial aspects of Jordanian laws were influenced by English law, including the Jordanian Arbitration Law, Insurance Law, Trade Law and Company Law.[53] This demonstrates how English law has been influential in the development of Jordanian commercial laws. All these reasons justify comparing the mediation practice in both systems.

2.2.3 The research strategy for the comparative study

The classic form of comparative law is functional comparison. According to Zweigert and Kotz, the functional approach is the "basic methodological principle of all comparative law."[54] A functional comparison puts the emphasis on the function of the law rather than the terminology. The functional approach reduces law to its essential function, describes and analyses the solutions to the specific issue in each country, and then considers the similarities and differences across legal systems.[55] This approach adopts the same methods for each legal system analysed. However, such an approach has its own limitations if the researcher is unable to apply the same methods in each jurisdiction. This challenge was influential in the research design of this study, and will be addressed in the discussion below.

The comparative study methodology was based on the black letter approach. The black letter approach was employed to understand relevant law as written in England and Jordan; moreover, the analytical approach was used to compare how the law is applied and the effect of the law in the two systems.

First, the doctrinal, or black-letter, method is typically carried out by identifying and locating the relevant primary sources of the law, reading, interpreting or analysing the legal issues, and fitting the new information within the existing legal framework.[56] As applied in this thesis, the researcher analysed primary sources such as statute, case law and other legal sources, and secondary sources such as existing literature[57] in both jurisdictions, where available.

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[53] Mohamed Olwan, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference: Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World) 137. < <http://www.ialsnet.org/meetings/enriching/olwan.pdf > accessed 31 October 2019.
[54] Zweigert and Kötz (n 43) 15.
[55] Uwe Kischel and Andrew Hammel. *Comparative Law* (Oxford University, Press 2019) 6.
[56] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, 2nd edn, 2018) 12-13.
[57] Coralie Neave-Coleshaw, 'Research Methods: Doctrinal Methodology'. <https://uweascllmsupport.wordpress.com/author/coralieneavecoleshaw/>accessed 9 August 2020.

Second, the analytical method was used to evaluate the commonalities and differences in laws between both countries.[58] This method addresses Hoecke's concerns over the narrow view in the black-letter approach, as well as explaining how the law is applied or suggesting ways in which the law could be improved.[59] For example, the analytical method has been applied in this study to explore the concept of access to justice as an explanation for the rejection of mandatory mediation in Jordan, and its acceptance in England.

Lastly, in order to avoid the pitfall of legal transplantation, "moving of a rule or a system of law from one country to another, or from one people to another,"[60] only recommendations that fit with the legal environment, culture and concept will be suggested.[61] In so doing, the researcher will avoid recommending amendments to the law and regulations in Jordan that are a direct copy of provisions from the English law, and that are incompatible with the Jordanian legal system. For example, in this study, the researcher will not recommend transplanting the rules in the CPR that conflict with the Jordanian concept of access to justice as-is in the Jordanian law.

2.2.4 Challenges in comparing England and Jordan

The choice of comparing England and Jordan proved challenging in terms of the availability of resources in Jordan. The Jordanian resources available included statute and policy memorandums, but there was limited case law and literature. The main concern was that, without enough information about the practice of mediation in Jordan, claims would largely be based on the legislation. As Hoecke explains, "comparing only legislation is risky when there is no information available on how it works in practice, and such a limited comparison is only acceptable for countries which are not at the core of one's comparative research."[62] Hoecke goes on to state that comparing law-in-context requires sufficient legal sources and literature for each system being compared.[63]

[58] Hoecke (n 41) 2. 14.
[59] ibid 2. 16.
[60] Alan Watson, Legal Transplants: *An Approach to Comparative Law: An Approach to Comparative Law* (1st Edinburgh. Scottish Academic Press Ltd 1974) 21.
[61] Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) The Cambridge Law Journal 313. 315
[62] Hoecke (n 41) 2, 6.
[63] ibid 2, 7.

Fortunately, it was possible to overcome deficiencies in the availability of Jordanian literature by conducting an empirical study in Jordan, making an important original contribution to knowledge.

2.3 Empirical Methodology

This section begins by justifying the research approach deployed in England, then moves on to discussing the research approach deployed in Jordan, addressing the rationale and practicalities of undertaking an empirical study of mediation practice in Jordan. Having explored the research methodology and methods of the empirical study, the integration of the qualitative and quantitative data and the development of the four themes that emerged from the empirical study are discussed. This chapter will then conclude by addressing the limitations of this research.

2.3.1 Research deployed in England

From the outset of this research, it was clear that a comparison with a more active and developed jurisdiction would enable the researcher to better understand the factors that contribute to the low uptake of mediation in Jordan. Important research materials were identified through a literature review focusing on the English mediation practice. In particular, the review began with The Woolf Report[64] and The Jackson Report,[65] as well as the review of the Civil Procedure Rules 1998,[66] and significant case law framed the researcher's study. This review was supplemented by secondary data from the Centre for Effective Dispute Resolution (CEDR) related to civil and commercial mediation in England.[67] Further, specific data was requested from the UK Ministry of Justice (discussed in Chapter 1).[68] The availability of extensive primary and secondary sources was determinative in the decision to use England as a comparator to Jordan.

[64] Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).
[65] Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (The Stationery Office 2010)
[66] The Civil Procedure Rules 1998
[67] Centre for Effective Dispute Resolution, The Eighth Mediation Audit (10 July 2018) 3. <https://www.cedr.com/wp-content/uploads/2020/01/The_Eighth_Mediation_Audit_2018.pdf > accessed 28 December 2020.
[68] The Number of Claims Referred to the Small Claims Mediation Service, from 2013-14 through 2020-21. The data were provided to the author upon request.

2.3.2 The justification for not being able to conduct quantitative and qualitative study/primary research in England

After the literature review and secondary data analysis were completed, it was clear that there was sufficient information to address the research questions without the need for collection and analysis of primary research data in England.[69] Existing mediation literature[70] and case law [71] in England confirms that mediation was active in the English civil justice system after the promulgation of the CPR of 1998 came into effect. For example, as Genn[72] noted, the take-up of mediation increased after the judgment of *Dunnet v Railtrack*[73] in which the court exercised its discretion to impose costs sanction on a party for unreasonably refusing an invitation to ADR,[74] and the judiciary played an active role in directing parties to attempt mediation.[75] Further, the increase in the use of mediation was observed by Kallipetis as he stated, "In the UK the Woolf Reforms gave a great impulse towards ADR in general and mediation in particular. Currently there are more civil and commercial disputes being resolved through some form of ADR than there are being litigated."[76] Moreover, there is extensive literature about compulsion in mediation,[77] and several empirical studies and evaluation research studies have been conducted related to the use of mediation in England.[78] Therefore, conducting primary

[69] Mandy Burton, 'Doing Empirical Research Exploring the Decision-Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (2nd edn, Routledge 2018) 55.
[70] Hazel Genn, 'What is Civil Justice for–Reform, ADR, and Access to Justice' (2012) 24 Yale JL & Human 397; Woolf (n 64); AKC Koo, 'The role of the English Courts in Alternative Dispute Resolution'(2018) 38(4) Legal Studies 666; Bryan Clark, Lawyers and Mediation (Springer 2012); Neil H. Andrews, *Andrews on Civil Processes*: *Court Proceedings, Arbitration and Mediation* (2nd edn, Intersentia Ltd 2019); Masood Ahmed, 'Bridging the Gap between Alternative Dispute Resolution and Robust Adverse Costs Orders' (2016) 8 Contemp Readings L & Soc Just 98; and Adrian Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (3rd edn. Sweet& Maxwell, 2013)
[71] *Frank Cowl & Ors v Plymouth City Council* [2001] EWCA (Civ)1935; *GKR Karate (UK) Limited v Adrian Sclanders & Others*, 2000 WL 1629617; *Susan Dunnett v Railtrack Plc* [2002] EWCA Civ 303; *PGF II SA v OMFS Company 1 Limited* [2013] EWCA (Civ) 1288; *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA (Civ) 576; and *Lomax v Lomax as Executor of the Estate of Alan Joseph Lomax* (Deceased) [2019] EWCA (Civ)1467.
[72] Genn, Fenn, Mason, Lane, Bechai, Gray and Vencappa, (n 52).
[73] [2002] EWCA(Civ) 303.
[74] ibid [12].
[75] Genn, Fenn, Mason, Lane, Bechai, Gray and Vencappa, (n 52) 134. See also, Nicholas Gould, Claire King and Philip Britton (eds), *Mediating Construction Disputes: An Evaluation of Existing Practice.* (Centre of Construction Law & Dispute Resolution, King's College London 2010) 8.
[76] Michel Kallipetis, "Top 5 Things Everyone Should Know About Mediation" [Singapore International Mediation Centre, Singapore, September 2015}. <https://simc.com.sg/blog/2015/09/17/top-5-things-everyone-should-know-about-mediation/> accessed November 2020.
[77] Masood Ahmed, 'Implied Compulsory Mediation' (2012) C.J.Q, 31(2), 151; Shirley Shipman, 'Compulsory Mediation: The Elephant in the Room' (2011) 30(2) Civil Justice Quarterly 163; and Hong-Lin Yu, 'Carrot and Stick Approach in English Mediation–There Must Be Another Way' (2015) 8 Contemp. Asia Arb. J. 81.
[78] For example, Genn, Fenn, Mason, Lane, Bechai, Gray and Vencappa, (n 52) ; Hazel Genn, 'The Central London County Court-Pilot Mediation Scheme Evaluation Report' (Lord Chancellor's Department Research

research on the subject of the increase in mediation was not required in England, as there is sufficient literature on the subject.

Beyond this, in practical terms, conducting empirical research is labour intensive and time-consuming. Conducting additional interviews in England was not feasible because there is a limited time to complete the thesis.[79] Several researchers have also found low response rates for empirical legal studies in the UK presenting an additional burden. For example, Clark and Agapiou in their investigation of construction lawyers' attitudes on the use of mediation in Scotland distributed 165 questionnaires, just fifty of which were completed.[80] Another of their empirical research studies showed the survey response rate was 18%, and only a small number of participants agreed to be interviewed.[81] In a study conducted by King's College London Centre of Construction Law & Dispute Resolution, questionnaires were distributed in three Technology and Construction Courts, including Bristol, Birmingham and London,[82] with response rates around 15 percent.[83] In 2018, another empirical research study conducted for the Department for Business, Energy and Industrial Strategy evaluating the impact of the use of ADR and the court system on resolving consumer disputes showed a low response rate of 19 percent of completed questionnaires and a low interview rate with legal experts as only three out of 15 experts agreed to be interviewed.[84]

In addition to the problem of response rates and engagement, the researcher's experience of collecting secondary data would suggest gaining access to practitioners in England would be

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Series No. 5/98, July 1998); Margaret Doyle, *Evaluation of the Small Claim Mediation Service at Manchester County Court* (Final Report to the Better Dispute Resolution Team, Department for Constitutional Affairs 2006); Sue Prince, *Court-based Mediation: A Preliminary Analysis of the Small Claims Mediation Scheme at Exeter County Court*, (A report prepared for the Civil Justice Council, March 2004); and Sue Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Final Report Prepared for the Department of Constitutional Affairs, September 2006).

[79] For example, in her thesis, Whitehouse took nine months in doing empirical study in England to interview nineteen participants. Lisa Ann Whitehouse, LLB, 'A Contextual Analysis of the English Law of Mortgage; An Examination of its Juridical Content, Origins and Social Function by Way of an Empirical Study of Decision-Making Power Within the Mortgage Relationship' (PhD thesis, University of Hull 1999). 57, 95

[80] Andrew Agapiou and Bryan Clark 'Scottish Construction Lawyers and Mediation: An Investigation into Atitudes and Experiences' (2011) 3(2) International Journal of Law in the Built Environment. 159.,163.

[81] Andrew Agapiou and Bryan Clark 'A Follow-up Empirical Analysis of Scottish Construction Clients Interaction with Mediation' (2013) 32(3) Civil Justice Quarterly 349, 351.

[82] Gould, King and Britton (n 75) 43.

[83] ibid 45.

[84] Department for Business, Energy and Industrial Strategy, *Resolving Consumer Disputes Alternative Dispute Resolution and the Court System,* Final Report (2018) 7.<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698442/Final_report_-_Resolving_consumer_disputes.pdf > accessed 13 October 2020.

difficult. The attempt to carry out an empirical study in England was hampered by the lack of access to judges and legal professionals. This is evident from the researcher's first attempt to collect secondary data from the UK Ministry of Justice on November 27, 2017. The request was rejected due to limited staff resources.[85] Although the subsequent attempts[86] were successful, each response was received weeks after the initial request. Furthermore, as Hunter et al. have identified, conducting interviews with judges in England requires prior permission, advanced notification, and formal requests for meetings, which, even if approved, may not result in any interviews.[87] Similarly, Burton observed in her research of the magistrates' court in England and Wales that permission to conduct the research was difficult to obtain, with others having the same experience, unless the research was funded by the authorities.[88] Reflecting on these experiences, this research was limited to legislation, case law, literature, and secondary data analysis of English mediation practice.

2.3.3 Research deployed in Jordan

The research on the Jordanian mediation system is comprised of the black letter approach and the empirical approach. It began with an extensive review of the Jordanian Mediation Law,[89] Jordanian government statistics on mediation, and the available literature. Upon request, data was provided by the Ministry of Justice related to the number of cases referred to mediation and the settlement rate for all eight mediation departments in Jordan. The data showed that the majority of mediation cases were referred in the Mediation Department in the Palace of Justice of Amman, and there was limited uptake in the mediation departments outside of Amman.[90] This research, therefore, focuses on the mediation department, and requested annual records of the number of cases referred to mediation since the introduction of the mediation programme in 2006. The data revealed that the number of cases referred to mediation decreased

[85] The email from the Ministry of Justice declining to provide data was sent to the researcher on 4 December 2017.
[86] On July 20 and July 25, 2018, the researcher made two similar requests for data. Data from those requests were provided by email on 22 August 2018. A fourth request was sent on 22 April 2019, and the response was provided on 9 May 2019. The final request for data was submitted on 13 January 2022 and provided by email on 8 February 2022.
[87] Caroline Hunter and Judy Nixon and Sarah Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making' (2008) 35 JL & Soc'y 76. 81-82. Also, see the UK government guidance on applying for permission to access HM Courts and Tribunals Service to carry out academic research which entails several steps. < https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers > accessed 30 October 2020.
[88] Burton (n 69) 61.
[89] The Mediation Law for Civil Disputes Resolution (as amended) No. (12) 2006.
[90] Data from the Jordanian Ministry of Justice in Amman to author (5 July 2017).

dramatically after 2010. These figures alone indicate a decrease in mediation cases, but do not explain the reason why mediation declined in Jordan.

Unfortunately, there was nothing in the literature to explain the cause of the decreased mediation cases. In fact, the literature was limited to only one book related to the history of ADR, the process of mediation, its advantages and disadvantages,[91] two PhD theses, one a comparative study of mediation between Jordan and Morocco[92] and the other a comparative study of mediation between Jordan and other Middle Eastern countries;[93] three Masters theses on the role of private mediators,[94] the liability of the judge-mediator[95] and the role of the judge mediator,[96] and a few articles focused mainly on the process of mediation within the civil justice system.[97] Importantly, the review of the available literature shows there is a gap in the existing knowledge about the decline in mediation in Jordan. To remedy the lack of literature, it was necessary to conduct an empirical study to understand the reasons for the sharp decline in mediation in Jordan, as there was no legal source or literature available on the issue.

2.3.4 The rationale for conducting empirical research in Jordan

As Hoecke[98] pointed out, no comparative analysis without sufficient information can be carried out effectively.[99] As there is not sufficient literature on the practice of mediation to conduct PhD research, an empirical study on the practice of mediation in Jordan to prepare for the comparative analysis and to answer the research questions became essential.

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[91] Bashir Al Sleby, *Alternative Dispute Resolution ADR* (Darwael 2010).
[92] Abdullah Fawaz Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes, A Comparative Study' (PhD thesis, University Hassan 2015).
[93] Rolla Al-Ahmed, 'Mediation for Settling the Civil Disputes in the Jordanian Law: A Comparative Study' (PhD thesis, Amman Arab University 2008).
[94] Rola Saleh Abu Rumman, 'The Role of the Private Mediator to Solve the Civil Disputes' (Master's dissertation, Middle East University 2009).
[95] Ali Mustafa Bani Mustafa, ' The Civil Liability of the Judge-Mediator' (Master's dissertation, Yarmouk University 2011).
[96] Mohammad Ahmad Abualghanam, 'The Role of the Mediation Judge in Settling Civil Disputes at Jordanian Law: A Comparative Study (Master's dissertation, Al-Ahliyya Amman University 2017).
[97] Abdullah Fawaz Hamadneh and Youness Lazrak Hassouni, 'The Effectiveness of the Settlement Agreement Arising from the Mediation Process'(2016) 43 International Affairs and Global Strategy 18; Abdullah Fawaz Hamadneh, 'Legal liability of the Mediator' (2016) 46 Journal of Law, Policy and Globalization 102; Khaled Mustafa Moussa, 'Mediation to Settle Civil Disputes' (2004) 4 (1) Abhath Al Yarmouk Humanities and Social Sciences 3; Ayman Khaled Masadeah, 'Mediation to Settle Civil Disputes ' (2004) 20 Abhath Al Yarmouk Humanities and Social Sciences 1935; and Adel Al-Lawzi, 'Mediation as a Means of Settling Civil Disputes in Jordanian Law' (2006) 21(2) Mu'tah Journal for Research and Studies: Humanities and Social Sciences 251.
[98] Hoecke, (n 41) 2, 6.
[99] Ibid 2, 6-7.

The term empirical legal research refers to "the study of law, legal processes and legal phenomena using social research methods, such as interviews, observations or questionnaires."[100] Empirical legal research has a role in providing information about the law which may not be obtained from other research methods and "it answers questions about law that cannot be answered in any other way."[101] One of the primary reasons for conducting qualitative research, according to Creswell, is "that not much has been written about the topic or the population being studied, and the researcher seeks to listen to participants and build an understanding based on what is heard."[102] Furthermore, Burton observes if the research question cannot be answered through existing literature or secondary sources, then empirical legal research may be necessary.[103] Thus, for example, knowing the advantages of mediation within the civil justice system does not give insight into why the use of mediation has declined. Hence, the empirical study would remedy this weakness to understand why the use of court-based mediation was not successful after 2010. This research is the first study of its kind. It makes an original contribution to the literature by empirically studying stakeholders' experience and perceptions of mediation in Jordan.

2.3.5 Access in Jordan: Challenges and opportunities

The empirical research involved fieldwork in Jordan to conduct interviews with judges and disseminate questionnaires to lawyers. The language barrier would ordinarily pose a significant challenge to non-native researchers in terms of misunderstanding some responses and missing some important information.[104] However, as a native Jordanian, the researcher is fluent in Arabic, which facilitated the collection of the data and allowed full access to the written information.[105] Furthermore, Benstead found that diglossia, the use of a variety of dialects in a language, could be a challenge for the researcher in Arabic-speaking countries which creates the possibility of producing errors due to the difference between the spoken language and the

[100] Burton (n 69) 66.
[101] Anthony Bradney, 'The Place of Empirical Legal Research in the Law School Curriculum' in P. Cane and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 1033.
[102] John W. Creswell, *Research design Qualitative, Quantitative, and Mixed Methods Approaches,* (4th edn, SAGE Publications, Inc 2014) 61.
[103] Burton (n 69) 55.
[104] Rebecca Marschan-Piekkari and Cristina Reis, 'Language and Languages in Cross-Cultural Interviewing' in Rebecca Piekkari and Catherine Welch (eds) *Handbook of Qualitative Research Methods for International Business* (Edward Elgar Publishing 2004) 225.
[105] ibid 225.

written (legal) language.[106] However, this was not an issue for the researcher as a native speaker with a legal background. The researcher spoke and interacted with the interviewees in both formal and informal Arabic seamlessly. Another significant challenge to gaining access to judges and lawyers is the culture of *wasta*, using connections to get things done. Sakarna and Kanakri defined wasta as "the process in which someone asks somebody to do a favour for him or one of his relatives or friends," which in some cases may breach rules or regulations.[107] Seeking benefits or advantages by using *wasta* is understood as acceptable within the Arab world, though it could be considered corruption in the West.[108] Further, Cunningham and Sarayrah observed that *wasta* has deep roots in Arab countries, and became an essential part of the culture as *wasta* plays a key role in many aspects, such as family, politics and economics, which impacts decisions in the Middle East. For example, family prestige is used to gain access to resources through the practice of *wasta*.[109] Hence, they emphasised that some acts of *wasta* are moral, legal and fit within most culture frameworks.[110] The power of *wasta* still exists in Jordan, as many transactions cannot be done without the influence of *wasta*.[111] In this empirical research, the use of personal connections or *wasta* was used to facilitate participation in the interviews and the questionnaires, in some cases. For example, the researcher knocked on the door of one of the judges, providing his full name.[112] As this judge knew the researcher's grandfather, he welcomed him with a warm reception, and later introduced him to another judge to interview. In another example, due to the limited time the researcher had in Jordan, a personal contact put him in touch with the president of one of the courts that has a mediation department. The president of the court welcomed the researcher very warmly, and through this connection two more judges voluntarily agreed to be interviewed. In the current fieldwork using *wasta* or personal connection did not breach regulations or rules and, most importantly, participants could expect no benefits or personal gain for participating in my research. Though

[106] Lindsay J. Benstead, 'Survey Research in the Arab World' in Lonna Rae Atkeson and R. Michael Alvarez (eds), *The Oxford Handbook of Polling and Survey Methods* (Oxford University Press 2018) 232.
[107] Ahmad Khalaf Sakarna and Mahmoud Kanakri, 'Arabic Wasta from a Sociolnguistic Perspective' (2005) 58(4) Acta Orientalia Academiae Scientiarum Hungaricae 391, 392.
[108] Peter Pawelka and Andreas Boeckh, Patrimonial Capitalism: Economic Reform and Economic Order in the Arab World (2004) <40-41< https://publikationen.uni-tuebingen.de/xmlui/bitstream/handle/10900/47408/pdf/complete.pdf?sequence=1&isAllowed=y > accessed 3 November 2020
[109] Robert B. Cunningham and Yasin K. Sarayrah, *Wasta: Hidden Force in Middle Eastern Society: The Hidden Force in Middle Eastern* (Praeger Publishers 1993) 2-3
[110] ibid 4.
[111] Aseel Al-Ramahi, 'Wasta in Jordan: A Distinct Feature of (And Benefit for) Middle Eastern Society' (2008) 22(1) Arab Law Quarterly 35, 62.
[112] In many Arab countries, a person's full name is their first or given name, the middle name is the father's name and the grandfather's name followed by the last name which is the family name.

wasta could pose a challenge for someone without personal connections in Jordan, it helped to facilitate this fieldwork. Also, unlike in some countries, the use of e-mail and scheduled meetings are not extensively used in Jordan. As Rivera et al. discovered, scheduling interviews by first sending an introductory letter with a follow up telephone call is not as useful outside of the developed world, due to cultural and technical reasons such as unreliable mail service or a "penchant for day-to-day scheduling."[113] Furthermore, Clark found that many people in the Middle East prefer to be contacted for an interview by personal contact rather than a phone call or an email.[114] For example, in the current research, only two of the 17 interviews were scheduled beforehand. The remainder of the interviews were a result of showing up in person, directly contacting judges and requesting interviews. However, it should be noted, not all of the courts allowed the researcher access to the judges. One court official in a region outside of Amman required approval of the Judicial Council and the Ministry of Justice before conducting interviews. Culturally speaking, requiring formal approval was a clear signal that the official was not interested in making the judges available.

Several factors facilitated the collection of empirical research in Jordan. Firstly, in her experience interviewing political elites in the Middle East, Clark found the people freely consented to be interviewed.[115] Similarly, in the researcher's experience, the majority of Jordanian judges were welcoming to the concept of being interviewed for academic purposes without many hindrances or requirements, or even the necessity of making formal requests for an interview. Secondly, being a research student at the university encourages and motivates judges to participate in the research; as Corstange found, conducting empirical research by a university sponsor positively affects the response rate.[116] Another strategy to recruit participants is "knocking on doors," as this method creates a personal connection between the researcher and the participants in the Arabic culture, and makes the participants more likely to accept the invitation.[117] As a researcher, knocking on the door of the judge and politely requesting the possibility of conducting the interview was often sufficient. As noted above,

[113] Sharon Werning Rivera, Polina M. Kozyreva and Eduard G. Sarovskii, 'Interviewing Political Elites: Lessons from Russia' (2002) 35(4) Political Science and Politics 683,685.
[114] Janine A. Clark, 'Interviewing: Lessons Learned' in Janine A. Clark and Francesco Cavatorta (eds) *Political Science Research in the Middle East and North Africa: Methodological and Ethical Challenges* (Oxford University Press 2018) 112.
[115] ibid 109.
[116] Daniel Corstange, 'Foreign-Sponsorship Effects in Developing–World Surveys Evidence from a Field Experiment in Lebanon, (2014) 78(2) The Public Opinion Quarterly 474, 481.
[117] Katherine Davies, 'Knocking on Doors: Recruitment and Enrichment in a Qualitative Interview-Based Study' (2011) 14(4) International Journal of Social Research Methodology 291-292.

using personal connections helped to recruit participants and set the stage to be connected to other participants.[118]

Additionally, as suggested above, the power of speaking the same language of the interviewee is a powerful tool to collect information.[119] Being a native Jordanian gave the researcher the advantages of conducting the interview without the need for a translator, whereas non-Arabic speaking researchers would be limited to the observer role, and would need to depend on the translator to collect the data.[120] The researcher had the advantage of gaining the trust of the interviewee by virtue of being a native Jordanian.[121] As a native Arabic speaker, the researcher was able to pick up on clues in the judges' body language to determine when to probe further or when to move on. Because of this, the researcher was also able to adopt different approaches based on the interviewee's expressions. For example, the researcher was able to sense which interviewees readily agreed to the interview, or when he needed to build more rapport with the respondents before launching into the interview questions. Being a native speaker added a value to the interview, because there is interaction between the interviewee and the interviewer when opening the conversation and encouraging the interviewee to express their views. A native speaker may achieve a better result compared to the interviewer who does not speak the mother tongue which would affect the interaction of the interview.[122] In addition, understanding the culture of the country helped the researcher not to commit socially undesirable acts. For instance, eye contact is very important in the Arabic culture; people look into each others' eyes while they are speaking to show that they are paying attention. However, when the conversation is between a male and a female, eye contact is not acceptable as staring at females is a sensitive issue in Arabic culture.[123] For this reason, the researcher was very

[118] Esther Nir, 'Approaching the Bench: Accessing Eites on the Judiciary for Qualitative Interviews' (2018) 21(1) International Journal of Social Research Methodology 77, 80. See also, Joseph A. Conti and Moira E. O'Neil, Studying up: Qualitative Methods and the Global Power Elite' (2007) 7(1) Qualitative Research 63.
[119] Catherine Welch and Rebecca Piekkari, 'Crossing Language Boundaries: Qualitative Interviewing in International Business' (2006) 46(4) Management International Review 417, 430.
[120] Allyson Hawkins, Ruby Assad and Denis Sullivan, Citizens of Somewhere: A Case Study of Refugees in Towns Amman, Jordan (Friedman School of Nutrition Science and Policy at Tufts University. Refugees in Towns is a project of the Feinstein International Center 2019) 7. <https://reliefweb.int/sites/reliefweb.int/files/resources/RIT%2BReport%2BAmman%2BJordan.pdf > accessed 19 October 2020
[121] Janine A. Clark, 'Field Research Methods in the Middle East' (2006) 39(3) PS, Political Science & Politics 417, 419.
[122] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd edn Zed Books Ltd 2012) 229.
[123] Marzieh Gordan, Isai Amuthan Krishnan and Zurina Khairuddin, 'Culture Influence on the Perception of the Body Language by Arab and Malay Students' (2013) 2(6) International Journal of Applied Linguistics & English Literature 1,4. <https://www.journals.aiac.org.au/index.php/IJALEL/article/view/943/873> accessed: 19 October 2020.

careful when conducting the interview with a female judge. Furthermore, conducting the interviews in Arabic enabled the respondents to speak confidently, without hesitation, and to answer questions accurately as there was no language barrier.[124] Other important methods included being patient and flexible, conducting interviews in the middle of the hearing room between cases, standing up and pausing when necessary and, as is the custom, thanking the participants with excessive flattery after completion of the data collection. At times it was necessary for the researcher to stand up from one to two hours to complete the interview because it was conducted in the trial room and the court users were coming in and out. This gave the researcher the opportunity to observe in practice when some referral judges tried to invite disputants to mediation, and the clear rejection that followed from their lawyers.

2.4 Overview of the data collection

The empirical research used a mixed-methods research design where qualitative and quantitative data were collected concurrently. Following ethical approval from the ethics panel of the University of Stirling (GUEP 513),[125] the research fieldwork began in Jordan on the second of December 2018, and it ended on 31 January 2019. Data were collected through semi-structured interviews with 17 Jordanian judges (8 referral judges, 9 judge-mediators) and questionnaires were collected from 99 lawyers (See Appendix 1). These judges and lawyers were from courts in Jordan that have mediation departments, and were purposefully[126] chosen because they self-reported having experience using court-based mediation. The empirical data were analyzed separately using thematic analysis and descriptive statistics. Following the analysis, the quantitative and qualitative results were compared to confirm the findings, and several themes emerged, including the significance of the role of judges, the role of lawyers, education, awareness and training, and access to justice. These themes laid the foundation of the comparative study with the mediation practice in the English civil justice system.

2.4.1 The mixed methods research design

[124] Welch and Piekkari (n 119) 428.
[125] See Confirmation of Ethical Approval, v of this thesis.
[126] Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (3rd edn, Sage Publications Inc 2002) 230. See, also Creswell (n 102) 239. Demonstrates that purposefully selected sites or individuals "will best help the researcher understand the problem and the research question."

The mixed-methods approach to data collection provided more detailed information than could be provided by any one method. A purely quantitative approach (e.g., questionnaires) would allow the researcher to accommodate the lawyers' busy schedules and gain access to the users' view on mediation. This approach enabled the researcher to gather data efficiently and effectively from a large number of lawyers about the practice of mediation across various courts in Jordan. On the other hand, a purely qualitative approach (e.g., semi-structured interviews) would provide in-depth information about the process of mediation in the courts where the judges practice, but would limit the number of respondents that could realistically be consulted. As Creswell demonstrates, the advantages of the mixed-methods approach is to provide a deep understanding in relation to the research question and avoid the flaws of each method.[127] In addition, Bryman shows that the combined approach of mixed-methods helps to check the findings from one method against those of the other method, provides a more detailed overview of the study, and each type of research informs the other.[128] For instance, in this study, the questionnaire provided evidence of the lawyers' perceptions of the mediation process, how often their clients were referred to mediation, and how often the cases were settled through mediation. The interviews allowed the researcher to understand the factors judges considered to refer cases to mediation and to compare the lawyers' experiences with the judges' accounts of the mediation process. A broader understanding of the issue is required as the judge's view is limited to the comments on their own practices, whereas lawyers generally work with multiple judges and in various courts, and can provide insight into the practice of mediation more broadly.[129] Therefore, this study followed a mixed-methods research design in order to gain more in-depth information from interviews and questionnaires to better understand the perspectives and experiences of the key stakeholders of the justice system on the use of mediation.

2.4.2 Justification for excluding disputants from the empirical study

Disputants were excluded from this study primarily because judges and lawyers are the main players within the civil justice system, as laypeople are generally not permitted to represent

[127] Creswell (n 102) 264.
[128] Alan Bryman, Quantitative and Qualitive Research Further Reflections on their Integration, in Clive Seale (ed), *Social Research Methods: A Reader* (Routledge 2004) 506-507.
[129] Editorial, 'Lawyers refused to relocate to the Court of Appeal', *khaberni* (Amman 12 February 2020). < https://www.khaberni.com/news/331776-المحامون-يصعدون-رفضا-لنقل-محكمة-الاستئناف> accessed 31 December 2020.

themselves before a judge without their lawyers present.[130] In addition, laypeople are not required to attend the first judicial meeting where referral to mediation may be introduced, or attend mediation sessions, meaning disputants would have a limited ability to provide details of this important aspect of mediation practice .[131] Lastly, in practical terms, it would have been problematic to access citizens that have experience with court-based mediation. These are the factors influencing the researcher in his decision to focus on judges' and lawyers' experience in mediation, as the gatekeepers.

2.4.3 Geographical spread

Generally speaking, mediation is active in the Palace of Justice of Amman, but limited in courts outside of Amman. According to the Ministry of Justice, between 2010 and 2019,75 percent of mediation cases were referred in the Palace of Justice of Amman (See Chapter One, Table 1). During that same period, only three percent of mediation cases were referred in the three Mediation Departments outside of Amman (Al-Salt, Irbid, Zarqa). The lack of mediation activity outside of Amman was evident during the fieldwork. For example, the researcher could not identify a physical location (office) of one of the mediation departments outside of Amman; another mediation department was located in an isolated part of the court and was not in use. In the third location outside of Amman, an official noted that mediation has only become recently activated due to the interest of the president of the court.[132] For these reasons, the researcher attempted to collect data in all eight Mediation Departments, but focused research efforts on the Palace of Justice of Amman.

2.5 Lawyers' Questionnaire

As there are no previous empirical studies to draw on, and lawyers are the primary actors in the civil justice system, the questionnaire aimed to identify the use of the system, and potential

[130] Civil Procedure Law (as amended). No (24) 1988. Art 63(1) states that litigants cannot appear before the court to consider the case unless accompanied by attorneys representing them upon a power of attorney. And the Magistrates Courts Law No. (23) of 2017. Art.7(b) restates the same point with the exception when the case value is less than one thousand dinars litigants do not need a lawyer to represent them. In addition, the Bar Association Law (as amended) No. (11) 1972. Art.41 repeats the same point.
[131] The Mediation Law. Art. 5 states that the presence of a lawyer is a condition for conducting the mediation session.
[132] This contradicts the English example where uptake of mediation was spurred by the establishment of the Civil Procedure Rules. This is a point of comparison to be tackled in a later chapter of the thesis.

barriers to and recommendations for improving the utilisation of court-based mediation in Jordan. One of the limitations of this study is the lack of demographic information on the respondents (e.g., age, gender, number of years practicing law). However, the researcher's intention was to collect a purposeful sample[133] of lawyers experienced with using court-based mediation, as they were expected to provide rich information about the subject, rather than a representative sample; therefore, it was not as vital that demographic information be collected.

2.5.1 Introduction to the lawyer questionnaire

This quantitative questionnaire was administered in the winter of 2018-19 in Amman and Al-Salt, Jordan. The design was to distribute 80 percent of the questionnaires in Amman, since its courts dominate the mediation practice, and to distribute 20 percent outside of Amman, corresponding with the levels of the use of court-referred mediation in different parts of Jordan. Consequently, the researcher attempted to distribute questionnaires in every Mediation Department outside of Amman including Irbid, Zarqa and Al-Salt Palaces of Justice. During the multiple visits, in an attempt to recruit participants, the researcher spoke with more than 200 lawyers in the three courts outside of Amman that "supposedly" have court-based mediation, but only identified 10 lawyers who had experience representing clients in court-based mediation in Al-Salt, and none in Irbid and Zarqa.

2.5.2 The questionnaire

Although quantitative and qualitative research methods are commonly used in social science to collect in-depth information about a subject, they are less frequently used in empirical legal research due to a number of challenges.[134] Danet et al., found the reluctance of lawyers to participate in observational research is mainly due to their concern with breaching lawyer-client privilege.[135] Rosenthal pointed out several reasons for the refusal among lawyers to cooperate in empirical legal research. First is the issue of lawyer-client privilege. Second, the unwillingness of lawyers to compel their clients to surrender their privacy. Third, a lack of

[133] Patton (n 126) 230. See, also John W. Creswell (n 102) 239 demonstrates that purposefully selected sites or individuals "will best help the researcher understand the problem and the research question.
[134] Emilia Korkea-aho and Paivi Leino, 'Interviewing Lawyers: A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research' (2019) 11 Eur J Legal Stud 17.
[135] Brenda Danet, Kenneth B. Hoffman and Nicole C. Kermish, 'Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure' (1980) 14(4) Law and Society Association 905, 908.

motivation among lawyers to participate in research. Finally, lawyers are unwilling to be monitored.[136] More recently, Korkea-aho and Leino raised three challenges with interviewing lawyers: access: finding lawyers that agree to be interviewed; confidentiality: lawyers were concerned with potentially breaching their clients' privacy by discussing their information; and control of research process and data: some lawyers preferred to be in control of the interview or the interpretation of the data. For example, some lawyers requested a copy of the interview in advance to review it and edit it.[137] Crucially, they found that practicing lawyers have little incentive to participate in academic research, as participation in the interview comes at the cost of their paid time, unlike civil servants whose salaries are already paid.[138]

A survey format was preferred over a qualitative approach due to the time constraints of the surveyed group, and the efficiency in collecting data from a larger number of respondents within a scheduled period.[139] Additionally, the questionnaire allowed each lawyer the opportunity to provide anonymous feedback on their experience, which would allow for open and honest responses without fear of reprisal.[140] However, the disadvantages of the survey format are that some participants may misunderstand some questions and, as a result, give inaccurate answers, and participants may feel rushed to answer open-ended questions due to the limited time they have.[141]

Ideally, the researcher would have conducted interviews with lawyers to collect more in-depth information about the use of court-based mediation from the lawyer's perspective. However, given the existing research on the challenges of finding lawyers willing to participate in qualitative research, the time constraints of the fieldwork, and the limited spread of mediation in Jordan, it was more feasible to distribute questionnaires to lawyers than conduct lawyer interviews.

2.5.3 Structure of the questionnaire

[136] Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge* (Russell Sage Foundation 1974) 179.
[137] Korkea-aho and Leino (n 134) 37-46.
[138] ibid 46-47.
[139] Dalal Albudaiwi, "Surveys, Advantages and Disadvantages of" in Mike Allen (ed) *The SAGE Encyclopedia of Communication Research Methods* (SAGE Publications, Inc, 2018) 1735.
[140] ibid 1735.
[141] ibid 1735.

The questionnaire was designed to allow lawyers to share their perspectives and experience in engaging in the practice of court-based mediation in Jordan. The survey questions were grouped into themes for the purpose of preliminary analysis (Table 3). The survey questions were designed to explore lawyer's experience, behavior, opinions, and evaluations of the attitudes of both judges and clients to the practice of court-based mediation as applied in Jordan.

Table 3. Overview of themes

Theme	Description of the theme	Related questions
Lawyer	Lawyers' experience, training, opinions, actions	Q1, Q2, Q5, Q6, Q7, Q8, Q12, Q13, Q16, Q17, Q18, Q20, Q21, Q22, Q23
Judges	Referral judges' actions and judge-mediators' training	Q9, Q10, Q11, Q14, Q15,
Citizens/Users	Citizens/users' experience and motivations for using court-based mediation	Q3, Q4, Q19

The original questionnaire is included in Appendix 1 of this thesis. The questionnaire was written in the Arabic language, which is the official language of Jordan and the primary working language in the courts, with the English translation underneath. The intention of this design was to have the original language of the questionnaire and translated version in one document to simplify review and analysis of the data collected. As Harzing et al. argue, even if survey respondents have adequate English language skills, translating surveys into the local language shows the participants that the researcher made an effort to make it easy and comfortable for the respondents to understand, which could impact the response rates.[142] The

[142] Anne-Wil Harzing, B. Sebastian Reiche and Markus Pudelko, 'Challenges in International Survey Research: A Review with Illustrations and Suggested Solutions for Best Practice' (2013) 7(1) European J. International Management 112, 121.

questionnaire consisted of 23 closed-ended questions and 8 with open-ended follow-ups to clarify the reasons for their responses. The open-ended responses were translated from Arabic to English by the researcher.

Questionnaires were offered to lawyers at the Palaces of Justice in Amman, Al-Salt, Irbid and Zarqa, Jordan. The questionnaires were self-administered in the lawyer's lounges and collected immediately or at a later date.

2.5.4 Selection of respondents

The questionnaire was disseminated as a paper-based survey. Respondents were selected on the basis of having any previous experience representing clients that were referred to court-based mediation. An attempt was made to recruit lawyers to participate in the questionnaire at four courts that have mediation departments in Jordan, including the Palaces of Justice of Amman, Al-Salt, Zarqa, and Irbid. Due to time constraints and because the Palace of Justice in Amman is the central point for the vast majority of lawyers that practice in Amman, the other four courts located in Amman that have mediation departments were not targeted for recruitment. Only lawyers practicing at the various courts with mediation departments and with mediation experience were included, as they were expected to have familiarity with the process and developed opinions about the system. A total of 110 questionnaires were distributed to lawyers, and a total of 99 were returned completed, resulting in a response rate of 90.0 percent. Of the 99 completed questionnaires, 89 were collected at the Palace of Justice of Amman and 10 of the questionnaires were collected outside of Amman at the Palace of Justice of Al-Salt. The discrepancy between the numbers of surveys collected in both areas is explained below.

2.5.5 Recruitment strategies in Amman

As has been highlighted by other researchers, the most successful recruitment strategy was face-to-face recruitment of potential study participants.[143] In December 2018 and January 2019, the researcher made multiple visits to the lawyers' lounge at the Palace of Justice of

[143] James K. Doyle, 'Face-to-Face Surveys' Worcester Polytechnic Institute.3. <https://web.wpi.edu/Images/CMS/SSPS/Doyle_-_Face-to-Face_Surveys.pdf> accessed 5 January 2021.

Amman, and three visits to Al-Salt, two visits to Irbid, and one visit to Zarqa.[144] During these visits the researcher approached lawyers to enquire whether they had any experience with court-based mediation. Having explained the research study and the compliance of the data collection policy, they were invited to participate. Every effort was made to assure the potential participants that their participation was voluntary, and there was no pressure on them to complete the questionnaire. If they agreed to participate, respondents were provided the participant information sheet, participant consent form, the lawyer questionnaire and the participant debrief form. Most respondents completed the questionnaire in the lawyers' lounge. An empty box was provided for lawyers to return the questionnaires at a later time. Blank questionnaires and supporting documentation were also left in the lawyers' lounge in the Palace of Justice of Amman, but only two questionnaires were returned using this method.

2.5.6 Recruitment strategies outside of Amman

The same approach to recruit questionnaire participants outside of Amman was used, but with limited success. On January 20 and 30, the researcher visited the Palace of Justice of Irbid in an attempt to recruit lawyers to participate in the questionnaire. During the visits, nearly 100 lawyers were approached. Over the two visits to Irbid no lawyers with experience of court-referred mediation were identified. The Palace of Justice of Zarqa was visited on January 31, 2019 to attempt to recruit respondents for the questionnaire. None of the approximately 60 lawyers contacted had represented clients in court-based mediation. Moreover, the researcher visited the Palace of Justice of Al-Salt three times on December 18, 2018 and January 29 and 31, 2019 to attempt to recruit participants. During the second visit, approximately 20 lawyers were approached. The researcher was advised to return to the court on the following Thursday when a social gathering was held. During this third visit, 10 out of approximately 50 lawyers had experience representing clients in court-based mediation and agreed to participate in the research study and completed the questionnaire.

[144] The number of participants recruited, and the number of return visits reflect the number of cases referred to mediation in these jurisdictions according to the data from the Jordanian Ministry of Justice and conversations with officials that mediation was not active in the mediation departments outside Amman. For example, in the last three years 2017, 2018 and 2019 there were only 31 cases in Zarqa, 17 in Al-Salt and 135 in Irbid that were referred to mediation. Jordanian Judicial Council, (Judicial Authority Annual Reports of 2017, 2018 and 2019) < http://www.jc.jo/en/catalog/altkryr-alsnoy > accessed 30 December 2020.

2.5.7 Fieldnotes outside of Amman

Due to the infrequent use of court-based mediation in Al-Salt, Irbid, and Zarqa, as previously noted in the Judicial Council data, the researcher approached the mediation departments in each court to better understand the current use of mediation in the region. During multiple visits to one of the mediation departments outside of Amman, one official claimed that court-based mediation was active in this court, and that there would be more focus on it in the near future. However, this contradicts a 2017 report of the Judicial Council, which indicates that few cases were referred to mediation in that year from this court.

In another mediation department outside of Amman, the researcher was introduced to a court official, and was provided with data regarding the number of mediation cases. The official clarified that the judicial mediation service had been established in this court a decade earlier, but that it had not been active in many years. The official explained the main reason for the failure of mediation in this court is due to the lawyers and their rejection of the use of mediation due to money considerations; the lawyer considers that the source of his income is through court proceedings and not through mediation. Furthermore, the official indicated another reason is related to the presence of the president of the court, who encourages or reinforces the work of this department. If the president of the court is in favour of the use of mediation, mediation is active in the court. If the president of the court is not in favour of mediation, mediation is not active.

In a third mediation department outside of Amman, the researcher met with a current and former official of the court. Both shared the reasons why mediation had been inactive in the court. As with the second mediation department noted above, although court-based mediation had been established several years earlier, it had only occasionally been active over the years depending on the interest of the president of the court. Further, in this court they stated there was no encouragement from the referral judges, because the judge's daily average is about 50-60 cases, therefore, they do not have sufficient time to explain the mediation process and its advantages. The researcher spoke with the president of the court who cited several reasons for the modest use of court-based mediation. First, 30 percent of the cases in this court are civil and commercial, and 70 percent are criminal cases, which are not subject to mediation. Second, lawyers do not want to mediate for money reasons. Third, he believes the nature of the

community here is a factor: people are rigid and traditional, and they prefer to humiliate the other party through court proceedings rather than settle the cases in a friendly way.

Additionally, during the visits to the three mediation departments outside of Amman, the researcher spoke to more than 200 lawyers to get a sense of their lack of participation in mediation. Several reasons were repeated. For example, there is no real encouragement by the referral judges to refer cases to mediation. Lawyers confirmed to the researcher that they control the cases, and do not want to choose mediation for income considerations. Instead, they favour court proceedings. Some lawyers have no idea, and have never heard about court-based mediation. They also noted that for some years the mediation departments in these Palaces of Justice had not been active.

2.5.8 Preparing the data for analysis

The raw data from the lawyers' questionnaire was entered into a Microsoft Excel spreadsheet. Each column represented a question, and each row represented a respondent. Each response was given a numerical value. For example, yes was coded as "1." No was coded as "2." Open-ended follow ups were translated from Arabic to English by the researcher, and the English translations were entered into the spreadsheet.

Each question was analysed independently. A pivot table was created to generate a count for each question to ensure the data were processed correctly. Then the percentages of each question were calculated, represented in a chart, and examined more closely.

For open-ended follow-up questions, a pivot table was created with the responses. Each response was read and grouped into a category. In most cases, the percentages were calculated and represented in a chart for further preliminary analysis.

Upon closer examination of question 20 it was determined that many of the respondents misunderstood the question, as some responded negatively but answered the open-ended follow-up positively. The researcher then decided to recode this question based on the open-

ended responses.[145] Negative responses were coded "1." Affirmative responses were coded "2." Responses that did not include an open-ended follow-up retained their initial response.

2.6 Judge Interviews

The qualitative study is based on semi-structured interviews conducted in the winter of 2018-19 in Jordan. The interviews were designed to collect in-depth information regarding the practice of court-based mediation in Jordan, and judges' attitudes, opinions, and experience as referral judges and judge-mediators. Several factors influenced the decision to conduct judge interviews. First, the interviews were preferred over a quantitative approach to better collect comprehensive information. As Legard, Keegan and Ward demonstrate "the aim of the in-depth interview is to achieve both breadth of coverage across key issues, and depth of coverage within each."[146] Second, it was easier to identify referral judges and judge-mediators than lawyers with a range of experience with mediation, as judges are civil servants and can be easily located via the court. Third, interviewing judges would provide information about the process of referral to court-based mediation and the mediation sessions that would not have been obtained any other way.

2.6.1 Introduction: the semi-structured interview

The semi-structured interview was considered the most appropriate format because it allowed the same questions to be asked to each respondent, increasing the comparability between interviews, but allowing the flexibility to ask follow-up questions based on each individual's responses. According to Adams, the semi-structured interview is preferable when the researcher has several "probing, open-ended questions and want[s] to know the independent thoughts of each individual."[147] This was the case with the interviews the researcher conducted, as each judge had the opportunity to express their opinion and attitudes based on their experience regarding the use of mediation within the Jordanian civil justice system. For

[145] Question 20 asked if respondents believed that court-based mediation affects the quality of justice for their clients. The majority of respondents chose "Yes." A "yes" response indicated that court-based mediation negatively affects the quality of justice. However, the open-ended follow-ups indicated the respondents believed that court-based mediation positively affects the quality of justice. Therefore, the researcher recoded question 20 negatively or positively based on the written follow-up responses.
[146] Robin Legard, Jill Keegan & Kit Ward, 'In-Depth Interviews' in Jane Ritchie & Jane Lewis (ed), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications 2003) 148.
[147] William C. Adams, 'Conducting Semi-Structured Interviews' in Joseph S. Wholey, Harry P. Hatry & Kathryn E. Newcomer (ed), *Handbook of Practical Program Evaluation* (3rd edn, Jossey-Bass 2010) 367.

example, most of the judges (11 out 17)[148] emphasised the role of lawyers as an obstacle to the use of mediation. Although the role of lawyers was not a question in the interview protocol, it became important as these interviews progressed.[149] The rich data collected in the interviews also served to provide meaning to the findings of the questionnaire and secondary data.

2.6.2 Structure of the interviews

The semi-structured interviews were conducted face-to-face and in Arabic. Conducting face-to-face interviews had the advantage of allowing the researcher to observe the interviewees' body language (i.e., hesitation in answering the questions), confusion about the questions and the intonation of their voice, which allowed me to clarify the questions or ask follow-up questions, [150] and get more in-depth information about the subject. The primary disadvantages of face-to face interviewing must also be acknowledged, for example, longer time commitment required than other methods (i.e., conducting the interview, transcribing, translating), and the cost of collecting the data (i.e., travel costs to Jordan).[151]

The interview questions were included in Appendix 1 of this thesis. The interview questions were organised into two protocols, one for the referral judges and the other for the judge-mediators, with specific questions designed to focus on their different roles. The referral judge interview protocol consisted of 13 questions, with follow-up questions designed to clarify topics that emerged in the interviewees' answers. For example, referral judges were asked, "To what extent is the court encouraging mediation?" whereas the judge-mediator interview protocol consisted of 11 questions and probes. Interviews were transcribed first in Arabic and then translated into English. It should be noted, there was considerable difficulty in the translation process as the Arabic language is rich in vocabulary. There are several words that have no English equivalent, and often there are different meanings for the same word. Challenges also arise due to the differences in the structure, word order and grammar rules

[148] Chapter 4, 93-96.
[149] Legard, Keegan and Ward (n 146) 152.
[150] Raymond Opdenakker, 'Advantages and Disadvantages of Four Interview Techniques in Qualitative Research' (2006) 7(4) Forum: Qualitative Social Research 1,5.
[151] Isaac Dialsingh, 'Face-to-Face Interviewing' in Paul J. Lavrakas (eds), *Encyclopedia of Survey Research Methods* (Sage Publications, Inc 2011) 259.

between the Arabic and English languages.[152] Baker raised the issue of non-equivalence between languages as a central issue in translation.[153] For example, one judge noted that *Al-Dam* cases are excluded from court-based mediation. The word *Al-Dam* (الدم) in the legal context means cases of murder, homicide and killing. However, a literal translation of *Al-Dam* (الدم) from Arabic to English would have a different meaning as the common usage of the word translates to blood.[154] This makes exact translation difficult. Instead, it was the researcher's intention to preserve the meaning in the translations. In doing so, the purpose is to communicate the information instead of replicating the purpose of the original text.[155]

2.6.3 Methods for qualitative data: Judge interviews

Interviews were conducted in person at various courts in Jordan, including four courts in Amman and two courts outside of Amman. The interviews were conducted in-person during court hours in the judges' offices. 11 interviews were audio-recorded after obtaining the consent of the participants. Handwritten notes were taken for the 6 participants that did not consent to be recorded. Some interviewees chose not to be recorded as some interviews were conducted in the hearing room or trial office, with many interruptions from lawyers and disputants. Other interviewees preferred not to be recorded for personal reasons.

2.6.4 Respondents

As Krueger and Casey noted, the main principle of recruitment is to invite participants who have the knowledge, experience, and qualifications of the subject topic.[156] As this study was concerned with the judges' experience and attitudes towards the practice and use of court-based mediation, having relevant experience was of particular importance. Therefore, judges were

[152] Yehia Ahmed Al-sohbani and Abdulghani Muthanna, 'Challenges of Arabic-English Translation: The Need for Re-systematic Curriculum and Methodology Reforms in Yemen' (2013) 4(4) Academic Research International 442, 446-447
[153] Mona Baker, *In Other Words: A Coursebook on Translation* (Routledge 1992) 20-21. See also, Amira D. Kashgary, 'The Paradox of Translating the Untranslatable: Equivalence vs. non-Equivalence in Translating from Arabic into English' (2011) 23(1) Journal of King Saud University–Languages and Translation 47-57.
[154] Ahmad Oweidi Al-Abbadi, *Bedouin Justice: The Customary Legal System of the Tribes and its Integration into the Framework of State Polity From 1921-1982* (Darjareer Publishing & Distribution, Amman 2006) 14.
[155] Rosaleen Howard, Luis Andrade Ciudad and Raquel de Pedro Ricoy, 'Translating rights: the Peruvian Indigenous Languages Act in Quechua and Aymara' (2018) Amerindia, 40 (1) Amerindia, 219, 224.
[156] Richard A. Krueger and Mary Anne Casey, 'Focus Group Interviewing' in in Joseph S. Wholey, Harry P. Hatry & Kathryn E. Newcomer (ed), *Handbook of Practical Program Evaluation* (3rd edn, Jossey-Bass 2010) 290.

purposefully selected on the basis of having experience in the practice of referring disputants to court-based mediation, or having facilitated mediation sessions as a judge-mediator. Further, prior to data collection, the researcher identified four main judges who helped to establish court-based mediation in Jordan; requesting interviews of each of them was prioritised. It was also the researcher's intention to obtain a range of judges' experience inside and outside of Amman. Therefore, an attempt was made to recruit judges to participate in the interviews at all eight Mediation Departments that are run within the Jordanian courts. However, the response was greater in Amman, where court-based mediation is more widely practiced. As result, 17 interviews were conducted, 14 in courts inside Amman and three in courts outside Amman, one of which does not have a mediation department.[157]

2.6.5 Recruitment strategies

The most successful recruitment strategy was direct recruitment of potential interviewees. Multiple visits to the eight courts that have mediation departments were made. During these visits referral judges and judge-mediators were approached in their offices, mostly in the hearing room, and invited to participate in the study. Efforts were made to assure the judges that their participation was voluntary and there was no pressure on them to agree to be interviewed. If they agreed to participate, respondents were provided with the participant information sheet, participant consent form, and the participant debrief form. Participants were also asked if the interviews could be audio recorded.

The 'Snowballing' or 'chain sampling' approach was also used, by asking the interviewees to point out other participants that fit within the research subject.[158] This approach was, to some extent, successful. For example, after an interview with one judge-mediator, this respondent helped me establish contact with a judge-mediator in another court. The disadvantage of this approach is the lack of 'diversity of the sample frame.'[159] However, only two interviewees were interviewed based on the snowballing sampling strategy. The researcher also employed a

[157] It should be noted that the researcher conducted one interview at a court that does not have a mediation department with a former judge-mediator who is currently serving at this court. The interview was conducted on the recommendation from other judges due to his experience with helping establish court-based mediation in Jordan.
[158] Jane Ritchie, Jane Lewis & Gillian Elam 'Designing and Selecting Samples in Jane Ritchie & Jane Lewis (ed), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications 2003) 94.
[159] ibid 94.

'purposeful sampling' technique, which is described by Patton as the selection of key sources of information based on their ability to provide rich information related to the issue.[160] For this reason, judge-mediators and referral judges were recruited due to their experience and knowledge of judicial mediation in Jordan.

2.6.6 Preparing data for analysis

The audio recordings were downloaded to a secure, password protected laptop to facilitate transcription, translation, and coding. The audio recorded interviews were transcribed in Arabic within a few days of conducting the interviews. Handwritten notes were typed in Arabic as soon as possible after the interview to ensure that the notes were accurately transcribed.

In February and March 2019, the Arabic transcriptions were translated into English. Using thematic analysis,[161] each interview was first read and manually coded for preliminary analysis. The interview transcripts were then uploaded into NVivo qualitative data analysis software for thematic coding. Using NVivo, responses to each interview question were grouped together for easier analysis. Responses were read and coded by concept, and those concepts were grouped into major categories until the emerging themes were identified. The data were coded until no new themes emerged.

2.7 Data Integration and the Development of Themes to Consider in the Comparative Study

After the data were collected, the quantitative and qualitative data were analysed separately and then aggregated to confirm or contest the findings from each. This is what Creswell calls the convergent parallel mixed-methods approach. In this approach, the quantitative and qualitative data are collected and analysed independently, then the results are compared to check for similarities and differences between the data.[162] The idea is that each type of data has

[160] Patton (n 126) 230. See, also Creswell (n 102) 239. Demonstrates that purposefully selected sites or individuals 'will best help the researcher understand the problem and the research question.'
[161] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77,91-99.
[162] Creswell (n 102) 44.

its strengths and weaknesses, and by combining the different types of data you better understand the research question.[163]

Descriptive statistics were calculated for each question in the questionnaire. The results were initially analysed for patterns in the data without any pre-existing categories. During the analysis of the interview data, several themes emerged that aligned with four overarching themes (judges as gatekeepers, lawyers as gatekeepers, access to justice and education, awareness and training). To compare the questionnaire data with the interview data, the questionnaire data were categorised under the same four themes, and compared with the interview findings. Crucially, these themes explained some of the reasons for the decline in the use of mediation in Jordan.

In most cases, the findings from the questionnaire confirmed the findings from the interviews. For example, judges and lawyers agreed that awareness and training for all stakeholders is a significant barrier to the greater use of court-based mediation within the Jordanian civil justice system. There were also findings that were not confirmed. For instance, lawyers and judges disagreed about coercion in mediation. A minority of lawyers believed there is coercion in the referral process, while judges insisted they have no authority to compel parties to mediate.

As explained earlier in this chapter, it was risky to carry out a comparative study between two countries without sufficient resources on both sides. Thus, the lack of literature in Jordan on the decline in mediation justified the need to conduct empirical research to answer the research questions. The overall results of the empirical study constructed a rich description of the practice of mediation in Jordan that would substitute for the deficiencies in the literature. In doing so, key themes that emerged from the empirical research allowed for the comparative study to begin between both jurisdictions.

2.8 Data protection

The following original research data were collected: digital audio recordings of interviews, interview transcriptions, completed questionnaires, signed participant consent forms, and fieldnotes. All electronic research material including digital audio recordings, interview

[163] ibid 264.

transcriptions and fieldnotes were stored on a password-protected computer and encrypted external hard drive. Hard copies of completed questionnaires and participant consent forms were stored in a locked file cabinet, with control limited to the researcher. Participants were identified by a unique coding number that was developed to ensure confidentiality. All personally identifying information was deleted.

2.8.1 Ethical issues and anonymity

The British Psychological Society set a code of Ethics for Conducting Research with Human Participants.[164] The code emphasises the importance of the protection of participants' identities, as the researcher should ensure information collected is kept confidential and anonymous.[165] Ryen explained that researchers "are obliged to protect the participants' identity, places, and the location of the research."[166] Further, it is the duty of the researcher to inform the participants about the research project before they consent, to protect them from any potential harm that may result as a part of their participation in the research.[167]

To ensure the empirical research was conducted in an ethical way, approval was obtained from the ethics panel at the University of Stirling (GUEP 513)[168] to conduct primary research, and the Research Integrity Training provided by the University of Stirling was completed.[169] In the field, the following steps were taken: first, the purpose of the research project was explained to potential participants. Second, if they agreed to participate, they were provided with the participant information sheet, participant consent form and participant debrief form. The form was reviewed with participants and the researcher emphasised their participation was voluntary, and could be withdrawn at any time. Third, anonymity and confidentiality of the participants' information were maintained by generating unique coding numbers to protect their identity, as mentioned above. For example, the interviewees' names were not disclosed;

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[164] The British Psychological Society *Ethical Principles for Conducting Research with Human Participants* (The British Psychological Society 2014) 4.
[165] ibid 8.
[166] Anne Ryen, 'Ethical Issues' in Clive Seale, Giampietro Gobo, Jaber F. Gubrium and David Silverman (eds), *Qualitative Research Practice (*AGE Publications Ltd 2004) 221.
[167] Malcolm Williams, 'The Ethics of Social Research' in: *Making Sense of Social Research* (SAGE Publications, Ltd 2003) 163-167. See also, James Giordano, Michelle O'Reilly, Helen Taylor and Nisha Dogra, 'Confidentiality and Autonomy: The Challenge(s) of Offering Research Participants a Choice of Disclosing Their Identity' (2007) 17(2) Sage Publications 264,273.
[168] Ethical Approval (n 125).
[169] University of Stirling 'Research Integrity Resources' < https://canvas.stir.ac.uk/courses/2058 > accessed 23 October 2020. This series of Research Integrity trainings regarding Ethical Practice and Conduct were watched from 11-13 of November 2018.

instead, there were assigned participant codes (i.e., R.J.1 and J.M.1) in reporting the data. In addition, the exact location where the data was collected was not named. Instead, references are made to the locations of Amman and outside Amman. Moreover, a generic term was used where possible to refer to court officials who were not judges as a way to protect their identities and to make it hard to track them.

2.9 Limitations of the study

Despite the insight gained from the empirical study, there are some limitations to each method and the combination of methods in this research study. First, because of the size of the sample[170] and the regions studied, the research findings are not generalisable to jurisdictions outside of Jordan that were not included in the research.[171] Although Mediation Departments exist in four geographic regions in Jordan (Amman, Al-Salt, Irbid and Zarqa), the majority of interviews (14 out of 17) and questionnaires were collected from Amman (89 out of 99). However, discussions with court officials and lawyers from the three locations outside Amman suggest that the findings are applicable in the other jurisdictions in Jordan. Second, another limitation of the study is that it excludes lawyers that have no experience in representing clients in mediation. Arguably lawyers with no experience or those that did not have the chance yet to represent a client in mediation may still provide important information about challenges to the use of mediation. However, having spoken to more than 200 lawyers that did not have experience with mediation, their comments were cited in the fieldnotes and were consistent with the findings of this study. Third, the recruitment of participants outside Amman was limited due to the small number of stakeholders that have experience with court-based mediation in Jordan. Nevertheless, the empirical research was a first step in understanding the practice of mediation in Jordan, and was vital to the study as the themes that emerged from the empirical study led to the focus of the comparative analysis.

The next chapter will present empirical findings on lawyers' experiences and perceptions of court-based mediation in Jordan.

[170] For example, the questionnaire sample (99) is relatively small compared to the number of practicing lawyers in Jordan which is 13,689 according to data from the Jordanian Bar Association to Hazem Abu Hazeem (13 October 2020).

[171] Lisa M Given (ed), 'Generalizability' *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE Publications, Inc 2012) 372.

CHAPTER THREE: EMPIRICAL FINDINGS ON LAWYERS' EXPERIENCES AND PERCEPTIONS OF COURT-BASED MEDIATION IN JORDAN

3.1 Introduction

Building on the previous chapter, this chapter presents empirical findings on lawyers' experiences and perceptions of court-based mediation in Jordan resulting from a quantitative study. It presents the findings on the factors that influence the decision-making of lawyers on the subject of court-based mediation. Accordingly, this chapter will examine several factors, including: the authority of judges to refer cases to mediation; the legal obligation of lawyers to attend the mediation sessions; the lawyers' perceptions of the impact of mediation on the court's caseload and their clients, and the role education plays in the use of mediation. This chapter therefore supports the assertions in the hypotheses of this work that judges act as gatekeepers to the use of mediation, as they are not actively encouraging parties to use mediation due to the lack of duty to do so; lawyers act as gatekeepers and determine which clients accept the mediation invitation, as lawyers have no obligation to advise, discuss or encourage their clients to use mediation; court based-mediation improves access to justice and ensures the quality of justice and the lack of awareness; education and training amongst all stakeholders hinders the use of mediation. In this regard, this chapter is divided into four themes. First, is the role of the court to encourage the use of mediation. Second, is the role of lawyers in mediation. Third, is the role of mediation in terms of improving access to justice and ensuring the quality of justice. Finally, this chapter will explore mediation education, awareness and training for all court users.

3.1.1 Introduction to the lawyer questionnaire

This study examined the role lawyers play in the decision to refer a case to mediation. The questionnaire was intended to examine three aspects:

1. The knowledge, experience, and views that Jordanian lawyers have of court-based mediation;
2. The influence lawyers have over their clients' decision-making; and
3. Lawyers' preference(s) for mediation and mediation referral practices.

As the Jordanian Mediation Law requires the attendance of lawyers as a condition to conduct mediation sessions, but does not establish the duty of lawyers to encourage or advise clients to use mediation,[172] this study intends to find out the factors lawyers take into consideration when advising clients to resolve disputes via court-based mediation. Thus, this chapter presents findings on the practice of judges during the referral process to mediation; lawyers' experience with mediation, their role in encouraging clients to use mediation; their views of court-based mediation and its impact on access and quality of justice; and their prior awareness of mediation. This research is the first study of its kind to examine the stakeholder roles and responsibilities in the development and use of mediation in Jordan, and therefore makes an original contribution to the literature by empirically studying stakeholders' experience and perceptions of mediation in Jordan. It is a study and a dataset which furthers the existing knowledge in this area, and which will provide opportunities for empirically led policy decisions. The contribution this study makes will be to inform future work in respect of mediation programmes within the Jordanian civil justice system.

3.2 Findings

This section presents empirical findings that explore lawyers' attitudes towards mediation and identify underlying issues that have historically led to the underuse of court-based mediation in Jordan.[173] The questionnaire results provide insights into the lawyers' perceptions of the mediation process, judges, and the complex reasons why some clients choose or avoid court-based mediation.

3.2.1 The role of judges as gatekeepers to mediation

3.2.1.1 Judicial encouragement of court-based mediation in Jordan: The lawyers' perspective

Referral to mediation is codified in the Mediation Law, the Civil Procedure Law (hereinafter "CPL") and the Magistrates' Courts Law as referral to mediation is based on judicial discretion.[174] Art. 3(a) of the Jordanian Mediation Law gives discretion to the Civil Case

[172] The Mediation Law for Civil Disputes Resolution (as amended) No. (12) 2006. Art. 5. See also, Bar Association Law (as amended) No. (11) 1972.
[173] See Chapter 1 of this thesis. Also, see Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment of the Mediation Law 2017*, which acknowledged the underuse of mediation in its policy as the amendment intended to give the power to judges to refer cases to mediation without the parties' consent. See more details in Chapter 5.
[174] These laws will be the subject of an analytical discussion in Chapter 5 and throughout the thesis.

Management Judge (hereinafter "CCMJ") and the Magistrate Judge to refer cases to mediation after seeking the parties' consent.[175] In addition, Art. 59(3) bis of the CPL gives discretion to the CCMJ to refer the dispute to mediation after seeking the parties' consent, in order to seek a friendly settlement to the dispute.[176] Moreover, Art. 7(a) of the Magistrates Courts Law states the Magistrate Judge has the discretion to refer the case to mediation after seeking the parties' consent.[177] It should be noted that while referral judges have the discretion to refer cases to mediation, they are not required to do so, and referral to mediation is subject to their approval, which makes judges gatekeepers to the use of mediation.[178]

The data in Figure 3 show that only 17% of respondents believe that judges encourage disputants to use mediation *all the time*,[179] whereas 76% of respondents believe that judges encourage disputants to mediate *some of the time*.[180] A further 5% of respondents believe that judges *never*[181] encourage disputants to use mediation.

These data are consistently demonstrated by the Jordanian Ministry of Justice and Jordanian Judicial Council data, which showed that between 2010 and 2019 one-quarter of one percent (0.24%) of registered cases were referred to court-based mediation during this period.[182] These findings show that judges are promoting the use of mediation, but to a limited extent. This is not surprising, as referral judges do not have any statutory obligation or duty to encourage parties to mediate.[183]

[175] The Mediation Law. Art. 3.
[176] The Civil Procedure Law No. 24 of 1988 (as amended). Art. 59(bis) (3).
[177] The Magistrates Courts Law No. 23 of 2017. Art. 7(a).
[178] Unlike in the English system where judges have the duty to encourage the use of ADR, referral judges in Jordan have the discretion to refer cases to mediation. The role of the court to encourage the use of mediation is a comparative point with the English civil justice system to be addressed later in Chapter 5 of the thesis.
[179] Emphasis added.
[180] Emphasis added.
[181] Emphasis added.
[182] Mediation data from the Jordanian Ministry of Justice to author (5 July 2017) and litigation data from Jordanian Judicial Council, Judicial Authority Annual Reports from 2010 to 2019 (Jordanian Judicial Council) <http://www.jc.jo/annual_reports> accessed 10 March 2022.
[183] Judicial discretion to refer cases to meditation is provided in Art. 3(a) of The Mediation Law No. 12 of 2006 (as amended), Art. 59(bis)(3) of The Civil Procedure Law No. 24 of 1988 (as amended), and Art. 7(a) of the Magistrates Courts Law No. 23 of 2017. This topic will be addressed in Chapter 5.

Figure 3: Percentage of Respondents Who Believed Judges Encourage Their Clients to Use Mediation

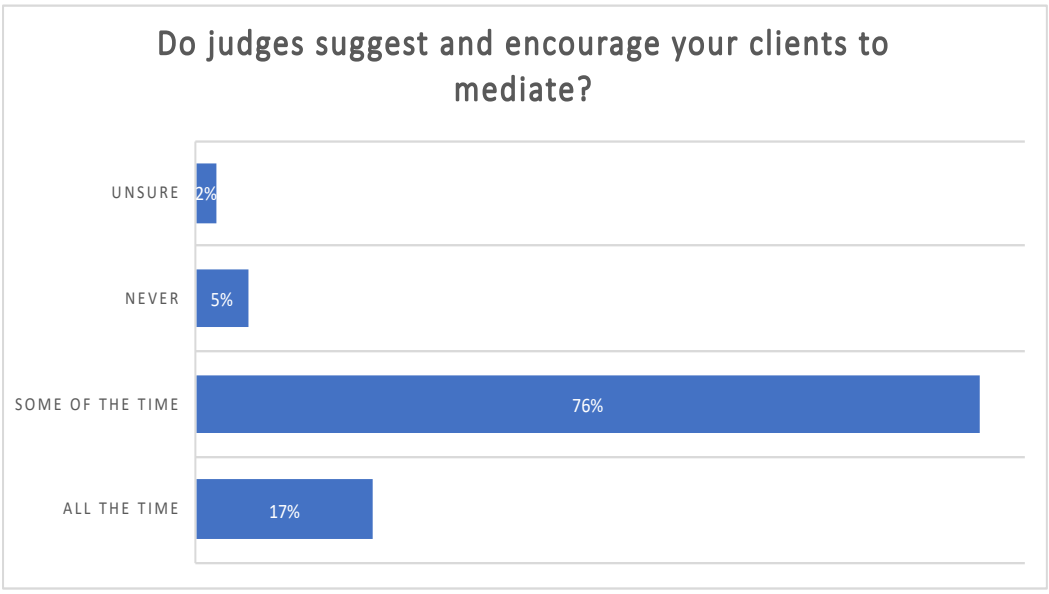
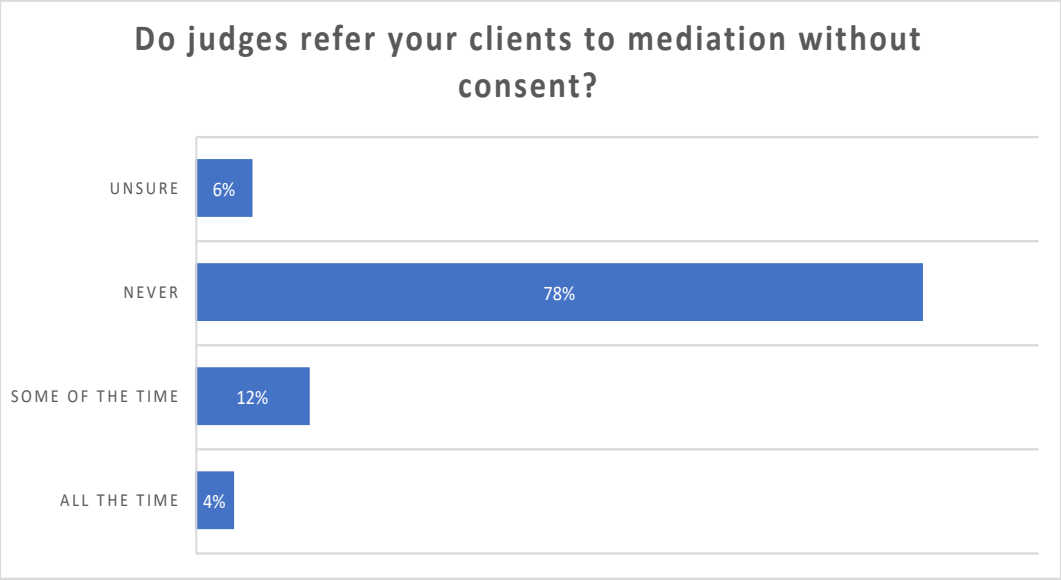


Figure 4 illustrates that the majority of respondents (78%) say judges *never*[184] refer their clients to mediation without their consent. The respondents reported that judges *some of the time*[185] (12%) or *all the time*[186] (4%) refer their clients to mediation without consent. Another 6% of respondents were *unsure*[187] whether their clients were referred to mediation with or without their consent.

[184] Emphasis added.
[185] Emphasis added.
[186] Emphasis added.
[187] Emphasis added.

Figure 4: Percentage of Respondents Who Believed Judges Refer Clients to Mediation Without Their Consent



This would suggest that, in general, judges are referring disputants to mediation only after obtaining their consent.[188] However, the fact that 16% of respondents say judges impose mediation upon disputants without their consent indicates some judges may be overstepping their authority, and this may indicate the need for additional training and education in ADR for judges, as the law requires the consent of the parties as a precondition for referral to mediation.[189]

3.2.1.2 Disputes suitable for mediation

The Jordanian Mediation Law does not include criteria for determining which cases are suitable for mediation. However, it should be mentioned that insurance, labour, lease and money claims are among the disputes that the Jordanian Council of Ministers proposed for automatic referral to mediation in the current mediation draft before the House of Parliament, and it is possible to presume that the lawmakers believe these cases are most suitable for resolving through mediation.[190]

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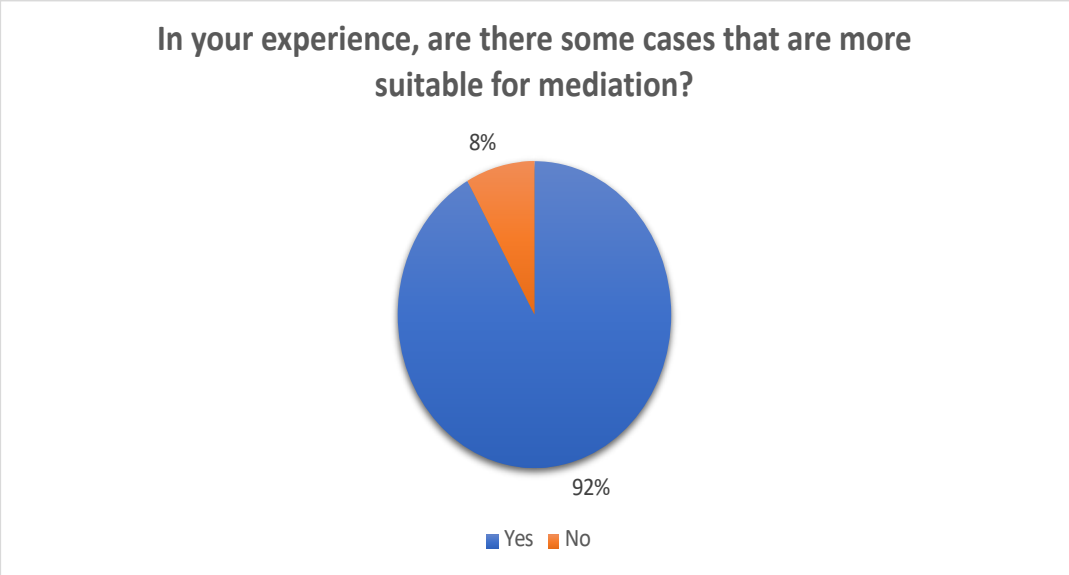
[188] Another fundamental concept of mediation is voluntariness of the process.
[189] Mediation education, awareness and training is a point of comparison between the English and Jordanian systems to be addressed in Chapter 7 of the thesis.
[190] The Mediation Draft Law for Civil Disputes Resolution of 2019 is currently before the Jordanian House of Parliament. Art. 4 of the draft includes mandatory referral to mediation in four types of disputes: labour, leases, insurance and money claims. <https://representatives.jo/AR/List/مشاريع_القوانين_المحالة_للجنة_القانونية > accessed 28 March 2022.

Figure 5 illustrates the general consensus of the respondents (92%) is that some cases are more suitable for mediation than others.

Figure 5: Respondents Views on Whether Some Cases Are Suitable for Mediation

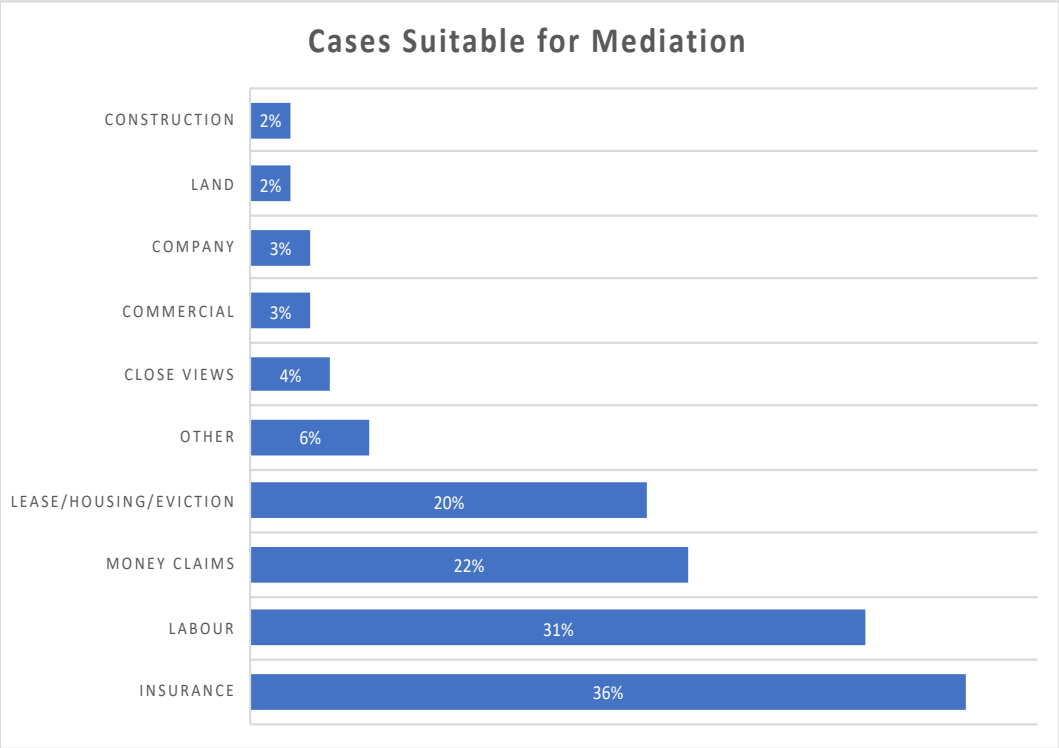


Respondents were asked to identify which cases are more suitable for mediation. Figure 6 shows the majority of respondents thought insurance, labour, money claims and lease/housing/eviction to be cases suitable for resolving via mediation,[191] while commercial, company, land and construction disputes are less suitable for mediation from the lawyers' point of view.

Most of the respondents say that some cases are more suitable for mediation because they have straightforward claims that are about money, and there is space for negotiation and no need for the court procedures. However, in other cases, respondents believed they were less suitable for mediation due to complicated legal questions. These data suggest that lawyers recognise the usefulness of mediation for resolving factual cases, although some cases still require adjudication as mediation is not a panacea for resolving all disputes.

[191] Responses add up to more than 100% as the question was open-ended and lawyers were not limited in the number of responses.

Figure 6: Cases Which Are Suitable for Mediation



The results show that judges are encouraging disputants to use mediation, but not to an extent that significantly reduces the caseload of the court, which was the purpose of introducing the law.[192] The extent to which a statutory obligation to encourage the use of mediation would increase the uptake of mediation will be investigated in Chapter 5 of this thesis.

3.2.2 Lawyers' experience as users of court-based mediation in Jordan

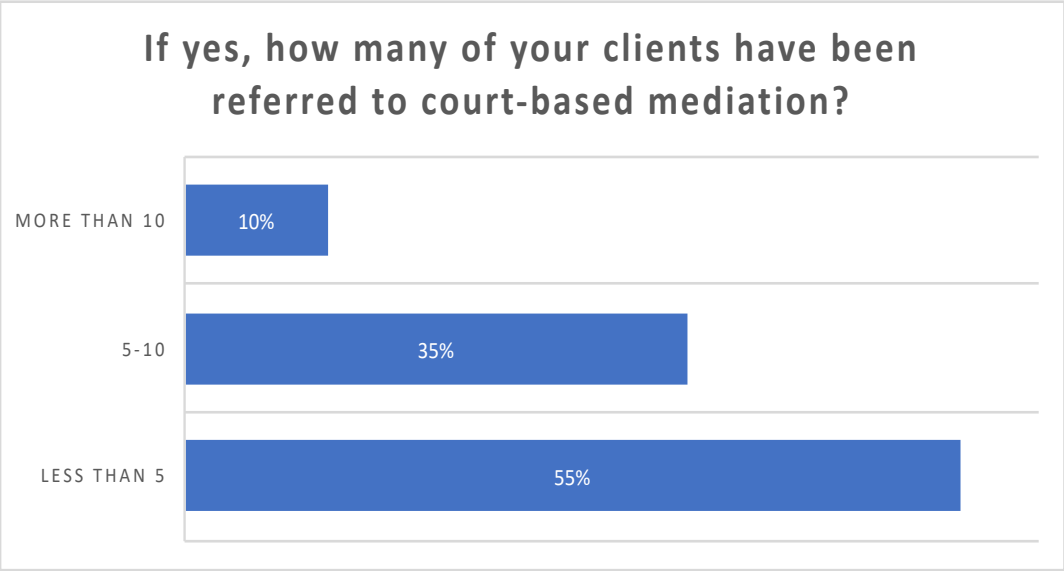
3.2.2.1 Lawyers presence as a condition for conducting mediation sessions

Lawyers have a central role in mediation sessions, as Art. 5 of the Jordanian Mediation Law requires that lawyers be present as a condition for conducting the mediation session.[193] As expected, all the respondents had experience representing clients that had been referred to court-based mediation. 100% of the questionnaire respondents reported having previously represented clients that were referred to court-based mediation, because only lawyers with mediation experience were targeted for participation.

[192] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law (2006)* to author (5 July 2017).
[193] The Mediation Law. Art. 5.

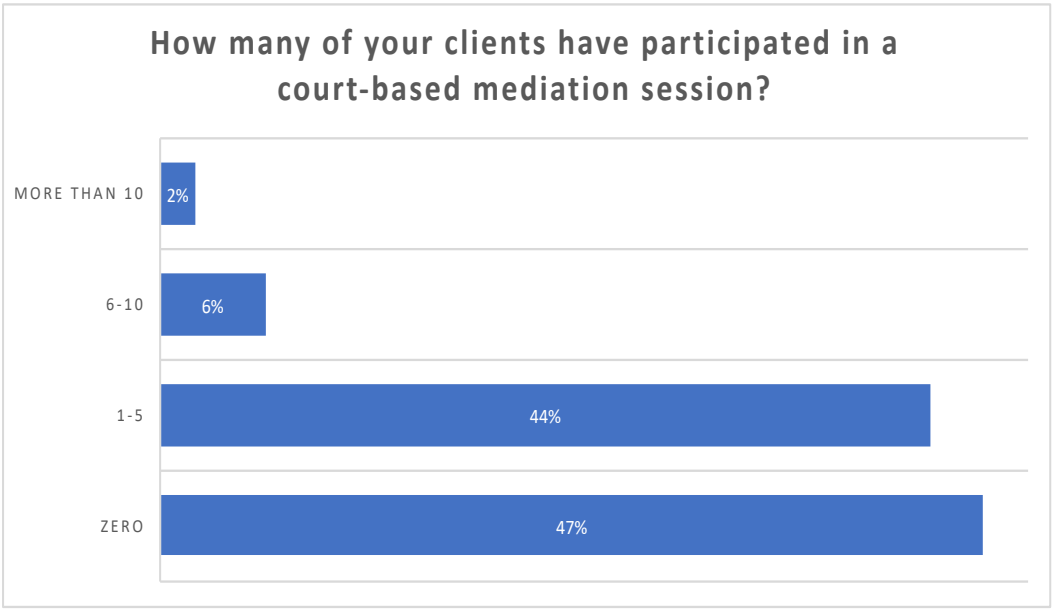
Significantly, the vast majority of the respondents (90%) had 10 or fewer clients that had been referred to court-based mediation. Figure 7 shows that over half of respondents (55%) had fewer than five clients that were referred to court-based mediation, and over one-third (35%) had between five and ten clients referred to court-based mediation. Surprisingly, only 10% of respondents had more than 10 clients that were referred to court-based mediation although court-based mediation was established in Jordan more than 15 years ago. Given the condition of lawyer's attendance at mediation sessions and the low number of clients that respondents reported having been referred to mediation, it can be presumed there is a low referral rate to court-based mediation in Jordan.

Figure 7: Clients Who Were Referred to Court-Based Mediation



Although Art. 5 of the Jordanian Mediation Law requires the presence of lawyers, the attendance of clients is not mandatory. As shown in Figure 8, only 2% of respondents had more than 10 clients participate in court-based mediation sessions, whereas almost half of the respondents (47%) had no clients participate in mediation sessions, 44% of respondents had between one and five clients participate, and 6% of respondents had six to ten clients participate as the participation of clients is not required by law. (Percentages may not total 100 due to rounding.)

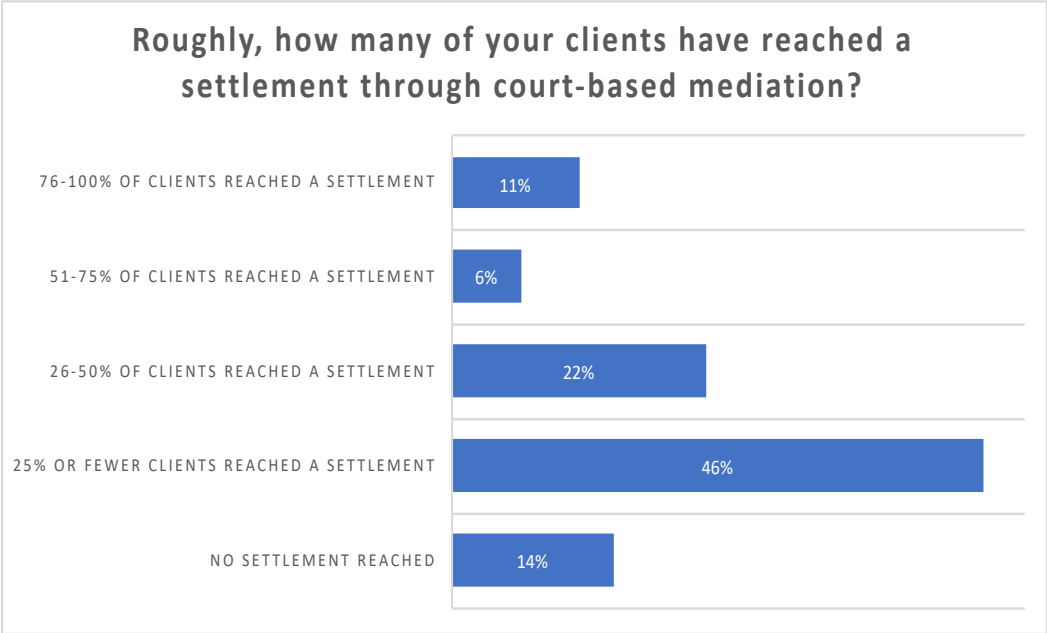
Figure 8: Clients That Have Participated in a Mediation Session



It is interesting that client attendance is not a necessary condition for conducting mediation sessions, despite self-determination being considered one of the fundamental principles of mediation. That the presence of the parties is not required, but the lawyer's presence is required in court-based mediation demonstrates the centrality of lawyers in the mediation process in the lawmakers' view, and the peripheral role of the clients themselves.

Finally, the vast majority of respondents (85%) have had clients reach a settlement through court-based mediation (Figure 9). However, 14% of respondents had no clients reach a settlement through court-based mediation. This demonstrates that mediation is an effective ADR method, and disputants have a chance to end disputes and reach a settlement in a friendly manner.

Figure 9: Clients That Reached a Mediation Settlement



The data supports the conclusion that lawyers play a central role in mediation, and mediation is an effective alternative to litigation, as the majority of respondents had some clients that reached a settlement. The extent to which lawyers act as gatekeepers to the use of mediation will be explored in the next section of the chapter.

3.2.2.2 Lawyers as gatekeepers to mediation

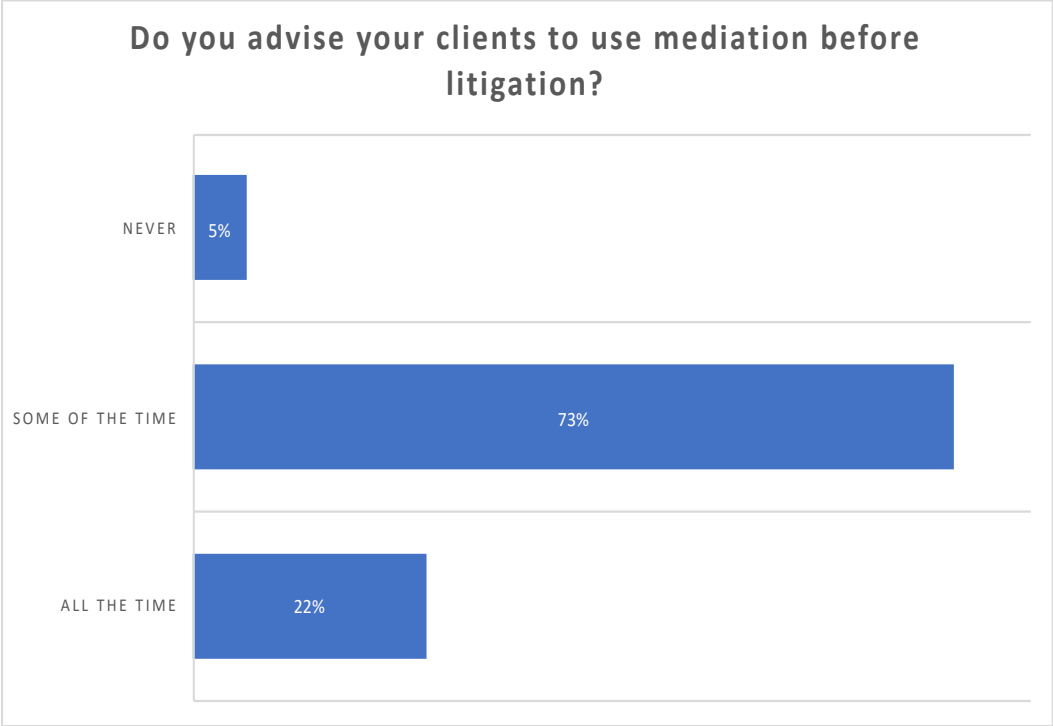
As mentioned earlier, the Jordanian Mediation Law requires the presence of lawyers as a condition of conducting mediation sessions; however, there is no statutory duty for lawyers to attempt to resolve disputes through mediation, or advise their clients to consider mediation.[194] Similarly, the Jordanian Bar Association Law[195] does not include a statutory obligation for lawyers to discuss ADR forms with their clients. Moreover, there is no guidance in the Lawyer's Code of Ethics and Code of Conduct of 1979[196] that advises lawyers to discuss with their clients whether an ADR method would be more appropriate than litigation.

Despite there being no legal requirement for lawyers to advise their clients to consider mediation, the data in this study shows that some lawyers advise their clients to use court-based

[194] Lawyers as gatekeepers to mediation will be a point of comparison with the English system in Chapter 6.
[195] The Bar Association Law.
[196] Lawyer's Code of Ethics and Code of Conduct of 1979.

mediation before resorting to litigation. As shown in Figure 10, the vast majority of respondents (95%) have advised their clients to use mediation as a first resort. Almost three-quarters of respondents reported advising their clients to use mediation *some of the time*[197] (73%), whereas 22% of respondents indicate that they advise their clients to mediate before litigating *all the time*.[198] It is also worth noting that 5% of respondents reported *never*[199] advising their clients to consider mediation before resorting to litigation. This is encouraging as it demonstrates the willingness of lawyers to advise their clients to consider using mediation at least some of the time.

Figure 10: Lawyers' Advice to Pursue Mediation Before Litigation

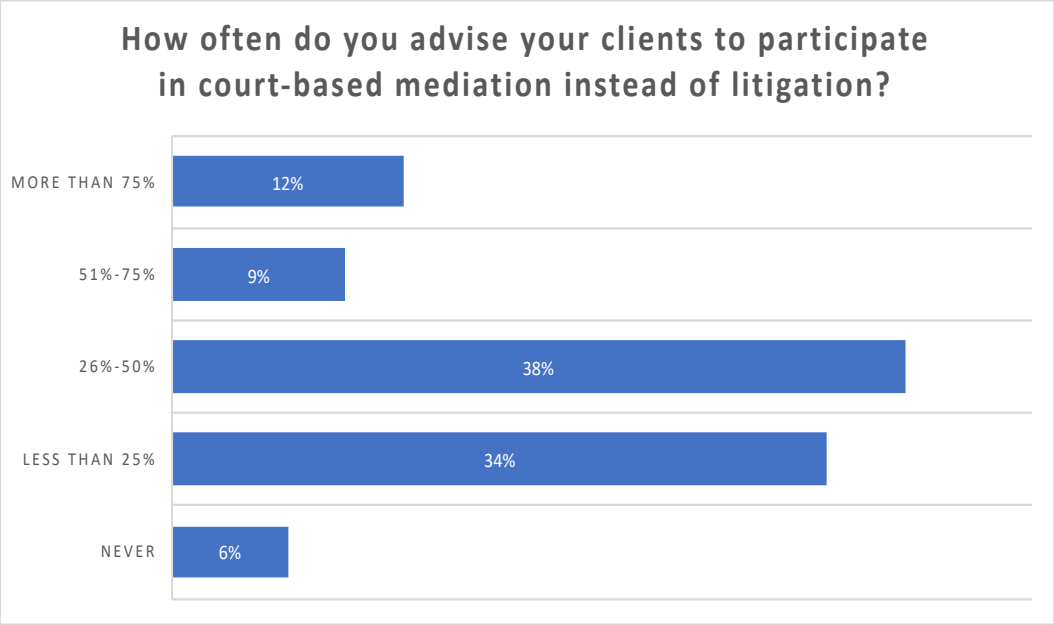


Respondents were asked the frequency with which they advise clients to choose mediation over litigation. The highest percentage of respondents (38%) reported they advise their clients to pursue mediation more than one-quarter of the time. At the same time, only 21% of respondents advise their clients to participate in court-based mediation instead of litigation more than half of the time (Figure 11). Given there is no obligation for lawyers to advise their clients to resort

[197] Emphasis added.
[198] Emphasis added.
[199] Emphasis added.

to mediation before litigation,[200] it is likely lawyers would advise their clients to use mediation more frequently if there was a statutory obligation to do so.

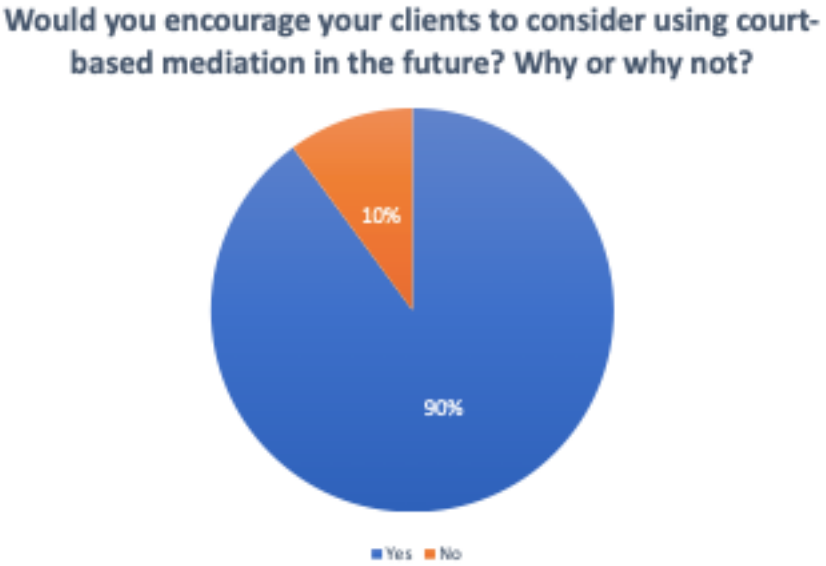
Figure 11: Frequency That Lawyers Advise Their Clients to Pursue Mediation Over Litigation



Another finding is that 90% of the lawyers responded that they would encourage their clients to use court-based mediation in the future. Figure 12 is a promising sign that indicates the majority of lawyers with mediation experience are open to using mediation in the future.

[200] Obligation of lawyers to advise their clients to use ADR is a point of comparison with the English system in Chapter 6. For example, CPR r 1.1, 1.3 "The parties are required to help the court to further the overriding objective."; the court guides such as the Commercial Court Guide, tenth edition (2017), para G1.4 and the Solicitors Regulation Authority and the Bar Standards Board for barristers. More details in Chapter 6.

Figure 12: Percentage of Lawyers That Would Encourage Their Clients to Use Court-Based Mediation in the Future



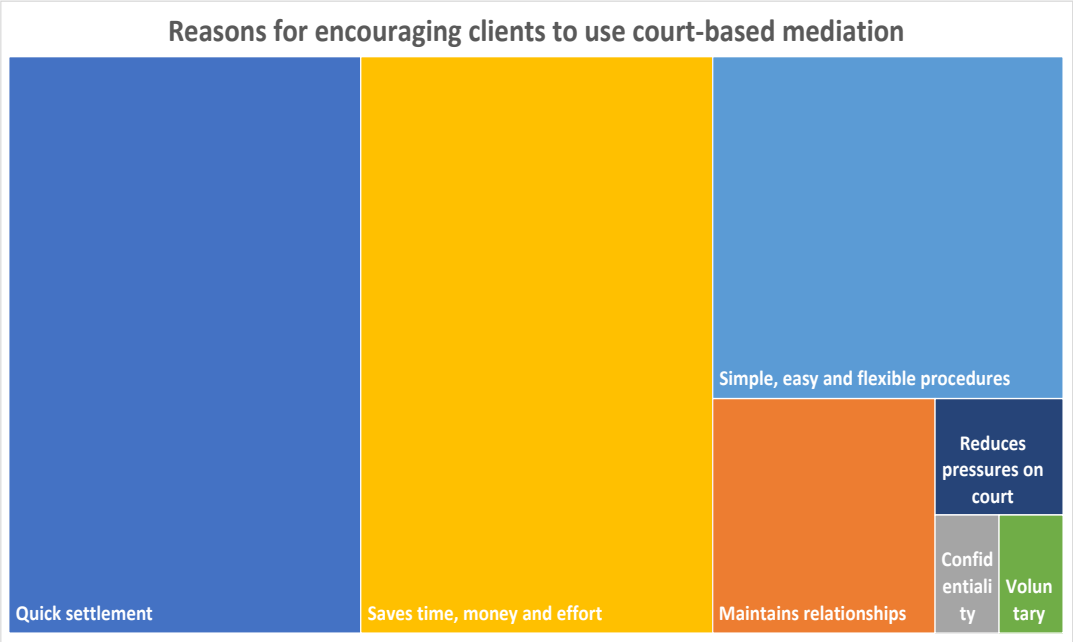
Respondents cited varying reasons for recommending future clients to use mediation, as shown in Figure 13:

- it is a quick way to settle many kinds of disputes compared to litigation even if the disputants get less than they asked for;
- it saves time, effort, and money;
- it has simple, easy, and flexible procedures;
- it improves the relationships between the disputants, and contributes to strengthening their social relationship;
- it reduces the caseload of the court;
- it maintains the confidentiality of the clients; and
- settling is voluntary, and not mandatory, among other reasons.

The 10% of the respondents that would not encourage their clients to consider using court-based mediation in the future would not do so for several reasons:

- they believe it affects the quality of justice for the disputants;
- mediation is a complicated process; and
- some types of cases are not suitable for mediation.

Figure 13: Reasons for Encouraging Clients to Use Court-Based Mediation in the Future

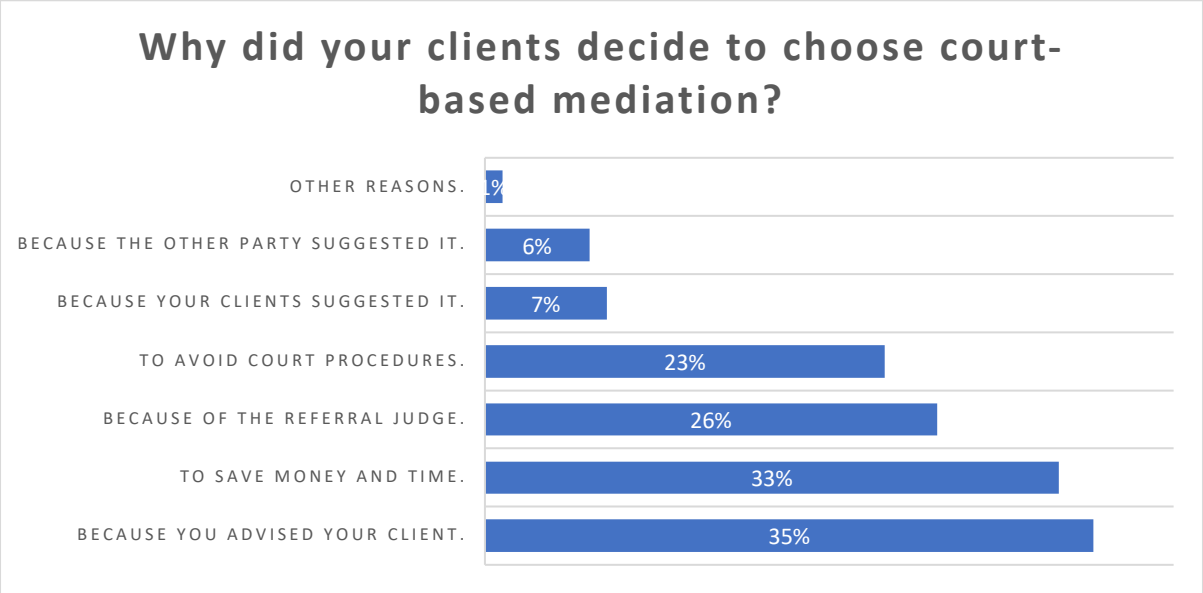


These results are optimistic, as they indicate lawyers with experience using mediation would advise their clients to choose mediation in the future due to the advantages of mediation over litigation. However, less promising is the frequency at which lawyers are advising their clients to participate in court-based mediation instead of litigation (as seen in Figure 11), which suggests very few of their clients are experiencing the benefits of mediation.

3.2.2.3 Reasons clients choose court-based mediation

Respondents were asked to describe their clients' motivations for choosing mediation over litigation. In the data, there seem to be two patterns emerging; of clients choosing court-based mediation due to the importance of personal recommendations, and the benefits of mediation over litigation (Figure 14).

Figure 14: Clients' Motivation to Choose Mediation



Not surprisingly, one of the main reasons client's choose court-based mediation is based on the advice of their lawyers (35%). Thus, the data indicates the influence of lawyers in encouraging their clients to choose mediation. The clients also valued saving time and money (33%). Interestingly, just 26% of clients chose court-based mediation based on the referral judge's recommendation. It is not clear if this is due to a lack of encouragement by the referral judges (as shown in Figure 3 only 17% of respondents believed referral judges encourage the use of mediation all of the time) or the absence of clients at the first judicial meeting, or some other reason. Avoiding court procedures is another important factor in choosing court-based mediation (23%), which was one of the main intentions of the Mediation Law as stated in the Policy Memorandum.[201] Additionally, the initiative among disputants to recommend mediation was not highly rated as a factor in choosing mediation. This may be interpreted as a lack of awareness by lay citizens of the existence of court-based mediation.[202] Moreover, as previously noted, disputants are not legally required to attempt to mediate their disputes before resorting to litigation.[203]

[201] *The Policy Memorandum* (n 192). A similar conclusion was made in England. In her evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court, Prince cited two main reasons for choosing mediation are because of the recommendation by the judge (54%) and to avoid a court hearing (14%). See Sue Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Final Report Prepared for the Department of Constitutional Affairs, September 2006). 85-86.
[202] Awareness of mediation among citizens is a point of comparison between the English and Jordanian systems to be addressed in a Chapter 7.
[203] Duty of the parties to attempt to resolve disputes using ADR is a point of comparison between the English and Jordanian systems to be addressed in Chapters 5 and 6. See also, CPR r.1.3.

In conclusion, because lawyers have no legal obligation to discuss the use of ADR forms with their clients, they act as gatekeepers to mediation by advising their clients to choose mediation. As such, they do have an influence over the clients' decision-making. Lawyers are the only link to the justice system for many disputants, and are partially responsible for the poor uptake of court-based mediation as they decide whether to discuss alternatives to litigation with their clients, they represent their clients at the referral stage and at mediation sessions, and many have the final say in accepting the invitation to mediation and the mediation settlement agreement.

3.2.3 Does mediation improve access to justice and ensure quality of justice?

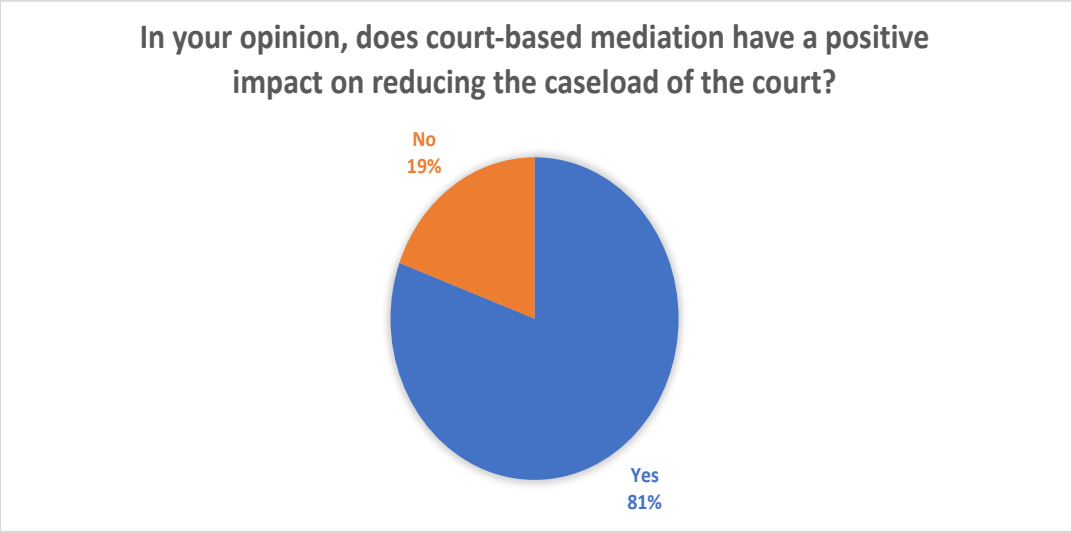
3.2.3.1 Reducing the caseload of the court

Art. 101 of the Constitution of the Hashemite Kingdom of Jordan, 1952 states that the Jordanian courts should be open to all citizens and shall be free from any interference in their affairs.[204] This guarantees the right of access to justice and to seek a judicial judgment via the formal procedural rules for all citizens. Access to justice is also supported by Art. 102 of the Constitution which states that the Jordanian courts shall have jurisdiction over all persons in all matters civil, commercial and criminal, thus ensuring the right to go to the court in order to solve any disputes. Moreover, the Policy Memorandum of the Mediation Law emphasises that the courts are the official method for solving the individual's disputes according to the Constitution, and as the number of cases registered before the courts is steadily increasing, it was necessary to search for an alternative to solve these disputes in order to improve access to justice.[205] The Mediation Law was established to improve access to justice for all citizens by reducing the caseload of the court, and reducing the time to achieve a settlement.

Respondents were asked if they believe court-based mediation reduces the caseload of the court. As shown in Figure 15, the vast majority of respondents (81%) regard court-based mediation as having a positive impact on reducing the caseload of the court. The remaining 19% of respondents do not believe that court-based mediation positively impacts the caseload of the courts.

[204] The Constitution of the Hashemite Kingdom of Jordan of 1952 (as amended). Arts. 101, 102.
[205] Jordanian Council of Ministers, *The Policy Memorandum* (n 192).

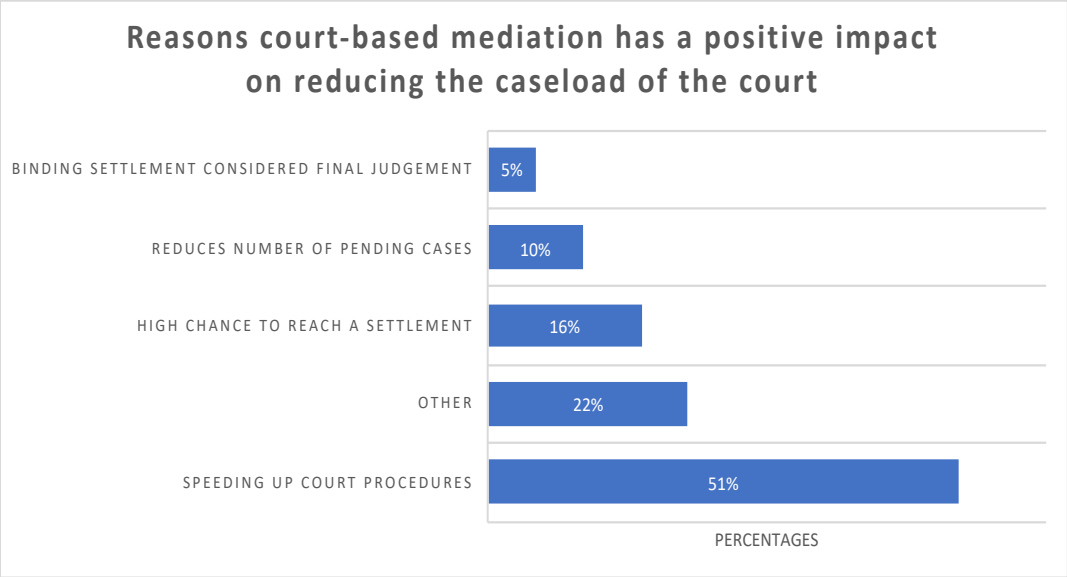
Figure 15: Impact of Court-Based Mediation on the Court's Caseload



More than half of respondents (51%) who believe court-based mediation reduces the court's caseload point to the speed of the court procedures, whereas 16% believe mediation has a high chance of leading to a settlement. Another 10% cite the reduction in the number of pending cases, and 5% mention that mediation is considered a final binding judgment not subject to any means of appeal (Figure 16).[206] The data point to the positive impact of court-based mediation on the caseload of the court from the lawyers' perspective. However, this view is not reflected in the number of cases registered, as discussed in Chapter 1.

[206] Responses add up to more than 100% as the question was open-ended and lawyers were not limited in the number of responses.

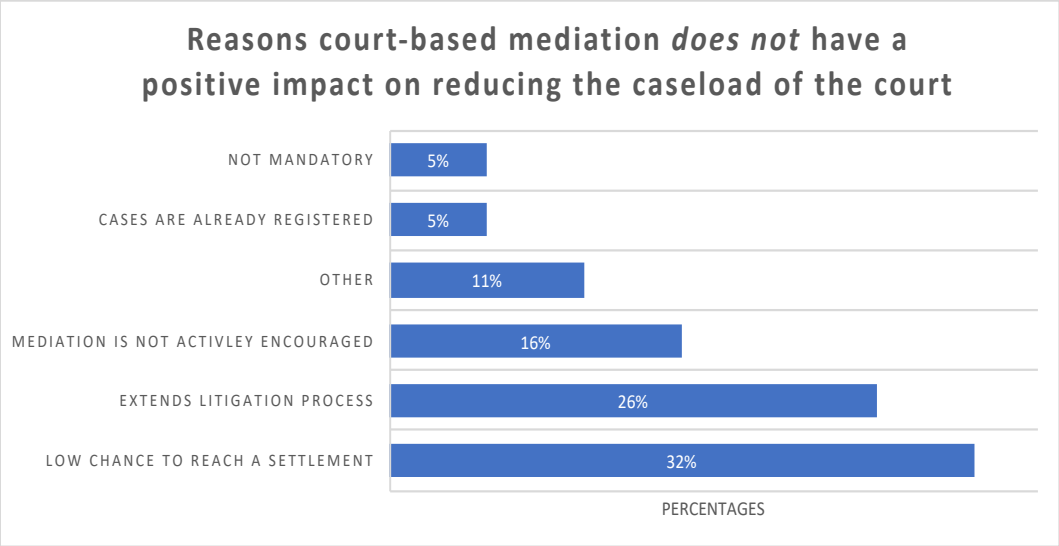
Figure 16: Reasons Court-Based Mediation Has a Positive Impact on Reducing the Court's Caseload



Of the 19% of respondents who do not say that mediation has a positive impact on reducing caseloads, some believe there is a low chance of reaching a settlement (32%), others believe that mediation extends the litigation process (26%), and, finally, some are of the opinion that meditation is not actively encouraged by referral judges (16%) (Figure 17).[207] These data illustrate a common concern about court-based mediation: failure to reach a settlement in mediation will result in an extended litigation process. The data are consistent with findings in Figure 3 which showed that just 17% of the referral judges encouraged the use of mediation all the time. It is important to note that some lawyers (5%) believe that court-based mediation does not have a positive impact on reducing the caseload of the court, because mediation is not mandatory, and may indicate that the low uptake of voluntary mediation does not contribute to reducing the number of cases before the court.[208] It is plausible that in the minds of these respondents, mandatory mediation is necessary for mediation to make a positive impact on reducing the court's caseload.

[207] Ibid.
[208] Mandatory mediation will be discussed in Chapter 5 of this thesis.

Figure 17: Reasons Court-Based Mediation Does Not Have a Positive Impact on Reducing the Court's Caseload



It is not surprising that lawyers who have experience with mediation generally believe that mediation helps to reduce the caseload of the courts, as the majority of respondents reported that mediation speeds up the court procedures. It seems plausible that settling disputes via court-based mediation avoids the lengthy litigation procedures, thereby reducing the case backlog and–potentially–increasing the efficiency of the court. On the other hand, it is noteworthy that a minority of lawyers (19 %) believe that court-based mediation does not have a positive impact on reducing the caseload of the court. Their views on mediation could be explained by participation in mediation sessions that did not result in settlement agreements, and thus extended the litigation process.

Furthermore, respondents with a favourable view about the impact of mediation on reducing the caseload of the court believe there is a high chance of reaching a settlement via mediation. This contrasts with the minority of lawyers that believe court-based mediation does not have a positive impact on reducing the caseload of the court, and reported that there is a low chance of reaching a settlement. It is possible that the difference of opinion may be related to the amount of experience with court-based mediation, such that more experienced lawyers report a greater chance of settlement than less experienced lawyers. One limitation of the questionnaire and the data is the lack of demographic data from the respondents, as was discussed in Chapter 2.[209]

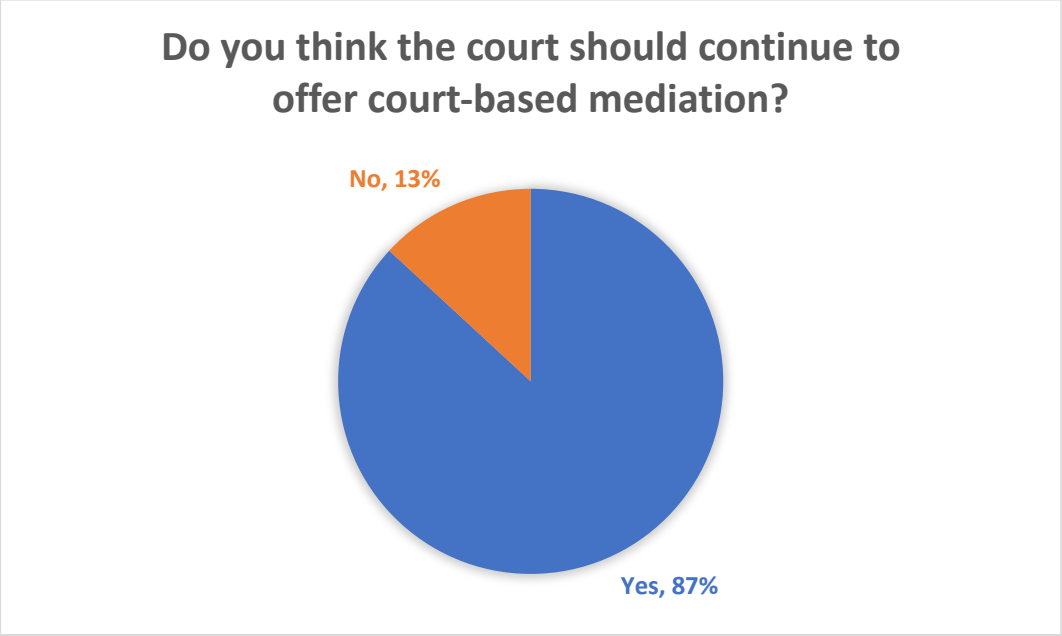
[209] See thesis methodology in Chapter 2.

As seen above, the majority of respondents reported that court-based mediation has a positive impact on reducing the caseload of the court. This is an encouraging sign as reducing the caseload on the courts was the primary intention of the Jordanian lawmakers when they introduced the Mediation Law.[210] However, it remains to be seen if court-based mediation improves access to justice, as mediation is not active in the Jordanian courts and there is a limited opportunity for mediation to make an impact on the overall caseload of the court.

3.2.3.2 Continuation of court-based mediation

Respondents were asked if they think the court should continue to offer court-based mediation. The vast majority of the lawyers (87%) who responded to the questionnaire supported the continuation of court-based mediation. See Figure 18.

Figure 18: Continuation of Court-Based Mediation



Some of the reasons the respondents supported the continuation of court-based mediation include:

- mediation reduces the pressure on the trial judges, and reduces the caseload;
- mediation is a quick method to solve disputes;

[210] *The Policy Memorandum* (n 192).

- mediation saves time, money, effort, and avoids court procedures;
- mediation is an alternative dispute resolution which offers a variety of solutions to the disputants, unlike the court judgments;
- there are many types of cases that are suitable for mediation;
- mediation does not affect access to justice, because disputants can always return to the court;
- parties reach a friendly settlement and maintain their relationship;
- it is the citizen's legal right to have this service, which is free of charge, unlike private mediation;
- mediation has advantages over private mediation such as the return of court fees; and
- the mediation settlement agreement is legally binding and enforceable by the court which contributes to reducing the litigation stages.

The 13% of the respondents who think the court should not continue to offer court-based mediation offered several reasons:

- the court needs to improve and develop judicial mediation to achieve the best result;
- there are some types of cases that are not suitable for mediation and require court procedures to solve;
- court-based mediation is not applied effectively, and as a result most cases go to court procedures; and
- some disputants use court-based mediation as a tool to extend the litigation process.

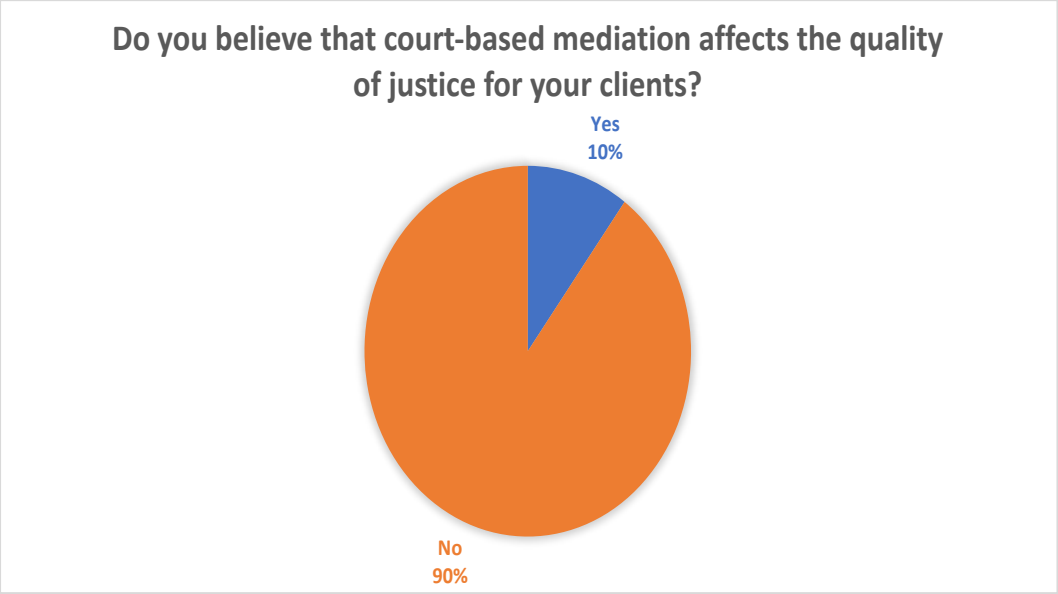
These findings indicate that the majority of lawyers who have experience with mediation generally support the continuation of court-based mediation and recognize its many advantages, which include elements of effective access to justice. Others emphasise the need for continued improvement and development of judicial mediation to make it more effective. Interestingly, some respondents indicated that some disputants misuse mediation as a tool to prolong the litigation process, which completely contradicts the lawmakers' intention of reducing the courts' caseload and shortening the litigation process and stages. The potential of education, awareness, and training to influence stakeholder opinions about mediation will be taken up later in this chapter.

3.2.3.3 Mediation's effect on the quality of justice

There are a number of provisions in the Jordanian Mediation Law that ensure the quality of justice of the mediation process. First, referral to mediation is based on the parties' consent with encouragement by the referral judge, but without coercion, as stated in Art. 3. Second, court-based mediation is facilitated by a judge-mediator, as required by Art. 4. Third, the mediation settlement agreement is ratified by a trial judge, and, fourth, after ratification, the mediation settlement agreement is equal to the judicial judgment, and enforceable by the court as stated in Art. 7.[211]

Respondents were asked whether they believe court-based mediation affects the quality of justice for their clients. The general consensus (90%) is that court-based mediation does not affect the quality of justice for their clients (Figure 19).

Figure 19: Does Court-Based Mediation Affect the Quality of Justice?



Respondents gave several reasons why they believe court-based mediation does not affect the quality of justice, including:

- court-based mediation is a voluntary option based on the disputants' consent and parties have the right to withdraw from the mediation session and go to the court without penalty;

[211] The Mediation Law. Arts. 3, 4, and 7.

- parties to the dispute choose the solution that satisfies them;
- it is linked to the judicial system and the law;
- parties settle in a friendly way;
- parties are free to settle without any coercion from the judge-mediator;
- it is an alternative dispute resolution and is not legally binding for the parties to settle;
- it is a quick procedure which saves expenses;
- parties can speak and negotiate freely due to the confidentiality of the mediation sessions;
- it decreases the caseload of the court and shortens the litigation stages, which gives the trial judges time to consider more significant disputes; and
- court-based mediation is an administrative system rather than a judicial system that is based on the adversarial principle.

The 10% of respondents who believe court-based mediation affects the quality of justice for their clients gave several reasons, including:

- some parties make concessions and give up some of their claims in the mediation process;
- the party was unable to choose litigation procedures to solve the dispute; and
- it affects the quality of justice for cases that have legal issues.

These findings indicate that the vast majority of lawyers who have experience with mediation generally believe that mediation does not negatively affect the quality of justice, but improves the quality of justice for their clients and the entire judicial system.

3.2.3.4 The role of the judge-mediator

The Jordanian lawmakers further ensured the quality of justice of the mediation process by giving wide authority to the mediator to control the mediation session and take any measures necessary to bring about a settlement. Art. 6 of the Mediation Law sets out the role and duties of the judge-mediator in conducting the mediation sessions and gives the mediator wide authority to:

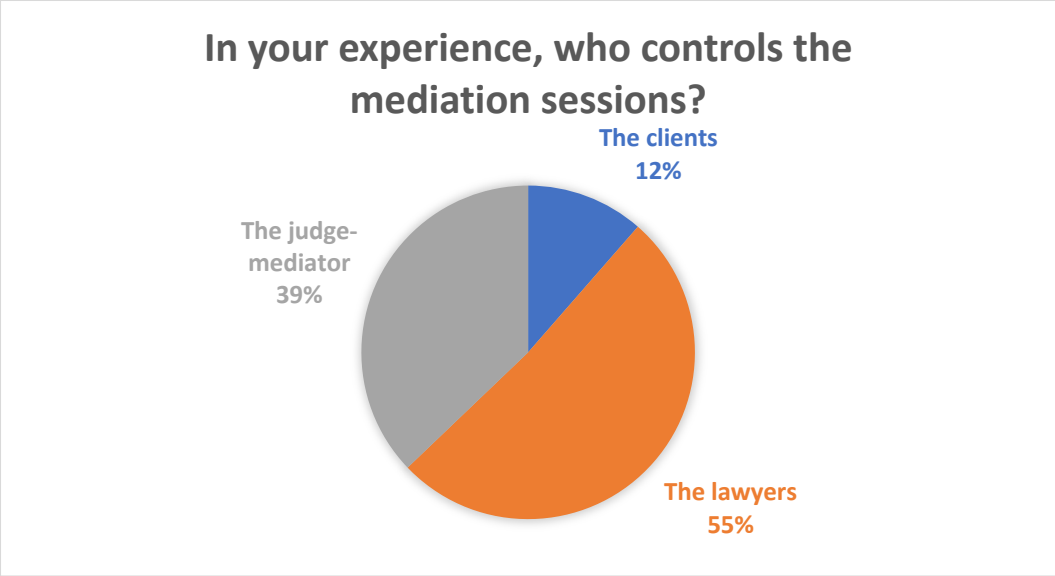
> take whatever measure s/he deems appropriate to bring parties into agreement with the view of reaching an amicable settlement to the dispute, [the] mediator shall be

> allowed to express opinion, evaluate evidence, present legal documents and judicial precedents and take all other measures that facilitate mediation.[212]

Art. 7 of the Mediation Law gave authority to the mediator to control the mediation process. The language of this article suggests that it is the mediator that reaches or does not reach the settlement to the dispute.[213] Giving this authority to the mediator is in direct contradiction with the principle of mediation in which the mediator is a neutral third party, and has no power over the disputants.

Respondents were asked who controls the mediation sessions. The majority of respondents (55%) say that lawyers control the mediation sessions, whereas 39% say it's the judges who control the mediation sessions (Figure 20).[214]

Figure 20: Who Controls the Mediation Sessions?



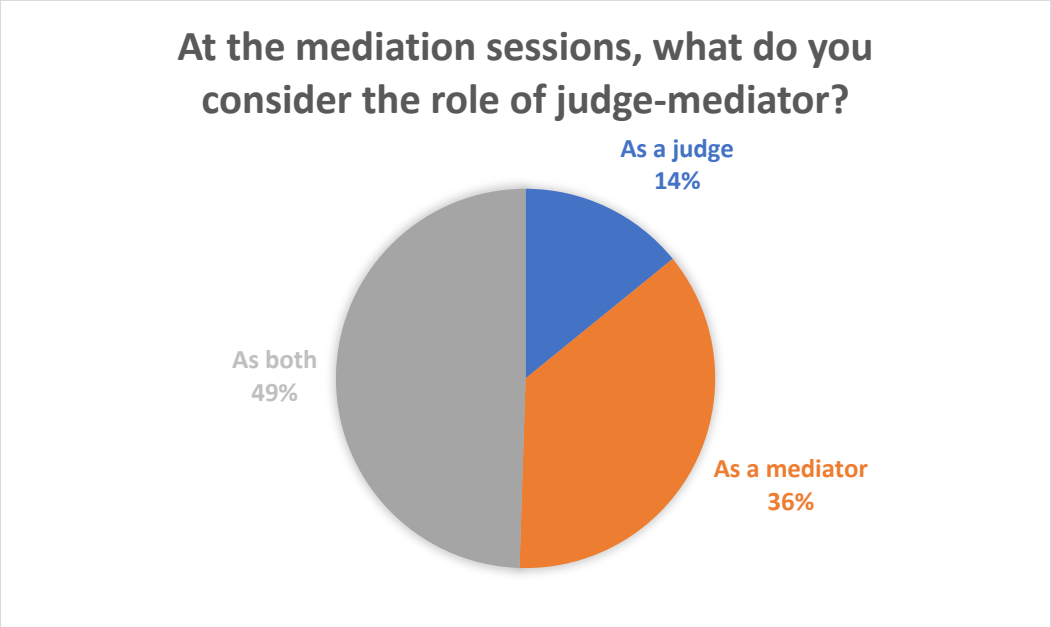
It is not surprising the majority of respondents say that lawyers control the mediation sessions, as this corresponds with the language of the Mediation Law, which requires the presence of lawyers but not clients. It is interesting to note that few respondents (12%) say the disputants are in control of the mediation sessions. However, it is unclear from the data if the lawyers are referring to control of the mediation process or control of the mediation outcome. This finding

[212] The Mediation Law. Art. 6.
[213] ibid Art. 7.
[214] Responses add up to more than 100% as lawyers were permitted to select more than one response.

calls into question the self-determination of disputants in court-based mediation in Jordan. It seems plausible that the intention of the Jordanian lawmakers was to give control of the mediation session to judge-mediators to ensure the quality of justice for both parties.

The lawyers were also asked their perceptions of the role of the judge-mediator. The data in Figure 21 indicates that almost half of the respondents (49%) consider the role of the judge-mediator as both a judge and a mediator at the same time.

Figure 21: What is the Role of the Judge-Mediator?



Respondents say the judge-mediator exercises the judge's role by:

- controlling the mediation session;
- applying laws;
- using the influence and authority of a judge; and
- issuing a decision at the end of the dispute,

as well as exercises the mediator's role by:

- closing the gap between parties;
- giving advice to help them settle; and
- offering solutions to the disputants to end the session in a legal way.

While over one-third (36%) of the respondents considered the role of the judge-mediator as a mediator because the judge-mediator facilitates the negotiation between the parties to the dispute, helps parties to settle without forcing them to do so, and without using his authority as a judge, and, gives disputants the opportunity to speak freely and express their opinions.

Lastly, 14% of the respondents considered the role of the judge-mediator as a judge, because the judge-mediator is not a full-time mediator and functions as a trial judge at the same time, the judge-mediators control the mediation sessions, and they apply part of the CPL on the subject of the dispute.

The results show that lawyers have disparate views regarding the role of the judge-mediator. It is not surprising that 63% of respondents view the judge-mediator as a judge (14%), or as both a judge and a mediator (49%), as the Mediation Law gives the judge-mediator many of the same functions as a trial judge, and many judge-mediators are not full-time; they function as trial judges at the same time in the same court.

To conclude, court-based mediation in Jordan does not emphasise the empowerment of the parties and their self-determination, but instead focuses on the role of the judge-mediator to ensure the fairness of the process. Although the process is called "mediation," it is possible lawmakers were more interested in ensuring access to justice and the quality of justice of the mediation process.

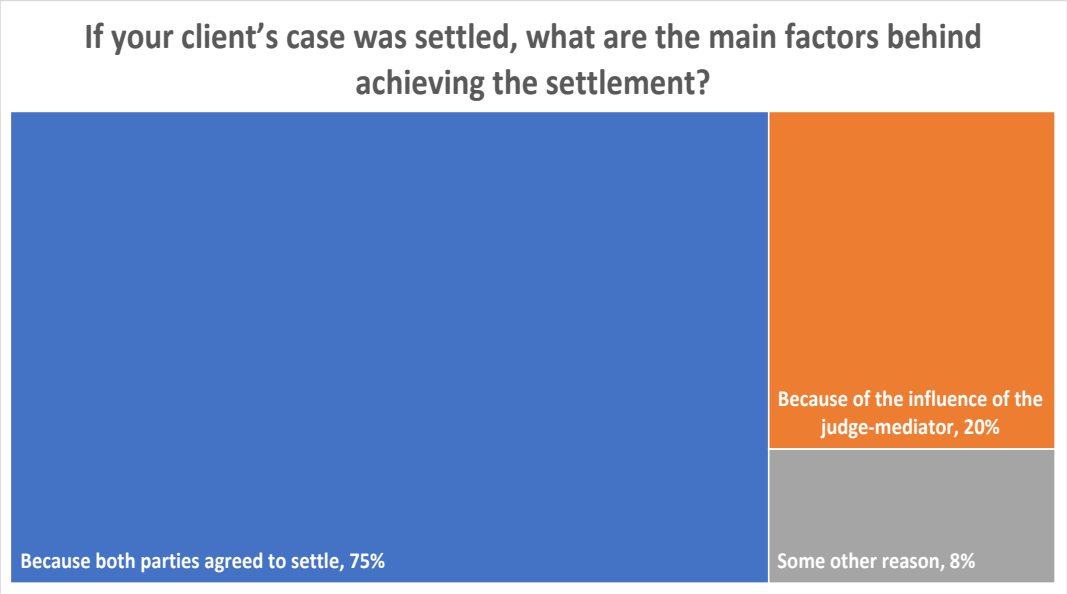
3.2.3.5 The principle of voluntariness

The "amicable settlement to the dispute" is discussed throughout the Mediation Law and the Policy Memorandum. Accordingly, the referral judge can invite parties to use mediation to settle the dispute, and the judge-mediator can facilitate the mediation to help parties to reach a settlement. However, the Mediation Law does not compel parties to accept the mediation invitation or the final settlement agreement. Thus, the Mediation Law gives priority to the principle of voluntariness, as compelling parties to mediate and preventing parties from exercising their right to litigation would not ensure access to justice or the quality of justice of the mediation process.[215]

[215] Access to justice will be discussed in detail in Chapter 5 of this thesis.

Another finding of the data is that the majority of respondents (75%) say that the main factor behind achieving a settlement is that parties agreed to resolve their dispute ,as shown in Figure 22. Some of the reasons parties agreed to settle were; the goals of saving time, money, and effort and shortening the procedures and litigation stages; maintaining the relationship by reaching a friendly solution that satisfied both parties; both parties made concessions in order to settle; parties had the real intention to end the dispute and the influence of the lawyers convinced parties to settle.

Figure 22: Reasons for Achieving a Settlement



One-fifth (20%) of the respondents cite the main factor behind achieving the settlement is the influence of the judge-mediator, including the evaluation of the legal standing of each party which helped parties settle; the authority and the influence of the judge-mediator and the control of the mediation process pushed parties to settle, and the judge-mediator mentioned that if the case proceeds to trial it would take a long time to settle.

These findings would suggest that having a real intention to resolve the dispute is the main reason parties achieve a settlement. These findings demonstrate that although the parties may not control the mediation session, it is the willingness of parties to agree to a mediation settlement that ultimately determines the mediation's success. However, the influence of the judge-mediator is a factor which should not be ignored, given that mediation is done under the

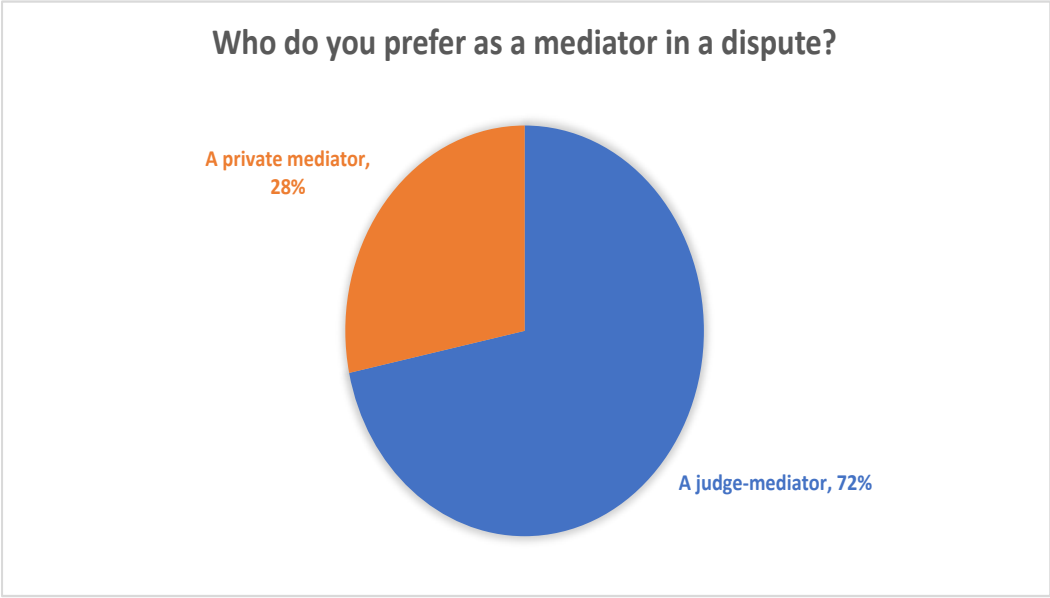
civil justice system umbrella, and the influence of the judge-mediator at the mediation sessions is another way to ensure and deliver quality of justice in the mediation settlement agreement.

3.2.3.6 Mediator preference

According to Arts. 2 (a) and (c) of the Mediation Law there are two types of mediators– judge-mediators who conduct the mediation sessions within the court system, and private mediators who conduct the mediation sessions outside the court. Private mediators are nominated by the Chairman of the Judicial Council and chosen from retired judges, lawyers, professionals, and other experienced persons known for their integrity and impartiality.[216] Parties may also choose their own private mediator from outside the list, with approval by the referral judge.[217]

As shown in Figure 23, the majority of respondents (72%) prefer a judge-mediator to mediate a dispute.

Figure 23: Mediator Preference



Respondents gave several reasons why they prefer a judge-mediator, including:

- the experience and legal knowledge of the judge-mediator regarding the law;

[216] The Mediation Law. Arts. 2 (a) and (c).
[217] ibid. Art. 3(b).

- the authority, prestige, and influence of the judge-mediator helps parties to reach a settlement;
- impartiality of the judge-mediator;
- ability to evaluate the legal standing of the parties;
- skills and ability to facilitate the negotiation;
- keeping the mediation settlement under the judicial system; and
- trust in the judge among disputants and their lawyers.[218]

However, more than one-quarter (28%) of the respondents prefer a private mediator for several reasons, including:

- the broader experience, skills and knowledge of private mediators;
- avoiding the prestige and influence of the judge on the disputants;
- parties and lawyers are open to discussing any point without any hesitation and going into details without affecting the original case;
- private mediators are faster than judge-mediators in settling the dispute;
- private mediation is a new revenue stream for lawyers, and
- the private mediator operates as a full-time mediator, unlike the judge-mediator, and has adequate time to consider the case and help parties settle.

These findings suggest that the respondents' preference for a type of mediator depends in part on whether or not they view the influence of the judge-mediator positively or negatively. Overall, the majority of lawyers with experience using court-based mediation prefer a judge-mediator over a private mediator, due to various reasons that include elements that ensure the quality of justice in mediation.

In summary, the majority of lawyers believe that as court-based mediation reduces the caseload of the court, it should be continued; it improves access to justice and it positively affects the quality of justice for their clients. Also, by giving the judge-mediators the authority to control the mediation sessions, the lawmakers ensured the quality of justice of the mediation process, but at the expense of the self-determination of the parties.

[218] Trust in the judiciary is a cultural factor that stems from Jordanian customs which is highlighted in the judge interviews in Chapter 4.

3.2.4 Education, awareness and training for stakeholders

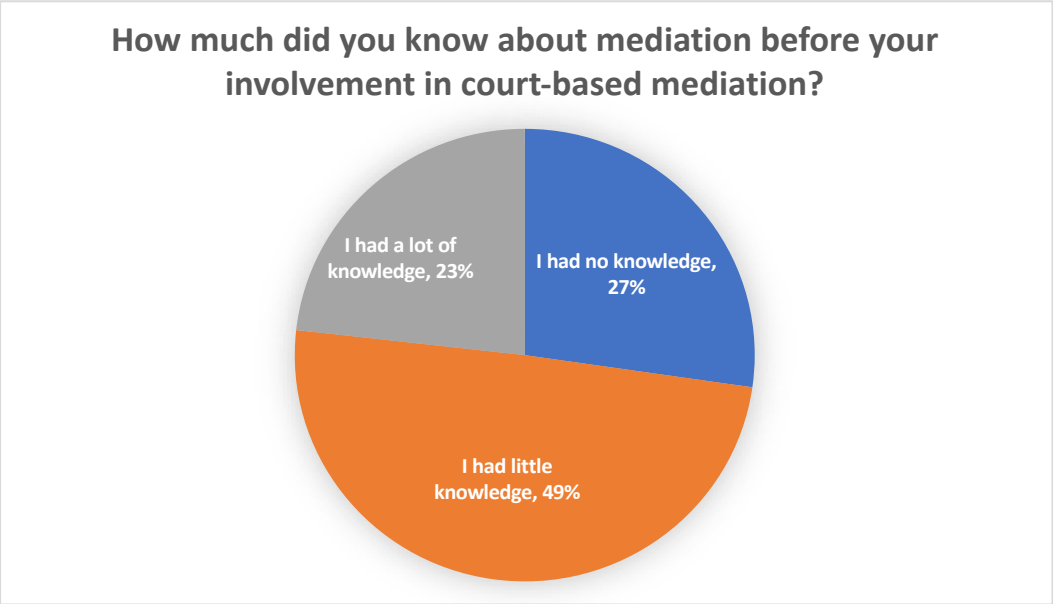
3.2.4.1 Lawyers' education, awareness and training about mediation

There is no statutory duty or obligation for lawyers to acquire education or training related to mediation.[219] Moreover, there is no requirement in the lawyers' professional code requiring education, awareness, or training on mediation.[220] Similarly, lawyers have no statutory or professional duty for engaging in continuing professional development in order to continue providing legal services.[221] Lastly, although court-based mediation differs in significant ways from community mediation as typically practiced in Jordanian society (i.e., the role of the mediator), the Policy Memorandum did not address education, awareness, or training for stakeholders.[222]

Respondents were asked about their prior knowledge about mediation. Over two-thirds of respondents to the questionnaire reported they had little or no knowledge about mediation before their involvement in court-based mediation. Figure 24 shows the most common answer was *I had little knowledge*[223] (49%), whereas 27% had *no knowledge*[224] of mediation and 23% *had a lot of knowledge*.[225]

[219] Mediation education and training for judges is a point of comparison between the English and Jordanian systems to be addressed in Chapter 7.
[220] Lawyer's Code of Ethics and Code of Conduct of 1979.
[221] The Bar Association Law. See also, Lawyer's Code of Ethics and Code of Conduct of 1979.
[222] Jordanian Council of Ministers, *The Policy Memorandum* (n21).
[223] Emphasis added.
[224] Emphasis added.
[225] Emphasis added.

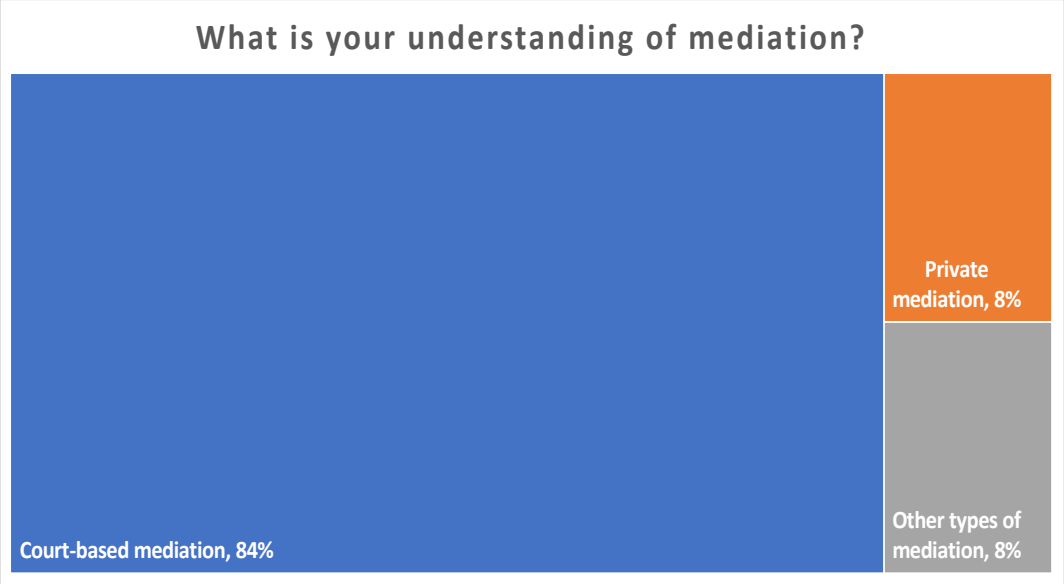
Figure 24: Prior Knowledge About Mediation



Although the Mediation Law was enacted in 2006, this finding is not surprising given there is no obligation for lawyers to continue their professional development, and there is limited opportunity for lawyers to gain experience with the mediation process due to the low demand for court-based mediation.

The term mediation, as identified by the majority of respondents (84%), is understood to mean court-based mediation taking place inside the court and facilitated by a judge-mediator (Figure 25). Respondents do not primarily think of mediation in the private sector, or other types of mediation. In a country where tribal mediation has been practiced for hundreds of years to settle disputes, and continues to this day, one would expect tribal mediation would figure more prominently in the minds of lawyers than other types of mediation.

Figure 25: Lawyers' Understanding of Mediation



The findings show that the majority of attorneys that responded to the questionnaire had little or no knowledge about mediation before their involvement in court-based mediation. These findings suggest a more active role for the faculties of law, Bar Association, Ministry of Justice, and courts to provide education and training to lawyers in ADR forms, mainly mediation.[226]

3.2.4.2 Judges' education, awareness, and training about mediation

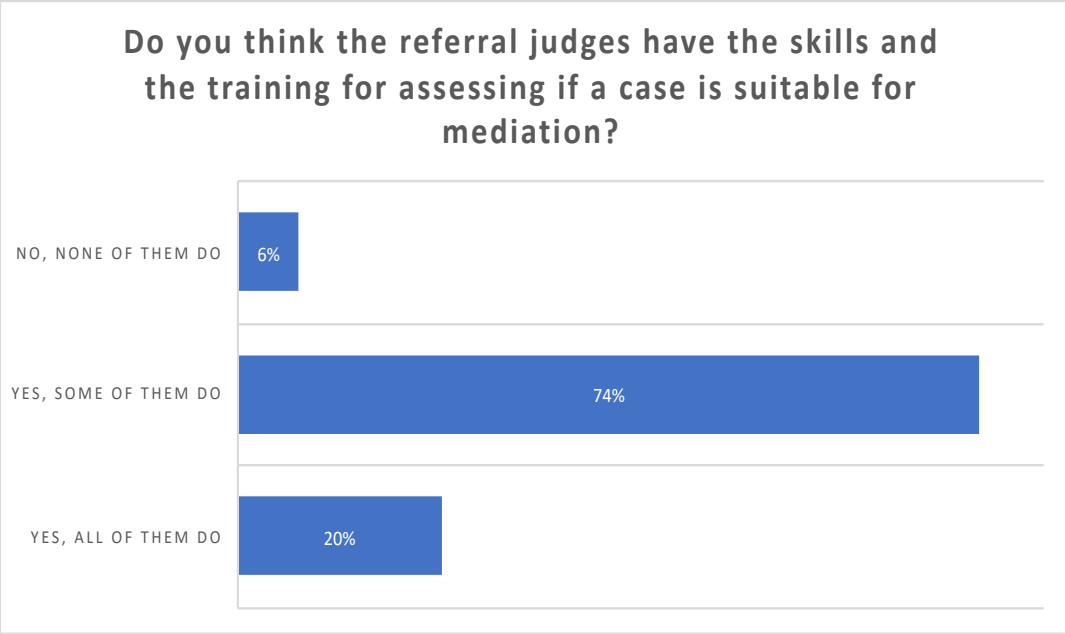
In contrast to lawyers, judges have a statutory obligation to obtain continuing professional development in order to deliver competent service to the court's users. Art. 9 of the Code of Judicial Conduct of 2021 states that judges should always seek to develop and improve their scientific and practical capabilities by attending training courses, seminars, and workshops that will increase their efficiency in order to keep up with the legislation.[227] These courses and training sessions are usually provided by the Judicial Council.

Respondents were asked about the skills and training of referral judges. Figure 26 shows the majority of respondents (74%) say *some*[228] judges have the skills and the training for assessing the suitability of cases for mediation, while 20% of respondents say that *all*[229] judges have

[226] Mediation education, training and awareness for lawyers is a point of comparison between the English and Jordanian systems to be addressed in Chapter 7.
[227] Code of Judicial Conduct of 2021. Art 9.
[228] Emphasis added.
[229] Emphasis added.

these skills. Interestingly, another 6% of respondents say *none*[230] of the referral judges have the necessary skills and training for assessing the suitability of cases for mediation.

Figure 26: Skills and Training of Referral Judges



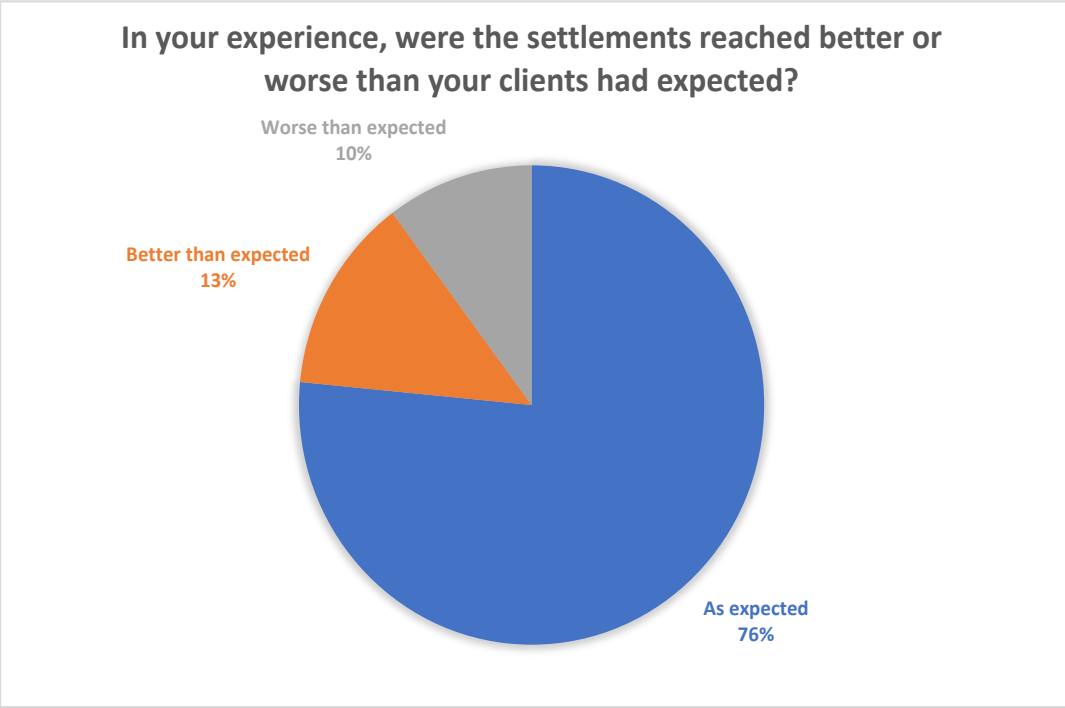
This finding indicates that, according to the respondents to the questionnaire, some referral judges have not obtained the skills needed to assess whether cases are suitable for mediation, although they are required to seek continuing professional development.[231] These data suggest that more training is needed for the referral judges.

3.2.4.3 Users education, awareness and training about mediation

Finally, respondents were asked about their clients' satisfaction with the settlement agreement. The data show that the majority of respondents (76%) say the settlements met their clients' expectations; 13% say the settlement agreements were better than expected, and only 10% of settlements did not meet the clients' expectations, as shown in Figure 27. This finding reflects the importance of lawyers educating their clients about mediation, and managing their expectations of the mediation settlement.

[230] Emphasis added.
[231] Mediation education and training for judges will be addressed in Chapter 7 of the thesis.

Figure 27: Clients' Satisfaction with the Settlement Agreement



Although the Mediation Law was enacted in Jordan in 2006, there is still little experience with court-based mediation by disputants, lawyers, and judges. The findings suggest additional education, awareness and training about mediation is needed to inform all stakeholders about the existence of court-based mediation and its process, benefits, and expectations. The extent to which education, awareness, and training about mediation would increase the use of mediation will be investigated in Chapter 7 of this thesis.

3.3 Conclusion

The findings of this empirical study on the lawyers' views and experience of using court-based mediation suggest that lawyers encourage their clients to use this method *some of the time*.[232] Most would continue to do so in the future because of its benefits, such as reaching a quick settlement and saving time, money, and effort. Significantly, the study found that lawyers reported that insurance, labour, money claims and landlord-tenant cases are most appropriate to resolve through court-based mediation, as these types of cases are factual and do not require legal proceedings. Most agreed that referral judges are encouraging their clients to use court-

[232] Emphasis added.

based mediation *some of the time*.[233] However, as only 10 % of respondents had more than 10 clients that were referred to court-based mediation, it is clear that judges are referring disputants, but to a limited extent. Some lawyers believed that encouragement by the referral judge does influence their clients' decisions to accept the mediation invitation. Others believed the advice of the lawyers was the primary influence on their clients' decision-making. Moreover, the respondents emphasised the impact of court-based mediation to reduce the caseload of the court and to positively affect the quality of justice for their clients. Lastly, the study found a lack of education, awareness, and training on mediation amongst stakeholders.

These findings support the assertion in the hypotheses of this work: that lawyers and judges act as gatekeepers to the use of mediation; court-based mediation delivers access to justice, and, at the same time, ensures the quality of justice; and there is a lack of education, awareness and training amongst all stakeholders. For all these reasons, the use of mediation is in decline in Jordan. Having explored the lawyers' views on the use of court-based mediation, the next chapter will present empirical findings on judges' experiences and views on mediation in order to have a full picture of the practice of mediation in Jordan.

[233] Emphasis added.

CHAPTER FOUR: EMPIRICAL FINDINGS ON JUDGES' EXPERIENCES AND PERCEPTIONS OF COURT-BASED MEDIATION IN JORDAN

4.1 Introduction

Having explored the lawyers' perceptions and experience with court-based mediation, this chapter presents empirical findings on judges' experiences and perceptions of court-based mediation in Jordan resulting from the qualitative study. Thus, it contributes to examining the central hypothesis of this thesis: that the absence of a statutory duty for judges and lawyers to encourage the use of mediation is an obstacle to the greater use of court-based mediation in Jordan. The previous chapter provides empirical evidence that judges and lawyers encourage the use of court-based mediation, but to a limited extent; court-based mediation reduces the caseload of the court and, therefore, positively affects the quality of justice, but there is a lack of awareness, education, and training amongst all stakeholders. This chapter presents the views and experiences of referral judges and judge-mediators, and explores the implications of the previous results.

While the majority of data from the lawyers' questionnaire is consistent with findings from the judges' interviews, some significant differences exist. Although the previous chapter found that lawyers believe court-based mediation improves access to justice, this chapter presents findings that suggest judges' opinions are mixed. Judges agree that court-based mediation improves access to justice, but referral judges and judge-mediators differ in their support of mandatory mediation. Similarly, evidence from the judges' interviews raises questions about the previous finding regarding lawyers' support for court-based mediation, as judges believe lawyers are the main obstacle to the use of mediation due to their self-interest. Furthermore, although a minority of lawyers suggest there is coercion in the referral process, judges insist they have no authority to compel parties to mediate.

4.1.1 Introduction to the Judge Interviews

The study examined the processes used by referral judges and judge-mediators in promoting and conducting court-based mediation. The interviews were designed to collect in-depth information regarding the practice of court-based mediation in Jordan and judges' experience as referral judges and judge-mediators. As the Jordanian Mediation Law does not include

criteria for determining cases that are referred to mediation, this study identified the factors referral judges take into consideration when inviting disputants to use court-based mediation. The processes judge-mediators use in conducting the mediation sessions will also be examined here, because mediators are allowed to take whatever measures are appropriate to facilitate the mediation.

This chapter begins by presenting a brief summary of the key findings of the quantitative and qualitative studies from the analyses outlined in the previous chapter, and examined below. It then presents data that tests the hypotheses of this thesis, and in doing so, presents findings on:

- The role of judges as gatekeepers to mediation.
- The role of lawyers as gatekeepers to mediation.
- The extent to which court-based mediation improves access to justice and quality of justice.
- The lack of education, awareness and training among stakeholders as a hindrance to the use of mediation.

The chapter concludes by highlighting the legal issues from the data collection that will be explored in the remaining chapters of the thesis. This chapter draws upon the original data collected during the empirical phase of this research to outline the basis for comparison to the English system.

4.2 Summary of Key Findings from Quantitative and Qualitative Studies

4.2.1 Mediation is active in some courts in Jordan, but total referrals are low as stakeholders have no incentive to refer cases to court-based mediation

The findings from the lawyers' questionnaire and the judges' interviews confirm the hypothesis that the Jordanian Mediation Law did not establish a statutory duty for judges and lawyers to encourage the use of mediation; as a result, stakeholders have no incentive to refer cases to court-based mediation. Generally speaking, mediation is partially active in the Palace of Justice of Amman, and limited in courts outside Amman. Of the lawyers who participated in the survey, 90% reported that 10 or fewer of their clients had been referred to court-based mediation, although court-based mediation was established in Jordan more than 13 years ago (Figure 7). Further, the judges interviewed noted that referral judges use their discretion on when to invite disputants to attempt to resolve their case through mediation, and some prefer to reconcile the cases themselves rather than refer them to mediation.

4.2.2 Lawyers act as gatekeepers to court-based mediation

Lawyers play a central role in the use of court-based mediation in Jordan. Out of the 99 lawyers who participated in the questionnaire, over one-third believed the main reason their clients choose court-based mediation is based on the advice of their lawyers (Figure 14). However, only 22 percent of the lawyers reported advising their clients to pursue mediation before litigation *all of the time* (Figure 10). Furthermore, more than half of the lawyers reported that they control the mediation sessions (Figure 20). These findings are supported by the judges' interviews, which indicate that lawyers are the main gatekeepers in terms of promoting or preventing the use of court-based mediation, because they have control over their clients: they decide whether or not to resort to mediation and whether or not to discuss alternative dispute resolutions. However, the only role and responsibility of lawyers in the mediation process is to attend the mediation sessions. As a result, lawyers have no incentive to resort to mediation.

4.2.3 Judges act as gatekeepers to court-based mediation

The findings indicate the importance of judges in the promotion and outcomes of mediation. Lawyers reported:

- referral judges are encouraging disputants to use mediation, but to a limited extent (Figure 3)
- encouragement of the referral judge is a factor in determining whether clients choose to use mediation (Figure 14)
- influence of the judge-mediator is a consideration in achieving a settlement (Figure 22)
- judge-mediators control the mediation sessions more than the parties (Figure 20) and
- respondents generally prefer a judge-mediator over a private mediator due to the impartiality and trust of the judges (Figure 23).

The judge interviews support this data. It was reported that:

- many referral judges only offer mediation to disputants as a formality,
- judge-mediators are the subject of trust among the court users,
- judge-mediators influence the parties' satisfaction with the mediation process,
- and the judge-mediators choose the style of mediation instead of the disputants.

4.2.4 Jordanian lawmakers did not establish clear standards for criteria for referral

The Jordanian Mediation Law did not establish standards for referring cases to mediation, as the only requirement in the law is that referral to mediation is based on the disputants' request or consent to an offer from the referral judge. Instead, referral judges are granted the discretion to determine which cases are appropriate for solving via mediation. The lawyers and judges generally agreed that cases with factual disputes such as labour, insurance, money claims, leases and landlord-tenant disputes are most suitable to refer to mediation (Figure 6). However, cases with complicated legal issues require court procedures.

4.2.5 Awareness, education and training are needed for all stakeholders

Although the Mediation Law was enacted in Jordan in 2006, there is still little experience with court-based mediation by disputants, lawyers, and judges. 76% of the lawyers that responded to the questionnaire reported having little or no knowledge of mediation before their involvement in court-based mediation (Figure 24). The data show disputants do not typically initiate mediation sessions, which may be interpreted as a lack of awareness by lay citizens of the existence of court-based mediation (Figure 14). Further, only 20 percent of lawyers reported that *all* judges have the skills and the training for assessing the suitability of cases for mediation (Figure 26). The judges interviewed identified awareness and training for all stakeholders as significant barriers to the greater use of court-based mediation within the Jordanian civil justice system.

4.2.6 Judges and lawyers generally agree that court-based mediation does not affect the access and quality of justice

The results of the data show that judges and lawyers agree that court-based mediation does not affect the quality of justice. Lawyers reported that mediation improves the quality of justice as shown in Figure 19. Similarly, judges emphasised that quality of justice is not negatively affected due to monitoring of court-based mediation by the civil justice system. In fact, some judges believe that court-based mediation improves the quality of justice for the entire judiciary, because it reduces the caseload of the court and gives the trial judges more time to consider disputes with more complicated legal issues. Furthermore, judges and lawyers agree that court-based mediation should be continued for various reasons, including reducing the caseload of the court which improves access to justice, as shown in Figure 18.

4.2.7 Support for mandatory mediation is mixed

Automatic referral to mediation was included in a previous mediation draft amendment that failed, and is currently in a new proposal under consideration by the Jordanian Council of Ministers.[234] The findings indicate that there are divided views on the support for mandatory mediation. While the vast majority of the referral judges (7 out of 8) are against mandatory mediation, the majority of judge-mediators (7 out of 9) are in favour of mandatory mediation for some types of cases. Referral judges base their opposition to automatic referral to mediation on the principle that mediation is voluntary and is an alternative to litigation, and the judges believe forcing disputants to mediate will extend the litigation period as disputants will not engage in the mediation process in good faith. On the contrary, the majority of judge-mediators believe that automatic referral to mediation would contribute to easing a significant burden on the court's caseload and save time, money, and effort, as straightforward disputes would be solved via mediation.

4.3 Findings

This section presents empirical findings on judges' perspectives on court-based mediation in Jordan from the interviews conducted. The findings reflect the judges' experience and opinions on the process of judicial mediation, the power and influence of judges, and barriers that hinder the use of mediation within the civil justice system.

4.3.1 Judges as Gatekeepers: The Power of Judges to Refer Cases to Court-Based Mediation in Jordan

4.3.1.1 Judges' discretion in determining the criteria for referral to mediation

The study explored the referral process to court-based mediation from the time the case is received by the Civil Case Management Judge or Magistrates Judge until it is referred to mediation, is settled via reconciliation or continues with the trial proceedings. Interviewees identified two patterns of referral to court-based mediation. Mediation uptake is facilitated through invitation from the judge, or by request of the parties with the referral judge's approval, as there are no guidelines for determining which cases are suitable for mediation.

[234] The Mediation Draft Law for Civil Disputes Resolution of 2019 is currently before the Jordanian House of Parliament to be discussed. Art. 4 of the draft includes mandatory referral to mediation in four types of disputes: labour, leases, insurance and money claims. < https://representatives.jo/AR/List/>مشاريع_القوانين_المحالة_للجنة_القانونية > accessed 28 March 2022.

The majority of referral judges (6 out of 8) interviewed noted they always refer cases to mediation when requested by the parties.[235]

> I refer to the mediation based on Article 3(a) of the Mediation Law which states, "After meeting with the disputants or their legal attorney and upon their request or after seeking their consent, the Case Management Judge or the Magistrates Judge may refer the dispute to the Judge-mediator or a Private mediator in order to reach an amicable settlement to the dispute." If the parties to the dispute request mediation, then I transfer the case based on their desire. (Referral Judge 8)

Moreover, when inviting disputants to resolve their case through mediation, referral judges (8 of 8) also take into account several criteria, including the value of the claims, the existence of family or commercial relationships, and when the points of agreement are more than the points of disagreement.[236]

> I take into consideration when the value of disputes is less than 1000 dinars or the existence of family relations and commercial partnerships. (Referral Judge 3)

> I look to see if the points of agreement are more than points of disagreement. Here, as a Case Management Judge, I offer or present a settlement to the parties to resolve the dispute or to refer the dispute to court-based mediation if the parties ask or show a desire to refer the dispute to mediation. As a Case Management Judge, I will honour the parties' desire and refer the case to mediation. (Referral Judge 5)

[235] Criteria for referral to mediation in the English system has been addressed in the literature and the judiciary. For example, this point has been made by Mantle in her book, Marjorie Mantle, *Mediation: A Practical Guide for Lawyers* (2nd edn, Edinburgh University Press 2017). Mantle points out disputes that are suitable or not suitable to mediate 34-42. Also, Susan Blake, Julie Browne, and Stuart Sime, The Jackson ADR Handbook (2nd edn, Oxford University Press 2016) discussed criteria for referral to mediation in section D. Further, the English judicial rulings point out some criteria as seen in *Thakkar v Patel* [2017] EWCA (Civ) 117.[27] In his ruling Lord Justice Jackson identified three circumstances which are suitable for mediation: 1) if the dispute is about money, 2) if the litigation cost is higher than the claim, and 3) if both disputants have a close view about the issue and are willing to accept an offer.

[236] A similar conclusion was made in England. In her evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court, Prince found "The value of the claim was an important deciding factor in whether or not the case would settle as 22% of referred cases were for less than £500 and this increased to 32% for cases which actually settled at mediation". See Sue Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Final Report Prepared for the Department of Constitutional Affairs, September 2006) 10.

These findings suggest that referral judges use their discretion to determine the criteria for referral and, surprisingly, judges do not feel an obligation to actively offer or encourage parties to use court-based mediation unless disputants specifically ask to use this service. This result is consistent with the data from the lawyer's questionnaire which found that over three-quarters of the respondents believe that judges encourage disputants to mediate *some of the time* (Figure 3). This is an interesting finding, because it demonstrates that the discretionary referral to mediation has resulted in only a limited number of disputants using mediation.

4.3.1.2 Considerations judges take into account when choosing cases suitable for mediation

As with the criteria for referral, the Jordanian Mediation Law did not provide guidance on types of cases that are suitable for mediation, but granted referral judges the authority to determine which cases are appropriate for solving via mediation. All the interviewees suggested that most civil and commercial disputes are suitable for mediation, especially disputes about financial compensation which are straightforward and do not require court proceedings to solve. The judges interviewed indicated that money claims, insurance, leases, landlord-tenant and labour disputes are types of cases that are most suitable for mediation.

> In the money claims and labour cases both the plaintiffs and the defendants know the amount of money disputed. Each party knows its rights and obligations. For example, in the labour dispute as a plaintiff [the worker] knew how many hours he worked, and the employer knew how many hours the worker had worked. Also, they both knew why the worker's services had been terminated. Both are aware of the details of the work. There is nothing technical or complicated in this kind of dispute which makes it suitable for mediation. (Referral Judge 3)

These results are similar to those reported in the lawyers' questionnaire, as shown in Figure 6. Generally, it was found that lawyers thought that simple cases about money are suitable for mediation because they can be resolved through negotiation, whereas cases with complicated legal issues require adjudication.[237]

[237] A similar finding was made in England. For example, the researchers of the Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme found that "Solicitors and mediators cited the…. Cases dealing with complex points of law or those where the parties were seeking a precedent were said to be unsuitable". See Lisa Webley, Pamela Abrams and Sylvie Bacquet, 'Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme.' (Final Report, Report to the Department for Constitutional Affairs, September 2006) 13.

However, one judge mentioned that recently insurance companies refuse to resort to mediation due to so-called 'fabricated accident' claims. The judge explained that insurance companies prefer to proceed to trial, because going to mediation would indicate there is some merit to the plaintiff's claim, and the judge may not evaluate evidence that could dismiss the case.

All referral judges (8 out of 8) pointed out the existence of relationships between the parties to the dispute as a factor in determining cases that are suitable to refer to mediation.

> Most disputes are suitable for mediation in which the disputes between parties have a relationship either commercial or family relationships. They accept the mediation invitation because there are personal relations between the parties to the dispute. From my experience disputes that are suitable for mediation are lease and labour… Because these conflicts are based on the personal relationship between the parties to the conflict, these personal relations make it easy for the Magistrate's Judge to calm the parties to the conflict down and remind them of the personal relationship that binds them. (Referral Judge 6)

Other interviewees (4 out of 8) emphasised the desire of the parties to reach an amicable solution as a determining factor in referring cases to mediation[238].

> All disputes are appropriate for mediation if there is a real desire of the parties to reach a friendly solution. But if there is no real interest of the parties in settling the conflict amicably, there will be no conflict appropriate to mediate. (Referral Judge 5)

Furthermore, some interviewees (7 out of 17) believe cases that require technical expertise are suitable for mediation because the expert's report becomes the basis for resolving the dispute, as it defines all the facts, rights and obligations for each party, and this facilitates negotiations between the parties in order to reach a settlement.

[238] A similar finding was made in England. For example, the researchers of the Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme found that "Solicitors and mediators cited the attitude of the parties as an important factor in assessing the suitability of a case for mediation". See Webley, Abrams and Bacquet (n 237)13.

> Cases that are required to conduct technical expertise are suitable for mediation because the expert report shows all the detail. Here each party knows his legal situation. (Referral Judge 2)

While the referral judges interviewed believe that most cases may be solved through mediation, there are some cases that are best solved through trial proceedings. The majority of interviewees (9 out of 17) pointed out that cases with complicated legal issues, cases with many points of disagreement, and disputes with parties that are intransigent in their views are less suited to mediation.

> Moreover, disputes that are not suitable for mediation are co-ownership cancellation and properties disputes, construction disputes, claim damages as well as disputes in which the state is a party such as acquisition cases. These disputes are difficult to solve through mediation, due to many legal issues, as well as many procedures. For example, dispute of acquisition requires experts from the circle of the area, as well as experts from the Department of Land and Survey, experts from real estate dealers and reports of experience from different departments. (Judge-Mediator 9)

> Yes, some cases are not suitable for the mediation. For example, there are conflicts where there are differences on many points, and it is not easy to bring the views closer, also disputes that the plaintiff is insistent on proceeding with the trial proceedings. (Referral Judge 1)

Although many judges (6 out of 17) agree that labour disputes are suitable for mediation, the vast majority of these cases are not referred to court-based mediation because these types of disputes are exempt from the court fees and, therefore, disputants do not choose to resort to mediation.

> The reason is that labour disputes are exempt from legal fees, and that encourages the plaintiff [worker] to raise the ceiling of his financial claims, which are often unreasonable. Also, the defendant [employer] has several strong points of law to win his case before the trial judge. Moreover, the labour dispute depends mainly

> on personal evidence. Therefore, parties to the dispute want to proceed to litigation in order to win their claim. (Judge-Mediator 5)

These results indicate lawyers and judges agree that most civil and commercial cases can be solved through mediation, especially labour, insurance, money claims and landlord-tenant disputes. As one would expect, however, judges and lawyers believe some cases require court proceedings, and are not appropriate to mediate. This is a promising sign that stakeholders agree on the types of cases suitable to be resolved via mediation, removing one obstacle in the gatekeeper's decision-making.

4.3.1.3 Power of referral judges to refer cases to mediation

Interviewees were insistent that referral judges can only encourage parties to choose mediation, and do not have the power to refer cases to mediation without the consent of the parties. The consensus (8 out of 8) among those referral judges interviewed is that disputants are referred to mediation on a voluntary basis, and without any coercion.[239] Judges encourage the use of

[239] The power of the court to compel parties to mediate will be taken up in Chapter 5 as a comparison with the English civil justice system. This point has been made by Mantle (n 235) 16. Mantle's expansion on the nature of mediation, she expressed the opinion that voluntariness is at the core of mediation as parties can mediate at the time they want, reach a settlement, or depart from a mediation session.; Also, in his final report, Lord Jackson confirmed the duty of the court to encourage parties to use mediation and provided guidance for judicial encouragement of mediation and the court has the power to impose costs sanctions on parties that unreasonably refuse to mediate. However, Lord Jackson rejected the practice of compulsory mediation. See also, Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (The Stationery Office 2010) 361. Moreover, according to the Civil Procedure Rules 1998, r.1.4(2) one of the Case Management duties is to encourage disputants to use alternative dispute resolution if appropriate and to facilitate the use of ADR. r.1.4(2). However, the Civil Procedure Rules give judges the power to assign costs to one party or another. For example, Rule 44.3(4) allows judges to take into consideration the conduct of the parties in deciding the cost order. The costs rules make it very interesting as the nature of mediation is shifted away from voluntariness. For example, if one party unreasonably refuses the court's invitation to mediation the court may consider it misconduct and as a result costs sanctions may be imposed as it seen in *PGF II SA v OMFS Company 1 Limited* [2013] EWCA (Civ)1288. As noticed by Stephen Walker, the mediation practice in the English system is semi-mandatory and ignoring the court's invitation to mediate subjects parties to financial consequences. Stephen Walker, *Mediation Advocacy: Representing and Advising Clients in Mediation* (2nd edn, Bloomsbury Professional 2018) 19.

court-based mediation by presenting the beneficial mediation features to the parties when they transfer from a trial judge to a judge-mediator. The features include, but are not limited to:

- speedy settlement;
- retrieval of the court fees;
- confidentiality of the mediation sessions;
- maintenance of relationships;
- the mediation settlement agreement is considered a final binding judgement not subject to any means of appeal; and
- disputants are still under the civil justice system.

The interviewees highlighted the limitations of their power over the parties:

> As a referral judge, I do not have the power or the authority to force any party to mediate. I encourage only. (Referral Judge 4)

> I highlight the advantage of the existence of the judge-mediator subject to circumstances of the people who trust the judge. I explain that parties would not go out of litigation, parties will transfer from the framework of the trial judge and enter the scope of the judge-mediator. I explain that the judge-mediator will evaluate the legal standing of the parties' arguments in detail to help them settle. The purpose of these steps is to encourage parties to use court-based mediation. (Referral Judge 6)

Data from the lawyer's questionnaire supports this finding, as over 75% of the respondents believe that judges *never* refer their clients to mediation without their consent (Figure 4). The results show that referral judges encourage parties to choose mediation as authorised by the Mediation Law, but generally do not coerce disputants to do so. This finding indicates the referral judges respect the voluntary principle of mediation, and may explain the partial opposition to mandatory mediation examined later in this chapter.

4.3.1.4 Tension between the duty to offer reconciliation and discretion to refer cases to mediation

The study revealed one potential conflict of interest which may discourage judges from referring cases to mediation. Art. 59(bis)(3) of the Civil Procedure Law imposes a duty upon the Case Management Judge to attempt to solve the dispute amicably, but it is the judge's discretion to offer the parties to refer their cases to mediation.[240] Moreover, Art. 7(a) of the Magistrates Courts Law gives discretion to Magistrates Judges to refer a case to mediation, but requires a duty to attempt to reconcile the litigants.[241] Some interviewees (8 out of 17) say referral judges are not offering or encouraging the use of mediation, or are doing so as a formality only. One of the reasons discussed was that the Magistrates Judges' main duty is to offer and encourage reconciliation to solve disputes, whereas offering and encouraging the use of mediation is not a priority.

> As a Magistrate's Judge (Judge of the Peace), I must encourage the parties at the beginning of the trial session to reconciliation and encourage them to do so to save time and effort on the parties and the court. Also, I rarely refer parties to mediation. The reason is I do not see that there is sufficient awareness among the litigants in the concept of mediation and its advantages and I do not have time to explain the concept, benefits, and procedures of court-based mediation. (Referral Judge 4)

> [A]t the beginning of the first meeting with the parties to the dispute I encourage them to settle in a friendly way. As a Magistrate's Judge, my task is to conduct a reconciliation between the parties before entering the court proceedings. (Referral Judge 8)

These findings show that while referral judges have the discretion to offer mediation, they do not have an obligation to do so, [242]which gives rise to the hypothesis that referral judges act as gatekeepers to mediation by controlling which cases go to mediation and which are settled by reconciliation. It is unclear if referral judges are motivated by their own self-interest, such as the judge's record for resolving cases or by a lack of conviction in court-based mediation.

[240] CPL 1988. Art. 59(bis) (3).
[241] The Magistrates Courts Law No. (23) of 2017. Art. 7(a).
[242] Similar to the CPL and the Magistrates Courts Law, the Mediation Law. Art 3(a) based referral to mediation on judicial discretion.

Judges acting as gatekeepers to mediation is a topic that will be investigated in a later chapter of this thesis.[243]

4.3.2 Lawyers as gatekeepers: The power of lawyers to reject or resort to court-based mediation in Jordan

The findings of the study show that judges believe lawyers control the decision on whether to resort to mediation, and lawyers do not favour mediation due to financial self-interest. The influence of lawyers over their clients is directly related to data presented in Chapter 3. These findings contribute to the hypothesis that lawyers are the gatekeepers that promote or prevent the use of court-based mediation.

According to the judges interviewed, lawyers are the main stakeholders that are attending before the referral judges and the judge-mediators. Although judges prefer the presence of the parties at the mediation sessions, clients generally do not participate in the mediation process.

> The majority of the attendees in the mediation sessions are lawyers, but in some instances, I request the presence of the parties to the dispute, which often helps and makes it easy to settle. (Judge-mediator 1)

This finding is consistent with the data in the lawyers' questionnaire, which showed that almost half (47%) of the respondents reported that none of their clients participated in mediation sessions (Figure 8). Bear in mind, as previously noted, the Jordanian Mediation Law requires only the presence of lawyers–not clients–as a condition to conduct mediation sessions.[244]

Moreover, the interviewees (11 out of 17) stressed that lawyers have control over their clients, and, as a result, it is they who decide whether to discuss alternative dispute resolutions, and, ultimately, whether to resort to mediation.

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[243] Judges as gatekeepers will be taken up later in Chapter 5 as a comparison with the English civil justice system. See also, CPR 1.4(2)(e) establishes the duty of the court to encourage disputants to use alternative dispute resolution if appropriate and to facilitate the use of ADR.

[244] Lawyers' roles and responsibilities in mediation to advise their clients to use ADR before resorting to litigation is a point of comparison between the English and Jordanian systems to be addressed in Chapter 6. This point was made by Blake, Browne, and Sime (n 235)36-45. Also, Brown and Marriott discussed this point in their book, H. Brown & A. Marriott, 'ADR Principles and Practice' (3rd edn, Sweet & Maxwell 2011). Chapter 17 and Bryan Clark in his book, Bryan Clark, *Lawyers and Mediation* (Springer 2012).

> Lawyers and not their clients attend most of the cases presented before me. Lawyers are the ones who decide to resort to mediation or not. They know how to evaluate the legal status of their client. Some of them do not favour mediation because of income considerations. Some of them do not choose mediation due to the lack of awareness regarding alternative dispute resolutions. (Referral Judge 7)

This finding suggests one reason disputants choose or reject court-based mediation is on the advice of their lawyers. Results from the lawyers' questionnaire support this finding as only 13 percent of the respondents said that parties initiate the decision to use mediation, and the main factor behind why clients choose mediation is based on the advice of their lawyers (Figure 14). This finding demonstrates the importance of legal counsel in a client's decision to resort to mediation, as disputants are not required to attempt to mediate their disputes before resorting to litigation.[245]

The general consensus among the judges interviewed is that lawyers are not in favour of mediation. The judges believe there is a conflict of interest between lawyers and their clients that may result in the lawyers discouraging their clients to resort to mediation, due to financial considerations which predominantly benefit the lawyers.[246] According to the interviewees, lawyers consider litigation as a source of income, and reject mediation for financial considerations. While resorting to mediation may bring a quick settlement, the court proceedings ensure lawyers can benefit from their clients at every stage of litigation. The longer the case goes through the litigation stages, the greater the income the lawyer receives from his client. Consequently, many lawyers believe mediation will adversely affect their income.

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[245] Duty of the parties to attempt to resolve disputes using ADR is a point of comparison between the English and Jordanian systems to be addressed in Chapters 5 and 6. For example, CPR r.3. "The parties are required to help the court to further the overriding objective". This point has been made by Susan Blake, Julie Browne, and Stuart Sime, The Jackson ADR Handbook (2nd edn, Oxford University Press 2016)). 36-45. Also, in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576. Lord Dyson underlines the importance of the lawyers' duty to discuss with their clients the use of ADR before resorting to litigation "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR." [11].

[246] This point has been made by Hazel Genn, 'The Central London County Court-Pilot Mediation Scheme Evaluation Report' (Lord Chancellor's Department Research Series No. 5/98, July 1998) 39. Genn found that some lawyers were not in favour of mediation because of the fear of reducing their income. Also, she found that the majority of the parties accepted the mediation invitation based on their lawyer's advice and the vital role of lawyers as a gatekeeper to mediation. Clark (n 244) 40, pointed out that lawyers resist mediation due to money consideration.

> The lawyers have control over their clients and do not urge and encourage them to use mediation. For example, in several cases, the disputants are willing to use mediation, but unfortunately, the control of their lawyers prevent them from doing so. I often am in favour of the parties to the dispute attending with their lawyers so they hear when I explain the advantages and benefits of mediation such as the recovery of judicial fees and speed of reaching a settlement, as compared with the slow judicial proceedings. And the reason lawyers are discouraged from using court-based mediation is because by conducting legal proceedings they obtain large amounts of money from their clients, but through mediation they will not receive the same amount of money. (Referral Judge 1)

Data from the lawyers' questionnaire confirmed that only 22 percent of lawyers advise their clients to use mediation before litigation *all the time* (Figure 10), and nearly three-quarters of the respondents (72%) said they advise their clients to participate in court-based mediation instead of litigation half the time or less (Figure 11). These findings support the judges' conclusion that lawyers are not consistently encouraging their clients to resort to mediation.

Unexpectedly, two judge-mediators mentioned that the general economic situation of the country causes lawyers and litigants to avoid resorting to court-based mediation precisely because mediation speeds the enforcement of the settlement. In these instances, disputants prefer to complete the court proceedings to postpone payment, and lawyers continue collecting fees until the final verdict is rendered.

> The economic situation of the country, in general, is not good, prompting lawyers and parties to the conflict to stay away from mediation because it is a quick way to reach a settlement and speed enforcement of this settlement. Therefore, parties resort to litigation proceedings in order to extend the length of litigation, which takes several years until the final verdict. While resorting to mediation requires prompt payment of the amount claimed. (Judge-mediator 2)

The findings show that judges believe lawyers act as gatekeepers to mediation by controlling the decision to use mediation, often being motivated by their own financial interests, and therefore discouraging the use of mediation. A statutory duty for lawyers to encourage the use of mediation is a topic that will be investigated in a later chapter of

this thesis,[247] as one method of addressing the reluctance of lawyers to recommend mediation to their clients.

4.3.3 Ensuring Access and Quality of Justice: Integration of Mediation in the Civil Justice System

4.3.3.1 Improving access to justice through the use of court-based mediation

As previously noted in Chapter 3, the Jordanian Constitution grants citizens the right to access the court to settle all personal, civil, and commercial disputes. The Jordanian lawmakers in the Policy Memorandum of the Mediation Law expressed the intention to reform the civil justice system through the use of mediation as an alternative to litigation. The aim of the lawmakers was to improve access to justice for all citizens by providing a free and quick alternative to litigation which would reduce the caseload for other cases that require adjudication.[248]

The general consensus among judges (17 out of 17) is that court-based mediation should continue due to its advantages, including:

- saving time, effort and money for the disputants, and
- reducing the pressure on the court

–which will contribute to giving the trial judges more time for consideration of disputes that have significant legal issues. However, many interviewees (9 out of 17) stressed that there is a need to reactivate, or to properly utilise the mediation departments, and for raising awareness among society in order to fully achieve the desired end.[249]

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[247] Lawyers as gatekeepers to mediation will be taken up in Chapter 6 of this thesis as a comparison with the English civil justice system.

[248] *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law (2006)* to author (5 July 2017)

[249] Mediation education, awareness, and training for stakeholders are points of comparison between England and Jordan and will be discussed in Chapter 7. As indicated by Clark, legal education is vital to promote and increase the practice of mediation, however, there is a lack of legal education and awareness regarding mediation in England and Wales and Scotland. See, Clark (n244)51.; Genn in her evaluation of the mediation services in Central London County Court, found that education combined with encouragement are the main keys to promote the use of mediation effectively. Hazel Genn, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (Ministry of Justice 2007) 204-205. Moreover, the Civil Justice Council (CJC) ADR Working Group Final Report pointed out that there is a lack of public awareness regarding ADR. See Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018). Para 6. See also, Lord Jackson emphasises the importance of training for judges and lawyers and the need for public education to raise public awareness regarding ADR. Lord Justice Jackson (n 239) 363. Doyle in her evaluation of the Small Claims Mediation Service at Manchester County Court, found that one of the challenges to the use of mediation is a lack of awareness about the mediation service among the public. Margaret Doyle, *Evaluation of the Small Claim Mediation Service at Manchester County Court* (Final Report to the Better Dispute Resolution Team, Department for Constitutional Affairs 2006). 117. Also, Prince, in her analyses of the Small Claims Mediation Pilot Service at Exeter County Court for disputes on the small claims track, indicates the

> Yes, the court should continue to provide this service to relieve the burden of the court, however, provided that there is cooperation between the various ministries and industrial and commercial sectors in Jordan to raise awareness about the advantages of mediation. (Judge-mediator 1)

> Yes, the court should continue to provide this service, but on the condition that there are awareness programs for the lawyers and citizens in relation to the concept of mediation, because we should open up the subject of alternative means to resolve disputes that proved successful in the West. The judicial mediation maintains the confidentiality of mediation sessions, and contributes to saving time, effort, and money for parties and reduces the caseload of the courts. (Referral Judge 6)

Not surprisingly, all the judges interviewed are supporters of judicial mediation due to its advantages, especially reducing the caseload of the court, which improves access to justice, and believe that court-based mediation should be continued with some improvements such as reactivating the mediation departments and raising awareness of the benefits of mediation.

This finding is consistent with the data in the lawyers' questionnaire which showed that the majority of respondents (87%) support the continuation of court-based mediation due to its many advantages, including elements of access to justice, while 13% percent of lawyers said that the court should not continue to offer judicial mediation for reasons the judges also cited, including the need for improving court-based mediation to make it more effective (Figure 18). These findings indicate that the judges and lawyers with experience using court-based mediation favour continuation of the service, as it reduces the caseload on the court and, as a result, improves access to justice.

4.3.3.2 Judges' perspectives on mandatory mediation

There is a divide in the interviewees' support for mandatory mediation. Most of the judge-mediators (7 out of 9) interviewed supported the automatic referral to mediation in some types

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importance of mediator training for the success of the mediation process. Sue Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Final Report Prepared for the Department of Constitutional Affairs, September 2006) 113-114.

of cases such as labour, insurance, banking, lease and landlord-tenant disputes, because these cases are solvable by mediation and negotiation. The supporters of mandatory mediation believe that it would contribute to easing a significant burden on the court's caseload, saving time, money, and effort. However, two judge-mediators pointed out that mediation is purely voluntary, which is an alternative to litigation, and coercion of parties to mediate will not achieve any results if the parties to the dispute are not convinced to resort to mediation. That said, one of the two judges does support an initial mediation session before disputants proceed to the litigation stage.

> I am a supporter of mandatory referral to mediation. I support giving the referral judge the power to assess whether the disputes are suitable to refer to mediation, and then refer it to mediation, which is what was emphasized in the amended draft of the Mediation Law of 2017, but unfortunately, this amendment was not successful. (Judge-mediator 7)

> Yes, I am with the mandatory referral to mediation because it will contribute to reducing the burden on the court and has advantages for the parties to the dispute, especially the recovery of legal fees, saving time, effort on the parties and maintaining the confidentiality of their dispute through mediation. These features, if there is no force to use mediation in some types of disputes, parties would not have a sense of these advantages if mediation is not attempted. (Judge-mediator 9)

On the contrary, seven out of eight referral judges interviewed said they are against mandatory or automatic referral to mediation. Their opposition to mandatory mediation is based on the principle that mediation is voluntary, and referral is based on the disputants' consent. These judges are concerned that forcing disputants to mediate will lead to intransigence in their opinions, and, as a result, the mediation will fail, and the case will be returned to the trial judge. This will prolong the length of litigation, and does not contribute to reducing the pressure on the court, but instead will increase the burden on the court as they believe many cases will be heard by both a judge-mediator and a trial judge after the mediation fails.

> I am against automatic referral to mediation. If parties do not have the desire to refer the dispute to the mediation, forcing him to mediate will lead to prolonging the length of litigation. The mediator shall conclude the mediation works within

> three months. Adding this period will increase the length of litigation because in the end mediation will fail and the case is returned to the trial judge. Therefore, I am with voluntary mediation, not with compulsory mediation. (Referral Judge 7)

Interestingly, one interviewee believed that mandatory mediation would prevent citizens' access to justice. Another interviewee noted that the House of Parliament rejected the 2017 amendment to the Mediation Law on the grounds that mandatory mediation is unconstitutional, as they believed it prevents access to justice.[250]

> Compulsory mediation is unconstitutional because it deprives citizens of their right to resort to the court. Therefore, mediation must be voluntary or optional, and citizens have the right to choose between mediation and litigation. (Referral Judge 8)

> I was a member of the committee to amend the Mediation Law, and we put the text of the mandatory referral to mediation in some disputes, such as insurance and labour, but we were shocked with supporters of the Constitution, that this text is unconstitutional, because the constitution provides citizens the right to resort to the judiciary. In arguing with them, we told them that the right to resort to the judiciary was protected and at what stage the parties can withdraw from mediation sessions. (Judge-mediator 6)

These findings suggest that judge-mediators support mandatory referral to mediation to increase the uptake and settlement rate, which would reduce the caseload of the court, whereas the referral judges are concerned that parties would not mediate in good faith if forced to do so, and merely would extend the litigation process. Furthermore, lawmakers oppose mandatory mediation on the basis that it will prevent access to justice.

Together, these findings support the hypothesis that court-based mediation reduces the caseload of the court and delivers access to justice, but raise questions about the

[250] The Mediation Draft Law for Civil Disputes Resolution of 2019 is currently before the Jordanian House of Parliament to be discussed. Art. 4 of the draft includes mandatory referral to mediation in four types of disputes: labour, leases, insurance and money claims.
<<https://representatives.jo/AR/List/مشاريع_القوانين_المحالة_للجنة_القانونية>> accessed 28 March 2022.

constitutionality of mandatory mediation. Access to justice and mandatory referral to mediation are topics that will be examined in a later chapter of this thesis.[251]

4.3.3.3 Ensuring the quality of justice of the mediation process

As previously mentioned, the Mediation Law supports the quality of justice of court-based mediation by requiring the parties' consent to referral, ensuring fairness of the process by giving authority to the judge-mediator to control the mediation sessions, monitoring the settlement agreement and enforcing the settlement.

The general consensus among both referral judges and judge-mediators is that court-based mediation does not affect the quality of justice negatively and, in many instances, it improves the quality of justice because mediation settlement agreements are drafted by the disputants based on their interests and their free will. Therefore, the settlement satisfies both parties and strengthens their relationships. Some interviewees (8 out of 17) stressed that mediation improves the quality of justice because judicial mediation is conducted under the judicial system, is facilitated by a judge-mediator, the settlement agreement is ratified by a trial judge, and the agreement is enforceable by the court. Some interviewees emphasised that mediation ends disputes from its roots. As a result, parties are more likely to be satisfied with the settlement agreement, and less likely to return to court. This, in turn, gives the trial judge more time to consider cases with more complicated legal issues, and thus improves the quality of justice for cases that resort to litigation. Others noted that mediation offers alternative solutions that are flexible in contrast to a court judgment which is based solely on the interpretation of the law.

> On the contrary, it does not affect the quality of justice. Judicial mediation improves the quality of justice and gives equal justice to the parties to the dispute, because both parties drafted the settlement agreement of their own accord, and both of them participated in writing the judgment. In my opinion, justice is when parties are satisfied with the settlement, regardless of whether this settlement was through a court ruling or via mediation. The participation of parties to the dispute in the writing of the settlement agreement: this is what is called justice, because parties

[251] Mandatory mediation and access to justice will be taken up later in the thesis as a comparison with the English civil justice system in Chapter 5.

> formulated a decision that satisfied them. Moreover, Jordanian society is based on a tribal system, also the extended family, therefore, members of the community are resorting to mediation in order to maintain social relations and strengthen ties between members of society, unlike Western societies. (Judge-mediator 1)

Notably, some interviewees pointed out that, via mediation, disputants may make concessions in the settlement agreement. Interviewees say that these concessions do not affect the quality of justice negatively, as disputants may give up part of their claim in exchange for a speedy settlement.

> I always say take your right today, it is better than taking it after ten years of litigation. We do not know if you will be alive or not. (Referral Judge 2)

Interestingly, one interviewee indicated that the quality of justice is uncertain when mediation is conducted by a private mediator who may not act as a neutral third party.

> Also, the issue of impartiality of the mediator, especially the private mediator, may affect the quality of justice. Therefore, there is a reluctance among parties to the dispute to choose a private mediator, while judicial mediation improves the quality of justice because mediator judges and trial judges monitor it. (Referral Judge 6)

Overall, these findings suggest that judges believe that judicial mediation improves the quality of justice. The judges emphasised that the quality of justice is not negatively affected due to the monitoring of court-based mediation by the judiciary. This finding is consistent with the data in the lawyers' questionnaire, which showed that the vast majority of respondents (90%) believe court-based mediation improves the quality of justice positively (Figure 19). Significantly, these findings raise questions about the quality of justice achieved through private mediation.

4.3.3.4 Role of the judge-mediator

The vast majority of judge-mediators (7 out of 9) interviewed said they explain their role as a mediator and how it differs from the role of the trial judge at each opening mediation session. The interviewees indicated that they do so through examples, including the operation of

mediation, by facilitating the negotiation between the parties, closing the gaps in order to help them reach a settlement, exiting from the subject of the lawsuit, if appropriate, and it is the parties that reach the settlement through their own free will.

> I have always given this interpretation in every opening session. I have always focused on this point because, in the eyes of the parties and their lawyers, we are judges. Therefore, I have the task of convincing them that I am a mediator rather than a judge. So I do not blame them, because they are not used to seeing the judge function as a mediator, or any other function. I have entrusted to them at the stage of the settlement agreement that I am not a judge here to issue a verdict, and you will reach this settlement with your conviction and free will. (Judge-mediator 6)

However, two interviewees (2 out of 9) indicated the content of the opening session differs depending on whether or not the disputants are present. Here interviewees say they explain the judge-mediators' role only for those who are lay citizens. These judges expressed the belief that lawyers should know how the role of a judge-mediator differs from the role of a trial judge.

> Sometimes I explain the role of the judge-mediator to some parties to the conflict and often do not explain this role to the lawyers because they should know this role in advance. As appropriate, I give this explanation regarding the different roles. (Judge-mediator 2)

These findings show that the majority of judge-mediators explain their role and the process of judicial mediation at the opening session. This is an encouraging sign as most respondents to the lawyer's questionnaire reported having little (49%) or no knowledge (27%) about mediation before their involvement in court-based mediation (Figure 24). Less encouraging is the finding that carrying out the introduction is contingent on the presiding judge.

4.3.3.5 Styles of mediation

Judge-mediators were asked about the provision in Art. 6 of the Jordanian Mediation Law which allows mediators to take whatever measures appropriate to facilitate the mediation, including expressing opinions, evaluating evidence and presenting legal documents and

judicial precedents to amicably end the dispute.[252] Seven out of nine of the judge-mediators interviewed indicated that they take an evaluative stance. This means, according to interviewees, that they use their knowledge of the law, express their opinion about the case's likely outcome if it were to proceed to trial, give legal advice, and evaluate the legal standing of the parties' arguments in closed sessions to help parties to reach a settlement. These judge-mediators believe that using their expertise and focusing on the legal issues will help the parties to become more reasonable about their claims, and facilitate the negotiations.

Interviewees differ in the timing and use of these measures. Some use an evaluative style only as a last resort, when the parties are at an impasse, whereas some consider it appropriate to use at any time depending on the circumstances of the case.

> Yes, I express my legal opinion and the presentation of judicial precedents shall be in closed sessions. The law gives these tools to the judge-mediators in order to assist the parties and persuade them to settle. For example, as a judge-mediator, sometimes I find that a party is intransigent in his view. So I use my authority to request a closed session to discuss his opinion and I present case law to clarify that his demands are wrong, which is to convince the party that his opinion is not valid, which helps to modify his position and facilitate the process of negotiations to settle. (Judge-mediator 8)

However, two interviewees stressed that expressing opinions, evaluating evidence and presenting legal documents and judicial precedents go beyond the role of the judge-mediator to the role of the trial judge. These judges focus on the facilitator role of the mediator to close the gap between the parties without using any legal points.

> I have never evaluated the legal standing of any party for fear that if one of the parties sees that he has a strong legal position he is not going to make any concessions, and this would lead to the collapse of the mediation process. Neither do I advise the parties, not at the beginning of the session nor the end of the

[252]Mediation Law. Art.6 allows the mediator to choose the appropriate style of mediation.

> mediation session, because my role as mediator is to round up the views to help parties settle. (Judge-mediator 2)

These findings suggest that the style of mediation varies by judge-mediator with some using an evaluative style often, some only as a last resort to help parties reach a settlement and others preferring to stick to the traditional role acting as a facilitator. These findings are consistent with the data in the lawyers' questionnaire, which showed that the majority of the respondents reported that they consider the role of the judge-mediator as a judge (14%) or as both judge and mediator at the same time (49%), whereas a minority (36%) of lawyers consider the role of the judge-mediator as a mediator only (Figure 21).

The Jordanian lawmakers gave wide authority to the judge-mediator to choose the style of mediation in order to end the dispute. This differs from the literature on the style of mediation which focuses on the parties' choice of approach to resolve the conflict.
Significantly, in the Jordanian style of mediation, the authority that should be derived from the parties to the conflict is given to the judge-mediator, which raises a red flag as the nature of mediation is twisted in the process.

4.3.3.6 Trust in the judiciary influences parties to choose mediation and settle the dispute

Interviewees agreed that the involvement and presence of the judge-mediator is an encouraging element for disputants to choose court-based mediation and to settle the disagreement, due to the trust, confidence, impartiality and experience of the judge-mediator. At the referral stage, trust in the judge-mediator encourages parties to resort to mediation.

> Yes, the involvement of judge-mediators encourages the parties to resort to court-based mediation to end the conflict. Parties to the dispute have the confidence and trust in the judge-mediator, because parties know that he is a neutral person, has experience and knowledge of legal issues superior to that of the lawyers. A judge-mediator is telling the truth and advises all parties impartially. (Referral Judge 8)

> The advantage of making the judge a mediator is a privilege because people and lawyers have the confidence and trust in the judge more than others. The general impression for people that the judge is neutral and gives correct information that is

> documented and does not cheat any party. This characterisation creates an atmosphere of trust among citizens and lawyers, which facilitates the mediation process. Knowing that the Jordanian Mediation Law allows parties to choose private mediators who are outside the judiciary, but in practice, many cases have not been referred to the private mediators. (Judge-Mediator 8)

While at the mediation session, confidence in the judge-mediator's legal knowledge, experience and impartiality influences the parties to settle because they value the judge's opinion.

> Yes, through my experience, the influence and prestige of the judge are encouraging the parties to settle, because it is through my experience as a trial judge and also as a judge-mediator that the parties to the dispute usually have high confidence in what the judge says. This confidence stems from the customs and traditions of our Jordanian society which inherited trustworthiness of the judge whether he is a trial judge or tribal judge. The judge in our society is the subject of the trust and respect of all people. (Judge-Mediator 9)

> It encourages, but it is not a matter of influence, and not the prestige of the judge is that which encourages. What encourages is the trust of the parties in the judge-mediator. As a judge-mediator, I do not have any authority over the parties, but through my observation and experience, the parties to the dispute have high confidence in the person of the judge-mediator, and, moreover, rely on everything he says; his advice is trusted by parties. Also, the image that I am a judge is stuck in the minds of the parties, and this generates confidence…In general, more litigants look to the judge-mediator as a neutral and impartial person. It is a type of trust in the judiciary and not as a judge as a person. (Judge-Mediator 6)

Interviewees also stressed that trust in judges is deeply rooted in the Jordanian culture, and the belief that a judge is the only person who can end the dispute is one reason private mediation has not taken off.

> Even though more than ten years have passed since the experience of court-based mediation in Jordan, it is still in the new stage due to the culture of the community.

> Through my experience, the societal culture is that citizens have confidence in resorting to the judge-mediator due to his experience in evaluating their legal standing, which is much better than resorting to private mediators. The citizen trusts the judge-mediator compared to other countries that rely on private mediation rather than judicial mediation. (Judge-Mediator 4)

These findings indicate that the involvement of the judge-mediator plays a vital role in encouraging parties to choose mediation and to settle due to the trust in the judges' evaluation. In fact, 20% of the respondents to the lawyers' questionnaire reported that one of the factors in achieving a settlement is the influence of the judge-mediator. However, the fact 75% of the respondents reported that the main factor behind achieving the settlement is because parties to the dispute agreed to settle, shows there is no coercion on the parties to accept the settlement agreement (Figure 22). This is a promising sign that the influence of the judge-mediator is not absolute, and the presence of the judge-mediator at the mediation sessions is another way to ensure and deliver quality of justice in the mediation settlement agreement.

Furthermore, the findings suggest that trust in the judge-mediator is one reason for the low demand for private mediation, although private mediators have the same authority and duties as judge-mediators. This is consistent with data from the lawyers' questionnaire which found that 72% of respondents said that they prefer a judge-mediator over a private mediator due to several reasons, including elements that ensure the quality of justice, such as impartiality of the judge, ability to evaluate the legal standing of the parties, and keeping the mediation settlement under the judicial system (Figure 23).

In conclusion, these findings give rise to the hypothesis that court-based mediation improves access to justice and ensures the quality of justice for the entire judiciary by reducing the caseload of the court and conducting, monitoring and enforcing mediation settlements under the civil justice system. Access to justice and quality of justice via mediation is a topic that will be investigated in a later chapter of this thesis.

4.3.4 The Role of Education, Awareness, and Training to Promote the Use of Mediation

4.3.4.1 Judges' education, awareness and training about mediation

Although judges have a statutory duty to continue their professional development,[253] interviewees noted the lack of training courses for referral judges and judge-mediators.

> Yes, there is a lack of training and a lack of experience among referral judges, and this also applies to judge-mediators. (Referral Judge 1)

> Yes, some courses have been taken, but there is a lack of specialized courses in developing communication skills. These principles will contribute to encouraging parties to use mediation. (Referral Judge 3)

> Lack of training courses among referral judges regarding skills to convince the parties to choose mediation [is one barrier to the use of mediation]. Personally, I took one training session regarding mediation, and this is not sufficient, because it did not include the communication skills and the skills needed to convince the parties to resort to mediation. The course was about the definition of mediation and its advantages. (Referral Judge 5)

> Fifthly, [there is] the need for training courses regarding mediation skills, because there is not enough training for us as judges on the communication skills to encourage the parties and bring their views closer in mediation sessions. As a judge-mediator, I trained myself to be a mediator. (Judge-mediator 9)

The findings indicate there is not enough training provided for referral judges and judge-mediators on the skills necessary to encourage parties to use mediation and to facilitate the mediation process. These results are supported by data from the lawyers' questionnaire, as only 20% of respondents reported that all referral judges have the skills and the training to assess the suitability of cases for mediation (Figure 26). This points to the need for specialised training for judges in the area of mediation.

4.3.4.2 Lawyers' and users' education, awareness and training about mediation

[253] Code of Judicial Conduct of 2021. Art 9. Judicial education and training will be discussed later in Chapter 7.

There is unanimous agreement (17 out of 17) among all interviewees that there is a lack of awareness among the court's users (lawyers and disputants) regarding the concept and advantages of mediation. Many litigants and their lawyers are not aware of the existence of court-based mediation in Jordan, as they often hear about it for the first time from the referral judge.

> Secondly, the lack of awareness of the Jordanian citizen about court-based mediation. Through my experience, many of the disputants were surprised by the existence of something called judicial mediation in the court, and when I explain what mediation is, disputants ask more and more questions. Unfortunately, in most cases, parties reject the mediation invitation because it is something new and unknown for them. If they had prior awareness of the concept of mediation, this would be reflected in the acceptance of a large number of parties to the conflict to resort to mediation. (Referral Judge 6)

> Second, the majority of lawyers do not have any awareness of mediation procedures, some of whom consider it a lengthy procedure and time-wasting. Third, a lack of awareness among the Jordanian citizen, especially in this area about judicial mediation, which many of them do not know about it. (Referral Judge 8)

> The reason for their failure when applied in the courts is the lack of sufficient awareness among the Jordanian citizen about the existence of court-based mediation as an alternative dispute resolution. Through my experience, most citizens are surprised by the existence of such a service at the courts. (Judge-mediator 5)

Some of the judges interviewed (7 out of 17) emphasised the negligence of the Bar Association to train its members on mediation's advantages, process and practice.

> The need for training lawyers by their Bar Association on the procedures and features of the mediation may contribute positively to reducing the caseloads. With the presence of lawyers that understand the concept of mediation, lawyers will begin with their clients urging them to use mediation as an alternative to litigation,

> and this would contribute significantly to reducing the burden on the courts. (Referral Judge 4)

This finding is consistent with the data in the lawyers' questionnaire, which showed that over three-quarters of respondents reported having had little or no knowledge about mediation before their involvement in court-based mediation (Figure 24). This finding indicates the need for education, awareness, and training for lawyers and disputants about the features of court-based mediation.[254]

4.3.4.3 The role culture plays in promoting and hindering the use of court-based mediation

Many judges interviewed (8 out of 17) emphasised that culture is playing two different roles in the spread of court-based mediation: a positive role to promote the use of mediation, as mediation and reconciliation is deeply integrated in Jordanian culture and religion, and a negative role to reject any invitation to court-based mediation, because Jordanian citizens are reaching the court as a last resort after they have tried all other alternatives.

> Mediation is widespread in our society and exists from a long time ago—long before any law or regulation concerning mediation. For example, tribal mediation until this day is represented and practiced by tribal elders when they sit with the parties to the conflict and facilitate negotiations between the parties and convince them to make concessions to reach a settlement. And mediation is considered a successful tool, because all parties come out satisfied and happy with this solution. (Referral Judge 2)

Although community mediation is widespread in Jordan, and litigation is used as a last resort, some interviewees acknowledged there is a stubbornness and intransigence that exists within Jordanian culture to reject any friendly solution once the dispute reaches the court.

> The reason, as I mentioned earlier, is that when the parties to the dispute reached the court means that they tried all solutions and alternatives to settle, and there is

[254] Mediation education, awareness and training among all stakeholders are a point of comparison between the English and Jordanian systems to be addressed in Chapter 7.

> no room for a friendly or amicable solution. Therefore, introducing the idea of mediating from the court will be rejected due to the difficulty of changing the parties' position and convincing them of the idea of mediation. (Referral Judge 7)

Another reason disputants reject court-based mediation is that for some Jordanians accepting the mediation invitation at the court is considered a sign of weakness; disputants believe it will make them look overly eager to settle, or that they have a weak case. Therefore, parties insist on proceeding to trial and having their day in court.

> Yes, some feel that the acceptance of the mediation is a sign of weakness, so it is rejected. Sometimes, some parties feel that they will get justice only through the judiciary and not through mediation. (Referral Judge 1)

Other interviewees emphasised the lack of understanding of the differences between community mediation, in which the mediator speaks on the disputant's behalf, and judicial mediation, where the judge-mediator facilitates the negotiation between the parties.

> As a Jordanian society, the mediator speaks on behalf of the parties and offers solutions, which is contrary to what is done in the judicial mediation; parties are negotiating and reach a solution, but the ignorance of the parties on the difference between these two types of mediation is one of the reasons that prevents them from choosing the judicial mediation. (Judge-mediator 6)

Some interviewees pointed out that litigants have used the Mediation Law in ways that were not anticipated or intended by the Jordanian lawmakers.[255] For example, mediation has been used by some disputants to prolong litigation to harm the other party, or to delay payment.[256]

> The other reason is that the parties to the dispute themselves do not wish and do not want to resolve the dispute amicably. They want to reach a solution through the

[255] In the Policy Memorandum that introduced the Jordanian Mediation Law the intended reasons for enacting the law were reducing the caseload of the court, maintaining relationships, and solving disputes in a quick manner.

[256] The duty of lawyers towards their clients and the court will be a point of emphasis between the English and Jordanian civil justice systems to be discussed in Chapter 6.

> court, for different reasons, some of whom want to prolong the litigation and others who want to exhaust the other party financially through litigation and lawyer's fees and expenses. (Referral Judge 5)

These findings show the vital role culture plays in the use of mediation. Although community mediation is widely used within Jordanian society and is a successful tool for solving disputes, there is a lack of understanding of the differences between community and judicial mediation. It is plausible that this confusion has led to a low uptake of court-based mediation. Further, culture plays a negative role, due to the inflexibility of Jordanian citizens, as they reach the court as a last resort and may see negotiating at that stage as a sign of weakness. This points to the need for education and awareness to help clear the confusion about the concept of court-based mediation, and may increase the demand for judicial mediation.

4.3.4.4 Education, awareness and training to promote the use of mediation

Some interviewees (7 out of 17) noted the selection of judge-mediators without the experience, skills, and conviction for mediation prevents the spread of court-based mediation in Jordan.[257]

> [T]here are a large number of judges in the Jordanian courts, but not every judge is competent and has the skills and legal knowledge to become a mediator. Mediation needs communication skills and employing the communication skills in the mediation process. Sometimes there are mediators that are surly/gloomy and giving orders to the parties to the dispute at the mediation sessions. This is going to lead to creating a negative impression of mediation; as a result, disputants resort to the trial judge. (Judge-Mediator 4)

> I noticed that the parties to the dispute and their lawyers do not favour mediation if there is a judge-mediator in the court whom they do not wish to be their mediator. I noticed that parties to the dispute would like to refer to mediation when there is an efficient mediator who has the skills and the experience, which helps them to resolve the dispute. (Referral Judge 7)

[257] Genn, in her evaluation of the mediation services in Central London County Court, found "that the motivation of the parties and willingness to compromise and skill of the mediator are critical to the outcome." Genn, (249) 201. Also, Genn found that poor mediator skills is one of the reasons that parties failed to settle their disputes. 96.

These findings suggest the skill of the mediator is a crucial factor in the success of the mediation process, and demonstrates the need to increase the competence of the judge-mediators, which may help them facilitate the mediation sessions and promote the use of mediation.

Nearly all of the judges interviewed stressed the need to raise awareness among society regarding the concept, advantages and existence of court-based mediation in Jordan. The judges called for national efforts to promote mediation through collaboration with the Ministry of Justice, Judicial Council, Bar Association, Chamber of Commerce, industry and insurance unions via newspaper, radio, and social media campaigns.

> We need a national effort. There is a need for a joint effort by the Bar Association, the Ministry of Justice and the Judicial Council. Also, the need for media supports, the need to provide an infrastructure for mediation departments, such as administrative and judicial cadres. Mediation is an acceptable idea in Jordanian society and has proven successful. If we remove obstacles to the spread of mediation, the use of court-based mediation will be accepted in the legal community. (Judge-Mediator 7)

Many judges (11 out of 17) also emphasised the need for training courses for referral judges to give them the skills to persuade disputants and lawyers to choose mediation over litigation, in such cases that are suitable for mediation. Training courses for judge-mediators would provide the skills of communication, negotiation, and closing the gaps between disputants. Training courses for lawyers would highlight the mediation process and procedures.

> Frankly, for one who gets used to the judicial work, it is not easy to become a mediator. As I mentioned earlier, that the training courses to prepare a judge to be a mediator are very necessary for the success of the mediation process. For example, when I started my work as a judge-mediator, I was used to [acting] as a trial judge issuing a judicial ruling that was not debatable by the parties to the dispute. Moreover, when I started my work as a judge-mediator, I was minimising or reducing the role of the parties to speak freely, but I was going back on it after a short period when I remembered that I was a mediator and not a trial judge. After

> I got several training sessions on mediation outside of Jordan, I managed to master the two personalities of the trial judge and the mediator personality when I am at the mediation sessions. (Judge-mediator 8)

These findings demonstrate the need for a concerted effort to promote the use of court-based mediation. The extent to which education, awareness, and training would help stakeholders to have a better understanding of the process, overcome their misconceptions and increase their demand for court-based mediation is a topic that will be investigated in a later chapter of this thesis.

4.4 Conclusions

The findings of this empirical study suggest that judges and lawyers agree that referral to mediation is active in Jordan, but to a limited extent, as some referral judges only invite parties to mediation as a formality. The study also found agreement between judges and lawyers on the types of cases most suitable for mediation–insurance, labour, money claims and landlord-tenant disputes–as these types of cases are based on factual issues, and do not require adjudication. Both judges and lawyers believe that court-based mediation reduces the caseload of the court, and support the continuation of the service, though judges' support for mandatory mediation varies depending on the access to justice argument. Data from the lawyer's questionnaire and judges' interviews also support the view that many stakeholders are not aware of the existence of court-based mediation, its processes, and the ways it differs from community mediation.

Where judges and lawyers disagree is on whether there is coercion in the referral to mediation. Judges insist there is no coercion on parties to accept the mediation invitation, while a minority of lawyers believe their clients have been compelled to mediate. Further, judges and lawyers strongly disagree on the topic of lawyers' encouragement of mediation. Judges believe lawyers are the biggest obstacle to mediation, and do not advise their clients to consider mediation due to their financial interests. On the other hand, the majority of lawyers say they advise their clients to consider mediation over litigation some of the time, though they have no legal obligation to do so.

These findings support the assertion in the hypotheses of this work that judges act as gatekeepers to the use of mediation, lawyers act as gatekeepers to mediation, court-based mediation delivers access to justice and ensures the quality of justice, there is a lack of education, awareness and training among stakeholders, and the absence of a statutory duty for judges and lawyers to encourage the use of mediation has resulted in a decline in the use of mediation in Jordan. These topics will be explored in comparison with the English system throughout the remainder of this thesis.

Chapter 5 of the thesis will examine the roles and responsibilities of judges in mediation, the ways in which judges act as gatekeepers to mediation, and the duty of judges to refer cases to mediation. Chapter 6 will build upon this, exploring the roles and responsibilities of lawyers in mediation, the ways in which lawyers act as gatekeepers to mediation, their conflicts of interest, and incentives for lawyers to attempt mediation before resorting to litigation. Finally, Chapter 7 will explore the awareness, education, and training of judges, lawyers and citizens related to mediation.

CHAPTER FIVE: THE ROLE OF JUDGES TO REFER CASES TO MEDIATION AND THE POWER TO COMPEL UNWILLING PARTIES TO MEDIATE

5.1 Introduction

The previous two chapters revealed that the main reasons for the low uptake of mediation in Jordan are the lack of authority of the referral judges to refer cases to mediation without parties' consent, and the fact that referral to mediation is based on judicial discretion, not a duty. The aim of this chapter is to answer three key questions related to the role of the judiciary in promoting mediation.

The first question is about the Jordanian view of access to justice. While the traditional concept of access to justice is linked to access to the court, the Council of Ministers has sought to broaden this view to include court-based mediation as a way to reduce the caseload on the court. In the discussion, legal reforms that include compulsion in mediation, which have been repeatedly rejected by the House of Parliament on the grounds that compulsory mediation is unconstitutional, will also be addressed. In England, the Woolf and Jackson reforms established a new concept of access to justice that not only considered each individual case, but looked at the civil justice system as a whole; rather than relying solely on litigation, it promotes ADR forms as a means of dealing with cases justly and proportionately.[258]

The second question, raised by the empirical study, is about the role of judges to refer cases to mediation. The empirical study hypothesised that the absence of a statutory duty for judges to encourage the use of mediation is one reason for the low referral rate to court-based mediation in Jordan. This chapter will therefore examine the role of the judiciary in the Jordanian Constitution and the Jordanian Civil Code, the general principles judges follow when applying the law, duty and discretion within the Mediation Law, Civil Procedures Law, and Magistrates Courts Law, and the hierarchy within these laws that undermine the referral to mediation.

Referral is the most important aspect of the judge's gatekeeper role in the Jordanian civil justice system, as parties can only access court-based mediation after referral by a judge. In contrast,

[258] John Sorabji, *English Civil Justice After the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) 197-199.

in the English civil justice system, judges do not act as gatekeepers to mediation but as active promoters, encouraging the use of alternative dispute resolutions and imposing costs sanctions upon parties that unreasonably refuse to mediate.[259] Both English and Jordanian systems, in the reform of their respective civil justice systems, implement the case management system as a way to control the vast number of registered cases before the courts in order to save costs and time for the litigants and the court. However, the English practice differs in assigning the case management with power, duties and discretion that are absent in Jordanian law. For instance, in England encouraging the use of ADR, mainly mediation, is one of the court's duties to manage cases, as a way to further the overriding objective.[260]

The final question this chapter examines is the power of judges to compel parties to mediate. The study focuses on the arguments raised by the Ministry of Justice, the House of Parliament, and the empirical study on the question of whether mandatory mediation is an obstacle to access to justice in Jordan. Similarly, the power of the English court to compel unwilling parties to mediate is a debatable issue. The chapter will examine the Court of Appeal's decision in *Halsey v Milton Keynes* and its impact on the court's power to compel parties to mediate.

In response to those questions, this chapter will first address the Jordanian and English view of access to justice. Second, the role of the court to promote the use of mediation will be examined. Third, the power of the court to compel unwilling parties to mediate. Finally, the arguments for and against mandatory mediation will be explored.

5.2 Access to Justice

5.2.1 The Jordanian view of access to justice

This section will explore the constitutional right of access to justice in Jordan. Traditionally, the Jordanian concept of access to justice included two components: access to the court, and the court's jurisdiction over all persons in all matters. Accordingly, Art.101(i) of the Jordanian Constitution of 1952 guarantees citizens the right to access the courts.[261] Art. 102 reinforces the right of access to justice; the court is the primary route to justice, as citizens have the right

[259] For example, *Susan Dunnett v. Railtrack PLC*, [2002] EWCA (Civ) 303,[14],[15], [16]. For more details and examples see section, 5.5.2.4 for examples of court-imposed costs sanctions for unreasonable refusal to mediate.
[260] CPR 1.4(2)(e).
[261] The Constitution of the Hashemite Kingdom of Jordan of 1952 (as amended). Art. 101(i).

to resort to litigation without barriers.[262] Over time, the concept of access to justice has broadened to include alternative dispute resolutions.[263] This can be seen in the introduction of the Mediation Law as court-based mediation was described as another way to access justice by the Ministry of Justice in 2003.[264] The empirical study demonstrated that these reforms have eased access to justice where it has been implemented.

5.2.1.1 Access to justice through access to the court (Art. 101)

The role of the judiciary is to administer justice for the members of the society. In the words of Adam Smith, it is the duty of the sovereign to protect: "…as far as possible, every member of the society from the injustice or oppression of every other member of it."[265] The government is responsible for administering justice via the courts, as the court has the constitutional power to solve all disputes between the citizens in order to protect people's rights and deliver justice to maintain the security and stability of society.[266] Access to justice is considered one of the fundamental rights of all Jordanian citizens, and has existed since the first Constitution in 1928.[267] The right of access to justice was traditionally understood to mean the right of an individual to defend a claim before the court within a legal system that is open to all.[268] For instance, Art. 101 of the Jordanian Constitution guarantees the right of all citizens to access the courts as it states, "The courts shall be open to all and shall be free from any interference in their affairs."[269] According to the Constitutional Court, Art. 101 provides every citizen the right to resort to a judge to file a claim or defend his rights, and the court does not differentiate between them in the right to resort to it. This is also echoed in practice. The Constitutional Court stated the right to access to justice in Art. 101 is a sacred right for all people, and is guaranteed by the Constitution which is supreme over all laws. Furthermore, the court argued the text of Art. 101 is absolutely clear in its language and is inclusive of all people. For the

[262] ibid Art. 102.
[263] AKC Koo, 'The Role of the English Courts in Alternative Dispute Resolution' (2018) 38 Legal Studies 666, 667.
[264] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment of the Provisional Mediation Law No. 37 of 2003*.
[265] Adam Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations*, Vol 2 (Methuen & Co., London 1930) 202.
[266] Mefleh A. Alqudah, *The Principles of Civil Procedures and Judicial Organizing*, (2nd edn Dar Al Thaqafa for Publishing & Distributing Amman 2013) 54-55.
[267] Jordanian Constitution of 1928, Art. 7.
[268] Muhammad Al- Tarawneh, *Human Rights between Text and Application*, (Dar Al-Khaleej for Publishing & Distribution, Amman, Jordan, 2017) 87-88, see also, Abdullah Saeed Al-Dawa, *Special and Exceptional Courts and their Impact on the Rights of Accused: A Comparative Study*. (Law and Economics Library, Riyadh, 2012) 90-91.
[269] The Constitution (n 261). Art. 101(i).

Constitutional Court, access to the court is the cornerstone of access to justice. Thus, the Constitution, pursuant to Art. 101, stipulates the right to access to justice must be ensured for all people without limitation and no law can be inconsistent with, or restrict, this right.[270] Furthermore, Jordan is a signatory of the Arab Declaration on the Independence of the Judiciary in which Art. 3 states that, "Litigation is a protected right and is guaranteed to all people. Every citizen has the right to resort to a natural judge."[271] The "justice" delivered by a natural judge is defined by Obiad as a judge appointed by the judiciary. His function is to solve individual disputes according to laws and to follow the justice rules that protect all litigants from the beginning of the trial to the issuance of the judgment.[272] Therefore, denying citizens the right to resort to the judiciary by such means as creating procedural or financial restrictions that impede access to the court is considered a breach of Art. 101 and an obstruction to access to justice.

5.2.1.2 Access to justice through the court as the primary pathway to administer justice (Art. 102)

Another cornerstone in the traditional understanding of access to justice is the view that the judiciary is the primary pathway to administer justice. In accordance with Art. 102 of the Constitution, the Jordanian courts have the right to exercise jurisdiction over all people in all matters in Jordan.[273] The Constitutional Court considers the text of Art. 102 as the foundation of the principle of the general jurisdiction of the regular courts, as the courts have full jurisdiction over all persons in all civil and criminal matters, including lawsuits brought by or against the Government.[274] Also, Art. 2 of the Law of Formation of Regular Courts[275] and Art. 27 of the Civil Procedure Law (CPL)[276] refer to the judiciary as the authority with the general jurisdiction of the Kingdom, competent to adjudicate all kinds of disputes.[277] Further, the Civil Courts exercise their jurisdiction in accordance with the provisions of the laws in force in order to settle disputes.[278] Accordingly, in the view of the drafters of the Constitution, the courts are

[270] The Jordanian Constitutional Court, Interpretation Resolution No. (3) 2018. Issued in 2018.
[271] Arab Declaration on the Independence of the Judiciary, Amman 1985.
[272] Mohamed Kamel Obaid, 'The Right of an Arab Citizen to have Recourse to a natural judge' (2003) 9-12. <https://www.ifes.org/sites/default/files/egypt_paper_natural_judge.pdf > accessed 19 May 2020.
[273] The Constitution (n 261) Art. 102.
[274] The Constitutional Court, Interpretation Resolution No. (10) 2013. Issued in 2013.
[275] Law of Formation Regular Courts (as amended). No. (17) of 2001. Art. 2
[276] CPL. Art 27.
[277] Laylaa Al-Khifaf, *Antagonism Stoppage in the Law Code of Civil Procedures: Comparative Study* (Law and Economics Library, Riyadh 2014) 94.
[278] The Constitution (n 261) Art. 103.

the competent authority to settle disputes, as the court is the only institution that is authorised to deliver justice to ensure equality between the litigants, and the judge is qualified to apply the measures of the fair trial.[279] Therefore, in the traditional view, giving the court jurisdiction over all persons is a key element guaranteeing access to justice.

5.2.1.3 The view of access to justice by the Constitutional Court and the Court of Cassation

Together, Art. 101 and 102 create a right of citizens to access justice through an independent judiciary that is open to all and has jurisdiction over all matters. This traditional view of access to justice is emphasised and supported by the Constitutional Court and the Court of Cassation.

In a case before the Constitutional Court the issue of access to justice was raised by the Exclusive Food Limited Liability Company.[280] The company argued that Art. 72 of the Income Tax Law, which states that correction procedures are not subject to appeal, is unconstitutional. The court agreed that the provision depriving the taxpayer of the right to resort to the judiciary to appeal a maths error in tax estimation is unconstitutional, because it impeded the right to access justice, as it prevented the company from defending its claim before the court. The Constitutional Court in its decision stated that Art. 72 of the Income Tax Law is unconstitutional based on Art. 101 of the Constitution, which granted access to justice to all via resorting to the court. Hence, the court found that Art. 72 deprives the taxpayer of the right to resort to the judiciary, and is contrary to Art. 101 of the constitution.[281] Furthermore, the Constitutional Court reiterated that the courts are the main pathway to settle disputes according to the text of Art. 102 of the Jordanian Constitution. Thus, the Constitutional Court enforced the right to access to justice through the judiciary that is open to all and is the main authority to administer justice.

In several cases,[282] the Court of Cassation linked the right of access to justice to the right of citizens to resort to the court – as guaranteed by Art. 101 of the Constitution – because the courts are the primary way and the competent authorities to settle disputes according to the text

[279] Al-Tarawneh (n 268) 87-88; see also, Al-Dawa, (n 268) 90-91.
[280] The Court of Cassation, Decision No. 5585/2018. Issued in 2018. It should be noted that Jordanian citation cases include the court's name, the case number and the issue date. The parties are not named in the citation.
[281] The Jordanian Constitutional Court, Interpretation Resolution No. (7) 2018. Issued in 2018.
[282] The Jordanian Court of Cassation, Decision No. 1401/2013. Issued in 2013. Also, see The Court of Cassation, Decision No. 1725/2015. Issued in 2015. The Court of Cassation, Decision No. 2815/2015. Issued on 18 October 2015. And, The Court of Cassation, Decision No. 1359/2019. Issued in 2019.

of Art. 102 of the Jordanian Constitution.[283] These cases will be analyzed in depth under mandatory mediation.

5.2.1.4 Broader interpretation of access to justice including alternative mechanisms for dispute resolution

As Sourdin notes, the traditional concept of justice considers "that justice can only take place within courts as it is only through the articulation by a judge of understandings about the rule of law that justice can be done."[284] Fiss argues in favour of the traditional view of the concept of justice such that "justice may not be done" in the absence of judicial involvement and trial.[285] As a result of the traditional view of access to justice, litigation has been considered the primary way to solve people's disputes, hence any alternative dispute resolution could face several obstacles to its development in Jordan.

However, justice has always existed outside of the judiciary as Sourdin also notes. Accordingly, access to justice is not limited to the right of access to the court.[286] For instance, as previously mentioned in Chapter 1, tribal mediation is a widely popular dispute resolution mechanism that has been used in Jordanian society for centuries, and remains active till today, demonstrating that justice existed before the creation of the judiciary. Furthermore, modern literature defines access to justice from a wider perspective, arguing that the concept of access to justice is not limited to access to the court. Instead, it has evolved from the right of all citizens to access the court, to include a fair and open hearing, timely proceedings, reasonable cost and access to legal representation, to increased access to justice via the use of ADR.[287] The focus on timely proceedings sees ADR as an alternative to litigation, epitomising an evolved understanding of justice and resolution, which is supported by this broader approach to access to justice.[288]

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[283] The Jordanian Court of Cassation, Decision No. 1359/2019. Issued in 2019. See also, The Court of Cassation, Decision No. 8002/2018. Issued in 2019. The Court of Cassation, Decision No. 6355/2018. Issued in 2018. The Court of Cassation, Decision No. 7052/2018. Issued in 2018.
[284] Tania Sourdin, 'The Role of the Courts in the New Justice System' (2015) 7 Y.B. Arb. & Mediation 95,98-99.
[285] Owen M. Fiss, 'Against Settlement' (1984) 93 YALE L.J. 1073. 1075.
[286] Sourdin (n 284) 95.
[287] Masood Ahmed & Dorcas Quek Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice' (2019) 38(1) Civil Justice Quarterly1,1-2.
Mauro Cappelletti, 'Access to Justice and the Welfare State' (1983) 81(4) Michigan Law Review 1006-1008.
[288] Sourdin (n 284) 98-99.

Following this development, the Jordanian Ministry of Justice attempted to balance the traditional view that sees the court as the only place to deliver resolution with the broader view of access to justice by introducing the use of mediation within the civil justice system. In 2002, the Council of Ministers enacted the Provisional Law No. 26 of 2002 that amended the CPL No. 24 of 1988. In this amendment, the lawmakers added Art. 59(bis), which introduced Civil Case Management and mediation to the Jordanian civil legal system.[289] In introducing the amendment, the Jordanian Council of Ministers emphasised the need to reduce litigation time and procedures, to speed the resolution of the disputes through civil case management and alternative dispute resolutions, namely mediation.[290] This is the first time the lawmakers introduced the idea of a multi-door courthouse that encourages parties to engage with mediation as an alternative to litigation under the umbrella of the judiciary. Further, in 2003 the government introduced the Provisional Mediation Law to regulate and organise the whole mediation process from the referral stage to the end of the mediation sessions. Crucially, rather than making the court a last resort, the government's plan to reform the civil justice system expanded access to the court. Accordingly, mediation was introduced to the Jordanian civil justice system as court-based mediation that is facilitated by a judge-mediator; the entire process is under the supervision and control of the judiciary. One of the judge interviewees, to convince parties to attempt mediation, stressed the voluntary nature of referred mediation. He further pointed to the disputants that they do not leave the court and can return to the court proceedings if they wish. All is carried out under the judicial umbrella as "parties would not go out of litigation; parties will transfer from the framework of the trial judge and enter the scope of the judge-mediator."[291] His words explain the difficulty in shifting from the traditional view of access to justice and the importance of explaining why the mediation process is completely voluntary from the referral stage to the settlement. This is because from the traditional perspective compelling parties to mediate would be considered an obstacle to the citizen's right to resort to the court and an impediment to access to justice.

5.2.1.5 The general consensus among stakeholders is that court-based mediation facilitates access to justice

[289] Ahmed Al-Katawneh and Walid Kanakria, *Civil Case Management* (Al-Dustour Commercial Printing Press, 2003) 5.
[290] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment to the Civil Procedure Law No. 24 of 1988* to Ashraf Abu Hazeem (31 December 2019).
[291] Referral Judge (6).

The results of the empirical study demonstrate that from the perspective of stakeholders in the judicial system, the introduction of court-based mediation has eased access to justice to the extent that it is used. For example, judges and lawyers noted that as mediation itself was free, and that court fees would be refunded for cases settled through mediation, access to justice was promoted as it removes an obstacle for disputants to defend their claim before the court. In several instances, the respondents raised concerns about the timeliness of litigation procedures, and viewed the speed of mediation as another way to facilitate access to justice. Furthermore, both judges and lawyers believed that court-based mediation delivers access to justice because it is voluntary from the referral stage to the point of settlement, and parties may withdraw at any time without consequences, and return to litigation. However, judges differed in their support for mandatory mediation within the civil justice system, as will be discussed in a later section. The respondents also noted that court-based mediation improves access to justice for the whole justice system, as it reduces the pressure on the court and gives trial judges more time for consideration of disputes that have significant legal issues.

Despite these efforts, the number of cases lodged with the Jordanian courts have increased[292] and the length of litigation has remained unchanged, as court-based mediation has not gained a foothold in the country. Therefore, the changing concept of access to justice is not highlighted by the interviewees as the key factor pushing for an increasing use of referred mediation in the Jordanian judicial system. Instead, several other reasons are mentioned as factors which may have limited the uptake of court-based mediation. They will be explored in the remainder of the chapter.

5.2.2 The English traditional view of access to justice

The right of access to justice is deeply rooted in England as the Magna Carta is considered a part of the English constitution and access to justice and a fair trial were enshrined in law when King John of England agreed to make peace with the barons in 1215.[293] The Magna Carta

[292] For example, the Jordanian Judicial Council reported that between 2006 and 2019 the number of registered cases increased 50 percent from 246,620 to 370,929 and pending or carried over cases increased 27 percent from 66,706 to 85,015 over the same period. Jordanian Judicial Council, Judicial Authority Annual Reports from 2006 to 2019 (Jordanian Judicial Council) < http://jc.jo/ar/catalog/altkryr-alsnoy > accessed 7 February 2022.

[293] Ellen Castelow, The Constitution of the United Kingdom. < https://www.historic-uk.com/HistoryUK/HistoryofBritain/British-Constitution/ > accessed 3 March 2021.

states, “To no one will we sell, to no one deny or delay right or justice.”[294] Blackstone commented on this passage when he stated, “A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.”[295] He went on to say, “Since the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.”[296] In Blackstone’s interpretation, access to justice is the right of an individual to defend a claim before the court within a legal system that is open to all. Zuckerman considered the right of access to justice as a fundamental right that is safeguarded by the right of access to the court to interpret and enforce the law.[297] The right of access to the court was also emphasised by Lord Diplock, as he stated,

> Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory.[298]

As in the Jordanian context, the traditional view of access to justice in England is synonymous with access to the court. But recent scholars have supported a more modern interpretation of access to justice. Cappelletti and Garth argued the concept of access to justice has been developed to a wider sense to include the use of ADR forms to overcome costly and lengthy litigation, which detract from effective access to justice.[299] Cappelletti and Garth were speaking from an American context but English scholars shared a similar view of the need to remove obstacles to access to justice.[300] For instance, Jacob states, “In practical terms, access to justice should be real, effective, comprehensive and unimpeded. This is not a ‘mission impossible,’

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[294] The National Archives, Magna Carta. <https://www.nationalarchives.gov.uk/museum/item.asp?item_id=3 > accessed 3 March 2021.
[295] William Blackstone, *Commentaries on the Laws of England in Four Books* vol.1 (Philadelphia: J.B. Lippincott Co., 1893) 104.
[296] ibid 104.
[297] Adrian Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (3rd edn, Sweet & Maxwell 2013) paras 3.23, 3.24.
[298] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India* [1981] AC 909, 977.
[299] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev 181, 183-185.
[300] Jack I.H. Jacob, *The Fabric of English Civil Justice* (Stevens & Sons 1987) 277.

but though it may take time, it is within the grasp of society determined to improve its system of civil justice."[301] Jacob did not mention the use of ADR, but English civil justice system reforms would call for the use of alternatives to litigation in the decades that followed.

5.2.2.1 English civil justice reform: Connecting access to justice and ADR

In England, several committees addressed litigation drawbacks such as cost and delay as they attempted to reform the civil justice system.[302] These committees were the Evershed Committee (1953); the Winn Committee (1968); the Cantley Committee (1976); the Civil Justice Review (1988) and the Heilbron-Hodge Committee (1993).[303] The Heilbron-Hodge Committee examined the English civil justice system against the criteria of accessibility, affordability and adaptability.[304] Critically, the committee's report pointed its finger arguing that high costs and long delays that prevented citizens from resorting to litigation were neither just nor fair.[305] The Heilbron-Hodge report recommended the establishment of a pilot scheme in the court to encourage and facilitate the use of ADR to overcome these obstacles and to improve access to justice.[306] Crucially, the report, upon successful completion of the pilot, recommended, "Permitting the court to encourage or, in a limited number of cases, to direct that the parties try to resolve their differences by ADR".[307] The committee reasoned that in the end the parties' interest is in solving their dispute rather than having their 'day in court.'[308]

The Woolf Report built on the earlier findings of the Heilbron-Hodge Committee, especially its emphasis on the potential of ADR to improve access to justice.[309] In 1994, the Lord Chancellor called on Lord Woolf to examine problems in the English civil justice system – high costs, slow trials, and inequality between opponents – that prevented access to justice.[310] The main objectives of Woolf's review were to save disputants time and money, ensure

[301] ibid 277.
[302] Rebecca Huxley-Binns and Jacqueline Martin, *Unlocking the English Legal System* (4th edn, Routledge 2014) 121.
[303] ibid 121.
[304] *H. Heilbron and H. Hodge (1993) Civil Justice on Trial: The Case for Change.* Joint Report of the Bar Council and Law Society, ch 1, para 1.2.
[305] ibid ch 1, para 1.2.
[306] ibid ch 9, para 9.15.
[307] ibid ch 9, para 9.15 v.(b).
[308] ibid ch 9, para 9.5.
[309] Barbara Billingsley and Masood Ahmed, 'Evolution, Revolution and Culture shift: A Critical Analysis of Compulsory ADR in England and Canada' (2016) 45 (2-3) Common Law World Review 186, 189.
[310] A.A.S. Zuckerman, 'Lord Woolf Access to Justice: Plus ça Change . . .' (1996) 59(6) The Modern Law Review 773, 773.

proportionate cost for the parties to the dispute and avoid litigation whenever possible. This resulted in two reports published in 1995 and 1996, which led to changes to the CPR that established the duty of the court to encourage the use of ADR within the English civil justice system. Lord Woolf also called for the establishment of active case management in the CPR to ensure the judge has the power to control the case,[311] including the power to encourage parties to use ADR to solve their dispute.[312] Two of the more significant changes made to the CPR after the Woolf Reports were the introduction of pre-action protocols and the tracking system where cases are allocated to small, fast and multi-tracks based on the complexity and value of the disputes.[313] Although the final Woolf Report did not suggest making ADR mandatory,[314] parties must now prove that they have attempted to resolve their disputes through ADR, mainly mediation,[315] for certain types of disputes.[316]

The Woolf reforms were followed by Lord Jackson's report which proposed several rule changes to control the costs of litigation.[317] Lord Jackson emphasised the role of ADR for reducing the cost of civil litigation and encouraging early settlement of cases, thereby improving access to justice.[318] Subsequently, Lord Justice Briggs' report highlighted the need to create an online court as another tool to access justice and further the use of alternative dispute resolution, mainly mediation, to solve disputes.[319] Similarly, Lord Willy Bach in the Bach Commission report on access to justice emphasised the importance of increasing the use of ADR as a way to make access to justice a reality.[320] Each of these reports contributed to promoting access to justice through the use of ADR.[321]

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[311] Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) ch 1, para 4.
[312] ibid ch 1, para 7 (d).
[313] Tamara Goriely, Richard Moorhead and Pamela Abrams, '*More Civil Justice? The impact of the Woolf reforms on pre-action behaviour'* (Research Study 43, Commissioned by The Law Society and Civil Justice Council 2002) 3.
[314] Woolf (n 311) ch 5, para 18.
[315] ibid ch 5, para 18.
[316] For example, CPR-Pre-Action Protocols.
[317] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) ch 3, para 5.15.
[318] ibid s 6, Para 6.3. and ch 36, para 1.2.
[319] Lord Justice Briggs, *Civil Court Structure Review: Final Report* (TSO, 2016) ch 12, paras 11 and 22.
[320] The Bach Commission on Access to Justice, *The Crisis in the Justice System in England & Wales* (Interim Report, November 2016) 6. See also, *The Right to Justice, The Final Report of the Bach Commission* (September 2017). It stresses that "There is a need to redesign the whole justice system to reduce complexity and cost so that effective remedy is as cheap and efficient as possible for all concerned" as ADR has a vital role to play within the civil justice system. 18.
[321] Ahmed and Anderson (n 287) 4.

5.2.2.2 Widen access to justice through ADR

Recent reforms of the civil justice system assumed the complexity of the court procedures, prohibitive costs and excessive delays denied access to justice for the average litigant. Hence, the use of ADR was promoted as a mechanism to increase access to justice. Research by Peysner and Seneviratne found that court-connected ADR systems offer access to justice and greater speed of process, but are expensive in many cases.[322] Koo argued that "Integrating ADR into the court system broadens the notion of justice and its access." She went on say, "the court plays an important role in managing cases that go through ADR. In future, judges should play a more central role to ensure the use, quality and integrity of alternative processes, and not the peripheral role they play at present."[323] In Ahmed's view, the use of ADR attempts to expand access to justice by reducing the delay in litigation and the cost of litigation.[324] Further, Ross argues that embedding mediation in the civil justice system provides another route to access justice. [325] In addition, Shipman et al., argued that providing institutionalisation of voluntary ADR by governments will increase access to justice where litigation is costly and it is difficult to access the courts.[326] Prior to Brexit, the EU made similar claims about wider access to justice through ADR.[327] Thus, one of the objectives of the European Mediation Directive was to promote the use of ADR to solve civil and commercial disputes to improve and provide better ways of accessing justice.[328]

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[322] John Peysner and Mary Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (Department for Constitutional Affairs,1 Jan 2005) 72.
[323] Koo (n 263)668. See also, John Sturrock, 'The Role of Mediation in a Modern Civil Justice System' (2010) 21 Scots Law Times 111, 112. Sturrock states that "I suggest that this does mean seeing the courts of law as one of a range of methods of dispute resolution in a modern society. And one which should serve usually as a very effective last resort in those cases in which it has a role to play."
[324] Billingsley and Ahmed, (n 309) 188. See also, Ahmed and Anderson (n 287) 2. Recently, Ahmed expressed his view on the Online Civil Money Claims Service it "represents a significant judicial and policy culture shift which recognises the increasing important role of ADR in the resolution of disputes and it further integrates ADR processes within the mainstream civil court process." See Masood Ahmed, 'The Digitisation Reforms and Procedural Justice' (2021) 3 Journal of Personal Injury Litigation 158,163.
[325] Margaret Ross, 'Embedding Mediation in Scottish Civil Justice – Riding the Tide for a Cultural Shift? 2020, University of Aberdeen: School of Law (Centre for Commercial Law, Working Paper Series; 005/20) 4. See also, in Scotland the proposal for the Mediation Bill intended to improve and increase access to justice by bringing mediation into the mainstream of the civil justice. See also, The Irish Mediation Bill of 2017 its objective is to promote mediation to make the civil justice system effective and efficient thereby helping in "reducing legal costs, speeding up the resolution of disputes, and relieving the stress involved in court proceedings." See Ireland Department of Justice, Mediation Bill 2017 < https://www.justice.ie/en/JELR/Pages/MediationBill2017> accessed 30 March 2021.
[326] Lorna McGregor, Rachel Murray and Shirley Shipman, 'Should National Human Rights Institutions Institutionalize Dispute Resolution?' (2019) 41(2) Human Rights Quarterly 309, 313-317.
[327] European Commission, 'Green Paper on Alternative Dispute Resolution in civil and Commercial Law' (COM (2002) 196 final) para 1.2 (5).
[328] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters. Paras 3, 5.

In his 2017 speech about access to justice, Lord Neuberger, the former President of the Supreme Court, pointed out that ensuring access to justice is a shared responsibility between the government, executive, lawmakers, judges and lawyers, as each one has a duty to improve and facilitate access to justice to ordinary people and businesses.[329] He added that the government's role in facilitating access to justice is not about funding, but entails establishing appropriate courts and processes.[330] For example, Lord Neuberger emphasises that the use of IT systems within the judiciary makes the system more affordable and more effective, and the use of ADR to resolve disputes with proportionate cost is another way to improve access to justice. He stated, "The only solution is for the legal system to provide a dispute resolution mechanism which is cost-effective...In a phrase imperfect, but accessible and affordable, justice: it's better than no justice or absurdly over-priced justice."[331] In Lord Neuberger's view the concept of access to justice is more than enabling citizens' access to the court. It includes the creation of systems that can solve disputes at an affordable price. In this way, ADR is one mechanism that is likely to support access to justice.

5.2.2.3 Can ADR widen access to justice?

Despite calls to increase the use of ADR in the English civil justice system, criticism has been expressed about the ability of ADR to achieve justice. As Hazel Genn has argued, the private nature of mediation, its focus on problem solving, and the mediator's concern with reaching a settlement are not consistent with claims that mediation increases access to justice. Genn claims fairness and justice are not relevant to the objective of mediation, as the parties' focus is to reach a solution that suits them.[332] In her view, one of the key issues is that mediation is only about resolving problems and is not concerned with substantive justice. As she puts it, "So not a 'justice' system at all, or at least not one that is concerned with substantive justice."[333] Genn goes on to say, "The outcome of mediation is not about *just* settlement, it is *just about settlement*."[334] Like Genn, Lord Neuberger concedes that ADR is an imperfect solution, but in

[329] Lord Neuberger, Access to Justice, Welcome address to Australian Bar Association Biennial Conference (London, 3 July 2017) para 5. <https://www.supremecourt.uk/docs/speech-170703.pdf > accessed 30 March 2021.
[330] ibid para 15.
[331] ibid para 18.
[332] Hazel Genn, 'What is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24 Yale JL & Human 397, 412-415.
[333] ibid 412-415.
[334] Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 117

his view it is necessary to provide accessible and affordable options to improve access to justice.[335] However, Genn rejects the view that the outcome of mediation should be measured as access to justice, as mediation has nothing to do with access to justice.[336] Zuckerman shared her view when he argued that delivering substantive justice is not a priority of the overriding objective of the CPR.[337] Sorabji agreed that Woolf 's new concept of justice focuses on delivering proportionate justice for all litigants as opposed to substantive justice, which is not a priority and is subject to limits, as the main goal is to minimise litigation cost and delay.[338]

Another criticism of the promotion of ADR within the civil justice system regards turning away from the courts' traditional role of resolving disputes. According to Genn, under the new justice system ADR, mainly private mediation, rather than public litigation is the government's preferred approach to dealing with disputes,[339] and the efforts and reforms that established the use of ADR within the court system are in line with the government's interest of "shifting dispute resolution attention away from the courts."[340] For instance, in 1998 the UK government published the white paper Modernising Justice, The Government's plan for reforming the legal services and the courts.[341] One of the stated objectives of the government's plan is to make court the last resort, as it explained, "But in civil matters, for most people, most of the time, going to court is, and should be, the last resort. It is in no-one's interest to create a litigious society."[342] Crucially, the government argued the implementation of ADR mechanisms "can make a fair and effective civil justice system."[343] The white paper and Woolf's recommendations regarding reforming the civil justice system were implemented in the CPR of 1998, as the CPR established that the court should be seen as a last resort and parties have the duty to try ADR before seeking litigation.[344] Genn's overall concern is that in the new system of justice the state is not fulfilling its function as a forum for dispensing justice; instead,

[335] Lord Neuberger (n 329) para 18.
[336] Genn, *Judging Civil Justice* (n 334)118-119.
[337] *Zuckerman* (n297) 6.
[338] Sorabji (258) 135-160 and 197-199. See also, John Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' (2012) 23(1) European Business Law Review 77-90.
[339] Genn, 'What is Civil Justice for? (n 332) 410-411.
[340] ibid 402.
[341] Lord Chancellor's Department, *Modernising Justice: The Government's Plans for Reforming Legal Services and Courts* (Stationery Office Books, Cm 4155, 1998)
[342] ibid para 1.10.
[343] ibid para 1.19. Similarly, in 2001 a pledge was made by the UK Government "requiring departments to use mediation, arbitration and conciliation" to settle their disputes. See, the UK Government, Government Supports More Efficient Dispute Resolution (Ministry of Justice, 23 June 2011) < https://www.gov.uk/government/news/government-supports-more-efficient-dispute-resolution> accessed 15 February 2022.
[344] Genn, 'What is Civil Justice for? (n 332) 403.

the state is pressuring litigants to divert their disputes to private mediation.[345] In Genn's view, the privatisation of disputes will ultimately hinder the development of the law.[346] In the researcher's view, this argument provides evidence against non-court-based mediation. But mediation that takes place within the court would refer cases with complex legal issues to litigation, as these cases help to develop the law, and away from mediation, which is most suitable for cases with factual issues. In addition, Genn claimed that ADR is undermining the rule of law, as parties shift their focus from legal rights to solving problems.[347] This concern was echoed by Ahmed when he stated, "Although ADR has a part to play in the civil justice system, it cannot serve the formal adjudicative role of the courts in administering equity and the law."[348] Professor Zander expressed concern with the government's plan to reform the civil justice system based on the Woolf reforms, as he argued that "it would be at the expense of justice."[349]

However, Lord Neuberger argued that maintaining the status quo would be at the expense of justice, as many citizens are unable to afford legal expenses, and accordingly mediation is an imperfect solution for dispute resolution. In the words of Lord Neuberger,

> It is absolutely fundamental that all citizens are able to establish their rights and defend themselves, whether against the state or against other citizens, i.e., whether public rights, private civil rights, or family rights. The traditional and principled way of achieving this is through the courts. It should not be impossible for citizens to have proper access to the courts – i.e., with decent legal advice and legal representation. However, and I do not say this in a spirit of recrimination, but simply as a matter of melancholy fact: the legal profession's charges, the court system's procedures and government cuts and charges render it difficult if not impossible for many citizens to get access to the courts. In those circumstances, provided that its costs are proportionate to the issues involved, mediation appears

[345] ibid 397-398. See also, Genn, Why the Privatisation of Civil Justice is a Rule of Law Issue, 36th F A Mann Lecture, Lincoln's Inn 19 November 2012. Genn's view is shared by Professor Murray. He calls the United States government's efforts to reduce its role in the civil justice system by giving space to ADR methods privatization of civil justice and argues it would negatively affect the rule of the law. P. Murray, 'Privatization of Civil Justice' (2007) 15 (2) Willamette Journal of International Law and Dispute Resolution 133-154. See also, the future of the legal profession survey found that "Privatisation of justice is the fourth biggest challenge (23%). Lawyers foresee a growing trend on the "privatisation" of justice through alternative dispute resolution mechanisms ADR." International Association of Young Lawyers, The Future of the Legal Profession Survey, 8. < https://www.aija.org/images/uploads/AIJA-CCBE%20Future%20of%20the%20Legal%20Profession%20survey_2018_summary.pdf > accessed 2 March 2021.
[346] Genn, 'What is Civil Justice for? (n 332) 398.
[347] ibid 411.
[348] Billingsley and Ahmed (n 309) 195.
[349] Michael Zander, The Government's Plans on Civil Justice, The Modern Law Review, Vol. 61, No. 3 (1998) 382, 383.

> in practice to be the only alternative. Whatever may be said about mediation as an alternative to litigation as a matter of principle, it appears to be quite a satisfactory alternative in practice at any rate to many people - at least judging by the reported outcomes.[350]

Bartlet agreed that high-quality voluntary mediation is a supportive and important factor in the access of public justice, and is an essential component of the rule of law.[351]

There is some truth to the argument that mediation does not provide substantive justice. The critics are correct that a mediator's role is not to assess the merit of the case or apply the rule of law. Yet, their analysis dismisses the access to procedural justice that ADR and mediation provide. Undoubtedly, the majority of disputants want to settle their disputes quickly and with the least cost and effort, and parties are not concerned whether it is called judgment, justice, settlement or agreement. As Arthur and Cullen argued, "Just settlements promote access to justice because in most cases early settlement is cost effective and may produce better outcomes for the parties than the zero-sum result assured by adjudication."[352] A costly civil justice system benefits no one except lawyers and rich people, and deprives millions of people from getting access.[353] Further, as Hyman and Love demonstrate, "Justice is too multi-faceted to be reduced to a definition or a single concept."[354] They explained that substantive justice 'comes from above': from the judge, the rule of law, and the principle of the justice system. While in mediation "parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts. Consequently, justice in mediation comes from below, from the parties,"[355] Rock elucidates that in mediation justice can be defined as "the justice that the parties themselves experience, articulate, and embody in their resolution of dispute. It is the decision making power of the parties which allows parties the freedom to craft solutions that best comport with their individual understanding of a just outcome."[356] Therefore, in the researcher's view, ADR, mainly

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[350] Lord Neuberger, 'Keynote Address: A View from On High', Civil Mediation Conference 2015 (12 May 2015) < https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf > accessed 4 March 2021. Para 26.
[351] Michael Bartlet, 'Mandatory Mediation and the Rule of Law' (2019) 1(1) Amicus Curiae 50, 52.
[352] Les Arthur and Brendan Cullen, 'Settlement and Reform of the Civil Justice System: How Settlement is Changing the Practice of Law' (2009) 17 Waikato Law Review 38,51.
[353] Heilbron and Hodge (n 304) ch 1, para 1.2.
[354] Jonathan M Hyman and Lela P Love, 'If Portia Were a Mediator: An Inquiry into Justice in Mediation' (2002) 9 Clinical L Rev 157,192.
[355] ibid 160-161.
[356] Evan M Rock, 'Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice' (2005) 6 Cardozo J Conflict Resol 347, 348.

mediation, remains the key route to widening access to resolution for procedural justice, though at the expense of substantive justice.

5.2.2.4 Access to justice through the overriding objective of the CPR

In Lord Woolf's final report, he set the course for the future of the English civil justice system: that the court will be used as a last resort, as litigants should try to use alternative dispute resolution as a starting point for resolving conflict.[357] In addition, litigants will be encouraged to settle the dispute before starting the litigation procedures.[358] At the core of the reforms is the overriding objective of the court: to ensure access to justice fairly and at proportionate cost.[359] As the result of Lord Woolf's final report, the overriding objective was established as the first rule in the Civil Procedure Rules of 1998.[360] The overriding objective instructs the court to deal with cases justly and at proportionate cost,[361] which ensures the parties are on an equal footing, cost is minimized and the case is dealt with in ways which are proportionate.[362] Furthermore, the CPR 1.2 states that the court should give effect to the overriding objective when exercising its power and interpreting any rule.[363] In other words, judges should act, manage, direct and give orders to manage the litigation process in the way that would reach the overriding objective. Therefore, the overriding objective should be considered when applying and interpreting the Civil Procedures Rules as a whole, as the CPR is drafted and guided by the overriding objective.[364] Turner considers the overriding objective as the most important reform of civil justice in England as the judge is now in control of managing the litigation process instead of the lawyers, and the court has responsibility to manage cases in a 'proactive manner.'[365]

One of Lord Woolf's recommendations was to establish judicial case management as a way to manage cases and control litigation procedures with the aim of achieving the overriding objective. Judicial case management gives judges the responsibility and power to further the

[357] Woolf (n 311) s 1, para 9.
[358] ibid s 1, para1.
[359] ibid s 1, para 9.
[360] CPR 1.1.
[361] ibid 1.1. Amended by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262) and the Civil Procedure (Amendment) Rules 2021 (SI 2021/117).
[362] CPR 1.1(2).
[363] ibid 1.2 (a) and (b).
[364] Déirdre Dwyer, 'What is the Meaning of CPR r 1.1(1)?' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On (*Oxford University Press 2009)73.
[365]Robert Turner, "'Actively': The Word that Changed the Civil Courts" in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009) 82.

overriding objective.[366] Woolf's new theory of justice was invoked by the Court of Appeal in *Flaxman-Binns v Lincolnshire County Council*, when the court stated, "Ultimately the issue is whether the overriding objective of dealing with this case justly calls for us to bring these proceedings to an end,…or to permit him to proceed with his claim…."[367] The judge departed from the traditional view of solely deciding the case on its merits. Instead, the judge weighed fairness to the claimant in making his ruling, reflecting the spirit of CPR 1.2. Critically, in *Tariq Ali v Esure Services Limited*, the Court of Appeal emphasised the importance of considering the share of the court's resources in the wordings "expense" and "proportionality" stated in the overriding objective when it asserted, that "…so far as practicable, dealing with the case in ways that are proportionate, ensuring that the case is dealt with expeditiously and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."[368] In *Jean F Jones v University of Warwick*, the Court of Appeal explained one crucial difference between the traditional approach to justice and the new concept of justice is that the judge is not to consider cases individually, but to consider the impact of a decision more broadly. As the judge stated, "Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole."[369] This is in sharp contrast with the Jordanian civil justice system which still considers delivering substantive justice a priority for the court, whatever the costs or the duration of the litigation, as the intent of the overriding objective is missing from the CPL that judges have to implement.

5.2.2.5 A new paradigm of justice: Proportionate justice

The overriding objective is the link that connects access to justice and ADR. The CPR established the duties of active case management and encouraging the use of ADR, in particular mediation, as a way to further the overriding objective, increase access to justice and fairly share the court's resources "as a whole."[370] The new paradigm of justice guided by the Woolf reforms and the CPR emphasises proportionate justice. Proportionate justice ensures access to substantive justice via the courts, as in the traditional view, and access to procedural justice via ADR.

[366] Woolf (n 311) ch 1, paras 1 and 4.
[367] [2004] EWCA (Civ) 424, [41].
[368] [2011] EWCA (Civ)1582,[21].
[369] [2003] EWCA (Civ) 151, [25].
[370] Ahmed and Anderson (n 287) 1-2.

The critics are correct that ADR is not concerned with substantive justice, but ADR is not just about settlement. ADR is a form of procedural justice that ensures a fair process, a fair hearing, each party can have their claim heard before a neutral third party, the outcome is a non-binding resolution and parties can return to the court to seek substantive justice. But, as Lord Woolf stressed, substantive justice and procedural justice are equally important.[371] In this way, ADR provides access to procedural justice for cases that do not have factual issues and do not need the application of the law to decide the merit of their cases with an overall approach. This then clears the backlog of cases and speeds the litigation process, thereby enhancing access to substantive justice for those cases that cannot be settled through ADR. In the words of Lord Clarke, "by encouraging the greater use of ADR court resources are released to other cases. It increases access to justice for those whose cases cannot settle through assisting those who wish to settle to do so…achieving proportionate justice for all."[372] The arguments in support of ADR are convincing; however, it is unclear that justice is being served by seeking resolution through private third-party mediators. This is not a consideration in jurisdictions that require judicial oversight of private mediation or provide for judicial mediation, as in Jordan.

By contrast, the Jordanian government's plan to reform the civil justice system never intended to make the court a last resort, but preserved the role of the state to administer justice.[373] Thus, Jordan established mediation in the civil justice system as a way to widen access to procedural justice that is performed under the supervision of the judiciary, and is conducted by a judge-mediator. The mediation settlement agreement is considered a final binding judgment and is enforced by the court. In this way, the Jordanian system offers greater access to justice because the court-based mediation service is free of cost, it is completely voluntary, it is conducted by an impartial judge who is trusted by parties to the dispute (See Chapter 4, 104-106), and the

[371] Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellors Dept 1995). Para 29.
[372] Anthony Clarke, The Future of the CPR (Designated Civil Judges' Conference, Scarman House, 25 June 2009) para 15. < https://webarchive.nationalarchives.gov.uk/20131202213834/http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-clarke-mor-10072009>
[373] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Law.* See also, Ministry of Justice Strategy 2014-2016 which emphasised the facilitation of access to justice as a pillar of the civil justice system and the importance of providing mediation as a method to facilitate and increase access to justice. 69 :< https://rm.coe.int/jordanian-ministry-of-justice-strategy-2014-2016/168078a8b8 > accessed 26 January 2021.

whole process is conducted under the shadow of the court, which in turn preserves the rights of both parties.

5.3 The role of the judiciary in promoting mediation in Jordan

5.3.1 The role of the judiciary in Jordan

The empirical study raised two concerns about the role of the judiciary in promoting mediation in Jordan: firstly, judges do not have a statutory duty to refer parties to mediation; secondly, judges hesitate in exercising their discretion to refer cases to mediation.[374] As judicial restraint in applying laws has been highlighted as the possible cause, the next section will explore the role of the judiciary within the strict separation of power, the general principles of applying the law, and the distinction between duty and discretion in the law.

5.3.1.1 Separation of power in the Jordanian Constitution and the role of the judiciary

To understand the issues raised in the empirical study regarding the limited power of judges to refer cases to mediation, it is crucial to identify the foundation of judicial power granted by the Constitution. The country's first constitution in 1928 ignored the principle of separation of powers, as all the governmental powers–legislative, executive and judicial–were held by the Emir. In particular, there was no judicial independence, as the Emir had the sole power to appoint judges and they were beholden to him.[375] The second constitution in 1947 introduced the important principles of democracy that did not exist in the Constitution of 1928, nevertheless, the legislative and executive power remained in the hands of the King.[376] While there was some improvement to the independence of the judiciary, appointment and dismissal of judges was controlled by the executive branch, which opened up the possibility for the executive authority to interfere with the affairs of judges.[377] Both Constitutions were not welcomed by the nation as the King held the executive and legislative power, and had the right

[374] Judicial discretion to refer cases to meditation is provided in Art. 3(a) of The Mediation Law. Art. 59(bis) (3) of The CPL Art. 7(a) of The Magistrates Courts Law No. (23) of 2017.
[375] Iman Fraihat, 'The Principle of the Separation of Powers in the Constitutions of Jordan and their amendments (1928-2011)' (2016) 43(2) Dirasat: Human and Social Sciences, University of Jordan 773, 777-778.
[376] ibid 781-784.
[377] Jordanian Constitution of 1928, Art. 42, and Jordanian Constitution of 1947, Art. 55, and see Salem Al-Kiswani, *Principles of Constitutional Law with an Analytical Study of the Jordanian Constitutional System* (Self-published, Amman 1983) 184 and Adel Al-Hyari, *Jordan's Constitutional Law and Constitutional System: A Comparative* Study (Ghanem Abda Press, 1972) 567.

to interfere with the affairs of the judiciary. As a result, there was a need for separation of power to establish a democratic state.[378]

During his short reign, King Talal bin Abdullah was responsible for forming the third constitution of Jordan. The third constitution contains several democratic principles, the most important of which is the principle of separation of powers.[379] Chapter Three of the Jordanian Constitution of 1952 established the separation of powers in Art. 25-27. First, Art. 25 states that Legislative power is vested in the National Assembly and the King, and the National Assembly is composed of both Senate and Parliament.[380] Second, Art. 26 states that the executive authority is vested in the King and he shall exercise his power via his ministers in accordance with the provisions of the Constitution.[381] Third, Art. 27 states that the judicial power is assumed by the courts of all types and degrees, and all rulings are issued in accordance with the law in the name of the King.[382]

Following the separation of powers principle, the judiciary has the power only to apply the laws enacted by the Legislature on the matter of the disputes, as the Constitution states in Art. 103 that the Civil Courts shall exercise their jurisdiction in civil and misdemeanor criminal disputes[383] in accordance with the provisions of the laws in force in the Kingdom.[384] However, if there is ambiguity in any provisions of law that is enacted by the Legislature, Art. 123 gives the Special Bureau power to interpret.[385] In this way, judges are prohibited from interpretation of the law, as it is not within their power.

Furthermore, in order to enhance the stability of the legal system, and since the Constitution is the highest legal rule, the Jordanian legislator added the Constitutional Court in 2011 by amending the Constitution.[386] Art. 58(1) of the Constitution states that a constitutional court of

[378] Fraihat (n 375) 784.
[379] ibid 785-786.
[380] The Constitution of the Hashemite Kingdom of Jordan of 1952.Art. 25.
[381] ibid. Art. 26.
[382] ibid.Art. 27.
[383] In Jordan, Civil Courts have jurisdiction over all civil and commercial disputes and misdemeanour criminal offenses, which follow criminal procedure law. Felony criminal offenses are under the jurisdiction of the criminal court.
[384] The Constitution of 1952. Art. 103.
[385] ibid Art. 123.
[386] Ziyad Adwan and Laith Nasrawin, 'The Role of the Constitutional Court in Scrutinizing the Constitutionality of Law in Jordan' (2018) 45(4) Dirasat: Shari'a and Law Sciences, University of Jordan 215, 215.

law is established in the capital, and it should be an independent authority.[387] The duty of the Constitutional Court is to oversee the constitutionality of laws and regulations in force.[388] The Constitutional Court has the right to interpret the provisions of the Constitution if requested to do so by a decision of the Council of Ministers, or by a decision taken by one of the bodies of the National Assembly.[389] Such a design is intended to strengthen the principle of separation of powers by giving only the right to the Constitutional Court to interpret the provisions of the Constitution and oversee the constitutionality of laws. However, the establishment of this court can also deprive the courts of research and investigation on the issue of the constitutionality of laws, as the role of the judge within the Jordanian civil justice system is just to apply the law to the dispute before him.[390]

The emphasis on the separation of governmental powers in the civil law tradition demands that law could only be made by elected officials and their delegates.[391] To apply the strict separation of power, the first source of law is the legislative body that is entitled to make law, and all statutes should be enacted by the legislature only, as they are elected by the nation and are accountable to the electorate. Hence, a judge in a civil law jurisdiction must turn to these sources of law in order to solve cases before him as a judge, and is obliged to find some form of law to apply whether a statute, a regulation, or applicable custom. He cannot turn to books and articles by legal scholars or to prior judicial decision for the law.[392]

As Sanders explains, for the civil law judge, consideration of the case begins with the code article.[393] Starting with the code text implies that the judge recognises the legislation as the true source of the law. The civil law method has been defined as "one in which the judge yields to the text."[394] This view is also supported by Hazard as he states, “The central task in a civil law adjudication is for the judge to identify the legal and factual issues involved and to decide them correctly.”[395] Furthermore, Merryman indicates that the civil law system is based on the idea

[387] The Constitution of 1952. Art. 58(1).
[388] ibid Art. 59(1).
[389] ibid Art. 59(2).
[390] Adwan and Nasrawin (n 386) 221.
[391] John Henry Merryman, *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn, Stanford University Press 1984) 36.
[392] ibid 23-24.
[393] Joe W Sanders, 'Judge: The Extent and Limit of His Role in a Civil Law Jurisdiction ' (1975-1976) 50 Tul L Rev 511, 512.
[394] ibid 512.
[395] Geoffrey C Hazard Jr, 'Discovery and the Role of the Judge in Civil Law Jurisdictions' (1998) 73 Notre Dame L Rev 1017,1021.

of firm separation of power; that the legislator makes the law and the judge applies it. Therefore, a judge's function is merely to find the relevant law provision, apply it to the facts of the case and present the solution. Thus, judges should not interpret incomplete, conflicting or unclear legislation based on the separation of power principle. The role of a judge is as an operator of a machine designed and built by the legislators.[396] In addition, in rare cases judges are expected to follow carefully drawn directions about the limits of interpretation.[397] Therefore, the role of the judge in the civil law tradition is limited. As Cummins states, "They are powerless to interfere with either the lawmaking process or the laws (statutes) it produces and have only such independence as the legislature chooses to give them."[398]

Following such an argument, Jordanian judges have a significant role to play in applying the law enacted by the legislature and have limited power to interpret the law. The next section will examine the general principles judges follow when applying the law.

5.3.1.2 General principles for the application of Jordanian civil law

Whilst the Constitution set the theoretical foundation for the role of the judiciary, the civil code defines the practical approach of how judges use and apply the law in their work. All rules are provided by the Jordanian Civil Code (JCC) which contains the general principles for civil law and the general approach to private law. Accordingly, in the absence of text in other laws judges should refer back to the JCC.[399] Hence, Art. 2 of the JCC No. 43 of 1976 set the guiding principles for the application of law and limitations of judicial discretion as follows: the provisions of this law shall apply to all cases as is, and there shall be no justification for *Ijtihad* (independent reasoning) where the provisions exist. If there is no provision applicable to the case, the judge shall decide the case according to the *Fiqh* (Islamic jurisprudence) that is most compatible with the provisions of the law. In the absence of such *Fiqh*, the judge shall decide the case according to *Shari'a* (Islamic Law), custom, and lastly according to the rules of justice.[400]

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[396] Merryman (n 391) 32, 36.
[397] ibid 36.
[398] Richard J. Cummins, 'The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France' (1986) 35(3) The International and Comparative Law Quarterly 594, 599.
[399] Hazem Awad, *Principles of Commercial Law* (2nd edn, Jaffa Scientific House for Publishing and Distribution 2006) 13. See Abbas Al-Sarraf & George Hazboun, *Introduction to the Science of law* (2nd edn, Dar Al Thaqafa for Publishing & Distributing 1991) 28.
[400] Jordanian Civil Law No. (43) of 1976. Art. 2.

Following these principles, the judge is not permitted to exercise discretion, interpretation or judgement in the presence of explicit and clear legal text.[401] In other words, the judge should follow the wording of the text as-is in the exercise of his duty to decide the case. It should be noted that the law does not allow the judge to decide the case on the basis of precedents, as judicial precedents have no official authority in Jordanian courts.[402]

5.3.1.3 Distinction between duty and discretion in the Jordanian legal system

The Jordanian lawmakers vested judges with authority to carry out duties and exercise limited discretion to decide disputes, issue judgments and manage the litigation procedures. The wording of the law makes a clear distinction between duties and discretion, as the judge must perform duties, while discretion gives the judge freedom to choose whether or not to carry out a provision.[403] This section will highlight the distinction between judicial duties and judicial discretion in the language of the texts.

The lawmakers use several phrases to indicate duties the judge must fulfill, as these phrases share the same legal meaning. For example, *yejb* (يجب) means shall, as in the judge has to do so. *Ala al-mahkamah* (على المحكمة) is the duty on the court to do it. *Al-maham* (المهام) is defined as the responsibility which one has to do, in the actions one is responsible for;[404] *wajibat* (واجبات) are duties one has to do, which are not optional; *kama alaiyah* (كما عليه) means a task judges should do.[405] For example, Art. 160 of the CPL states that the ruling shall (يجب) indicate the court that issued it, the date and place of its issuance, and the names of the judges who participated in its issuance.[406] The judge must comply with these provisions otherwise the ruling is not valid. Another example, as stated in Art. 158(2) of the CPL: After the conclusion of the trial, the court must (على المحكمة) pronounce the verdict publicly in the same session, otherwise in another session appointed for this purpose within thirty days at most. The lawmakers imposed this duty upon the court to ensure that this provision would be satisfied.[407]

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[401] Ahmed Yassin Al-Qaralh, *Juristic Rules and their Jurisprudence and Legal Applications* (Academic for publishing distributing 2014) 327.
[402] Abdelnaser Hayajneh, 'Theoretical Framework for Judicial Discretion within Qatari and Jordanian Civil Laws: Indications and Implications' (2015) 12(2) British Journal of Humanities and Social Sciences 70,73-74.
[403] Mohammad Naser Al-Rawashdeh, 'Civil Case Management in The Jordanian Judicial System: A Comparative Study with the American and English Systems' (PhD thesis Amman Arab University 2007) 221.
[404] Almaany Dictionary, <www.almaany.com>
[405] Mahmoud M. Alkelani, *Civil Lawsuit Management and Judicial Applications* (Dar Al Thaqafa for Publishing & Distributing 2012) 118.
[406] CPL Art.160.
[407] CPL Art. 158(2).

Lastly, as stated in Art. 43(b) of the Labor Law No. 8 of 1996, The Tripartite Commission undertakes the tasks (المهام) assigned to it in this law,[408] which means these tasks or duties must be fulfilled.

Generally speaking, there are two kinds of judicial discretion. The first kind is the discretionary power the judge uses to evaluate the evidence and the legal standing of the parties to the conflict in order to build his legal conviction, and then issue a court ruling in the case.[409] The Jordanian Court of Cassation explained the meaning in its ruling when it stated, "Discretionary power to weigh evidence and weighting evidence over another, and no oversight of the Court of Cassation over it as long as its conclusion is valid, and acceptable extract, and firm legal evidence, and it has a basis in the case according to Articles 33 and 34 of the Evidence Act."[410] This kind of judicial discretionary power is substantial discretion, as the court uses this type of discretion to help the court to issue the judgment. An example in the Civil Code is Art. 604 which gives the court the discretionary power to order the dissolution of a company, upon the request of one of the partners, for the failure of a partner to fulfill his pledge.[411] However, substantial discretion is outside the scope of this study.
The second type of judicial discretion, which will be the focus of this study, is procedural discretion, which is based on the judicial discretionary power to manage civil cases, such as the power to encourage parties to use mediation instead of litigation as provided by the CPL, Mediation Law and Magistrates Courts Law. The discussion of procedural discretion will be explored in a section below.

It is important to mention that both substantial and procedural discretionary powers share the same legal wording, as the Jordanian lawmakers refer to the following phrases to indicate judicial discretion: *yejuz* (يجوز), *liqadhi* (لقاضي), *salahiat* (صلاحياته) and *falahu* (فله). In the legal sense, these words give the judge discretion wherever they are mentioned in the law.[412] In other words, these are actions that are optional. The judge has the choice or freedom to act.[413] For

[408] Labor Law (as amended). No. (8) of 1996. Art. 43(b).
[409] Hussein Ragab Mohammed Mukhlif, 'The Discretionary Power of the Judge in the Civil Procedure Code and Evidence Act' (2013) 26 (6) Journal of Techniques 86, 89.
[410] The Jordanian Court of Cassation, Decision No. 6915/2018. Issued in 2018. See also, Jordanian Civil Law No. (43) of 1976. Art. 246(2).
[411] Jordanian Civil Law No. (43) of 1976. Art. 604.
[412] Suhaib Hroot, 'The Judge's Power to Assess the Means of Proof in Jordanian Law' (2019) 46(1) Dirasat: Shari'a and Law Sciences, University of Jordan 139, 140-141.
[413] Harith Suleiman Faruqi, *Faruqi's Law Dictionary English – Arabic* (5th edn, Librairie du Liban Publishers 2008) 221.

example, Art. 3(a) of the Mediation Law states: After meeting with the disputants or their legal attorney and upon their request or after seeking their consent, the Civil Case Management Judge or the Magistrate Judge has the discretion (لقاضي) to refer the dispute to the judge-mediator or to a private mediator in order to reach an amicable settlement to the dispute.[414] The next section will explore other duties and discretion in the provisions of the CPL, Mediation Law and Magistrates Courts Law which limits the power of judges to refer cases to mediation.

5.3.2 The power of the judiciary to promote mediation in Jordan

The Mediation Law, CPL and Magistrates Courts Law contain references to duty, but none provide a statutory duty for judges to refer cases to mediation. For example, Art. 6 of the Mediation Law states that the Mediator shall (يجب) schedule the sessions and report the time and venue to the disputants or their attorneys.[415] As indicated, a mediator must comply with these steps before a mediation session is conducted. They are not optional. As stated in Art. 59(bis)(2)(6) of the CPL, the following tasks (المهام) are the responsibility of the CCMJ: he shall (يجب) organize a record of his actions, including the agreed and disputed facts between the parties, and he shall (يجب) refer the case to the trial judge within thirty days from the date of his first session.[416] By law, these are duties the CCMJ must comply with. Another example is Art. 18 of the Magistrates Courts Law which states the time limit shall (يجب) be between the day on which the parties are notified of the case document or the notification of the witnesses, and the day they appear in court must be at least twenty-four hours.[417] Taken together, these provisions impose duties on the referral judges that must be fulfilled but there is no duty that requires judges to offer to refer cases to mediation. Further, as the empirical study demonstrated, there is also no duty to refer particular types of cases such as low value claims or cases with factual issues, as the lawmakers did not set criteria for referral to mediation. Instead, the lawmakers left it to the judge's discretion to decide when and which cases to refer to mediation. Judicial discretion in mediation in the context of the Mediation Law, CPL and Magistrates Courts Law will be explored in the next section.

5.3.2.1 Judicial discretion to refer cases to mediation in the Mediation Law, Civil Procedure Law and Magistrates Courts Law

[414] The Mediation Law. Art 3(a).
[415] ibid Art. 6.
[416] CPL. Art. 59(bis) (2)(6).
[417] The Magistrates Courts Law No. (23) of 2017. Art. 18.

Referral to mediation is codified in the Mediation Law, the CPL and the Magistrates Courts Law.[418] The Provisional Civil Procedure Law and the Provisional Mediation Law gave judges the discretionary power to refer cases to court-based mediation without the consent of the parties, but that power was rejected by the House of Parliament and the language was omitted in the final draft of the laws. Without this power, judicial discretion is limited to referral to mediation with the consent of the parties.

5.3.2.2 Discretionary power to refer cases to mediation "On his own initiative"

In the Provisional Civil Procedure Law and Provisional Mediation Law, the Council of Ministers gave the referral judge the discretion to refer cases to mediation based on his own initiative without the parties' consent. As stated in Art. 59(bis)(2)(7)(a) of the Provisional Civil Procedure Law, (لقاضي): The Civil Case Management Judge has the discretion *on his own initiative*, or at the request of the parties to the dispute to refer the dispute to mediation, if he finds that the nature of the dispute is suitable for mediation.[419] As mentioned earlier, when the phrase *liqadhi* (لقاضي) appears in the text of the law it indicates that the following provision of the law is discretionary. Thus, the CCMJ had the discretion to take the initiative to invite and refer parties to mediation based on his own judgment of the suitability of the case. This provision was intended to make the referral judge the leader of this reform effort by giving the CCMJ the authority to initiate the mediation process. Crucially, the phrase "after seeking the consent of the parties" is missing from the provision, which indicates that the CCMJ had the power to refer cases to mediation without consent of the parties. Moreover, reference to "on his own initiative" can be observed in the Provisional Mediation Law. For instance, Art. 3(a) of the Provisional Mediation Law states that (لقاضي): The Civil Case Management Judge has the discretion to refer the dispute *on his own initiative* to the judge-mediator or one of the private mediators, after meeting with the legal representatives of the litigants, if the nature of the dispute is suitable for mediation. The Civil Case Management Judge should (كما عليه) refer the dispute to mediation at the request of the parties to the dispute in order to settle the dispute amicably.[420] Again, the CCMJ had the discretion to refer parties based on his own judgment, but a duty to refer parties to mediation upon request. Furthermore, Art. 3(b) gave this discretion to the Magistrates Judge as Art. 3(b) states that (لقاضي): The Magistrates Judge, after meeting

[418] Judicial discretion to refer cases to meditation is provided in Art. 3(a) of The Mediation Law. Art. 59(bis) (3) of the CPL, and Art. 7(a) of The Magistrates Courts Law No. (23) of 2017.
[419] The Provisional Civil Procedure Law No. (26) of 2002. Art. 59 (bis)(2)(7)(a).
[420] The Provisional Mediation Law No. (37) of 2003. Art. 3(a).

the parties to the dispute, has the discretion to refer the dispute *on his own initiative* to the judge-mediator, if the nature of the dispute is suitable for mediation. The Magistrate Judge should (كما عليه) refer the dispute to the judge-mediator upon the request of the parties to settle it amicably.[421]

Art. 3(a) and (b) of the Provisional Mediation Law gave the discretion (لقاضي) to the CCMJ and the Magistrates Judge to refer suitable disputes to mediation based on their own judgement. Most importantly, the phrase "after seeking consent of the parties" is absent from these provisions; therefore, the parties' consent was not required. However, both judges had the duty (كما عليه) to refer disputes to mediation based on the request of the parties.[422] All of these instances indicate that discretionary power to refer cases to mediation "on his own initiative" without the consent of the parties was an essential feature of the provisional laws and referral to mediation after receiving the parties' consent was expressly excluded from the provisional laws.

The Policy Memorandum accompanying the Provisional Civil Procedure Law anticipated that giving the discretion to the CCMJ to refer cases to mediation without the consent of the parties would contribute to easing the pressure on the trial judge, shortening the litigation process and speeding the litigation time for other cases.[423] In practical terms, this provision was meaningless, as there were no accredited private mediators or judge-mediators to refer cases to until 2006. However, it was significant as this was the first time that mediation was mentioned as an alternative to litigation in the Jordanian civil justice system. Furthermore, this provision allowed the CCMJ the discretion to refer parties to mediation without their consent. While the CPL has been amended several times since it was enacted, the legal wording is still the same regarding the referral to mediation at the judge's *discretion*. Hence, the CPL does not require that judges use this authority, and the lack of a statutory duty may contribute to the low number of cases referred to mediation in Jordan.

Similarly, the Policy Memorandum accompanying the Provisional Mediation Law acknowledged that practical experience had proved that the current provisions were not enough

[421] ibid Art. 3(b).
[422] ibid Art. 3(a) and (b).
[423] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment to the Civil Procedure Law (1988)* to Ashraf Abu Hazeem (31 December 2019).

to ease the burden on the court.[424] For this reason, the Council of Ministers intentionally drafted the law to give referral judges the discretionary power to refer cases to mediation "on his own initiative" without the consent of the parties, as they understood that mediation would initially be rejected because it was a new mechanism within the civil justice system. It is worth noting that the main strength of the provisional law is the discretionary power given to the referral judges to refer suitable cases to mediation without parties' consent, which would have the potential for a large number of lawyers and litigants to engage with the mediation process. However, the weakness of the provisional law is that this power is discretionary rather than a duty. As previously mentioned, this provisional law was not implemented due to the lack of infrastructure, and its outcomes were not observed. Therefore, it is not possible to compare the uptake of mediation *without* the consent of the parties to the uptake of mediation *with* the consent of the parties. However, had this law been implemented there would likely have been a higher number of cases referred to mediation.

5.3.2.3 Rejection of the discretionary power to refer cases without consent of the parties as a breach of the constitutional right of access to justice

In the Council of Minister's effort to drive a significant number of citizens from litigation proceedings into mediation, it granted discretionary power to referral judges to choose cases that were suitable for mediation over the objection of the parties in the provisional laws. However, the House of Parliament rejected the power of the CCMJ to refer cases to mediation based on their own initiative. In the discussion of the Provisional Civil Procedure Law, the House of Parliament argued against referral to mediation based on the judge's own initiative as it would be a breach of Art. 101 of the Constitution, which guarantees access to justice to all people. According to this argument, the main element of access to justice is the ability of citizens to enforce their rights before a judge; therefore, in this view, any obstacle to a hearing before a judge in open court, including mediation, prevents access to justice. They further argued that because mediation is an alternative to litigation, referral to mediation should require the consent of the parties as it foregoes an open hearing. In other words, the lawmakers argued that giving judges the power to refer parties to mediation without their consent is against the

[424] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment to the Provisional Mediation Law of 2003* to the author (17 July 2017).

right of access to the court and a denial of justice as it blocks parties the right to go directly to trial.[425]

Following this debate, the House of Parliament revoked section (2)(7)(a) of Art. 59(bis) of the Provisional Civil Procedure Law that allowed the CCMJ to refer cases to mediation on his own initiative without the consent of the parties. The lawmakers argued that the same text would later be included in the amended Mediation Law of 2006; therefore, to avoid the repetition of legislation, the House of Parliament agreed to exclude this text from the amended CPL.[426] In the final provision, the CCMJ had no duty to encourage or offer the use of mediation, and no discretion to refer cases to mediation without the parties' consent. The final text of Art. 59(bis)(3) of the CPL reads (المهام): The Civil Case Management Judge has a duty to invite the parties to the conflict or their lawyers to attend before him and offer to settle the dispute between them amicably, and he has the discretion (فله) to refer the case to mediation with the consent of the parties to settle the dispute amicably.[427] Therefore, the CCMJ's power is only to refer cases to mediation with the approval of the parties. This severely limits the power of the CCMJ to require parties with suitable cases to explore the feasibility of resolving their dispute via mediation.

As with the Provisional Civil Procedure Law, the Provisional Mediation Law No. 37 of 2003 was debated by the House of Parliament once it reconvened.[428] The House of Parliament amended the provisional law by eliminating the provision that permitted the CCMJ and Magistrates Judge to refer suitable cases to mediation based on their own initiative, and has replaced it with a requirement of the parties' consent as a condition of referring cases to mediation. With this amendment, compulsory mediation, which was viewed as a key element of the Mediation Law, was removed to require mediation by consent. The House of Parliament further rejected all attempts to make mediation mandatory. This has led to the low uptake of referred cases to mediation, and will be further explored below under the mandatory mediation section.

[425] The House of Parliament discussion of the Civil Procedure Law No. (20) of 2005 to Ashraf Abu Hazeem (27 January 2020) 51-52.
[426] ibid 51-52.
[427] CPL. Art. 59(bis) (3).
[428] The provisional law was introduced by the Council of Ministers to the House of Parliament to make it a permanent law, which became the Mediation Law No. 12 of 2006 after the Parliament passed it with some amendments. It should be noted that according to Art. 94(i) of the Constitution the Council of Ministers has the power to issue provisional laws in the event that Parliament is not in session, provided that these provisional laws are presented to Parliament when it is in session to approve or amend such laws.

Significantly, this amendment removed the well-intentioned referral judge of his power to refer cases to mediation without parties' consent. Now, referred mediation requires the consent of both parties which could be another hurdle to the uptake of mediation. The House of Parliament defended this change based on Art. 101 and 102 of the Constitution, which granted access to the court to all citizens and the Jordanian court has the jurisdiction over all people. Thus, they argued referral to mediation without the consent of the parties would be unconstitutional and a breach of Art. 101 and 102 as it would prevent individuals from having their disputes heard by the court.[429] However, a duty to refer parties to mediation does not foreclose access to justice.[430] Furthermore, not having the power to refer suitable cases to mediation based on his own judgement limits the usefulness of the referral judge to promote mediation as an alternative to litigation.

Crucially, the wording of the amended text of Art. 3(a) of the Mediation Law indicates that the starting point of referral to mediation is based on the parties' request or approval, as parties' consent takes priority over the judge's discretion to invite parties to mediation. It states: After meeting with the disputants or their legal attorney and upon their request or after seeking their consent, the Civil Case Management Judge or the Magistrate Judge has the discretion (لقاضي) to refer the dispute to the Judge-mediator or to a private mediator in order to reach an amicable settlement to the dispute.[431] In other words, judicial discretion to invite or encourage parties to use mediation comes second. There is no provision in the Mediation Law that gives judges the power to compel parties to go to mediation based on their own judgment. This conclusion was agreed to by all the judges that were interviewed. As one stated, "Mediation is voluntary and not compulsory. If the parties refuse to mediate, I have no authority to force them to refer the dispute to mediation."[432] A judge-mediator explained, "The lack of duty on the part of the referral judges led to the failure to offer and encourage parties to use court-based mediation."[433] Furthermore, "the process of encouraging mediation by the referral judge has become a formality (not solemn)."[434] Significantly, the role of the referral judge as enacted by the

[429] The House of Parliament discussion of the Mediation Law of 2006 to Ashraf Abu Hazeem (27 January 2020). 8-12.
[430] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters. Art 5 (2). See also *Cable & Wireless Plc v IBM United Kingdom Ltd, [2002] EWHC 2059 (Comm Ct).*
[431] The Mediation Law. Art 3(a).
[432] Referral Judge 3.
[433] Judge-Mediator 5.
[434] Referral Judge 1.

lawmakers completely changed the role of the referral judge from an active to passive gatekeeper, as referral to mediation is now based on the parties' request, which contributes to weakening the role of the referral judge.

5.3.2.4 Duty and discretion in the same provision creates a hierarchy that undermines the referral to mediation

The House of Parliament created a hierarchy in the amended provisions by making reconciliation a duty and referral to mediation discretionary. Combining duty and discretion in the same provision emphasises the duty to attempt to reconcile the disputants and undermines the discretion to refer parties to mediation, as the duty to attempt to reconcile the disputants will always prevail over the discretion to refer parties to mediation. This hierarchy corresponds with Art. 59(bis)(3) of the CPL, which states (المهام): The Civil Case Management Judge has a duty to invite the parties to the conflict or their lawyers to attend before him and offer to settle the dispute between them amicably, and he has the discretion (فله) to refer the case to mediation with the consent of the parties to settle the dispute amicably.[435] This hierarchy is also observed in Art. 7(a) of The Magistrates Courts Law as it states: The Magistrates Judge has a duty (عليه) to make an effort to reconcile the litigants and the discretion (فله) to refer the case to mediation after seeking the parties' consent.[436] However, this may not encourage the uptake of mediation as the Ministry of Justice first anticipated. Both provisions serve to dilute the impact of the mediation law, as a referral judge may only invite or offer to refer cases to mediation if the reconciliation attempt is not successful, or if the parties request it. The effect is that reconciliation becomes an obstacle to the referral to mediation. This view is supported by the empirical study, as one of the judges interviewed stated: "As a Magistrate Judge and under the authority of Magistrates Courts Law it is my duty after meeting the parties to the dispute in the first session that I offer reconciliation, however, it is not my duty to invite parties to use mediation."[437]

5.3.2.5 Hesitation to use judicial discretion further undermines referral to mediation

This strict adherence to the law was also evident in the judge interviews, where judges were keen to avoid using their discretion by applying the text of the law as it is. For example, the

[435] CPL. Art. 59(bis) (3).
[436] The Magistrates Courts Law No. (23) of 2017. Art. 7(a).
[437] Referral Judge 8.

legal formula followed by the referral judge to refer cases to mediation is as follows: At the request of the parties to the dispute or after the parties to the dispute agree to refer the dispute to mediation, and pursuant to the provisions of Art. 3(a) of the Mediation Law one decides to refer the dispute to mediation.[438] All referral judges use this model when they issue the decision to refer cases to mediation, as they adhere to the exact language of Art. 3(a) of the Mediation Law and refer to the text of the article to complete the referral process. Furthermore, on February 25, 2020 the Brainstorming Session on the rule of law in Jordan was organized by the Amman Center for Human Rights Studies and attended by legal experts, lawyers, judges and lawmakers. The attendees highlighted and placed emphasis on the need for reviving the discretionary power of judges who often lack judicial control over litigation and management of cases.[439] The attendees pointed out that judges have limited discretion within the law, and most judges do not use the discretion that is granted to them by the law.

As the empirical data shows, judges are hesitant to use their discretionary power to offer or encourage parties to use court-based mediation, unless disputants specifically ask to use this service. This has likely resulted in a limited number of disputants using referred mediation.

Another challenge to the referral to mediation agreed by practitioners is a lack of knowledge of the benefits of mediation among some referral judges, as some referral judges do not have sufficient awareness of the concept of mediation. In addition, some judges do not have the skill to convince parties to refer their disputes to mediation, and there is a lack of training on referring cases to mediation.[440] The researcher is of the view that referral to mediation based on judicial discretion rather than a duty coupled with the lack of conviction of some judges significantly weakens the Mediation Law and hinders the growth of mediation in Jordan. To mitigate these obstacles, the Council of Ministers has repeatedly advocated for the implementation of mandatory mediation, as will be explored in the last section.

[438] The legal formula for the mediation sample given to the author of this study from some of the judges interviewed by the author in Amman. 2018.
[439] Amman Center for Human Rights Studies, A Brainstorming Session on the Rule of Law in Jordan, February 25 of 2020. <https://www.achrs.org/جلسة-عصف-ذهني-حول-سيادة-القانون-في-الأر/> accessed 16 August 2020.
[440] Amman Mediation Week, Recommendations, Status quo, and Suggested Solutions (18-19 March 2017) to author.

5.4 The role of the judiciary in promoting mediation in England

5.4.1 The role of the judiciary in England

In England, the judiciary has a history of curtailing abuse of power by the heads of state,[441] as well as creating judge-made law.[442] The primary function of the judiciary in the common law tradition is to apply the law enacted by the legislature, as judges are obliged to interpret the law in accordance with Parliament's intention.[443] However, unlike in the civil law tradition, common law judges are not bound by a strict application of the law.[444] In the common law tradition, there is a secondary judicial function of developing the law through the application of precedent and interpretation of statute, which Bingham describes as "judge as a lawmaker."[445] In other words, the relationship between the judiciary and the legislature is a cooperative partnership where the judiciary makes the law within limits.[446] As Merryman indicates, because judges create and design the law, judges exercise broad power even in the presence of a valid statute, and judicial decisions are considered a source of law in England.[447] At this point, it is important to mention that there is no mediation law in England, and ADR within the civil justice system, mainly mediation, has been developed by judges through a substantial body of case law that has been established since the enactment of the CPR of 1998.[448] That is to say, the English judge has more power than judges in the civil law tradition, in particular in Jordan. This power can be seen in the application and interpretation of the law. For this study, the focus will be on the use of mediation within the civil justice system in accordance with the CPR, as the later sections will explore judicial encouragement of ADR, mainly mediation, the power of the court to make an ADR order on its own initiative, and the power to impose costs sanctions on parties that unreasonably refuse to take part in ADR.

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[441] Merryman (n 391) 16.
[442] ibid 34.
[443] Richard Benwell and Oonagh Gay, "The Separation of Powers", Parliament and Constitution Centre SN/PC/06053 (15 Aug. 2011) para 2.2 < https://www.agora-parl.org/sites/default/files/agora-documents/sn06053.pdf> accessed 12 June 2021.
[444] Merryman (n 391) 36.
[445] Tom Bingham, T*he Business of Judging: Selected Essays and Speeches* (Oxford University Press 2011) 25-34.
[446] Benwell and Gay (n 443) para 2.2.
[447] Merryman (n 391) 34-35
[448] For example, in the case of *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [16] the court established criteria for assessing unreasonable refusal to mediate; In *Thakkar v Patel* [2017] EWCA (Civ) 117, [27] the court assessed cases suitable for mediation.

5.4.2 The role of the judiciary to promote mediation in England

In contrast to Jordan, the English court has a duty to encourage the use of mediation. Referral to ADR, mainly mediation, is codified in the CPR 1.4(2)(e), as one of the court's duties is to manage cases with the aim of furthering the overriding objective of the CPR. This section will explore the duty of case management, in particular the duty to encourage the use of ADR before court proceedings.

5.4.2.1 Case management: The lynchpin of the civil justice system reforms

Case management is the cornerstone of Lord Woolf's reforms.[449] For Lord Woolf, judicial case management was essential to furthering the overriding objective of dealing with cases justly,[450] and to reforming the litigation system that, in his view, was too fragmented, too adversarial, and too often ignored the rules of the court.[451] Judicial case management was necessary to move the control of litigation from the parties and their legal representatives to the court in order to overcome the drawbacks of the litigation system.[452] As a result of Lord Woolf's recommendations, the CPR established the court's duty of active management to further the overriding objective.[453] As Zuckerman noted, "Before the CPR, the court was essentially reactive, in that it merely responded to parties' applications in the course of litigation. Now the court is proactive. It must take the initiative and direct the intensity and pace of the litigation process."[454] Zuckerman's views are shared by Andrews, who states that the court's case management powers as provided by CPR 1.4(2) determine how litigation is to carry on guided by the overriding objective of the CPR.[455]

The implementation of case management has proven to be effective in reducing delays and ensuring the predictability and certainty of the litigation process, as the court is in the driving seat.[456] Hence, there was a 141 percent increase in private mediation after the CPR came into

[449] Woolf (n 311) ch 1, para 4.
[450] ibid ch 1, para 4.
[451] ibid s 1, para 2.
[452] ibid ch 1, para 4.
[453] ibid ch 1, para 4.
[454] Zuckerman (n 297) para 1.82.
[455] Neil Andrews, *English Civil Procedure Fundamentals of the New Civil Justice System* (Oxford University Press 2003) 337-338.
[456] John Peysner and Mary Seneviratne, 'The Management of Civil Cases: A Snapshot' (2006) 25(Jul) Civil Justice Quarterly 312, 325. See also, Michael Legg and Andrew Higgins, 'Responding to Cost and Delay Through Overriding Objectives – Successful Innovation?' in Colin B. Picker and Guy Seidman (eds), *The Dynamism of Civil Procedure - Global Trends and Developments* (Springer 2016) 181. Legg and Higgins

force.[457] In *Melvin Godwin v Swindon Borough Council*, the Court of Appeal highlighted the significance of case management to further the overriding objective as it stated, "The new procedural code of the Civil Procedure Rules is positively packed with instances where the court has a wide discretion to manage cases to achieve substantial justice in accordance with the overriding objective."[458] To control the litigation process, the CPR issued 12 guidelines to manage cases including encouraging the use of ADR, which will be discussed in the next section.

5.4.2.2 The duty of the court to manage cases according to the Civil Procedure Rules of 1998

The CPR of 1998 provides a statutory duty for judges to actively manage cases to control the progress of litigation and to deal justly with cases. The title of provision 1.4 of the CPR, Court's duty to manage cases, contains the first reference to the new requirement. Primarily, the CPR assigned judges with responsibility to carry out duties to manage the litigation procedures as rule 1.4(1) of the CPR states: "The court must further the overriding objective by actively managing cases."[459] The word 'must' makes it clear that the judge has to perform the duty as a means of furthering the overriding objective of the CPR. This is a statutory duty imposed on the judge, and compliance with this duty is not optional. CPR 1.4(2) outlines twelve guidelines of active case management. For example, these guidelines include encouraging cooperation between the parties, setting a timetable, controlling the progress of the case, and deciding which issues need a full trial and which can be summarily disposed.[460] This study will focus on the duty of the court to manage cases as set out in CPR 1.4(2)(e): "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure." [461] The wording of the provision places responsibility upon the court which the judge must fulfill to further the overriding objective by encouraging parties to use ADR in suitable cases. It is through the application of case management that the civil justice system reforms are realised. Thus, ADR is an important tool for achieving the overriding objective.

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demonstrated that the case management system has proved successful in furthering the overriding objective, in particular, in reducing the delay. But reducing the costs still required more work to be done.

[457] Emerging Findings: An Early Evaluation of the Civil Justice Reforms. Lord Chancellor's Department (2001). Para 4.12. <https://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/emerge/emerge.htm > accessed 19 March 2021.

[458] [2001] EWCA (Civ) 1478, [44].

[459] CPR 1.4 (1).

[460] ibid 1.4 (2).

[461] ibid 1.4 (2)(e).

5.4.2.3 The importance of ADR to actively manage cases and further the overriding objective

In the case of *Frank Cowl & Ors v Plymouth City Council*,[462] Lord Woolf highlighted the importance of ADR in saving time, expense, and stress.[463] He emphasized the court's new managerial powers in furthering the overriding objective when he stated, "[T]he courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts."[464]

Several publications emphasised the importance of the duty of the court to encourage the use of ADR as a way to further the overriding objective of the CPR. For instance, Lord Jackson's final report on the Review of Civil Litigation Costs of 2009 calls for settling disputes without proceedings, using ADR to settle disputes and decreasing the litigation cost.[465] Moreover, Jackson argued that ADR, specifically mediation, had a "vital" role to play in solving disputes and saving time and cost.[466] Jackson also advocated for more proactive case management by judges to ensure that parties adhere to timelines and keep costs proportionate.[467] Lord Justice Briggs in his final report, Civil Courts Structure Review, also highlighted the need to create an online court as a new method that would make the civil justice system easily accessible.[468] The online court is designed for the court's users to use ADR, mainly mediation, to solve their disputes.[469] The Civil Justice Council's final report on ADR emphasised the role of the judiciary in encouraging the use of ADR, as "Mediation is only one, albeit plainly the most important, of the ADR techniques which are available which could be further encouraged by the Court."[470] Lord Dyson also observed the growth and recognition of mediation within the English system.[471] Andrews viewed mediation as "a pillar of civil justice in modern English practice" and argued that mediation has a significant role in solving disputes.[472]

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[462] [2001] EWCA (Civ) 1935.
[463] ibid [1].
[464] ibid [2].
[465] Lord Jackson (n 317) s 6, Para 6.3. and ch 36, para 1.2.
[466] ibid s 6, Para 6.3. and ch 36, para 1.2.
[467] ibid s 6, para 6.8 and ch 39, para 8.1.
[468] Lord Justice Briggs (n 319) ch 1, para 1.28.
[469] Lord Justice Briggs (n 319) ch 12, para 11 and 22.
[470] Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018) s 8, Para 8.23(4).
[471] Lord Dyson, "Halsey 10 Years On–The Decision Revisited." In Lord Dyson *Justice: Continuity and Change*. (Oxford: Hart Publishing, 2018) 380.
[472] Neil H Andrews, 'Mediation: A Pillar of Civil Justice in Modern English Practice' (2007) 12 Zeitschrift fur Zivilprozess International 1, 3-5.

To summarize, the reform of the civil justice system that was proposed by Lord Woolf and implemented in the CPR changed the court's role from passive to proactive. The CPR places a duty on the court to manage cases to promote the overriding objective and achieve the ultimate goal of access to justice. The next section will explore the question: to what extent does the court have power to manage cases when exercising its duty under CPR 1.4?

5.4.3 The power of the court to manage cases in England

Unlike Jordan, the court in England has the power to control litigation. The previous section explained that the CPR 1.4 imposed a duty on the court to further the overriding objective through active case management. Similarly, the CPR vested the court with powers of case management. The CPR mentioned the powers of the court in several provisions. For example, CPR 1.2 states "The court must seek to give effect to the overriding objective when it— (a) exercises any power given to it by the Rules; or (b) interprets any rule."[473] This rule explains the general practice which applies in furthering the overriding objective (CPR 1.1). It explains that the court must promote the overriding objective whenever the court makes use of its power and clarifies the rules. The CPR does not grant any new power to the court in CPR 1.2, but it guides the court on how to apply the overriding objective when exercising its power. For the list of powers given to the court to manage cases see Part 3 of the CPR.

CPR 3.1(2) gives the court new powers to control litigation in order to carry out its duty of active case management, and to promote the overriding objective.[474] The court's powers of case management include the wide-ranging power in CPR 3.1(2)(m) to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."[475] As a result of this provision, the court has unrestricted power to take any steps it deems necessary to manage cases so as to further the overriding objective.

[473] CPR 1.2.
[474] CPR 3.1(2).
[475] ibid 3.1(2)(m).

Additionally, the CPR 3.3(1) vested the court with power to make an order on its own initiative, except where it conflicts with another rule.[476] This power is significant as it indicates that the court may give an order proactively without the explicit consent of parties to the dispute.

Furthermore, CPR 26.4(2A) grants power to the court on its own initiative to impose a stay on proceedings while parties attempt to solve their disputes using ADR if the court considers that such a stay would be appropriate.[477] For example, in the case of *Cable & Wireless Plc v IBM United Kingdom Ltd,* the court stressed that the order to stay or other order of the case management is entirely under the jurisdiction of the court.[478] In another ruling before the High Court of Justice, in the case of *Andrew v Barclays Bank Plc*, the judge explained very clearly that the court has the power to order a stay without the parties' consent.[479] Judge Waksman QC states, "The court has the power to impose a stay…where all parties request that stay or because the court of its own initiative considers that such a stay would be appropriate. So, the fact that one claimant is not happy does not in any way deprive the court of jurisdiction."[480]

The common denominator in these rules is that the CPR granted the court absolute power to manage cases to give effect to the overriding objective. It also indicates the court's power to stay proceedings on its own initiative. It begs the question: Does the court have the power to make an ADR order without the parties' consent? This question will be explored in the following sections.

5.4.3.1 The power of the court to order parties to attempt ADR before starting litigation

The following sections will describe how the court has used its powers of case management granted by the CPR to order parties to attempt ADR prior to starting court proceedings, and the ongoing debate about the power of the court to force unwilling parties to attempt ADR, mainly mediation, without their consent. The section will explore early judicial rulings that emphasized the power of the court to make an ADR order, discuss the impact of the *Halsey* decision on the court's reluctance to use its powers to compel parties to use ADR, and the current approach that fully utilises the judicial power vested by the CPR.

[476] ibid 3.3(1).
[477] ibid 26.4(2)(a).
[478] [2002] EWHC 2059 (Comm), at 8.
[479] [2012] C.T.L.C. 115[32].
[480] ibid [32].

5.4.3.2 Judicial rulings prior to Halsey

To understand the view of the judiciary on the power of the court to compel unwilling parties to use ADR, this section will explore the development of judicial rulings from 1999-2003, which covered the period before *Halsey*.

An early decision was made by the High Court Justice Chancery Division in the case of *Guinle v Kirreh*.[481] In this case, Mrs Justice Arden indicated that both parties had a weak financial position, and the costs would be very high for both parties if they proceeded to trial. Justice Arden therefore directed the parties to engage in mediation to further the overriding objective of the CPR 1.1 of dealing with cases justly and proportionately.[482] The claimant's counsel disagreed with this order, arguing that the court had no power to make such an order, but could only advise parties to use ADR to solve the dispute. Mrs Justice Arden responded, "In my judgment this is not so: all the order requires is that the parties should take such steps (if any) as they think fit following the appointment of the mediator."[483] In this case, the court relied on CPR 1.1 as justification for directing unwilling parties to attempt mediation.

In the case of *Cable & Wireless Plc v IBM United Kingdom Ltd*[484] involving a dispute resolution escalation clause, Justice Colman compelled the unwilling parties to attempt ADR. As Justice Colman stated:

> The making of such orders in appropriate cases is now commonplace, even where one party objects to such an order being made. Occasionally, the circumstances of a dispute may appear to the court so strongly to demand a reference to ADR that, even in the face of objections from both parties, such orders have been made and have led to settlements much to the surprise of the parties concerned.[485]

Justice Colman argued that the court has the power to compel unwilling parties to attempt ADR, even though there is a rejection from one or both parties. Crucially, Mr Justice Colman based his decision on the duty of the court to further the overriding objective (CPR 1.4), and did not rely on the court's power to manage cases. It is plausible that Mr Justice Colman

[481] [2000] CP Rep 62.
[482] ibid s (d).
[483] ibid s (d).
[484] [2002] EWHC 2059 (Comm).
[485] ibid [7].

considered the duty of the case management judge to further the overriding objective is sufficient to order unwilling parties to undertake mediation.

Lastly, in the case of *Shirayama Shokusan Co Ltd v Danovo Ltd*[486] before the High Court of Justice Chancery Division, the court addressed the question of compulsion to order unwilling parties to attempt to resolve their dispute by mediation.[487] Mr Justice Blackburne said, "There is no doubt that courts have assumed such a jurisdiction."[488] Moreover, he stated, "there is jurisdiction to order ADR, notwithstanding that one side opposes the making of such an order."[489] Mr Justice Blackburne relied on the duty of the judge to actively manage cases according to CPR 1.4(2) to compel unwilling parties to mediation, thus affirming the court's jurisdiction to do so.

The previous cases demonstrate that in the early years after the CPR came into force, the lower courts used various provisions of the CPR to compel unwilling parties to mediate, as long as there was no foreclosure of the court proceedings. However, shortly after the Court of Appeal's ruling in *Halsey,* the court became hesitant to use its power to compel parties to mediate, which will be taken up in the next section.

5.4.3.3 Halsey and rejection of the power to refer cases without consent of the parties as a breach of the right of access to court as provided by Article 6 of the European Convention on Human Rights

In *Halsey v. Milton Keynes Gen. NHS Trust,* the Court of Appeal addressed the question of whether the court has power to order parties to mediation without their consent.[490] The court responded by stating that forcing unwilling parties to submit their dispute to mediation would likely violate Art. 6 of the European Convention on Human Rights (ECHR) which protects citizens' access to a fair trial.[491] In addition, the court explained that forcing unwilling parties to mediate would be pointless, as no result would be achieved and it would add increasing costs.[492] Interestingly, rather than compel unwilling parties to mediate, Lord Justice Dyson

[486] [2003] EWHC 3306 (Ch).
[487] ibid [12].
[488] ibid [13].
[489] ibid [20].
[490] [2004] EWCA (Civ) 576 [9].
[491] ibid [9].
[492] ibid [10].

recommended using the "Ungley Order,"[493] the requirement that an unwilling party must justify their refusal to mediate at the end of the trial or face costs sanctions, as a means of encouragement. As Lord Justice Dyson explained, "A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR."[494] *Halsey* was a game changer as the Court of Appeal emphasised that mediation is voluntary, and the role of the court is only to encourage the use of mediation if the court considers it appropriate. Yet the court may sanction parties who unreasonably refuse to attempt mediation when considering costs.

Crucially, there is a contradiction in the court's view. On the one hand, the ruling states forcing unwilling parties to use mediation would breach their right of access to a fair trial under Art. 6 of ECHR. On the other hand, parties face costs sanctions if they unreasonably refuse to engage in ADR. If mediation or other forms of ADR are truly voluntary, parties should not be required to justify their refusal or face penalties. The question of whether mediation is voluntary if parties only participate under the threat of cost sanctions will be addressed in a later section.

5.4.3.4 Decisions since Halsey: The impact of Halsey on the power of the court to compel parties to mediate and to apply cost sanctions for refusing to mediate unreasonably

After the *Halsey* decision, the court's rulings were decisively against compelling parties to mediate, in contrast to the earlier decisions pre-*Halsey*. In fact, the *Halsey* decision impacted the momentum of the judiciary in terms of using its power to order mediation, as judges became hesitant to coerce parties to use mediation.[495] For example, in *Aird & Anr v Prime Meridian Limited*, the Court of Appeal argued that the court does not have the power to compel parties to engage in mediation by stating, "The court did not order the parties to mediate. The court would never, I think, sensibly make such an order, since the court cannot, in the real world,

[493] ibid [32]. In clinical negligence disputes, Master Ungley devised an ordered that "The parties shall by consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which, they rely for saying that the case was unsuitable."
[494] *Halsey* (n 490) [33].
[495] Dame Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray and Dev Vencappa, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series 1/07 May 2007) 19.

compel a party who does not want to participate in a mediation."[496] The court went on to say that they can order a stay of proceedings at the parties' request. Otherwise, encouragement is the most the court can do.[497] Moreover, the Court of Appeal in *PGF II SA v OMFS Company 1 Limited*[498] supported Lord Justice Dyson's views on *Halsey* as the court stated, "The court should not compel parties to mediate even were it within its power to do so. This would risk contravening Article 6 of the Human Rights Convention, and would conflict with…the voluntary nature of most ADR procedures."[499] The court emphasised the need to encourage the use of ADR in appropriate cases and "that encouragement may be robust."[500] Additionally, the court decided that failure to respond to a request for mediation is another factor that determines unreasonable conduct, and, as a result, costs sanctions would be imposed.[501] Similarly, Lord Justice Patten in *Gore v Naheed*,[502] rejected the idea of compulsion to ADR, as in his view parties have the right to submit their dispute to be decided by the court, but the court will impose costs sanctions upon parties that fail to engage in ADR unreasonably.[503] Consistent with the *Halsey* ruling, the Court of Appeal in the case of *Thakkar v Patel*[504] upheld a lower court's decision to impose costs sanctions upon the party that prolonged the process of mediation. In his ruling, Lord Justice Jackson sent a message that unreasonable refusal to mediate will be penalised when he stated, "If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."[505] Following the *Halsey* precedent, the court strongly encouraged, but did not order, parties to mediate, and permitted costs sanctions to be imposed if parties could not justify their refusal to mediate.

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[496] [2006] EWCA (Civ) 1866 [6].
[497] ibid [6]; Several judgments followed the principles set out in *Halsey*. For example, *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB), [21] (a) "A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights" and [26], in which the court followed the principles outlined in *Halsey* to test the reasonability of parties to engage in mediation.; *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2008] EWHC 424 (QB) [48] (a) "A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights". Also, the court states that unreasonable refusals to mediation "should take account of in the costs order in accordance with the principles considered in Halsey". *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2008] EWHC 424 (QB) [72]; similarly in *Daniels v Commissioner of Police of the Metropolis* [2005] EWCA (Civ)1312. The Court of Appeal followed the principles of *Halsey* to encourage the use of alternative dispute resolution [37] and punishing unreasonable conduct by depriving a party of costs [24] and [38].
[498] [2013] EWCA (Civ) 1288.
[499] ibid [22].
[500] ibid [22].
[501] ibid [40].
[502] [2017] EWCA (Civ) 369.
[503] ibid [49].
[504] [2017] EWCA (Civ) 117.
[505] ibid [31].

5.4.3.5 Critique of Halsey: Did the Court of Appeal go too far?

Several judges criticized the human rights argument made in the *Halsey* ruling. For example, Justice Lightman disagreed with Lord Justice Dyson about compulsory mediation breaching Art. 6 of the ECHR. Justice Lightman stated, "An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement…"[506] Lightman's view is supported by Sir Anthony Clarke who said, "What I think we can safely say though, without prejudicing any future case, is that there may well be grounds for suggesting that *Halsey* was wrong on the Article 6 point."[507] Further, Clarke concluded that the court has the power to direct parties to engage in mediation as this power exists in the combination of CPR 1.4 (2)(e), the duty to encourage parties to use ADR, and 3.1(2)(m), the power of the court to take any step to further the overriding objective.[508] From this perspective, compelling parties to mediate would not prevent citizens the right of access to justice, and would not breach Art. 6 of ECHR. Despite criticism of the ruling, Lord Dyson strongly adhered to his view on *Halsey* that judges should encourage parties to mediate but never compel them to do so, and costs sanctions are an appropriate method of encouragement.[509] However, he later admitted he was wrong about compulsory mediation breaching human rights by stating, "ordering parties to mediate in and of itself does not infringe their Art. 6 rights."[510] Furthermore, he explained that parties that have strong cases and would not wish to compromise have the right to have a day in court as the role of the court of law is not to force compromise upon litigants.[511]

Similarly, the Court of Appeal in *Rolf v DE Guerin* ruled that the judiciary has no power to force unwilling parties to mediate due to the people's right to have their day in the court; however, he held this argument is not sufficient for parties not to engage in mediation.[512] Lord

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[506] Gavin Lightman, 'Mediation: An Approximation to Justice' (2007) 73(4) Arbitration 400, 402. See also, Gavin Lightman, 'Breaking Down the Barriers' *The Times* (London 31 July 2007) < https://www.thetimes.co.uk/article/breaking-down-the-barriers-6djwq98ckpj > accessed 27 June 2021.
[507] Sir Anthony Clarke MR, 'The Future of Civil Mediation' (The Second Civil Mediation Council National Conference, Birmingham, May 2008) para 15.
[508] ibid para18.
[509] John Dyson, 'A Word on Halsey v Milton Keynes' (2011) 77(3) Arbitration 337,337; Dyson emphasised the same principle at the Belfast Mediation Conference as he states that "secondly, parties should not be compelled to mediate; and thirdly, that adverse costs orders are an appropriate means of encouraging parties to use mediation". See Lord Dyson, "Halsey 10 Years On–The Decision Revisited (n 471) 381.
[510] Dyson, 'A Word on Halsey v Milton (n 509) 338. A similar view was asserted by Lord Dyson at the Belfast Mediation Conference as he states that "what I would now say is that ordering parties to mediate in and of itself does not infringe their Article 6 rights". See Lord Dyson, "Halsey 10 Years On–The Decision Revisited (n 471) 381.
[511] Dyson, 'A Word on Halsey v Milton (n 509) 340.
[512] [2011] EWCA (Civ) 78.

Justice Rix argued that compelling unwilling parties to mediate would deny parties their day in court, but he also found this argument insufficient justification for failing to mediate.[513]

A critique from the Court of Appeal came in the case of *Wright v Michael Wright (Supplies) Ltd,*[514] as Sir Alan Ward raised a concern about litigants not willing to try mediation despite judicial encouragement. He called for the decision in the *Halsey* case, for which he was partly responsible, to be reviewed on the grounds that compelling unwilling parties to mediate is "not an obstruction of their right to access to the court."[515] He stated, "Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field."[516] Furthermore, Justice Norris in the case of *Bradley v Heslin*[517] explained that encouraging parties to solve their dispute via ADR and threatening them with costs sanctions was not being taken seriously by the litigants in boundary and neighbour disputes.[518] He questioned the argument against ordering parties to attempt mediation when he stated, "…but I do not see why…directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice."[519] The tide was turning against the argument that the court does not have the power to compel parties to mediate without their consent, as will be addressed in the next section.

5.4.3.6 The court's power to refer cases to ADR without parties' consent

The previous sections examined the divided view of the judiciary on the power of the court to order unwilling parties to attempt an ADR process. Several judgments before *Halsey* confirmed the power of the court to order parties to attempt ADR, as it is the court's duty to further the overriding objective of the CPR. The Court of Appeal in *Halsey* reversed this precedent and adopted a narrower interpretation of the court's power by arguing that forcing unwilling parties to mediate would violate citizen's right of access to the court. However, the debate was not settled, and the judiciary has been inconsistent regarding its power to order ADR, as some court

[513] ibid 41].
[514] [2013] EWCA (Civ) 234.
[515] ibid [3]. In fact, Sir Alan Ward is a vocal supporter of mediation as he describes the parties who enter into expensive litigation processes without trying mediation as "completely cuckoo". See Egan v Motor Services (Bath) Ltd [2007] EWCA(Civ) 1002. [53].
[516] *Wright* (n 514) [3].
[517] [2014] EWHC 3267 (Ch).
[518] ibid [24].
[519] ibid [24].

decisions considered that parties' consent is not required. For example, in the case of *Seals v Williams*,[520] Justice Norris cited CPR 3.1(m) in his decision to order Early Neutral Evaluation (ENE), a form of ADR, and he concluded the consent of the parties is not required to make such an order.[521] He goes on to say, "The expression of provisional views in the course of a hearing is not dependent in any way on the consent of the parties."[522] On the other hand, Honour Judge Birss in *Weight Watchers (UK) Ltd v Love Bites Ltd*[523] required both parties' consent to provide a non-binding opinion.[524]

In 2019, a crucial decision would help to settle the debate on the court's power to order unwilling parties to take part in ADR without their consent. In the original judgment issued in the case of *Lomax v Lomax*,[525] Justice Parker felt powerless to make an order of ENE due to the disagreement between the CPR and the court guides regarding the need of the consent of the parties.[526] As she ruled, "My conclusion does not disturb my view that this is a case which cries, indeed screams out, for a robust judge-led process to focus on the legal and factual issues presented by this case; and perhaps even craft a proposed solution for the parties to consider."[527]

In the case of *Lomax v Lomax, 2019*,[528] the Court of Appeal answered the question regarding the power of the court to compel unwilling parties to engage in ADR and the need of the parties' consent to make such an order. The issue of the appeal was on the power of CPR 3.1(2)(m), in particular, the power of the court to order an ENE hearing.[529] Lord Justice Moylan said that Parker J "decided that the court did not have power to do so when, as in this case, one party refused to consent to such a hearing."[530] Crucially, the defendant's counsel argued that the court has no power to order parties to submit their disputes to be solved via ADR as he relied on the *Halsey* judgment. Also, the counsel argued that court guides required the consent of the

[520] [2015] EWHC 1829 (Ch).
[521] ibid [5].
[522] ibid [7].
[523] [2012] EWPCC 11.
[524] ibid [4].
[525] [2019] EWHC 1267 (Fam).
[526] ibid [77].
[527] ibid [123].
[528] [2019] EWCA (Civ) 1467. See also, *Telecom Centre (UK) Limited v Thomas Sanderson Limited [*2020] EWHC 368 (QB), where Master Victoria McCloud offered to help the parties to solve the case by using ENE [3]. In addition, the court offered guidance on the process of ENE [12].
[529] *Lomax* (n 528) [1].
[530] ibid [4].

parties before referring their disputes to ADR.[531] Moreover, the defendant's counsel relied on the wording in CPR 1.4(2)(e) such as the court's role in "encouraging" and "facilitating" the use of ADR to indicate that the parties' consent is required.[532] Importantly, the counsel pointed to language regarding the court's power in CPR 3.1(2) as some subparagraphs used words such as "direct," "hold" and "required" while these words did not appear in CPR 3.1(2)(m) and he argued "that forcing the parties to have an ENE hearing would be a strange way of helping them to settle the case."[533]

Lord Justice Moylan responded to the defendant's counsel's arguments about CPR 3.1(2)(m) by explaining that "the wording of sub-paragraph (m) does not contain an express requirement for the parties to consent before an ENE hearing is ordered. The question therefore is whether such a limitation is to be implied."[534] Lord Justice Moylan rejected the argument of implied consent when he indicated that "If the intention had been to require the parties to consent, it would have been very easy to make this clear by expressly providing for this. In my view, the absence of any such express requirement is a powerful indication that consent is not required."[535] Crucially, Lord Justice Moylan argued that an ENE hearing does not prevent parties' access to the court as they are not required to settle. He stated, "It does not, in any material way, obstruct a party's access to the court…this is not in any sense an "unacceptable constraint," to use the expression from *Halsey*. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases."[536] Significantly, Lord Justice Moylan emphasised the power of the court to order an ENE hearing without the need of the parties' consent in accordance with the overriding objective. He went on to say,

> In conclusion, I see no reason to imply into subparagraph (m) any limitation on the court's power to order an ENE hearing to the effect that the agreement or consent of the parties is required. Indeed, in my view such an interpretation would be inconsistent with elements of the overriding objective, in particular the saving of expense and allotting to cases an appropriate share of the court's resources, and would, therefore, be contrary to rule 1.2(b).[537]

[531] ibid [20].
[532] ibid [22].
[533] ibid [22].
[534] ibid [24].
[535] ibid [30].
[536] ibid [26].
[537] ibid [32].

Further, Lord Justice Moylan rejected the counsel's argument on depending on court guides as he stated that guides and the White Book should not have the power to determine or override the CPR.[538]

In this judgment, the Court of Appeal clarified the power of the court to make an ADR order, in particular CPR 3.1(2)(m), to further the overriding objective. Several important points can be made here. First, the court guides should not be viewed as law, or as a substitute to the CPR, and under any circumstance may not override the CPR.[539] While the earlier court guides did require the parties' consent for ENE to take place,[540] these are just a guidance and cannot rule over the CPR. Significantly, the Queen's Bench Guide of 2021 indicated that the consent of the parties is not required for ENE, and cited the decision in *Lomax*. "Although ENE is usually consensual, the court can order that it take place even if parties do not agree (see Lomax v Lomax [2019] EWCA Civ 1467)."[541]

Second, Lord Justice Moylan created a road map for judges to enforce the power of the court to take any step or order, including ENE, to further the overriding objective of the CPR without the need of the parties consent based on CPR 3.1(2)(m).[542] Under this rule the authors of the CPR did not include the phrase "consent of the parties;" therefore, it must be understood that the court has the power to make an order without the need of parties' consent. As observed by Turner, the new procedure rules of the civil justice system and the overriding objective demonstrate that "the judge is in control of managing the litigation process instead of the lawyers, the court has responsibility to manage cases in a 'proactive manner.'"[543]

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[538] ibid [28].
[539] Court guides and other guidance, Practice notes (2021). <https://www.lexisnexis.co.uk/legal/guidance/court-guides-other-guidance > accessed 14 February 2021. For example, The Commercial Court; The Commercial Court Guide; The Business and Property Courts of England & Wales, Tenth Edition (2017) states that "The Guide does not however provide a complete blueprint for litigation and should be seen as providing guidance to be adopted flexibly and adapted to the exigencies of the particular case. It should not be understood to override in any way the Civil Procedure Rules or Practice Directions made under them, or as fettering the discretion of the Judges". 6; The Technology and Construction Court Guide, Second Edition. Issued 3rd October 2005, fifth revision, section 1; The Queen's Bench Guide, A guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice, 2021. 10; Chancery Guide 2016, 11; and Circuit Commercial (Mercantile) Court Guide.1.2.
[540] For example, Chancery Guide 2016 states that "In appropriate cases and with the agreement of all parties the court will provide a non-binding, early neutral evaluation (ENE) of a dispute or of particular issues (see CPR rule 3.1(2)(m))." 77.
[541] The Queen's Bench Guide, A guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice, 2021. 68
[542] CPR 3.1(2)(m).
[543] Turner (n 365)82.

Third and foremost, the ruling explicitly stated that an order of ADR without the parties' consent does not breach the parties' right of access to court, it is just a step before the start of the trial and parties have the right to continue with the court proceeding if they failed to settle.[544]

5.4.3.7 Can the Lomax decision be applied to other forms of ADR, namely mediation?

The *Lomax* decision confirmed the power of the court to make a mandatory ENE order and enabled the court to solve many disputes without undertaking a 'full trial.'[545] In addition, the judgment should be commended as it re-emphasized the power of the court to control litigation and to take any necessary order to further the overriding objective of the CPR.[546] Although *Lomax* concerned ENE, the ruling can also be applied to other forms of ADR. Clark considers the Court of Appeal's decision as a step forward to make mediation mandatory within the English civil justice system even though the decision concerns ENE.[547] However, Ahmed criticised the Court of Appeal's decision not to review and re-examine the issue of mandatory mediation, as he suggested that the court should have "addressed *Halsey* to make clear that an order for mediation during the court process, like ENE, does not hinder the parties' rights to access the courts…."[548] In Ahmed's opinion, the Court of Appeal's ruling in Lomax 'can justifiably extend to the making of mediation orders' because mediation, like ENE, is a type of ADR procedure, and the court has the power to compel parties to use any ADR forms in suitable cases.[549] Crucially, in the case of *McParland and Partners Ltd v Whitehead*,[550] Sir Geoffrey Vos, Chancellor of the High Court, indicated that the decision in *Lomax v. Lomax*[551] applies to the question of the power of the court to order mediation without the parties' consent, despite the decisions of *Halsey*. It is noteworthy that the court hinted in an indirect way that maybe it is time to review the *Halsey* position in order to reinforce the power of the court to

[544] *Lomax* (n 528) [26].
[545] Francis Ng, 'Succession: Saving Litigants from Themselves: Mandatory Early Neutral Evaluation in the English Courts' (2019) 6 Private Client Business 185. 191.
[546] Richard M. Little and Ahmed Abdel-Hakam, 'A Step Toward Mandatory ADR in English Courts' (2019) 37(11) The Newsletter of the International Institute for Conflict Prevention & Resolution 161. 175
[547] Bryan Clark, 'Lomax v Lomax & the Future of Compulsory Mediation' (2019) 169 (7866) New Law Journal 17.
[548] Masood Ahmed and Fatma Nursima Arslan, 'Compelling Parties to Judicial Early Neutral Evaluation but a Missed Opportunity for Mediation: Lomax v Lomax [2019] EWCA Civ 1467' (2020) 39(1) Civil Justice Quarterly 1,10-11.
[549] Masood Ahmed, 'Alternative Dispute Resolution During the Covid-19 Crisis and Beyond' (2021) King's Law Journal, DOI: 10.1080/09615768.2021.1886658. 1,2.
[550] *McParland and Partners Ltd v Whitehead* [2020] EWHC 298 (Ch).
[551] *Lomax* (n 528).

order parties to engage in mediation even without their consent.[552] Moreover, it is an early sign that judicial attitudes are shifting toward the power of the court to force unwilling parties to mediate.[553] In the view of the researcher, the court singled out the decision of *Lomax* to indicate that the court in the *McParland* case has the power to make a mediation order without parties' consent. While the *Lomax* judgment regards ENE, it will sound an alarm within the civil justice system for the need to take a more active approach to implement the use of ADR.[554] Thus, the debate over compulsory mediation will be continued in the English courts.[555]

A more active approach from the High Court of Justice Queen's Bench Division was seen in the case of *Simon Kelly v Raymond Kelly*.[556] Judge Pearce ruled that the desire of the party not to reach a settlement with the other party is not a justifiable reason not to mediate.[557] Additionally, in *United Kingdom Independence Party Ltd v Braine*[558] the court ordered parties to stay the court proceedings to attempt mediation as a condition to transfer their dispute to the County Court.[559] A similar position was taken in the case of *Hussain v Chowdhury*,[560] when the court ordered the parties to stay to engage in mediation.[561] Crucially, the court ordered the parties to mediate, and signalled that if the case was not settled the court would take into consideration the parties' effort while attempting mediation by stating, "Accordingly, the parties should make utmost efforts to ensure that mediation is successful. In any further consideration by the court, which it is hoped will not be necessary, the court is likely to look closely, so far as is open to it to do so, at the extent to which each side did so."[562]

Guise argues that since the *Lomax* decision the judiciary has been very supportive of strong encouragement of ADR and the power of the court to require parties to take part in ADR,

[552] Herbert Smith Freehills LLP, Post Lomax v Lomax: Two Recent Judgments Relating to ADR and the Courts (23 March 2020). < https://hsfnotes.com/adr/2020/03/23/post-lomax-v-lomax-two-recent-judgments-relating-to-adr-and-the-courts/#more-4338 > accessed 17 February 2021
[553] Charles Gordon, 'Can, and Should, the Courts Force Parties into ADR?' (Civil Mediation Council). < https://civilmediation.org/latest-news/forced-to-mediate/ > accessed 21 February 2021.
[554] Richard M. Little and Ahmed Abdel-Hakam, 'A Step Toward Mandatory ADR in English Courts' (2019) 37(11) The Newsletter of the International Institute for Conflict Prevention & Resolution 161. 174.
[555] Bryan Clark, 'Lomax v Lomax & the Future of Compulsory Mediation' (2019) 169 (7866) New Law Journal 17,18.
[556] [2020] EWHC 1027 (QB).
[557] ibid [18].
[558] [2020] EWHC 1794 (QB).
[559] ibid [119].
[560] [2020] EWHC 790 (Ch).
[561] ibid [2].
[562] ibid [20].

mainly mediation.[563] Although *Lomax* did not address compulsory mediation directly and did not overturn *Halsey*, the ruling is a blueprint for making a mediation order without the parties' consent.

5.4.3.8 Returning to the question of the power of the court to make a mediation order

In the researcher's view, the court has the power to make a mediation order based on several factors. Firstly, CPR 1.4 requires the court to actively manage cases[564] and the CPR states that one of the methods to actively manage cases is through encouraging the use of ADR.[565] Secondly, CPR 1.2 empowers the court to make a mediation order. As the court must seek to further the overriding objective when it exercises any power or interprets any rule.[566] Thirdly, CPR 1.3 requires the parties to help the court to further the overriding objective.[567] In this case the court has the power to order parties to take part in mediation to fulfil the duty of the parties to help the court to promote the overriding objective. Fourthly, CPR 3.1(2)(m) vested the court with the power to manage cases in order to take any steps or order to further the overriding objective.[568] As Ahmed pointed out, CPR 3.1(2)(m) was "deliberately drafted widely with the intention of providing the courts with the necessary discretion to manage disputes effectively in order to further the overriding objective."[569] Fifthly, CPR 3.3(1) gives the power to the court to make an order on its own initiative. Crucially, the common denominator of these rules is not requiring the consent of the parties implicitly or explicitly. In other words, parties have no right to intervene in the way that the court decides to manage cases. The point was well made by Mr Buckingham on behalf of the claimant (Lomax)[570] as he submitted that, "the rule does not expressly provide that the parties have to consent to an ENE hearing being ordered and that there is nothing which suggests that the need for such consent should be implied into the

[563] Tony N Guise, *Breaking the Backlog and Overcoming the Tsunami of Civil Litigation in England and Wales: An Empirical View of the Civil Justice Response to the Lockdown* (A White Paper from DisputesEfiling.com, June 2020) paras 89- 96; See also, *Sky's the Limit Transformations Ltd v Mirza* [2022] EWHC 29 (TCC). In his ruling Judge Davies expressed his regret that the parties were unable to resolve their disputes outside the court, "the outcome will likely be a financial disaster for one of the parties and, even if not, likely an expensive and ultimately unrewarding result for both." [5]. He also suggests for future construction disputes that the court direct the parties to "(c) a stay for mediation on receipt of the report and questions. If the parties are not willing to mediate and the judge does not consider it appropriate to order mediation, then there should be an order for compulsory early neutral evaluation before another TCC Judge." [6].
[564] CPR 1.4(1).
[565] CPR 1.4(2)(e).
[566] CPR 1.2(a) and (b).
[567] CPR 1.3.
[568] CPR 3.1(2)(m).
[569] Ahmed, 'Alternative Dispute Resolution During the Covid' (n 549) 8.
[570] *Lomax* (n 528).

rule."[571] Finally, CPR 44.3(4)(a) gives the power to the court to consider the conduct of the parties when exercising its discretion as to costs. For example, the court has the power to impose costs sanctions upon parties who refuse to engage in mediation unreasonably, which Tronson argues 'may be a *de facto* power to order mediation.'[572] Therefore, the court has the power to make a mediation order without the consent of the parties. However, the court has no power to force parties to follow such an order, though at the end of the trial the court will examine the conduct of the parties in determining costs and imposing financial consequences upon parties that did not follow the court order reasonably. In fact, the existence of costs sanctions is what makes the practice of mediation compulsory, as will be discussed in the next section.

To summarize, the CPR vested the court with the power to make an ADR order without the parties' consent. But, as explained previously, the judiciary has been inconsistent in using this power to force unwilling parties to mediate. In the researcher's view, and as Girolamo urged, the government should implement a clear and transparent policy that confirms the power of the court to order mediation, rather than depend on judicial discretion to make the civil justice system stable and effective.[573]

5.5 Mandatory mediation

5.5.1 Mandatory mediation as a solution to overcome judges' hesitance to use discretionary powers in Jordan

5.5.1.1 Re-thinking compulsion in Jordan

The low uptake of referred cases to mediation offered the Ministry of Justice an opportunity to re-think the element of compulsion. The Ministry of Justice was convinced that the lack of compulsion in the Mediation Law prevented the referral of suitable factual disputes to

[571] ibid [18].
[572] Brenda Tronson, 'Mediation Orders: Do the Arguments Against them Make Sense?' (2006) 25(Jul) Civil Justice Quarterly 412.
[573] Debbie De Girolamo, 'Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales' (2016) 35(2) Civil Justice Quarterly 162. 184. See also, Masood Ahmed, 'Mediation: The Need for a United, Clear and Consistent Judicial Voice: Thakkar v Patel [2017] EWCA Civ 117; Gore v Naheed [2017] EWCA Civ 369' (2018) 37(1) Civil Justice Quarterly 13, 18-19. Ahmed called for judicial leadership to set up a clear and harmonic system that clarifies the nature of ADR and litigants' obligations in ADR, as the judiciary's current approach toward the use of ADR in different cases causes confusion within the civil justice system including with disputants, legal representatives and the judiciary.

mediation, as the referral judges had no authority to refer cases without the parties' consent, and this led to the failure of the Mediation Law. Therefore, the Ministry of Justice argued there was a need to make mandatory mediation a requirement in some types of disputes, as these disputes can easily be settled via mediation in a quick way without going through litigation procedures. Compulsory referral to mediation would achieve the main goal of reducing pressure on the court.[574]

The Ministry of Justice via the Council of Ministers made several attempts to introduce an amendment to the Mediation Law to include mandatory mediation for specific types of disputes. In 2016, the Council of Ministers withdrew the draft amendment before the Parliamentary debate for unknown reasons.[575] The amendment was reintroduced in 2017 to give the power to judges to refer suitable money claims, insurance claims, lease claims and labour disputes to mediation without the parties' consent. The policy memorandum reasoned that the lack of compulsion in the Mediation Law has caused the low uptake of court-based mediation. It is necessary, therefore, to vest power in judges to refer suitable cases to mediation without the consent of the parties, to have the desired end of the use of mediation within the civil justice system.[576] Despite the concerns raised by the Ministry of Justice, the House of Parliament rejected the inclusion of the amendment in the Mediation Law. It should be noted that the lawyers on the House of Parliament's legal committee have been particularly influential in rejecting the two proposals that introduced mandatory mediation, as will be discussed in Chapter 6. The most recent attempt, in 2019, restated the same provisions with the same reasoning as in the 2017 draft. To date, the latest amendment has not been brought up for discussion in the House of Parliament.[577]

5.5.1.2 House of Parliament rejects compulsory mediation on the grounds that it impedes access to justice

[574] The House of Parliament discussion of the amendment to the Mediation Law of 2017 to Ashraf Abu Hazeem (27 January 2020) 40.
[575] Jordanian Council of Ministers, *The Draft Amendment of the Mediation Law 2016 and the Policy Memorandum and Explanatory Notes that Accompanied the Amendment to the Mediation Law 2016* to the author (17 July 2017).
[576] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment of the Mediation Law 2017*.
[577] The Mediation Draft Law for Civil Disputes Resolution of 2019 is currently before the Jordanian House of Parliament to be discussed. Article (4) of the draft includes mandatory referral to mediation in four types of disputes: labour, leases, insurance and money claims. <https://representatives.jo/AR/List/مشاريع_القوانين_المحالة_للجنة_القانونية> accessed 6 February 2022.

Despite the efforts of the Ministry of Justice, the House of Parliament remained unconvinced of the need for such an amendment, and claimed that compulsory mediation was unconstitutional, which led to the defeat of the amendment. The House of Parliament has rejected every attempt by the Minister of Justice to give judges the power to refer disputes to mediation based on their own initiative, as they view this as an overstepping of judicial authority, and an affront to the rights of citizens to access the court. The House of Parliament rejected the entire amendment on the grounds that it breached Art. 101 and 102 of the Constitution, as they argued that mandatory mediation would prevent the fundamental right of access to justice as protected by the Constitution.[578] The Parliament was critical of compulsory mediation, arguing that the whole mediation mechanism should be voluntary from the referral process to the end of the mediation session, otherwise it would forfeit the rights of citizens to have a hearing before a trial judge (Art. 101,) and would usurp the court's jurisdiction (Art. 102).[579]

The Minister of Justice responded to this critique by arguing that mandatory referral to mediation does not interfere with the right of access to justice, as the parties have the right to withdraw from the mediation session at any stage and resort to the court and, most importantly, nothing in the Mediation Law forces parties to reach a settlement. He further stated that the purpose of mandatory mediation is to introduce the parties to the benefits of mediation, and would increase the likelihood of reaching a solution and ending the dispute in a timely way, as evidenced by the Ministry of Justice annual reports which show the mediation settlement rate is around 70 percent. However, he argued, there is a need to implement mandatory mediation to allow more parties to experience it.[580] In the end, the House of Parliament rejected the arguments of the Minster of Justice, and refused to make the referral to mediation mandatory on the legal basis of the right of citizens to access justice via the court. This interpretation of access to justice aligns with the traditional view held by the Court of Cassation and the Constitutional Court, as will be explored in the next two sections.

[578] The House of Parliament discussion of the amendment to the Mediation Law of 2017 to Ashraf Abu Hazeem (27 January 2020). 41-43. See also, another attempt to enact mandatory mediation in The Mediation Draft Law for Civil Disputes Resolution of 2019 is currently before the Jordanian House of Parliament to be discussed. Art. 4 of the draft includes mandatory referral to mediation on a case-by-case basis in four types of disputes: labour, leases, insurance and money claims. < https://representatives.jo/AR/List/مشاريع_القوانين_المحالة_للجنة_القانونية > accessed 28 March 2022.
[579] The House of Parliament discussion (n 578) 41-43.
[580] ibid 44.

5.5.1.3 The Court of Cassation rejects negotiation or any procedure prior to litigation as a hindrance to access to justice

The Court of Cassation in several decisions reiterated the citizens' right to access the court without preconditions. The issue of a precondition to litigation was raised in case number 1401 of 2013,[581] as the insurance company argued that the insured person should start the negotiation process with the insurance company before resorting to the court, according to Art. 14(a) of the Compulsory Motor Insurance Law No. (12) of 2010, which states that the affected party must satisfactorily request the insurance company to compensate for the damages sustained and enable it to inspect the damaged vehicle before resorting to the judiciary.[582] Instead of engaging in negotiations, the insured started the litigation process. The Court of Cassation found that Art. 14(a) of the Compulsory Motor Insurance Law is unconstitutional and is not binding, as the Jordanian Constitution guarantees the right to resort to the judiciary in accordance with the provisions of Art. 101 and 102. Thus, the Court argued, this article violates the provisions of the Constitution by compelling the affected person to start the negotiation process with the insurance company as the first step in resolving the dispute before resorting to the court. Therefore, the insurance company's case must be dismissed, because it based its lawsuit on an unconstitutional text, as access to justice is protected by the Constitution.[583]

Another case before the Court of Cassation raised the issue of negotiation as a precondition to litigation. The National Electricity Company submitted an Appeals Court judgment to the Court of Cassation[584] on the grounds that the plaintiff did not start the negotiation process to discuss the amount of compensation as the first step before resorting to the court according to Art. 44(c) of the Electricity Law, which states, "If it is not possible to agree between the affected parties on the amount of compensation, the compensation is decided by the court." The Court of Cassation rejected the company's argument, as the court stated that the plaintiff has the right to resort to the judiciary without negotiating as a first step. The Court argued that Art. 101 of the Jordanian Constitution preserved the citizen's right of access to justice via the right of resorting to the courts, and the courts are the main competent authority to settle disputes

[581] The Jordanian Court of Cassation, Decision No. 1401/2013. Issued in 2013.
[582] The Compulsory Motor Insurance Law No. (12) of 2010. Art. 14(a).
[583] The Jordanian Court of Cassation, Decision No. 1401/2013. Issued in 2013. Also, see The Court of Cassation, Decision No. 1725 /2015. Issued in 2015. And the Court of Cassation, Decision No. 2815 /2015. Issued on 18 October 2015.
[584] The Court of Cassation, Decision No. 1359/2019. Issued in 2019.

according to the text of Art. 102 of the Jordanian Constitution. Similar to the decisions in other cases, the Court dismissed the lawsuit on the basis of unconstitutionality.

These rulings demonstrate the primacy of the right of individuals to access the "courts" without any barriers or conditions, because the courts are the official authority to adjudicate disputes in accordance with the Constitution. In this manner, the Court of Cassation, like the House of Parliament, adheres to the traditional interpretation of Art.101 and 102 of the Constitution: that access to justice is linked to access to the court, as the court is the main authority to settle disputes, and any required steps or procedures prior to the litigation process violate the citizen's right to access justice. Therefore, any attempt to resolve the dispute outside of the court's jurisdiction requires the consent of the parties to the conflict.

In 2009, the Court of Cassation examined a case regarding the compulsion to accept the invitation to mediation. The plaintiff argued that he suffered losses such as court fees, lawyer fees, time and effort because the defendant refused to accept judicial mediation before the Magistrates Court. The Court of Cassation rejected the plaintiff's argument as the court stated that referring the dispute to mediation is only at the request of the parties to the dispute, or after their acceptance of the judge's invitation according to Art. 3(a) of the Mediation Law. Therefore, the defendant has no obligation to accept the mediation invitation either from the plaintiff or from the judge, as mediation is completely voluntary and does not take place if there is no consent from both parties, which did not happen in this case.[585]

Based on these rulings by the Court of Cassation and its arguments that compulsory negotiation before resorting to litigation contradicts the right of access to justice as protected by the Constitution, and compulsory mediation contradicts the provision of the law which requires the consent of the parties, it is likely the Court of Cassation would reject any attempt to require mandatory mediation before litigation as an obstacle to the right of access to justice.

5.5.1.4 Constitutional Court's reliance on traditional concept of access to justice leads to the likelihood of rejection of mandatory mediation

As previously stated, the Constitutional Court's interpretation of the right of access to justice is the right of an individual to bring a claim before the court, as the courts shall be open to

[585] The Jordanian Court of Cassation, Decision No. 2549/2009. Issued in 2010.

everyone in accordance with Art. 101, and the court has the right to exercise jurisdiction over all persons to settle disputes according to Art. 102. In this way, the Constitutional Court's interpretation links the concept of access to justice to access to the court, as the court is the main authority responsible for the administration of justice.

The Constitutional Court has not yet reviewed any law that requires individuals to take steps before recourse to litigation. Nevertheless, it may be concluded that on the basis of its interpretation of Art. 101 and 102 the Court would find that any prior steps or procedures before resorting to the court are deemed to constitute a violation of Art. 101. Along these lines, it is highly likely that the Constitutional Court could consider mandatory mediation an infringement of the right of access to justice.

The position of the Constitutional Court and the Court of Cassation regarding the interpretation of Art. 101 and 102 of the Constitution is a traditional view of the concept of access to justice. In such a way, making the use of mediation within the civil justice system mandatory or as an initial mediation session before allowing parties to resort to the court would be considered unconstitutional from the perspective of both courts. However, as previously discussed, there is an argument to be made that access to justice has a broader interpretation than enabling parties to access justice through the court.

5.5.1.5 Compulsory mediation does not foreclose the access to justice. Compulsory resolution through mediation would foreclose the access to justice

Unfortunately, there is a dearth of literature regarding the use of mediation in Jordan in general, and the use of mandatory mediation, specifically. Three researchers address the use of mandatory mediation directly. Hamadneh, agreeing with the House of Parliament and the Courts, argues that the whole mediation mechanism from the referral process to the end of the mediation session should be voluntary. His critique is that mandatory mediation conflicts with the right of citizens to access justice via resorting to the court, because parties to the conflict would be prevented from going directly to a public hearing which is guaranteed by Art. 101 of the Constitution. Furthermore, Hamadneh argues that compulsory mediation would not achieve any results, as he believes parties would not mediate in good faith.[586] Conversely, Al-Ahmed

[586]Abdullah Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes, A Comparative Study' (PhD thesis, University Hassan 2015) 253-254.

and Al Sleby support the view that mandatory mediation does not prevent parties access to justice, and does not contradict the Constitution. First, while mandatory mediation does compel parties to attempt to mediate their disputes, parties are not obliged to reach a settlement. Second, parties have the right to withdraw from the mediation session at any stage without consequences. Third, if the parties to the dispute do not reach a settlement, then parties have the right to resort to the judiciary to decide their dispute. As a result, mandatory mediation does not conflict with the right of access to justice.[587]

The researcher agrees with the view of Al-Ahmed and Al Sleby that mandatory mediation does not prevent citizens the right of access to justice, as compulsion to attempt to resolve disputes via mediation is not a compulsion to settle. Only compulsory resolution through mediation would prevent access to justice, because settlement through mediation is considered a final and binding judgment that is not subject to any means of appeal. Parties would thus be prevented from having their dispute heard in a public hearing before a trial judge. However, because parties are not required to resolve their disputes through mediation and can return to the court at any time, access to justice is protected.

It may also be argued, as was noted in the empirical study, that mediation does not impede but improves access to justice, as some parties may reach a settlement without using the lengthy court proceedings, thereby saving court fees, lawyers' fees, effort and time. Mandatory referred mediation would facilitate access to justice, as more disputants would be introduced to the mediation process and its advantages over litigation. Further, it was a general consensus among the 17 judges interviewed [588] and the vast majority of respondents (90%) to the lawyers' questionnaire (Figure 19)[589] that access to justice is improved for the entire civil justice system when cases are settled through mediation, as it gives more time to the trial judges to consider cases with significant legal issues. As the quote commonly attributed to William E Gladstone states, "Justice delayed is justice denied."[590] The traditionalists argue for the rejection of mandatory mediation to protect access to justice, and reject the broader view that access to

[587] Rola Al-Ahmed, 'Mediation for Settling the Civil Disputes in the Jordanian Law: A Comparative Study' (PhD thesis, Amman Arab University 2008) 48. Also, Bashir Al Sleby, *Alternative Dispute Resolution ADR* (Darwael 2010) 192.
[588] Chapter 4, 100-101.
[589] Chapter 3, Figure 19.
[590] Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4 Victoria U L & Just J 46,46.

justice includes other factors such as time, expenses, stress and anxiety. In their restrictive view, justice must be achieved via the court, but at what cost?

5.5.1.6 Empirical study demonstrates mixed support for mandatory referral to mediation

Support for mandatory mediation was divided among judges interviewed as part of the empirical study. The vast majority of the referral judges (7 out of 8) oppose mandatory mediation based on the principle of voluntariness and, like Hamadneh, they believe compelling parties to mediate would extend the litigation proceedings, as parties would not mediate in good faith, and would return to the court. The majority of judge-mediators (7 out of 9) support mandatory mediation for factual disputes, as they believe that many cases would reach a settlement, and would reduce the burden on the court.

Two judges out of 17 interviewed addressed the constitutionality of compulsory mediation. In agreement with the traditional concept of access to justice advocated by the Courts, the House of Parliament and Hamadneh, one referral judge considered mandatory mediation an obstruction to access to justice as she stated, "Compulsory mediation is unconstitutional because it deprives citizens of their right to resort to the court. Therefore, mediation must be voluntary or optional, and citizens have the right to choose between mediation and litigation."[591] By contrast, a judge-mediator supported the view of Al-Ahmed and Al Sleby that compulsory mediation is not an impediment to access justice, as "the right to resort to the judiciary was protected and at what stage the parties can withdraw from mediation sessions."[592] This judge-mediator was appointed by the Ministry of Justice to negotiate the Mediation Draft of 2017 that included an amendment to establish mandatory mediation with the legal committee of the House of Parliament. During the debate, the judge was critical of the argument that mandatory mediation is unconstitutional, as mandatory referral to mediation does not force parties to settle. However, the Members of Parliament remained unconvinced, and the amendment was rejected.

5.5.1.7 Automatic referral to mediation: a compromise solution to increase the uptake of mediation in Jordan

[591] Referral Judge 8.

[592] Judge-mediator 6.

As mentioned previously, the traditional interpretation of access to justice considers access to justice as synonymous with access to the court. In this way, the concept of justice is narrow as it is actually about representation in court, and it does not reflect the modern understanding of access to justice. However, mandatory mediation within the civil justice system would likely be dismissed as unconstitutional given the interpretation of the Court of Cassation, the Constitutional Court and the House of Parliament. Therefore, the researcher of this study proposes two solutions that may withstand a constitutional challenge.

An amendment to Art.101 of the Constitution to broaden the definition of access to justice to include ADR would be the most effective solution, as it eliminates the arguments against mandatory mediation. However, in practical terms, the likelihood of amending the Constitution is very slim because in accordance with Art. 126 of the Constitution any amendment shall be passed by a two-thirds majority of the members of both Houses of Parliament.[593]

Another option, and a more practical solution, is to change the provisions of the law. In doing so, several scenarios can be offered to test it against the Constitution. First, the draft law should read as follows: "Referral judges have the duty (المهام) to encourage parties to use mediation as judges shall (يجب) do so in each case that is suitable to be mediated." In this way, this text is imposing duties on the referral judges that must be fulfilled, as referral judges have to encourage the use of mediation. In other words, it is not optional. Moreover, this draft would not contradict the Constitution, as there is no element of coercion of the parties to accept the referral judge's invitation to go to mediation. Instead, this amendment would impose an obligation upon the referral judges to encourage the use of mediation. The second potential draft shall read: "Referral judges shall (يجب) refer parties to mediation for any cases that are deemed suitable to mediate." Without doubt, this draft would be considered inconsistent with the Constitution, as it would read as preventing citizens' access to justice. A third potential draft may read: "Referral judges shall (يجب) refer parties to an initial informational mediation session for any cases that are deemed suitable for mediation." This draft is a compromise solution, as it only requires an informational session and parties may choose to opt out of engaging in the formal process. An advantage of this scenario is a good number of lawyers and litigants would be exposed to the advantages of mediation, and may continue with the process. However, while this draft has an even chance of passing the House of Parliament, the

[593] The Constitution of the Hashemite Kingdom of Jordan. Art. 126.

Constitutional Court may not approve the provision as it may be considered an obstacle to access to justice.

The researcher's view is that the third draft provision is the most practical, as automatic referral to mediation would increase the uptake of mediation, as it requires parties to attend an initial mediation session but there is no obligation for parties to continue the mediation process. However, as the empirical study demonstrates, lawyers have the greatest influence on their clients' decision to accept the mediation invitation.[594] Therefore, the uptake of mediation needs a comprehensive package that combines automatic referral to mediation, and imposes a duty on lawyers to encourage their clients to use mediation. The issue of lawyers as gatekeepers to mediation will be explored in Chapter 6 of this thesis.

5.5.2 The position on Mandatory Mediation in England

The official position of the English civil justice system is that ADR, mainly mediation, is not compulsory. This belief is at odds with the practice of imposing costs sanctions on parties that unreasonably refuse to mediate. The following section will explore the contradictions between the English view of mediation and its practice.

5.5.2.1 Mediation is not compulsory: The official position in the English civil justice system

The official position in England views mediation as a voluntary process; there is a rejection of mandatory mediation, as it is argued the court should encourage parties to use mediation, but not compel them to do so. Several significant reports showed the unwillingness of the court to introduce mandatory ADR mainly through mediation. For example, the Heilbron–Hodge report stressed the importance of ADR to provide solutions for certain cases, but said, 'it will never replace litigation.'[595] Further the report confirmed that the court's duty is to encourage, not to compel parties to attempt to resolve their dispute by ADR.[596] Similarly, Lord Woolf built on the Heilbron-Hodge report, and did not recommend or introduce the use of mandatory mediation. In his view, the court should play a significant part in encouraging the use of ADR as he explained: "I also remain of the view, though with less certainty than before, that it would not be right for the court to compel parties to use ADR and to take away or postpone their right

[594] Chapter 3. Figure 14.
[595] Heilbron & Hodge (n 304) ch 9, para 9.1.
[596] ibid ch 9, para 9.15.

to seek a remedy from the court."[597] Foreshadowing the unwillingness of English courts to compel parties to mediate but sanction parties for refusing to mediate, Woolf urged the court to take into account an unreasonable refusal to try ADR when deciding the costs.[598] In addition, Lord Jackson also rejected mandatory mediation as he stated, "I do not believe that parties should ever be compelled to mediate."[599] In Lord Jackson's view, the court should encourage the use of mediation by showing its advantages, and impose costs sanctions upon parties that refused to engage in mediation unreasonably.[600] Finally, Lord Justice Briggs acknowledged and supported this view as he stated, "The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory."[601] He went on to say, "This is, in many ways, both understandable and as it should be. First, the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service."[602] Similarly, this conclusion was supported by the Civil Justice Council (CJC) in their Interim[603] and Final reports on ADR and Civil Justice.[604] The final report indicated that "There was no or very little support for anything approximating to blanket, compulsory or automatic referral to mediation," but there is a need for robust encouragement by the court.[605] However, recently, the CJC has issued several reports that support the establishment of mandatory mediation, as will be discussed in a later section of this chapter.

The White Book of 2003 reinforced the majority opinion that the role of the court is to encourage parties to use ADR as a voluntary process. "The hallmark of ADR procedures…is that they are processes *voluntarily* entered into by the parties in dispute…Consequently, the court cannot direct that such methods be used, but may merely encourage and facilitate."[606] Crucially, the White Book of 2020 repeated the same quote, but without the last sentence that emphasised the court's lack of power to force parties to use ADR.[607] It is not clear why the last part was deleted; however, one can assume it is due to the inconsistent judicial decisions

[597] Woolf (n 311) ch 5, para 18.
[598] ibid ch 5, para 18.
[599] Lord Jackson (n 317) ch 36, para 3.4.
[600] ibid ch 36, para 3.4.
[601] Lord Justice Briggs (n 319) para 2.86.
[602] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report (Court and Tribunals Judiciary, December 2015) para 2.87.
[603] Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Interim Report (2017). Para 8.2.
[604] Civil Justice Council, ADR and Civil Justice (n 470).
[605] ibid Para 4.20.
[606] The White Book 2003, volume 1 (Sweet & Maxwell (3 April 2003) at para 1.4.11, emphasis added
[607] The White Book 2020, volume 2, section 14 - Alternative Dispute Resolution, B. - ADR in the Context of the CPR (Sweet & Maxwell 2020).

regarding the court's power to order parties to attempt ADR. The contradictions inherent in the English use of ADR, mainly mediation, will be discussed in the next section.

5.5.2.2 Exploring the contradictions inherent in the English practice of mediation

The new landscape of the civil justice system as described in Lord Woolf's Final Report is designed to make the court a last resort, as litigants should first attempt to solve their disputes using ADR. Lord Woolf stated very clearly "(a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available."[608] He continues: "(d) Two other significant aims of my recommendation need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation…"[609] That is to say, the civil justice system reform was designed to make the use of ADR a primary mechanism to solve disputes, instead of resorting to litigation. As the Master of the Rolls Sir Anthony Clarke explained, the intention is for ADR to become part of litigation culture: "It must become such a well-established part of it that when considering the proper management of litigation, it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes."[610] To make the court the last resort, several new procedures were established that encouraged or required the use of ADR, mainly mediation.

Many of Lord Woolf's recommendations that are implemented in the civil justice system such as the establishment of judicial case management, pre-action protocols, Fast Track, Multi-Track, and Small-claims Track routes either encourage or require parties to use ADR prior to the start of court proceedings.[611] The aim of the pre-action conduct and protocols is to encourage the parties to settle their disputes without proceeding to trial by various methods, including the use of ADR.[612] For example, the Pre-action Protocol for Media and Communications Claims requires parties to consider ADR to resolve their disputes before starting court proceedings.[613] One of the steps makes clear that "Although ADR is not compulsory, the court will expect the parties to have considered ADR. A party's refusal to

[608] Woolf (n 311) s 1, 5, para 9.
[609] ibid ch 1, para 7(d).
[610] Sir Anthony Clarke MR (n 507) para 5.
[611] Tamara Goriely, Richard Moorhead and Pamela Abrams, '*More Civil Justice? The Impact of the Woolf Reforms on pre-Action Behaviour'* (Research Study 43, Commissioned by The Law Society and Civil Justice Council 2002) 3.
[612] CPR-Pre-Action Protocols. See also Practice Directions–Pre-Action Conduct and Protocols. Objectives of pre-action conduct and protocols. Para 3.
[613] Pre-Action Protocol for media and communication claims. Para 3.8. See also, Practice Direction on Pre-Action Conduct and Protocols. Para 8. Emphasis added.

engage with ADR…might be considered unreasonable by the court, and could lead to the court ordering that party to pay additional costs."[614] Moreover, another protocol states that "… no party can or should be forced to mediate or enter into any form of ADR, but a party's silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs."[615] Similarly, CPR 26.3[616] requires the court to serve a Directions questionnaire to the parties for the purpose of determining which of three routes to allocate the claim.[617] The aim of the Directions questionnaire is to encourage parties to settle their dispute using ADR methods, mainly mediation, without going to a hearing.[618] In addition, the form contains a threat of costs sanctions against parties that refuse to attempt to solve the dispute.[619] Likewise, the Commercial Court Guide contains a Draft ADR Order that states "The parties shall take such serious steps" to solve the dispute by ADR before litigation procedures.[620] The parties shall, in addition, inform the court about the steps taken in ADR and explain why those measures failed.[621] The use of words such as "should," "shall" and "require" indicate that it is obligatory to attempt ADR . Moreover, requiring parties to justify their failure indicates that mediation is not voluntary, otherwise parties would not owe the court an explanation. This was highlighted in *Frank Cowl & Ors v Plymouth City Council*[622] as Lord Woolf stated "In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute."[623] Recently, the Ministry of Justice launched the Online Civil Money Claims Pilot.[624] For claims with values up to 500 pounds, the parties are automatically referred to mediation, and must opt out if they wish not

[614] Pre-Action Protocol for media and communication claims. Para 3.8.
[615] Pre-Action Protocol for the resolution of clinical disputes. Para 5.4.
[616] CPR 26.3.
[617] Small claims track, fast track and multi-track EX305 and EX306. <https://www.gov.uk/government/publications/small-claims-track-fast-track-and-multi-track-ex305-and-ex306> accessed 25 February 2021.
[618]For example, Form N 180 for Small Claims Track and Form N 181 for Fast track and multi-track state that "Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation." See, Form N181, Directions questionnaire (Fast track and Multi-track). Section A.
[619] Form N181, Directions questionnaire (Fast track and Multi-track). Section A.
[620] The Commercial Court Guide; The Business and Property Courts of England & Wales, tenth Edition (2017). Appendix 3. Para4.
[621] The Commercial Court Guide; The Business and Property Courts of England & Wales, tenth Edition (2017). Appendix 3. Para 5.
[622] [2001] EWCA (Civ)1935.
[623] ibid [3].
[624] Practice Direction 51R– Online Civil Money Claims Pilot. Section 6. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot#3 > accessed 1March 2021.

to mediate.[625] This is to say that the civil justice system is making mediation a first resort to solve disputes. In this way Prince argues that "for everyday low-value civil disputes, alternative dispute resolution (ADR) processes should be at the core of any design."[626] Furthermore, Prince demonstrates that "An online system that integrates mediation into a platform…offers a transformation in approach…An aspect of the reform-programme development is for mediation to become an obligatory element of a technological infrastructure."[627] In the word of Master of the Rolls Sir Geoffrey Vos "In short, mediation is not an end in itself. ADR is not alternative. Dispute resolution needs to become an integrated process in which the parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution."[628]

5.5.2.3 The power of the court to impose costs sanctions

To facilitate the new reforms of the civil justice system, Lord Wolf recommended vesting the court with the power to impose costs sanctions for parties that do not follow orders, directions and compliance with the rules, as the objective of the sanctions "is prevention, not punishment."[629] To give effect to Lord Woolf's recommendation, CPR 44 gives power to the court to make an order about the costs.[630] Under CPR 44.3(2)(a)[631] the losing party typically pays the costs of the winning party, but CPR 44.3(2)(b)[632] gives judges the power to make a different order. CPR 44.3(4)(a) requires the court to take into account the conduct of the parties when deciding the costs.[633] This applies to the parties' conduct before and during proceedings, including adherence to applicable pre-action protocols as stipulated in CPR 44.3(5)(a).[634] Brooker explains, "Costs sanctions were implemented to keep in check unreasonable litigation

[625] Monidipa Fouzder, 'Parties in HMCTS pilot snub small claims mediation (The Law Society Gazette, 5 November 2020) < https://www.lawgazette.co.uk/news/parties-in-hmcts-pilot-snub-small-claims-mediation/5106290.article > accessed 21 June 2021.
[626] Sue Prince, 'Encouragement of Mediation in England and Wales has been Futile: Is there now a Role for Online Dispute Resolution in Settling low-value Claims?' (2020) 16(2) International Journal of the Law in Context 181,181.
[627] ibid 193.
[628] Sir Geoffrey Vos Master of the Rolls (MR), The Relationship between Formal and Informal Justice, speech to Hull University. (26 March 2021) para 47. < https://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf > accessed 26 August 2021.
[629] Woolf (n 311) ch 6, paras3, 4.
[630] CPR 44.3(4) and r 44.3 (5).
[631] CPR 44.3(2)(a).
[632] CPR 44.3(2)(b).
[633] CPR 44.3(4)(a).
[634] CPR 44.3(5)(a).

practices, and prevent the parties and their lawyers from creating delay and unwarranted expense."[635] He adds, "Within this context ADR and mediation are integrated into CPR as a key component for promoting settlement and changing the adversarial litigation climate."[636] In practice, parties that unreasonably refuse to attempt to resolve their disputes by mediation or other ADR forms face a real threat of losing some of their costs. The fear of costs sanctions is an incentive for parties to participate in mediation.[637] In the Court of Appeal in OMV Petrom SA v Glencore International AG,[638] Sir Geoffrey Vos states that "A blank refusal to engage in any negotiating or mediation process, and the use of a vast asset base to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct."[639]

5.5.2.4 Examples of court-imposed costs sanctions for unreasonable refusal to mediate

The judiciary was and still is active in imposing costs sanctions for refusal to attempt mediation or another form of ADR. *Susan Dunnett v Railtrack Plc*[640] was the first case in which the Court of Appeal ruled that a successful party could be deprived of costs due to the refusal to engage in ADR.[641] The court found that Railtrack successfully defended its case against Susan Dunnett for compensation for her horses that were killed by the company's train. However, the court prevented Railtrack from recovering its costs because it found that the company refused to engage in ADR unreasonably.[642] Furthermore, the Court of Appeal in *Leicester Circuits Ltd v Coates Brothers Plc (Costs)*[643] held that withdrawal from mediation proceedings is unreasonable conduct which should be considered when the court awards costs.[644] Moreover, unreasonable delay in starting the mediation process may also result in an adverse costs order as held in *Nigel Witham Ltd v Smith*.[645] Similarly, ignoring a mediation invitation is considered unreasonable conduct, and as a result costs sanctions would be imposed. The Court of Appeal

[635] Penny Brooker, 'Judging Unreasonable Litigation Behavior at the Interface of Mediation in the English Jurisdiction' (2010) 2 (3) J. Leg. Aff. Dispute Resolut. Eng. Constr 148, 148.
[636] ibid 157.
[637] Bill Marsh, Alexander Oddy and Jan O'Neill, 'Chapter 9: England and Wales', in Nadja Alexander, Sabine Walsh, et al. (eds), *EU Mediation Law Handbook, Global Trends in Dispute Resolution*, vol 7(Kluwer Law International B.V 2017) 217.
[638] [2017] EWCA(Civ) 195.
[639] ibid [41].
[640] *Susan* (n 259).
[641] ibid [15],[16].
[642] ibid [14],[15],[16].
[643] [2003] EWCA (Civ) 333.
[644] ibid [27].
[645] [2008] EWHC 12 (TCC) [36].

in *GF II SA v OMFS Company 1 Limited*[646] ruled that "the defendant's silence in face of two requests to mediate was itself unreasonable conduct of litigation sufficient to warrant a costs sanction."[647] In addition, in the case of *Royal Bank of Canada v Secretary of State for Defence*[648] the court deprived the Secretary of State for Defence from recovering costs even though the department was successful in litigation, due to the fact that it was unwilling to mediate.[649] More recently, in *BXB v Watch Tower and Bible Tract Society of Pennsylvannia*[650] the court found that refusal to engage in mediation is unreasonable conduct, thus the court ordered indemnity costs against the defendant that refused to take part in mediation and failed to justify to the court the lack of engagement.[651] The judge pointed out, "This is, therefore, a case not just of silence in the face of an invitation to participate in ADR, but of breach of an obligation imposed by court order to explain a refusal so to participate. That conduct is, in my judgment, unreasonable."[652] Similarly, in *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd*[653] the court decided to reduce the awarded costs from the defendant because he unreasonably refused to engage in mediation.[654] Finally, in *DSN v Blackpool Football Club Limited*,[655] the court ordered indemnity costs to be paid to the claimant against the defendant, due to his failure to engage in mediation.[656] Crucially, the flaw in the defendant's justification, Justice Griffiths wrote, was "that the Defendant continues to believe that it has a strong defence. No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution."[657] This judgment is a reminder to parties and their legal representatives that having a strong case is not an acceptable excuse for not engaging or taking part in mediation, if they want to avoid having costs sanctions imposed by the court.

[646] [2013] EWCA (Civ) 1288.
[647] ibid [40]. For case comment see Masood Ahmed, 'Silence in the Face of Invitations to Mediate' (2014) 73 (1) The Cambridge Law Journal 35, 35-37.
[648] [2003] EWHC 1841 (Ch).
[649] ibid [11],[12].
[650] [2020] EWHC 656 (QB).
[651] ibid [9].
[652] ibid [8].
[653] [2020] EWHC 1050 (Comm).
[654] ibid [27], [29]. See also, *Thakkar v Patel* [2017] EWCA (Civ)117,[1],[2]. In this case the Court of Appeal confirmed that failure to mediate will result in costs consequences.
[655] [2020] EWHC 670 (QB).
[656] ibid [32].
[657] ibid [28].

The English practice of imposing costs sanctions on the parties that refuse to engage in mediation unreasonably contradicts the position that mediation is not compulsory. The question of how imposing costs sanctions undermines voluntary mediation will be discussed next.

5.5.2.5 Is mediation voluntary or compulsory within the English civil justice system?

Several scholars argue that the practice of mediation in the English civil justice system is not voluntary, due to the threat of costs sanctions. According to Quek, compulsory mediation has different levels including the approach taken by the English courts of imposing costs sanctions on the parties that refuse to participate in mediation.[658] Ahmed argues that implicit compulsory mediation exists within the English civil justice system because unreasonable refusal to engage in mediation comes with costs sanctions as a consequence.[659] This position was also supported by Yu, who argued that the practice of mediation within the English system is considered implied compulsory mediation because parties have no choice but to mediate to avoid a cost sanction.[660] Meggitt indicated that the approach taken by the English courts pressures parties to mediate without revealing their true intention, which he argues is to save money, and if the intention is to enforce mandatory mediation it should be announced and debated openly.[661] Also, in Andrew's view, imposing costs sanctions upon the party that refuses to mediate is against the voluntary nature of mediation.[662] Further, Koo argues that imposing costs sanctions on the parties that unreasonably refuse to take part in mediation 'puts some teeth in a civil

[658] Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479, 488-491, 503.
[659] Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31 (2) Civil Justice Quarterly 151. 152. See also, Masood Ahmed, 'A More Principled Approach to Compulsory ADR' (2020) 4 Journal of Personal Injury Litigation 577, 578. In addition, Ahmed argues that "the courts should be more willing to make POs to fulfil two policy objectives. The first is to achieve fairness by reimbursing the unsuccessful party for costs it has had to incur which could have been avoided but for the successful party's failure to engage in ADR or, at the very least, for failing to engage in ADR which would have had the benefit of narrowing the issues between the parties and allowed the parties to gain a better understanding of the strengths and weaknesses of their arguments in the event that the parties have to revert to the court process. The second objective is to reinforce the policy of requiring parties to seriously consider ADR and as envisaged by Lord Woolf, preserve the court process as a last resort". See, Masood Ahmed, 'Bridging the Gap between Alternative Dispute Resolution and Robust Adverse Costs Orders' (2016) 8 Contemp Readings L & Soc Just 98,100.
[660] Hong-Lin Yu, Carrot and Stick Approach in English Mediation - There Must Be Another Way, 8 Contemp. Asia Arb. J. 81 (2015). 106-107. See also, Carlo Vittorio Giabardo, 'Should Alternative Dispute Resolution Mechanisms Be Mandatory: Rethinking Access to Court and Civil Adjudication in an Age of Austerity' (2017) 44 Exeter L Rev 25. 36. "it is clear that when both parties are pushed to (unwillingly) mediate to avoid possible costs penalties, mediation can already be easily considered as quasi-compulsory means".
[661] Gary Meggitt, 'PGF II SA v OMFS Co and Compulsory Mediation' (2014) 33(3) Civil Justice Quarterly 335. 348.
[662] Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Springer 2012) 211.

justice system where commitment to ADR rests on party autonomy.'[663] Further, Shipman argued that imposing costs sanctions is an element of mandatory mediation, and she pointed out that in some cases imposing financial penalties would prevent parties from bringing their dispute before the court due to the lack of money, thus obstructing the right of access to court.[664] The consensus view of these scholars is the practice of mediation in England is compulsory due to the penalties imposed on parties who refuse to engage in mediation, and some believe it is inconsistent with the voluntary process of mediation, regardless of the official position. The question remains, what are the implications of establishing mandatory mediation?

5.5.2.6 What are the implications of making mediation mandatory: Arguments for and against mandatory mediation

As discussed in the previous section, many scholars argue that the practice of mandatory mediation exists in the English civil justice system due to the threat of costs sanctions. Indeed, this issue of mandatory mediation is debatable. There are two main arguments against mandatory mediation: mandatory mediation is incompatible with the principles of mediation, and mandatory mediation is an obstruction to access to the court. Thus, these issues and their counterarguments will be discussed below.

The first argument against mandatory mediation is that it conflicts with the principles of mediation. Voluntariness is at the core of mediation, as it is the free choice of the parties to enter mediation,[665] and both parties must consent to mediate.[666] Further, it is claimed that mandatory mediation weakens the principle of party self-determination if parties feel coerced to settle.[667] Another argument against mandatory mediation concerns the potential threat to the confidentiality of the mediation process, as the judge may reveal details about the mediation session when deciding the reasonableness of the parties' refusal to engage in mediation.[668]

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[663] A. K. C. Koo, 'Ten Years after Halsey' (2015) 34(1) Civil Justice Quarterly 77. 81.
[664] Shirley Shipman, 'Compulsory mediation: the elephant in the room' (2011) 30(2) Civil Justice Quarterly 163. 191. See also, Shirley Shipman, 'Waiver: Canute against the tide?' (2013) 32(4) Civil Justice Quarterly 470, 485-486. And Shirley Shipman, 'Alternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009) 354-355.
[665] Marjorie Mantle, Mediation: A Practical Guide for Lawyers (2nd edn, Edinburgh University Press 2017) 5.
[666] Alexander Bevan, Alternative Dispute Resolution (Sweet & Maxwell 1992) 27.
[667] Patricia Hughes, 'Mandatory Mediation: Opportunity or Suberversion' (2001) 19 Windsor YB Access Just 161, 202.
[668] Michael Bartlet, 'Mediation Secrets "in the Shadow of the Law" (2015) 34(1) Civil Justice Quarterly 112, 113.

Others argue that forcing parties to mediate may not achieve success if unwilling parties do not enter mediation in good faith.[669] Evidence cited by Genn and others "suggest that quasi-compulsion in the London context has not been particularly successful" as a majority of parties opted out of the mediation pilot.[670] Finally, opponents cite the increasing costs accrued when mediation is unsuccessful.[671]

Perhaps the strongest argument against mandatory mediation is that it hinders the right of access to justice,[672] as it prevents parties from submitting their dispute to the court, and it is a financial burden.[673] This view is supported by *Halsey* as the ruling noted "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."[674] Martlet argues that voluntariness of mediation "is the guarantor that it will not replace the constitutional right of access to the courts. While mediation augments access to a form of justice, it can only do so provided it is voluntary, and the right of access to the courts remains."[675] Thus, making mediation mandatory would impede access to the court. Crucially, it is argued that mandatory mediation undermines the rule of law, as it safeguards procedural justice but not substantive justice.[676] This is the same argument made by Hazel Genn in her criticism of private mediation.[677]

In contrast, supporters of mandatory mediation emphasise that mandatory mediation does not contradict with its voluntary nature, as the coercion to engage in mediation is distinct from forcing parties to reach a settlement, and as long as parties are free to opt out of the mediation

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[669] Bevan (n 666) 28. See also, *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [10]. Lord Justice Dyson in Halsey stated, "If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process." A similar point was made by Lord Dyson at the Belfast Mediation Conference. See Lord Dyson, "Halsey 10 Years On–The Decision Revisited (n 471) 383.
[670] Genn, Fenn, Mason, Lane, Bechai, Gray and Dev Vencappa, *Twisting Arms* (n 495) 197.
[671] ibid 110; See also, Hazel Genn, Shiva Riahi and Katherine Pleming, Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation, in Felix Steffek and Hannes Unberath (eds) Regulating Dispute Resolution ADR and Access Justice at the Crossroads (Hart Publishing 2013) 146-148.
[672] Quek (n 658)498.
[673] Quek (n 658) 498. See also Shipman, 'Compulsory Mediation' (n 664).191.
[674] *Halsey v. Milton Keynes Gen. NHS Trust,* [2004] EWCA (Civ) 576 [9].
[675] Michael Martlet, 'Mandatory Mediation and the Rule of Law' (2019) 1(1) Amicus Curiae 50. 76.
[676] Richard Ingleby, 'Court Sponsored Mediation: The Case against Mandatory Participation' (1993) 56 Mod L Rev 441. 450-451. See also, Michael Martlet (n 675) 52.
[677] Genn, 'What is Civil Justice for? (n 332) 412-415.

process at any time this should be sufficient to maintain the voluntariness of mediation.[678] Secondly, supporters of mandatory mediation argue that it increases access to justice. For example, Tronson argues that mandatory mediation may be permissible, even if it impedes access to the court, if it furthers the overriding objective of dealing with cases justly by making justice more accessible and affordable, which is especially important given the high cost of litigation in the UK.[679] Similarly, Lord Lightman indicated that litigation costs prevent access to justice, and mediation gives litigants a chance to an 'approximation to justice' they can afford.[680] Significantly, advocates of mandatory mediation contend that it would not breach the right of access to the court because requiring parties to engage in the mediation process before resorting to litigation is considered a procedural step, and parties have the right to resort to the court if they do not settle.[681] In the words of Justice Norris, directing parties to attempt to solve their dispute via mediation before resorting to trial should not be viewed as an 'obstruction on the right of access to justice.'[682] Genn explained that "Referral to mediation is a procedural step...It does not exclude access to the courts and…does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point, and to continue with the litigation."[683] This view is supported by Ahmed as he argues, "Ordering parties to engage with ADR is not a violation of their rights to access to the courts, because they are at liberty to withdraw from that process before a final settlement agreement…Rather, the right to access would be undermined if the parties are compelled to

[678] Karl Mackie, David Miles, William Marsh and Tony Allen, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing Ltd,2007) 75.
[679] Tronson, (n 572) 417- 418. See also, Paul Randolph, 'Compulsory Mediation?' (2010) 160 (7412) The New Law Journal 499. 499-500; as Lord Phillips states "It is madness to incur the considerable expense of litigation—in England usually disproportionate to the amount at stake—without making a determined attempt to reach an amicable settlement." See also, Nicholas Phillips, 'Alternative Dispute Resolution: An English Viewpoint' (2008) 74 (4) Arbitration 406, 418.
[680] Lightman, 'Mediation: An Approximation to Justice'(n 506) 402. See also, Gavin Lightman, 'Breaking down the barriers' (n 506).
[681] Henry J. Brown and Arthur Marriott, *ADR Principles and Practice* (3rd edn, Sweet& Maxwell 2001) 96-97. See also, Jens M. Scherpe and Bevan Marten, 'Mediation in England and Wales: Regulation and Practice' in Klaus J. Hopt and Felix Steffek (eds) *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 378-380. See, Bryan Clark, Lawyers and Mediation (Springer 2012) 145-146. See Susan Blake, Julie Browne and Stuart Sime, The Jackson ADR Handbook (2nd edn, Oxford University Press 2016) section 9.10. See Daniel Kaufman Schaffer, 'An Examination of Mandatory Court-based Mediation' (2018) 84(3) Arbitration 229. 336-337.
[682] *Bradley v Heslin* [2014] EWHC 3267 (Ch) [24].
[683] Genn, Fenn, Mason, Lane, Bechai, Gray and Dev Vencappa, *Twisting Arms* (n 495) 15. Also, others argue that mandatory mediation increases the opportunity for parties to reach a settlement. As the saying goes "You can drag a horse to water, but you can't make it drink." However, the horse may drink from the water because he is there. The same saying applies to forcing parties to engage in mediation. See Graham Huntley, 'You can Drag a Horse to Mediation.…' (2013) 163 (7567) The New Law Journal 9.

settle through ADR."[684] This view is supported by the Court of Justice of the European Union (CJEU). In *Menini v Banco Popolare Società Cooperativ,*[685] the court explained that making mediation mandatory as a requirement before resorting to litigation does not conflict with the right of access to the court[686] Furthermore, Lord Thomas Lord Chief Justice (LCJ), in his speech celebrating the 800th anniversary of the Magna Carta, highlighted the importance of encouraging the use of ADR where litigation is very expensive.[687] In a recent development, the Civil Justice Council had been asked to address the question of the legality and desirability of compulsory ADR.[688] Regarding the legality question, it "concluded that parties can lawfully be compelled to participate in ADR." As for the desirability question, the report identified circumstances where "compulsion to participate in ADR could be a desirable and effective development. In doing so, we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted."[689] Furthermore, the report concluded that making ADR mandatory within the English civil justice system would be in agreement with Art. 6 of ECHR as long as this mandatory ADR form did not foreclose access to the court. The report concluded, "If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation, then there is not [a conflict with Art. 6]."[690] The report's final remark, "Above all, as long as all of these techniques leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do), then we think that the greater use of compulsion is justified and should be considered,"[691] is critical.

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[684] Ahmed, 'A More Principled Approach to Compulsory ADR (n 659) 587. See the critique of Halsey in section 5.4.3.5 for judicial decisions in support of the argument that compelling parties to mediate does not prevent access to the court.

[685] *Menini v Banco Popolare Società Cooperativ* (C-75/16) EU:C: 2017:457.

[686] The court states that "Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires". See *Menini v Banco Popolare Società Cooperativ* (C-75/16) EU:C: 2017:457 [61].

[687] Lord Thomas Lord Chief Justice (LCJ) The Legacy of the Magna Carta: Justice in the 21st Century, speech to the Legal Research Foundation, (25 September 2015) para 17.< https://www.judiciary.uk/wp-content/uploads/2015/10/the-legacy-of-magna-carta-lcj.pdf > accessed 26 August 2021.

[688] Civil Justice Council (CJC) Report on Compulsory ADR (June 2021) < https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 26 August 2021. Para1.

[689] ibid Para 7.

[690] ibid Para 58. Also, for more details on mandatory ADR and ECHR see Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26(3) The European Journal of International Law 607, 622-634.

[691] Civil Justice Council (CJC) Report on Compulsory ADR (n 688) Para 119.

5.5.2.7 Mandatory mediation in the era of COVID-19

In the researcher's view, the arguments in support of mandatory mediation are compelling. Principally, mandatory mediation is not equivalent to mandatory settlement. Moreover, mandatory mediation does not preclude access to justice, as parties have the right to opt out at any time without reaching a settlement, however, compulsory resolution through mediation would.[692] As Judge Waksman QC states "the purpose of these orders is not to force the ADR to produce a particular result, it is simply to suspend the proceedings for a period of time to give that process a chance to succeed."[693]

Mandatory mediation also supports the government's agenda to make the court the last resort, as the English government indicated, "It is in no-one's interest to create a litigious society."[694] Marriott indicated that ADR should be mandatory in England, as it will improve access to justice based on other jurisdictions' experience.[695] As the CJC ADR Working Group noted that ADR is underused and is 'too little known,'[696] mandatory mediation would reveal the benefits of mediation to more disputants,[697] as mediation has low uptake when it is voluntary.[698] Some have even argued that mandatory mediation should be viewed as the normal way to solve disputes, while litigation should be the exception, with people resorting to the court only when necessary 'in an age of austerity.'[699] Moreover, in certain disputes, a well-managed mandatory mediation scheme with competent mediators will reflect positively on the public and litigants,

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[692] Karl Mackie, David Miles, William Marsh and Tony Allen, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing Ltd,2007) 75; Quek (n 658) 285-288.
[693] *Andrew v Barclays Bank Plc,* [2012] C.T.L.C. 115 (2012) [32].
[694] Lord Chancellor's Department, *Modernising Justice* (n 341) para 1.10.
[695] Arthur Marriott, 'Mandatory ADR and access to justice' (2005) 71(4) Arbitration 307,317. See also, Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2nd edn, Springer 2018) 272. Andrews states that "litigation is a private war" even if judges deny this fact.
[696] Civil Justice Council, ADR (n 470) Para 4.1
[697] Billingsley and Ahmed (n 309) 206.
[698] Genn, Fenn, Mason, Lane, Bechai, Gray and Dev Vencappa, *Twisting Arms* (n 495) 9. Also, low uptake on voluntary Court-based mediation in Jordan.
[699] Carlo Vittorio Giabardo, 'Should Alternative Dispute Resolution Mechanisms Be Mandatory: Rethinking Access to Court and Civil Adjudication in an Age of Austerity' (2017) 44 Exeter L Rev 25. 28. See also, for example, Department for Business, Energy, and Industrial Strategy found in their empirical study that consumers show that ADR is cheaper and quicker than the court proceedings. Department for Business, Energy and Industrial Strategy, *Resolving Consumer Disputes Alternative Dispute Resolution and the Court System, Final Report* (2018) 3. See also, Willis v Nicolson [2007] EWCA Civ 199. Para [18]. Lord Justice Buxton indicated that parties should be encouraged to solve their dispute without resorting to litigation due to costly litigation system. He added "The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions."

and ensure the continuation of justice to be done properly.[700] Similarly, Ahmed strongly suggests that mediation be made mandatory within the civil justice system, as he states the courts should be "more willing to compel parties to ADR in appropriate cases. The overriding objective and, in particular, the need for the parties and the courts to incur proportionate costs provides the courts with the legitimacy to compel to engage (not compel to settle) with ADR."[701]

Crucially, the COVID-19 pandemic presents an opportunity for the English civil justice system to establish mandatory mediation as an alternative to litigation. Guise suggests that a robust approach by the judiciary is needed to increase the use of ADR, in order to avoid the backlog of litigation due to the impact of COVID-19.[702] Recently, Ahmed called for the judiciary to take advantage of the COVID-19 crisis to develop the Court of Appeal's ruling in *Lomax* to affirm the power of the court to compel parties to use mediation to manage the backlog of claims.[703] It is a promising sign that during the lockdown parties have turned to ADR to solve their disputes away "from the adversarial court system."[704] It may be a one-time opportunity

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[700] Julio César Betancourt, 'Mediation in England and Wales Why should it be mandatory?' (2016) 1 (1) Mediation Theory and Practice 95, 104.

[701] Ahmed, 'A more principled approach to compulsory ADR' (n 659)588; A similar view was asserted by Feehily as he calls the Irish lawmakers to introduce mandatory mediation. He states that "It is important when introducing statutory mediation schemes that the legislature is cognisant of ensuring that any compulsory aspect comprises a compulsion to initially engage and that the parties are free to leave the process at any time. In order to ensure that such schemes do not constitute constraint, financial or otherwise, and fall foul of constitutional and ECHR Act rights of access to court, the compulsion to consider commercial mediation should only impose a short delay, providing the space within which informed parties may attempt to settle their dispute with the assistance of a trained mediator. Mediation must be presented as a condition precedent to litigation or arbitration, not as the only means of dispute resolution. Provided such schemes are in the general interest and proportionate, the principal of effective judicial protection will not preclude them". See, Ronan Feehily, 'Creeping Compulsion to Mediate, the Constitution and the Convention' (2018) 69 N Ir Legal Q 127,146.

[702] Guise (n 563) 34; The Ministry of Justice acknowledged the backlog due to the Covid-19 pandemic and called for the need for people to resolve their disputes out of court. "Additionally, the Covid-19 pandemic has put extra pressure on the courts and the wider justice system, and a consequential effect of more people being equipped to resolve their disputes without needing to wait for a court would be a significant reduction in the burden on the current system, delivering better outcomes for parties and society at large." See, Ministry of Justice, 'Dispute Resolution in England and Wales: Call for Evidence (31 October 2021) 7. < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf > accessed 11 March 2022.

[703] Ahmed, 'Alternative Dispute Resolution During the Covid-19 Crisis (n 549) 2; Also, Ahmed argues "that the civil courts should more readily exercise their case management powers in compelling non-consenting parties to engage with these ADR procedures which have the potential, like the Fire Court, to assist in better managing tenancy disputes". See, Masood Ahmed, 'The London Fire Court, ADR, and the contemporary civil court process' (2021) 40(4) Civil Justice Quarterly 263,265.

[704] Mark Dubbery & Tara Lyons, 'ADR – Compromise in COVID-19 lockdown' (Pump Court Chambers, 14 April 2020) <https://www.pumpcourtchambers.com/2020/04/14/adr-compromise-in-covid-19-lockdown/ > accessed 1 March 2021. For example, the Construction Leadership Council's COVID-19: Managing Contractual disputes & collaboration – Summary Guide was issued on 14 July 2020. The guide set out steps to encourage partnership in the light of the pandemic among these steps is the need to use ADR for the benefits of saving time and costs. See also, The Construction Leadership Council's COVID-19: Managing Contractual disputes &

to introduce disputants to the benefits of mediation, and to implement mandatory mediation within the civil justice system.

5.5.2.8 The Civil Justice Council gives the nod to make mediation mandatory the way forward

As mentioned previously, the CJC's report concluded that mandatory mediation is lawful and compatible with Art. 6 of the ECHR.[705] The Master of the Rolls, Sir Geoffrey Vos, welcomed the report's conclusion as he stated, "ADR should no longer be viewed as "alternative" but as an integral part of the dispute resolution process; that process should focus on "resolution" rather than "dispute."[706] In another example of ADR becoming embedded within the culture of the civil justice system, the Commercial Court Guide 11th Edition and Circuit Commercial Court Guide[707] now refers to Negotiated Dispute Resolution (NDR)[708] to give an indication that these solutions are not alternative, but rather part of the conflict resolution process. Significantly, in November 2021, the CJC proposed to make compliance with pre-action protocols mandatory.[709] In addition, the report proposed to impose an obligation on parties to act in "good faith" while trying to solve the dispute.[710] Similarly, the recent CJC final report on the resolution of small claims recommended that the attendance of the parties should be

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collaboration – Summary Guide (14 July 2020) <http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/07/Construction-Leadership-Council-Covid-19-Managing-Contractual-Disputes-Collaboration-Summary-Guide-July-2020.pdf > accessed 1 March 2021. For instance, to reduce the backlog of cases due to COVID-19, in February 2021 the UK Government launched the Rental Mediation Service pilot "for landlords and tenants undergoing possession proceedings." Rental Mediation Service, < https://www.gov.uk/guidance/rental-mediation-service#about-the-service > accessed 27 August 2021

[705] Civil Justice Council (CJC) Report on Compulsory (n 688) Paras 1, 7.

[706] Courts and Tribunals Judiciary, 'Mandatory (Alternative) Dispute Resolution is Lawful and should be Encouraged' (12 July 2021 < https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/ > accessed 2 November 2021. A similar view was stated by the High Court of Justice, in *Ociusnet UK Ltd & Anor v Altus Digital Media Ltd & Anor*. The court expressed its dissatisfaction of spending tens of thousands of pounds by the parties and wasting the court's time on litigation as the court called for "application, which included an order facilitating the parties' engagement in settlement/ADR. In this case, in my view, a non-litigated approach to the dispute should be treated as the primary not the "alternative" means". See *Ociusnet UK Ltd & Anor v Altus Digital Media Ltd & Anor* [2021] EWHC 3377 (Ch). Paras [81,82].

[707] Courts and Tribunals Judiciary, 'New editions of the Commercial Court Guide and Circuit Commercial Court Guide published' (3 February 2022) < https://www.judiciary.uk/announcements/new-editions-of-the-commercial-court-guide-and-circuit-commercial-court-guide-published/ > accessed 3 February 2022.

[708] HM Courts and Tribunals Service, The Business and Property Courts of England and Wales, The Commercial Court Guide (incorporating The Admiralty Court Guide) Eleventh Edition (2022). G, G1.1; HM Courts and Tribunals Service, The Business and Property Courts, The Circuit Commercial Court Guide (2022 Edition) 33.

[709] Civil Justice Council (CJC) Review of Pre-Action Protocols, Interim Report (November 2021) para 3.13 < https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf > accessed 14 January 2022.

[710] ibid paras 1.4 and 2.8.

mandatory at mediation sessions for claims of £500 or less.[711] In the same direction, in 2021 the Ministry of Justice begin a call for evidence asking "the judiciary, legal profession, mediators and other dispute resolvers, academics, the advice sector, court users" to provide insights on their experiences using ADR.[712] The goal of this call is to make the use of ADR to solve disputes 'becomes the norm'. [713] In the researcher's view, these reports pave the way for adopting mandatory mediation in the English civil justice system in the near future.

5.6 Conclusion

This chapter examined several issues related to the concept of justice, the role of the court in encouraging the use mediation, the power of the court to compel parties to engage in ADR and the issue of compulsion in mediation.

In Jordan the study highlighted the concept of justice from the point of view of the Jordanian Constitution, the Constitutional Court, the Court of Cassation and the lawmaker's standpoint that justice can only be found inside the court through litigation. However, this concept of justice does not acknowledge that justice has always existed outside of the court, and has undermined the promotion of mediation as an alternative process to access justice. The study found the Ministry of Justice broadened the concept of access to justice by making a multi-door court that provided citizens with alternatives to litigation, namely mediation, to resolve their disputes quickly. In contrast to Jordan, the study found that the English civil justice system broadened the concept of access to justice by making a multi-door court that encouraged citizens to consider alternatives to litigation, namely mediation, to resolve their disputes.

[711] Civil Justice Council (CJC) the Resolution of Small Claims, Final Report (January 2022). Para 4.12. < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf > accessed 11 February 2022.
[712] The UK Government, Closed consultation: Dispute Resolution in England and Wales: Call for Evidence (2021) < https://www.gov.uk/government/consultations/dispute-resolution-in-england-and-wales-call-for-evidence> accessed 11 March 2022.
[713] Ministry of Justice, 'Dispute Resolution in England and Wales: Call for Evidence (31 October 2021) 6. < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf > accessed 11 March 2022. Crucially, one of the questions is about the effectiveness of mandatory ADR that "work well when they are part of the court process". See, Ministry of Justice, 'Dispute Resolution in England and Wales: Call for Evidence (31 October 2021) 10 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf > accessed 11 March 2022.

The English court's support for mediation is required by the CPR, in particular the duty of the court to encourage the use of ADR to solve disputes as an initial step before continuing with litigation. The duty of the court is intended to further the overriding objective of dealing with cases justly and proportionately, and to make the court a last resort. It also strengthens the court's authority to impose financial penalties on parties who violate court orders and directions, including refusing to engage in mediation unreasonably. On the other hand, in Jordan, referral judges have no obligation to offer, encourage or invite parties to the dispute to use mediation, which poses a challenge to mediation becoming a viable alternative to litigation.

In the provisional laws, the Jordanian Ministry of Justice empowered the referral judges to refer cases to mediation, on their own initiative without the parties' consent, to support the use of mediation. In addition, several attempts to include compulsory mediation in the Mediation Law have been made, as the Ministry of Justice deeply understands that coercion is needed to make mediation impactful. However, the lawmakers, the Constitutional Court and the Court of Cassation have rejected any amendments to make mediation compulsory, as the lawmakers insist that mediation should be conducted on a voluntary basis and the parties' consent is required to refer cases to mediation. By contrast, the study found that the English court is divided on the issue of the power of the court to compel parties to engage in ADR. The court affirmed this power until the Court of Appeal in the *Halsey* decision narrowly interpreted the court's power to compel unwilling parties to use ADR, and instead emphasized the use of costs sanctions to strongly encourage parties to attempt ADR. The Court of Appeal in the *Lomax v Lomax* ruling reaffirmed the court's power to order parties to engage in ENE, a form of ADR, without the consent of the parties, in accordance with CPR 3.1(2)(m). However, because the court did not directly overrule *Halsey*, the debate continues on the court's power to order parties to engage in mediation without their consent.

The issue of compulsion in mediation was the key disagreement observed in the empirical study. The vast majority of the referral judges (7 out of 8) opposed mandatory referral to mediation, on the grounds that compulsory mediation would only extend the litigation process as parties would not mediate in good faith, and would return to the court, while the majority of the judge-mediators (7 out of 9) supported mandatory mediation for cases with factual disputes to increase the use of mediation and ease the burden on the trial judges. Similar to Jordan, in England, the issue of mandatory mediation is a matter of ongoing debate as some members of the judiciary and some scholars consider mandatory mediation a breach of the citizens' right

to access the court, while others argue that anything short of compulsory resolution does not foreclose access to the court and believe the advantages of mandatory mediation outweigh the disadvantages. This is the conclusion of the CJC Report on Compulsory ADR, which found that compelling parties to mediate is both legal and desirable and does not conflict with the right to access to the court in Art. 6 of ECHR. Jordan, in contrast, is further behind in embedding mediation into its civil justice system, and one constituent group poses a significant challenge to making mediation mandatory–lawyers. This will be discussed in the next chapter.

CHAPTER SIX: LAWYERS AS GATEKEEPERS TO MEDIATION IN JORDAN AND ENGLAND

6.1 Introduction

The previous chapter identified several reasons for the low uptake of mediation in Jordan: the lack of authority to refer cases to mediation without parties' consent, the fact referral to mediation is based on judicial discretion; lack of authority to impose costs sanctions upon parties that unreasonably refuse to engage in mediation, and the reliance on non-statutory measures to encourage mediation uptake. In contrast, the uptake of mediation in England is increasing due to the impact of the CPR, which vested judges with the power to control litigation, and the obligation to further the overriding objective. For example, judges have the duty to encourage the use of ADR, mainly mediation; judges have the power to order parties to attempt the use of ADR without the parties' consent, and judges have the power to impose costs sanctions upon parties who refuse to engage in mediation unreasonably. Judges in Jordan and England have different roles and powers to encourage the use of mediation, which is reflected in the uptake of mediation in their respective jurisdictions.

Building on the empirical study, the aim of this chapter is to answer several key questions related to the role of the lawyers in promoting mediation. The first question raised by the empirical study is about the role of lawyers in encouraging their clients to use mediation. The empirical study hypothesised that the absence of a statutory duty for lawyers to encourage the use of mediation is one reason for the low referral rate to court-based mediation in Jordan. Therefore, this chapter will examine the roles and responsibilities of lawyers in mediation, and the ways in which lawyers act as gatekeepers to mediation in:

- Jordan's Civil Procedures Law,
- Magistrates Courts Law,
- Mediation Law and Bar Association Law
- Jordan's professional ethics and codes of conduct;
- England's CPR and professional codes of conduct.

The second question raised by the empirical study is about the lawyers' conflicts of interest, particularly financial considerations, that act as disincentives to encouraging clients to mediate their disputes. The third question is about the control lawyers have over their clients and the

legal system. The final question this chapter will explore is recent developments in the area of mandatory mediation, and their impact on lawyers.

6.2 The Right of Litigants to Represent Themselves

6.2.1 The right of litigants to represent themselves in Jordan

The role of lawyers as gatekeepers to mediation is significant, because parties are not allowed to appear before the court on their own except in certain circumstances. According to Art. 63(1) of the CPL, litigants (other than lawyers) cannot appear before the courts without lawyers who represent them, under the power of attorney.[714] The same provision is restated in the Bar Association Law No. 11 of 1972[715] and in the Magistrates Courts Law No. 23 of 2017, with one exception: Art. 7(b) permits litigants in person within the jurisdiction of the Magistrates Courts for cases valued at one thousand dinars or less.[716] The reason for preventing the parties from appearing before the court without their lawyer is due to the litigants' lack of knowledge of the litigation procedures.[717] Moreover, Art. 65 of the CPL explains that the purpose of appointing legal representation is to authorise the attorney to carry out the actions and procedures necessary to file the case, plead, appear before the court, and follow the case up until the final judgment is issued.[718] In delegating authority to an attorney, the lawyer will have the duty to go to the court and perform all actions on behalf of the client. Therefore, parties are not required to appear before the court or attend any judicial sessions, including mediation sessions. In practice, only lawyers are present in the Jordanian courts.[719]

These regulations confirm that litigants in person are generally not allowed, as parties have no right to appear before the court without legal representation. This poses an obstacle to the uptake of mediation, as citizens are prevented from appearing before the court on their own and obtaining a referral to mediation. In leaving citizens out of the referral process, parties are dependent on the advice of their lawyers. Decision-making remains in the lawyers' hands.

[714] CPL. Art. 63(1).
[715] The Bar Association Law (as amended) No. (11) 1972. Art 41.
[716] Magistrates Courts Law No. 23 of 2017, Art. 7(b).
[717] Mefleh A. Alqudah, *The Principles of Civil Procedures and Judicial Organizing* (2nd edn Dar Al Thaqafa for Publishing & Distributing Amman 2013) 252-253.
[718] CPL, Art. 65.
[719] Mahmoud M. Alkelani, *Civil Lawsuit Management and Judicial Applications* (Dar Al Thaqafa for Publishing & Distributing 2012) 127-128.

6.2.2 The right of litigants to represent themselves in England

Unlike Jordan, in England citizens have the right to litigate in person. A litigant in person is any individual that represents themselves in a court of law without an attorney.[720] This right is regulated by the Legal Services Act 2007 Part 3: the 'exercise of a right of audience,' and is defined as "The right to appear before and address a court, including the right to call and examine witnesses."[721] Litigants in person are treated equally with litigants that have legal representation in terms of following and applying the CPR. Lord Justice Briggs made a ruling in *Nata Lee Ltd v Abid*[722] before the Court of Appeal explaining that litigants in person are required to follow the CPR, the same as any other litigant. "[T]he fact that a party (whether an individual or a corporate body) is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective," the ruling read. "In short, the CPR do not, at least at present, make specific or separate provision for litigants in person."[723] Similarly, in *Ogiehor v Belinfantie,*[724] the Court of Appeal stated that litigants in person will receive no special treatment regarding court proceedings. "The overriding objective requires the courts, so far as practicable, to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties."[725] Further, in the case *Barton v Wright Hassall LLP,*[726] the Supreme Court confirmed this stance. "Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."[727]

The right for English citizens to appear before the court and represent themselves without legal representation opens the door for individuals to be introduced to and take advantage of free mediation services, such as the Small Claims Mediation Service[728] and Rental Mediation

[720] Court and Tribunals Judiciary, Advice for Litigants in Person. < https://www.judiciary.uk/you-and-the-judiciary/going-to-court/advice-for-litigants-in-person/ > accessed 28 August 2021.
[721] The Legal Services Act 2007, Schedule 2, para 3(1)
[722] [2014] EWCA (Civ) 1652.
[723] ibid [53].
[724] [2018] EWCA (Civ) 2423.
[725] ibid [30]; Moreover, the court explained that "While litigants in person will always attract the assistance of the court, they are not and cannot be a privileged class, relieved of their obligations under the Civil Procedure Rules. Judges will show common sense and often flexibility, but in the end must enforce the Rules, and have a proper eye to the legitimate interests of the other parties to litigation, including as to costs. That is a fundamental obligation, as the overriding objective makes clear: "enabling the court to deal with cases justly and at proportionate cost."" [44].
[726] [2018] UKSC 12.
[727] ibid [18].
[728] HM Courts & Tribunals Service, Small Claims Mediation Service < https://www.gov.uk/guidance/small-claims-mediation-service > accessed 28 August 2021.

Service.[729] In the absence of this right, Jordanian citizens are prevented from accessing the free court-based mediation service on their own, which may contribute to the low uptake of mediation.

6.3 The Role and Responsibility of Lawyers to Encourage the Use of Mediation in Accordance with the Law – In the Interest of Clients

6.3.1 The role and responsibility of lawyers to encourage the use of mediation in accordance with the Jordanian Civil Procedure Law

As explained already in this thesis, referral to mediation is codified in the Jordanian Mediation Law, the CPL, and the Magistrates Courts Law. According to Art. 59(bis)(3) of the CPL, mediation may be suggested by the CCMJ as a way to settle the dispute in a friendly manner.[730] As parties are not allowed to appear before the CCMJ without their lawyers present and are not required to attend the proceedings, lawyers are presented with the referral to mediation, and the parties may not be aware of the option to use court-based mediation to solve their dispute. This is corroborated by the empirical study, which confirms that lawyers typically attend proceedings before the referral judges without their clients present, according to the judges interviewed.[731] Further, there is also no statutory duty in the CPL for lawyers to confer with their clients before accepting or rejecting an offer of mediation. Moreover, the findings of the empirical study that show 40% of the lawyers reported advising less than a quarter of their clients to pursue mediation instead of litigation[732] are a strong indication that many lawyers are not communicating with their clients about alternative methods to settle their disputes. In this way, lawyers are the ultimate decision-makers regarding whether to resort to mediation.

6.3.2 The role and responsibility of lawyers to encourage the use of mediation in accordance with the Jordanian Magistrates Courts Law

As previously discussed, referral to mediation is also one of the discretionary powers of Magistrates Judges, as it is solely through the CCMJ or Magistrate Judge that a party may access court-based mediation. According to the Magistrates Courts Law Art. 7(a), the Magistrates Judge has the discretion to refer the case to mediation after seeking the parties' consent.[733] As litigants in person may appear before the Magistrates Court with cases valued

[729] Ministry of Housing, Communities & Local Government, Rental Mediation Service < https://www.gov.uk/guidance/rental-mediation-service > accessed 28 August 2021.
[730] CPL Art. 59(bis) (3).
[731] Chapter 4, 93-96.
[732] Lawyers' Questionnaire. Figure 11.
[733] The Magistrates Courts Law. Art. 7(a).

at one thousand dinars and less,[734] the judges may refer these parties to mediation directly. Paradoxically, these same litigants may not appear before the judge-mediator without legal representation. Not allowing litigants in person to appear before a judge-mediator on their own behalf is the major deficiency in the law. Such a deficiency should be corrected by an amendment to Art. 7(b) that allows litigants in person to appear before the judge-mediator without legal representation for cases valued at no more than one thousand dinars. However, as Al Sleby observed, the majority of claims before the Jordanian courts are represented by lawyers.[735] Accordingly, the same criticism directed at the CPL applies to the Magistrates Courts Law, in particular, the lack of duty on lawyers to encourage, discuss or offer to their clients the use of court-based mediation. Further, the absence of a statutory duty for lawyers to encourage the use of mediation is cited as one of the reasons for the low uptake of mediation in Jordan by judges in the empirical study.[736]

6.3.3 The role and responsibility of lawyers to encourage the use of mediation in accordance with the Jordanian Mediation Law

As discussed already in this thesis, the purpose of the Mediation Law is to regulate and organise the entire mediation process from the referral stage to the end of the mediation session. Referral to mediation is limited to the CCMJ and Magistrates Judge, in accordance with Art. 3(a) of the Mediation Law.[737] Enjoying a central role in Art. 5 of the Mediation Law, the lawyers' presence is a condition for conducting mediation sessions,[738] while the law is silent as to their responsibilities. The first point of criticism about the Mediation Law is the absence of a legal duty on lawyers to encourage or discuss the use of mediation with their clients.[739] The second point of criticism is the requirement for a lawyer to attend mediation sessions. While this may be reasonable in litigation proceedings, the lawyers' presence as a condition of conducting mediation sessions is not necessary: mediation is concerned with the mutual interests of the disputants, and is not focused solely on legal issues. Consequently, knowledge of the law is not a pre-condition for mediation, and while parties have the right to legal representation at any time, the presence of lawyers should not be required to conduct a mediation session. Having a

[734] ibid Art. 7(b).
[735] Bashir Al Sleby, *Alternative Dispute Resolution ADR* (Darwael 2010) 44.
[736] Chapter 4, 93-96.
[737] The Mediation Law. Art. 3(a).
[738] ibid Art. 5.
[739] Unlike other jurisdictions, Jordan does not require lawyers to advise their clients about mediation. For example, the Irish Mediation Act No. (27) 2017, Part 3(14)(1) imposes an obligation on solicitors and barristers to advise clients prior to litigation proceedings to consider using mediation and provide information about the mediation process and its advantages.

lawyer present is unnecessary in cases where legal knowledge is required, as a judge-mediator who is an expert in the law is facilitating the mediation session, and is in a good position to address the issue. Further, the empirical study found that most of the judge-mediators interviewed follow the evaluative mediation style by giving advice to parties about legal issues and the likely outcome if the case proceeds to trial.[740]

6.3.4 The role and responsibility of lawyers to encourage the use of mediation in accordance with the Jordanian Bar Association Law

Presently, the Bar Association Law does not mandate lawyers to discuss, inform or offer the use of mediation to their clients as an alternative to solving their disputes, instead of resorting to litigation.[741] The provisions of the law address the registration,[742] training,[743] fees[744] and defence of clients before the courts. For example, Art. 39 of the Bar Association Law affirms the right of the lawyer to follow the path he deems likely to be successful in defending his client before the court.[745] Furthermore, Art. 54 obliges the lawyer to abide by the principles of honour and integrity, perform all the duties that this law imposes on him, and comply with the regulations and traditions of the association.[746] Also, Art. 55 states that lawyers should defend their clients with integrity and sincerity before the court.[747] It is important to note that nothing in this law places an obligation on lawyers to act in the best interest of their clients, or in the interests of the civil justice system. Instead, following the path they deem successful allows lawyers to act in their own best interest. The findings of the lawyers' questionnaire indicate that only 22% of respondents report that they advise their clients to mediate before litigating *all the time*.[748] Further, only 21% of respondents advise their clients to participate in court-based mediation instead of litigation more than half of the time.[749] These findings support the judges' conclusion that lawyers are not consistently encouraging their clients to resort to mediation, as lawyers have no statutory duty to encourage the use of mediation.[750]

[740] Chapter 4, 102-104.
[741] The Bar Association Law.
[742] ibid Arts. 7-20.
[743] ibid Arts. 25-37.
[744] ibid Arts. 45-52.
[745] ibid Art. 39.
[746] ibid Art. 54.
[747] ibid Art. 55.
[748] Lawyers' Questionnaire. Figure 10.
[749] Lawyers' Questionnaire. Figure 11.
[750] Chapter 4, 93-96.

Significantly, the law has been amended several times, the most recent of which was in 2019.[751] Despite mediation having been enacted in Jordan since 2006, the amended law fails to mention mediation or other ADR methods. There are no guidelines for participation in mediation sessions, and there remains no legal obligations for lawyers to advise, encourage, or inform clients about the use of mediation or other alternatives to litigation. Further, all these amendments failed to address the best interest of clients or the civil justice system, unlike the English system which requires the parties and their lawyers to help the court further the overriding objective. The Bar Association Law should be amended to provide guidance for participation in mediation sessions, and discussing litigation alternatives with clients, and require lawyers to act in the best of interest of clients and the court by promoting the use of mediation.

6.3.5 The role and responsibility of lawyers to encourage the use of mediation in accordance with English law: Statutory duty under the CPR

Unlike Jordan, in England, the CPR 1.3 expressly requires parties' support and imposes a duty on the parties, not just the judiciary, as "The parties are required to help the court to further the overriding objective."[752] As explained in the previous chapter, the overriding objective of the CPR is to deal with cases justly and proportionately, and this is achieved primarily through actively managing cases,[753] including the recommendation to encourage parties to use ADR before starting litigation.[754] "Civil procedure rules CPRs in the English jurisdiction were introduced to restrain the adversarial and expensive litigation activities of the legal profession,"[755] Brooker explained. She added that "Under CPR both the judiciary and the parties have a duty to consider ADR alternatives such as mediation."[756] Also, under CPR 1.3 the responsibility to help the court rests with both parties, as both are required to take the initiative to help the court further the overriding objective. The "initiative to help" was addressed in the Court of Appeal ruling in *Khalili v Bennett*.[757] Lady Justice Hale explained that "It may, therefore, no longer always be appropriate for defendants to sit back and wait for

[751] Law No. (6) of 2019 - The law amending the Bar Association Law was issued in the Official Gazette No. (5561) on 17 February 2019. The amendment extended the term of the Bar Council to three years instead of two.
[752] CPR 1.3.
[753] CPR 1.4.
[754] CPR 1.4(2)(e).
[755] Penny Brooker, 'Judging Unreasonable Litigation Behavior at the Interface of Mediation in the English Jurisdiction' (2010) 2 (3) J. Leg. Aff. Dispute Resolut. Eng. Constr 148, 148.
[756] ibid 148.
[757] [2000] E.M.L.R. 996.

the claimant to do nothing when there are several steps that they themselves could have taken to have the matter disposed of earlier."[758] This duty on parties was upheld by the court in the case of *Frank Cowl & Ors v Plymouth City Council*.[759] Lord Woolf emphasised that to further the overriding objective parties should attempt to use ADR to resolve the dispute before resorting to the court.[760]

The duty to further the overriding objective is not limited to the parties, but also includes their legal representatives.[761] As the Court of Appeal in *Khudados v Hayden*[762] explained, the duty of the parties under CPR 1.3 to help the court is extended to their lawyers as well. "What of CPR 1.3? The language of the rule is couched in terms that "the parties are required to help the Court" and the rule is headed 'Duty of the Parties.'" Lord Justice Ward went on to say, "Accepting for the purpose of the argument that there is a duty, and that the duty falls on the legal advisers as well as the litigant, it is at most a duty to the court, not to the other side."[763] Furthermore, in *Frank Cowl & Ors v Plymouth City Council*, Lord Woolf stressed, "This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable."[764] These rulings clearly indicate that the duty to support the overriding objective applies to legal representatives. Therefore, it is also incumbent on lawyers to consider the use of ADR before resorting to litigation. In *Halsey v. Milton Keynes Gen. NHS Trust*,[765] the Court of Appeal underlined that duty to help the court extends to using mediation when it said, "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."[766] Further indication of lawyers'

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[758] ibid [46]; See also, *T (A Child) (Contact: Alienation: Permission to Appeal), Re* [2002] EWCA (Civ) 1736,[50] Legal representatives have a duty to alert the judge about any material omission, this was very clear in Court of Appeal ruling in the *T (A Child)* case, Lord Justice Thorpe explained that "an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists... In many cases, the advocate ought to raise the matter with the judge in pursuance of his duty to assist the court to achieve the overriding objective CPR 1.3".

[759] [2001] EWCA (Civ) 1935.

[760] ibid [3]. See also, The Court of Appeal in *OMV Petrom SA v Glencore International AG* [2017] EWCA (Civ) 195, [39]. Sir Geoffrey Vos says very clearly that parties have a duty to consider the use of ADR "The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

[761] Susan Blake, Julie Browne and Stuart Sime, The Jackson ADR Handbook (2nd edn, Oxford University Press 2016) para 4.02.

[762] [2007] EWCA (Civ) 1316.

[763] ibid [39].

[764] [2001] EWCA (Civ) 1935 [27].

[765] [2004] EWCA (Civ) 576.

[766] ibid [11]. Similar guidance is provided by the Law Society of Scotland in B1.9 Dispute Resolution. < https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-9-dispute-resolution/ > accessed 26 December 2021.

responsibility to encourage the use ADR comes in the *Burchell v Bullard* case before the Court of Appeal. Lord Justice Ward stated in his ruling that "The court has given its stamp of approval to mediation, and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate."[767] In the case of *Lexi Holdings v Pannone & Partners*,[768] Lord Justice Briggs explicitly stated that the duty is imposed upon both the parties and their legal representatives. "Nonetheless the parties and their legal teams are obliged by CPR 1.3 to help the court to further the overriding objective."[769] The Court of Appeal, in its ruling in *Susan Dunnett v Railtrack Plc*,[770] summarised the obligation of lawyers to further the overriding objective in its judgement. "It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules."[771] The statement went on to warn lawyers of the possibility of costs sanctions for breach of this duty. "[i]f they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence."[772] These cases confirm the duty of lawyers under CPR 1.3 to encourage their clients to engage in ADR before resorting to litigation. Sander argues that lawyers should be under a duty to advise their clients of ADR options to solve their disputes, and compared such obligation to the doctor's obligation to inform the patients of other options before doing surgery.[773] Lurie and Press expressed a similar view that lawyers have an obligation to advise their clients about alternative methods to settle their disputes, but also about the relative costs of early versus late settlement.[774] The Civil Justice Council's ADR report observed, "the Courts' acknowledgement that litigation lawyers are now under a professional obligation to advise their clients of the availability and advantages

[767] *Burchell v Bullard* [2005] EWCA (Civ) 358, [43]. See also, the Court of Appeal in *Oliver v Symons* [2012] EWCA (Civ) 267,[53]. Lord Justice Ward shows his frustration with lawyers that failed to convince parties to resort to mediation that may have led to a fair compromise. He said, "It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come." See also, *Faidi v Elliot Corp* [2012] EWCA (Civ) 287, [39] as Lord Justice Ward expressed the same view.
[768] [2010] EWHC 1416 (Ch).
[769] ibid [7].
[770] [2002] EWCA (Civ) 303.
[771] ibid [15].
[772] ibid [15].
[773] Frank E A Sander and Michael L Prigoff, 'Professional Responsibility – Should There Be a Duty to Advise of ADR Options' (1990) 76 (11) ABA J 50, 50.
[774] Paul M Lurie and Sharon Press, 'The Lawyer's Obligation to Advise Clients of Dispute Settlement Options' (2014) 20 (4) Disp Resol Mag 34, 34-35.

of ADR."[775] In addition to CPR 1.3, the Directions questionnaire[776] and the main court guides[777] require legal representatives to discuss with their clients the possibility of solving disputes via ADR and to warn them of costs sanctions if they refuse to attempt ADR unreasonably. The extent to which lawyers must help the court will be taken up in the next section.

6.3.6 The extent to which legal representatives must fulfil their duty to the court in England

Legal representatives have a duty to help the court to further the overriding objective in accordance with the CPR, and a statutory duty to "act in the best interests of their clients," as established in the Legal Services Act 2007.[778] However, the line between the lawyer's duty towards the court and the lawyer's duty towards his clients is unclear, as there is no explicit provision in the CPR on this issue. The judiciary has issued conflicting rulings as to whether the practice of furthering the overriding objective constitutes a breach of the lawyers' duty to their clients. For example, in *Hallam Estates Ltd v Baker*,[779] Lord Justice Jackson stressed there is no conflict between the lawyer's duty to help the court and protecting the interests of his clients. "Therefore, legal representatives are not in breach of any duty to their client when they agree to a reasonable extension of time which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation."[780] Significantly, Lord Justice Jackson suggests that furthering the overriding objective by saving the court's resources also benefits clients by eliminating lengthy litigation proceedings.[781] The Court of Appeal went a step further in

[775] Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Interim Report (2017). para 2.5(e).
[776] For example, Form N181, Directions questionnaire (Fast track and Multi-track) Section A. For legal representatives only "I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle". See also, Form N150 Allocation questionnaire – Money Claims UK, Section A. For legal representatives only "I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle".
[777] For example, The Commercial Court Guide, tenth edition (2017), para G1.4. "Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and should ensure that their clients are fully informed as to the most cost-effective means of resolving their dispute". See also, Chancery Guide 2016, Para 18.1. "Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed about the most cost-effective means of resolving the dispute". Similar statement in The Technology and Construction Court ("TCC") Guide, second edition. Issued 3rd October 2005, fifth revision. Para 7.1.3; The Circuit Commercial (Mercantile) Court Guide, para 7.3 and The Patents Court Guide issued April 2019, para 9.2.
[778] Legal Services Act 2007. Pt 3(c).
[779] [2014] EWCA (Civ) 661.
[780] ibid [12].
[781] [2014] EWCA (Civ) 661[12].

Skjevesland v Geveran Trading Co Ltd,[782] where Lady Justice Arden declared "…an advocate has a duty to the court, which overrides his duty to his client."[783] In her view, a lawyer's duty under CPR 1.3 surpasses his duty towards his clients.[784] By contrast, Lord Justice Ward, in *Khudados v Hayden*,[785] argued that the lawyer's duty to help the court should not supersede his duty towards his client. "Whatever may be the requirement to help the court, it cannot in my judgment, extend so far as to impose upon counsel a duty in conflict with his proper duty to his client."[786] In *Denton v TH White Ltd,*[787] the Court of Appeal articulated a different approach by explaining that the role of lawyers is to advise clients about their duty toward the court. "Representatives should bear this important obligation to the court in mind when considering whether to advise their clients…in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions."[788] Johnson argues that the Court of Appeal in *Khudados v Hayden* "was happy only to offer "tentative observations" about what it did not include. But for practitioners…who have to deal with the practical effect of the CPR every day, the hazy outlines of the obligation owed under CPR 1.3 are plainly in need of some sharper definition."[789] These contradictory court decisions demonstrate the need for further guidance to bring clarity to the legal practice, and determine where to draw the line on lawyers' duty towards the court and towards their clients. What is certain is breaching the lawyer's duty to encourage the use of mediation as one of the tools to further the overriding objective will result in financial penalties imposed by the court, as will be discussed below.

6.3.7 Costs sanctions: The consequence for breaching the duty in CPR 1.3

Unlike Jordan, as discussed in Chapter 5, Rule 44 of the CPR gives the court the power to impose costs sanctions on parties that unreasonably refuse to mediate as a way of showing dissatisfaction with the actions of the parties, and it is costs that have changed the 'culture of litigation.'[790] However, as Mackie et al. pointed out, imposing a direct penalty on lawyers that

[782] [2002] EWCA (Civ) 1567.
[783] ibid [37].
[784] ibid [37].
[785] [2007] EWCA (Civ) 1316.
[786] ibid [39]
[787] [2014] EWCA (Civ) 906.
[788] ibid [43].
[789] Adam Johnson, '*Khudados v Hayden*: CPR r.1.3 and the Advocate's Duty to the Court' (2008) 27(3) Civil Justice Quarterly 294, 299.
[790] Karl Mackie, David Miles, William Marsh and Tony Allen, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing 2007) 183.

failed to advise their clients to attempt ADR forms has not been tested in the English system.[791] Instead, the parties and lawyers are considered one unit under CPR 1.3, and the costs sanctions are borne by the parties. The consequences of non-compliance with the obligations under CPR 1.3 are found in *Davies v Forrett*.[792] The High Court of Justice advised the parties that breaching their duty to help the court to further the overriding objective would result in costs sanctions. As Mr. Justice Edis reminded the parties, "This is a duty and not an exhortation. Breach of duty is a significant matter which is directly relevant to costs issues."[793] Brooker describes how the attitude of the court applies to parties that do not engage in ADR. "Litigants are now required to consider mediation, and can be penalised under the Civil Procedure Rules if they unreasonably refuse to use an ADR procedure."[794]

6.4 Professional Ethics and Codes of Conduct

6.4.1 Lawyer's code of ethics and code of conduct in Jordan

This section briefly examines the professional ethics and codes of conduct to identify lawyers' duties that are relevant to the use of ADR. The General Authority of the Bar Association adopted the Lawyer's Code of Ethics and Code of Conduct on 29 June 1979 to establish expectations for legal professionals.[795] It is compulsory for members of the Bar Association to follow the guidance; however, it should be noted that the Lawyer's Code of Ethics and Code of Conduct has no legal status, because it is not a law that was enacted by the House of

[791] ibid 182.
[792] *Davies v Forrett* [2015] EWHC 1761 (QB).
[793] *Davies v Forrett* [2015] EWHC 1761 (QB),[23]. See also, *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC) [42-49]. The court emphasised the duty of lawyers and parties to help further the overriding objective according to CPR 1.3. Thus "It is therefore time to say, in the clearest terms, that parties and their solicitors can no longer conduct litigation in a manner which does not keep the proportionality of the costs being incurred at the forefront of their minds at all times." Further the court explained that parties' breaching this duty "must expect to bear the costs." See also, *Emmanuel v Revenue and Customs Commissioners* [2017] EWHC 1253 (Ch), [46]. See also, Chapter 5, section 5.6.4 For examples of court-imposed costs sanctions for unreasonable refusal to mediate.
[794] Penny Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries' (2014) 43 Comm L World Rev 120, 120; see the case of *Lejonvarn v Burgess* [2020] EWCA (Civ) 114. The Court of Appeal concluded that "...because the respondents unreasonably refused to accept the Part 36 offer that was made early, and which they then failed to beat, this is an appropriate case for indemnity costs" [97]. Allan explained that the case of *Lejonvarn* was one example in which the Court of Appeal explained how the costs regime is being used to address the bad behaviour from litigants. He adds "*Lejonvarn* was one such case. In those cases, the court must take firm control from the outset and a robust approach where parties are uncooperative. That approach must encompass not only management through to trial, but also encouraging a consensual resolution through settlement or ADR where appropriate. The CPR gave courts wide powers in this regard although, as *Lejonvarn* makes clear, those powers are not always being used to full effect." Alexandra Allan, 'Case management, uncooperative litigant behaviour and indemnity costs amid "echoes of the bad old days": Lejonvarn v Burgess [2020] EWCA Civ 114' (2020) 39(4) Civil Justice Quarterly 293, 304.
[795] Lawyer's Code of Ethics and Code of Conduct of 1979. Para 2.

Parliament.[796] The code includes a practice guideline for lawyers regarding the ethics and acceptable conduct of the legal profession in dealing with the court, clients and other lawyers.[797] While the professional ethics and codes of conduct are well established regarding litigation, none are specific to ADR, though the principles should apply. For instance, Rule No. 7 instructs lawyers to advise their clients about possible outcomes of the case.[798] Significantly, serving the best interests of the client appears only in Rule No. 30, in describing the duty of the lawyer in the final analysis of the case.[799] By comparison, the English civil justice system requires solicitors and barristers to act in the best interest of their clients at all times, as will be discussed in the next section. Most importantly for this thesis, the code does not mention the subject of ADR. It is significant that the Lawyer's Code of Ethics and Code of Conduct has not been updated, revised or amended since it was established, bearing in mind it has been fifteen years since court-based mediation was enacted within the civil justice system. It is evident that the Bar Association drafted the rules with only the principles of litigation conduct in mind. The very fact that ADR is not discussed emphasises the marginality of alternatives to litigation. Indeed, the empirical study suggests the vast majority of Jordanian lawyers are not engaging with court-based mediation, and are not familiar with the mediation process. Al Sleby argues this is partially due to the deficiency of the rules that regulate the lawyers' practice in Jordan.[800] The Lawyer's Code of Ethics and Code of Conduct is outdated, and should be revised to reflect the new developments in the Jordanian civil justice system, particularly the Mediation Law.

6.4.2 Professional codes of conduct in England

This section briefly examines the codes of conduct that are relevant to ADR in the Solicitors Regulation Authority (SRA) Code of Conduct, for solicitors, and the Bar Standards Board (BSB) Code of Conduct, for barristers.

In 2019, the SRA Standards and Regulation introduced changes to the SRA Principals and the Solicitors Code of Conduct.[801] The new codes are less prescriptive and more reliant on

[796] The introduction of the Lawyer's Code of Ethics and Code of Conduct of 1979. Para 1.
[797] ibid Rule No .1.
[798] ibid Rule No. 7.
[799] ibid Rule No. 30.
[800] Al Sleby (n 735) 87.
[801] SRA reforms 2019: What is Changing and how can you Prepare? < https://www.lexisnexis.co.uk/blog/future-of-law/sra-reforms-2019-what-is-changing-and-how-can-you-prepare > accessed 25 August 2021.

solicitors using their own judgment.[802] One of the key changes from the SRA Code of Conduct 2007 was in the explicit guidance in Rule 2.02 which imposed a duty on lawyers to advise clients of their option to use ADR.

> When considering the options available to the client (2.02(1)(b)), if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes. There may be costs sanctions if a party refuses ADR - see *Halsey v Milton Keynes NHS Trust and Steel and Joy* [2004] EWCA (Civ) 576.[803]

Whereas the SRA Code of Conduct 2011 mandatory outcome 1.12 could be understood as an obligation to advise clients about the availability of ADR,[804] the new SRA Principles and Code of Conduct, in contrast, does not impose a direct duty on lawyers or firms to advise clients regarding ADR options; however, the principles and codes of conduct may be interpreted to advise clients about the option to use ADR. For example, these principles include that: solicitors should act in a way that upholds the constitutional principle of the rule of law and the proper administration of justice, and in the best interests of each client.[805] Paragraph 2.6 of the 2019 SRA Code of Conduct for Solicitors, Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs) states, 'You do not waste the court's time.'[806] Not wasting the court's time would likely include an obligation for solicitors to advise their clients to attempt ADR, if ADR would save the court's time. Additionally, the SRA Code of Conduct for Firms para 4.1 imposes an obligation to protect the client's best interests.[807] This code may be interpreted as an obligation for firms to advise their clients about ADR options, if attempting ADR would be in the best interests of their clients.[808]

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[802] Gavin Irwin and Helen Lavery, The New SRA Standards and Regulations: a StaR is Born < https://www.2harecourt.com/training-and-knowledge/the-new-sra-standards-and-regulations-a-star-is-born/ > accessed 15 September 2021.
[803] Solicitors' Code of Conduct 2007, Guidance to Rule 2. Client care 2.02, para 15. < https://www.whatdotheyknow.com/request/63467/response/157863/attach/6/Rule%202.pdf?cookie_passthrough=1 > accessed 25 August 2021.
[804] SRA Handbook, SRA Code of Conduct 2011, Mandatory outcome O (1.12) < https://www.sra.org.uk/solicitors/handbook/code/ > accessed 17 July 2021.
[805] Solicitors Regulation Authority, SRA Principles. <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 17 July 2021.
[806] Solicitors Regulation Authority, SRA Code of Conduct for Solicitors, RELs and RFLs. Section two 'Dispute resolution and proceedings before courts, tribunals and inquiries' para 2.6 < https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ > accessed 17 July 2021.
[807] Solicitors Regulation Authority, SRA Code of Conduct for Firms, para 4.1 < https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ > accessed 17 July 2021
[808] For example, in a recent ruling by the High Court of Justice, the court restated the obligation of solicitors to inform their clients of litigation risks, costs and the potential outcomes of their case. See *Mervyn Lambert Plant Ltd v Knights Solicitors* [2022] EWHC 165 (QB) [11-15].

The BSB Handbook version 4.6 which came into effect on 31 December 2020 details the Core Duties and Rules that regulate the professional conduct of barristers.[809] Similar to the SRA Standards and Regulation, BSB Core Duties include: "observe your duty to the court in the administration of justice [CD1],"[810] and "act in the best interests of each client [CD2]."[811] Core Duty 7 requires barristers to provide competent legal services to clients,[812] which includes "taking all reasonable steps to avoid incurring unnecessary expense."[813] Further, Rule C3.3 requires barristers to "take reasonable steps to avoid wasting the court's time."[814] These standards are relevant for ADR, as barristers have a duty to further the overriding objective, including using ADR if it saves the court's time and resources. This calls for a balanced best interest that takes into account the best interests of the client and the court. For example, it is in the interests of both for the client to understand the potential costs and time saved by resolving their dispute through ADR and to avoid costs sanctions for unreasonably refusing mediation. Therefore, barristers, like solicitors, have a duty to advise their clients on all ADR options, costs, suitability, time, and implications.[815]

Unlike Jordan, in England, solicitors and barristers have a duty to the court to support the proper administration of justice and to act in the best interests of their clients. Consequently, if the disputes are suitable to be solved by ADR, solicitors and barristers are required to advise their clients on the use of ADR which may save time, money, and effort on the part of their

[809] The Bar Standards Board, The BSB Handbook - Version 4.6. < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/14f5ab60-b707-45fc-b8d4cf4cd410dc63/second-edition-test31072019104713.pdf > accessed 17 July 2021.
[810] The Bar Standards Board, The BSB Handbook - Version 4.6, Part 2: Code of Conduct, Part 2 - B. The Core Duties < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/14f5ab60-b707-45fc-b8d4cf4cd410dc63/second-edition-test31072019104713.pdf > accessed 17 July 2021.
[811] ibid Part 2: Code of Conduct, Part 2 - B. The Core Duties.
[812] ibid Part 2: Code of Conduct, Part 2 - B. The Core Duties.
[813] The Bar Standards Board, The BSB Handbook - Version 4.6, gC38 (3). < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/14f5ab60-b707-45fc-b8d4cf4cd410dc63/second-edition-test31072019104713.pdf > accessed 17 July 2021.
[814] The Bar Standards Board, The BSB Handbook - Version 4.6, Part 2: Code of Conduct, Part 2 - C1. You and the court, r.c3.3. The Core Duties < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/14f5ab60-b707-45fc-b8d4cf4cd410dc63/second-edition-test31072019104713.pdf > accessed 17 July 2021.
[815] Mackie, Miles, Marsh and Allen (n 790) 182. In fact, the Ministry of Justice Civil Court User Survey shows that "The majority of claimants reported that they would ideally have avoided court action, they had taken some form of alternative action to avoid going to court." See Becky Hamlyn, Emma Coleman, TNS BMRB Susan Purdon, Bryson Purdon and Mark Sefton, Civil Court User Survey: Findings from a postal survey of individual claimants and profiling of business claimants (Ministry of Justice Analytical Series 2015)1. < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/472483/civil-court-user-survey.pdf > accessed 11 February 2022.

clients and the court.[816] Moreover, solicitors and barristers have a duty to inform their clients of costs sanctions if they refuse to attempt the use of ADR unreasonably.[817] It could be argued that it is sufficient to impose an implicit duty on solicitors and barristers to advise clients on the ADR options, because ADR has been enshrined in the law and the legal culture in England since the enactment of the CPR in 1999. On the other hand, such implicit duties may not be as effective in jurisdictions where ADR is not as well developed, such as Jordan.[818]

6.5 Lawyers' Resistance to Using Mediation Before Resorting to Litigation – In the Interest of Lawyers

6.5.1 Jordanian lawyers' resistance to using mediation before resorting to litigation

There has been reluctance among some Jordanian lawyers to advise their clients to use court-based mediation, as was explained in Chapter 3. Findings from the empirical study indicated that Jordanian lawyers resist mediation due to many reasons, such as believing that accepting the mediation invitation is a sign of weakness in the case,[819] limited knowledge of mediation,[820] and parties and their lawyers resisting mediation to delay payment.[821] But the strongest evidence about lawyers' resistance to mediation points to concerns about a decrease in fees as a result of settling cases quickly through mediation. Although this question was not included in the lawyers' questionnaire, the judges' interviewed believed that money considerations were the primary reason for the low uptake of mediation in Jordan. As detailed in Chapter 4, the general consensus among the judges interviewed is that lawyers are not in favour of mediation due to financial considerations. The judges explained that resorting to litigation is more profitable to lawyers, as litigation has several stages and lengthy procedures that generate more income, while resorting to mediation may bring a settlement in a short period of time.[822] Al

[816] For example, according to the UK Government, "The mediation sector in the UK was estimated to be worth £17.5bn in 2020, and it is estimated that mediation can save businesses around £4.6 billion per year in management time, relationships, productivity and legal fees." See, The UK Government, 'Open Consultation: The Singapore Convention on Mediation' (2 February 2022) <https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation > accessed 24 February 2022.
[817] Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press 2016) s 6, para 6.7.
[818] For example, Rule B 1.9 Standards of Conduct for solicitors of Scotland impose explicit duty on solicitors "Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives. A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options" < https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-9-dispute-resolution/ > accessed 18 July 2021.
[819] Chapter 4, 109-111.
[820] Chapter 4, 107-109. And Lawyers' Questionnaire, Figure 24.
[821] Chapter 4, 93-96.
[822] Chapter 4, 93-96.

Qatawneh argues that lawyers are not interested in resorting to mediation due to the strong belief that settling disputes through mediation would negatively affect their income.[823] This argument is supported by attendees of Amman Mediation Week, which included members of the Jordanian Senate and Parliament, judges, lawyers, representatives from the Ministry of Justice and others, who identified that the resistance of lawyers to resorting to mediation is partially based on the assumption that their income will be affected.[824] Similarly, Al Sleby claims that lawyers have no desire to resort to mediation as lawyers earn more money via litigation.[825] As mediation is voluntary in Jordan and there is no legal or ethical duty on lawyers to encourage the use of mediation, it is not surprising that lawyers act in their own best interests whenever possible. A duty to help the court or face costs sanctions is an unknown concept in Jordan. However, the threat would likely overcome the unwillingness of some lawyers to accept mediation and increase the uptake of court-based mediation in Jordan as demonstrated by England, where the practice of mediation has increased markedly despite lobbying from legal professional organisations since the introduction of the CPR in 1998.

6.5.2 English lawyers' resistance to using mediation before resorting to litigation

Like Jordanian lawyers, early research indicated that English lawyers were resistant to engage in mediation.[826] Reasons behind their resistance are wide-ranging, such as viewing mediation

[823] Mohammad Al Qatawneh, *Mediation in Settling Civil Disputes* (Department of the National Library 2008) 77.
[824] Amman Mediation Week, Recommendations, Status quo and Suggested Solutions (18-19 March 2017) to author.
[825] Al Sleby (n 735) 98. Also, during the fieldwork for this thesis, the researcher approached the Mediation Departments in each court in Jordan to better understand the current use of mediation in the region. Officials in Mediation Departments outside Amman confirmed that the lawyers refuse invitations to use court-based mediation due to money considerations. Additionally, during these visits the researcher spoke to more than 200 lawyers to get a sense of their lack of participation in mediation. One of the most frequent reasons given is that lawyers do not want to choose mediation for income considerations. Instead, they favour the court proceedings.
[826] Julio César Betancourt, 'Mediation in England and Wales Why Should it be Mandatory?' (2016) 1 (1) Mediation Theory and Practice 95, 96.

as a sign of weakness in the case,[827] lack of knowledge of mediation,[828] and parties and their lawyers prefer to complete the court proceedings to postpone payment if they are liable to pay the claimant.[829] Among other reasons are lawyers' conflicts of interest due to financial considerations, which will be the focus of this section, and education, awareness and training, which will be discussed in the next chapter of this thesis.

Nevertheless, lawyers' resistance to mediation has undergone a shift in the two decades since the introduction of the CPR. Initially, Genn found that some lawyers were not in favour of mediation because they feared a reduction in their income.[830] This finding was confirmed by del Ceno's empirical research on the English lawyers' attitudes towards mediation in

[827] Bryan Clark, 'Mediation and Scottish Lawyers: Past, Present and Future' (2009) 13 Edinburgh L Rev 252, 260. See also, Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report,* (Lord Chancellor's Department Research Series No. 5/98, July 1998),6; Varda Bondy and Margaret Doyle, *Mediation in Judicial Review: A Practical Handbook for* Lawyers (The Public Law Project 2011) 26. This is also true in other countries, for example, Italy, Vittorio Indovina, 'When Mandatory Mediation Meets the Adversarial Legal Culture of Lawyers: An Empirical Study in Italy' (2020) 26 Harv Negot L Rev 69, 100; South Africa, Ronan Feehily, 'The Role of the Lawyer in the Commercial Mediation Process: A Critical Analysis of the Legal and Regulatory Issues' (2016) 133(2) The South Africa Law Journal 351,361. USA, Roselle L. Wissler,' Barriers to Attorneys' Discussion and Use of ADR' (2004) 19 Ohio State Journal on Dispute Resolution 459, 463.

[828] Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report,* Lord Chancellor's Department Research Series No. 5/98, July 1998, 35. See also, Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018). Para 4.4.

[829] In England, Genn showed that one of the reasons that defendants resist or withdraw from mediation is a strategy to delay payment. See Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 109-110.

[830] Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report*, (Lord Chancellor's Department Research Series No. 5/98, July 1998). 38-39. A similar finding was noted in the evaluation of Birmingham Court-Based Civil (Non-Family) Mediation Scheme, mediators expressed their views on solicitors' attitudes towards mediation. "Solicitors were said to regard mediation as a loss of income and, for this reason, had an interest in keeping the litigation going". See Lisa Webley, Pamela Abrams and Sylvie Bacquet, *'Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme*.' (Final Report, Report to the Department for Constitutional Affairs, September 2006) 82.The fear of reducing income is evident in many countries, for example, Italy, Vittorio Indovina, 'When Mandatory Mediation Meets the Adversarial Legal Culture of Lawyers: An Empirical Study in Italy' (2020) 26 Harv Negot L Rev 69, 91; Italian lawyers held a strike against making mediation mandatory as they considered the reform "a severe threat to the income and integrity of those who operate Italy's slow-moving legal system." See 'Editorial' 'Compulsory Mediation Angers Lawyers Working in Italy's Unwieldy Legal System' *The Guardian* (London, 23 May 2011) < https://www.theguardian.com/law/butterworth-and-bowcott-on-law/2011/may/23/italian-lawyers-strike-mandatory-mediation > accessed 5 August 2021; Malaysia, Archie Zariski, 'Lawyers' Resistance to Mediation: Evolution and Adaptation' (2nd AMA Conference Rediscovering Mediation in the 21st Century, Kuala Lumpur, February 24-25/ 2011) 4-5 < http://barcouncil.org.my/conference1/pdf/7.LAWYERSRESISTANCETOMEDIATIONASCOTTISHPERSPECTIVE.pdf > accessed 28 July 2021; USA, Don Peters, 'Understanding Why Lawyers Resist Mediation' (2nd AMA Conference Rediscovering Mediation in the 21st Century, Kuala Lumpur, February 24-25/ 2011) Para 2 < http://barcouncil.org.my/conference1/pdf/8.LAWYERSRESISTANCETOMEDIATIONASCOTTISHPERSPECTIVE.pdf > accessed 19 May 2021, Leonard L Riskin, 'Mediation and Lawyers' (1982) 43 Ohio St LJ 29,48;, and Roselle L. Wissler,' Barriers to Attorneys' Discussion and Use of ADR' (2004) 19 Ohio State Journal on Dispute Resolution 459, 463; and Nigeria, see Larry O. C. Chukwu and Kevin N. Nwosu, 'The Role of Lawyers in Fostering Alternative Dispute Resolution in the Multi-Door Courthouse' (2016) 49 (2) Law and Politics in Africa, Asia, and Latin America 220, 230.

commercial landlord and tenant disputes.[831] del Ceno's research shows that the legal profession did not consider resorting to mediation as profitable, and senior barristers preferred litigation over mediation, since it generates more money.[832] The fear of losing money was also cited as one of the reasons lawyers do not encourage and promote the use of ADR in the 2017 International Mediation Institute Global Pound Conference Series online survey.[833]

Research suggests the fear of losing income is justified. In fact, in countries where lawyers are paid by the hour, resorting to mediation is financially unprofitable. As Wissler's review of empirical research on mediation in the United States pointed out, lawyers make less fees if the case is mediated and more fees if the case is litigated, where they charge hourly for their work.[834] This view is supported by findings from the survey "How Lawyers' Intuitions Prolong Litigation." Wistrich and Rachlinski found that lawyers paid per hour have an interest in increasing costs, prolonging litigation, and postponing settlement; consequently, lengthy litigation is financially in the interest of lawyers.[835] This is also true in the UK, as Mayson explained that when lawyers get paid per hour, there is no doubt that they "will try to create as many chargeable hours as possible," and, as a result, clients' best interests become second priority.[836] This was supported by Visscher who found that "Empirical research indeed suggests that the payment structure affects the behaviour of the lawyer. In that respect, lawyers

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[831] Julian Sidoli del Ceno, 'An Investigation into Lawyer Attitudes Towards the use of Mediation in Commercial Property Disputes in England and Wales' (2011) 3 (2) International Journal of Law in the Built Environment 182.

[832] ibid 192; Sturrock explained that fear among many lawyers of losing money is one of the reasons that lawyers resist using mediation. See John Sturrock, 'Making Better Use of Mediation to Resolve Disputes and Manage Difficult Issues' (June 2015) < https://www.mediate.com/articles/SturrockJ35.cfm > accessed 2 August 2021.

[833] International Mediation Institute (IMI), Global Pound Conference Series, Global Data Trends and Regional Differences (2017)16. < https://imimediation.org/research/gpc/ > accessed 5 August 2021. See also, International Mediation Institute (IMI) Global pound Conference (GPC) Los Angeles Report (2019), the survey shows that lawyers are the main gatekeepers to mediation "because lawyers rely on billable hours and, as such, it is not in their financial interest to assist the quick resolution of matters." 14 < https://imimediation.org/download/909/reports/47997/gpc-los-angeles-report.pdf >accessed 8 August 2021

[834] Roselle L Wissler, 'The Effectiveness of Court-Connected Dispute Resolution in Civil Cases' (2004) 22 Conflict Resol Q 55, 67; See also, ADR Center, The Cost of Non-ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation, Survey Data Report (2010). This survey shows that EU Lawyers consider ADR a threat because they fear losing legal fees. Para VI < https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/Survey-Data-Report.pdf > accessed11 August 2021.

[835] Andrew J Wistrich and Jeffrey J Rachlinski, 'How Lawyers' Intuitions Prolong Litigation' (2013) 86 (3) S Cal L Rev 571, 627. See also, Michael J. Kaufman, The Role of Lawyers in Civil Litigation: Obstructors Rather than Facilitators of Justice (1988) 77 (4) Illinois Bar Journal 202 -209. Kaufman stresses that lawyers are obstructors rather than facilitators of justice as they use tactics to extend litigation and delay resolution and contribute to making the system adversarial. He argues that the litigation system is not adversarial but lawyers and the 'public view it that way'.

[836] Stephen W Mayson, 'The Future of the Legal Profession' (1992) 1 Nottingham LJ 1,4.

seem to also serve their self-interest, irrespective of and sometimes even contrary to the interests of the client."[837] Visscher continued to say that when lawyers have to make a decision to choose between litigation or ADR, it is naïve to think that lawyers would put the interest of their clients over their own interest when it comes to their money.[838] Furthermore, Menkel-Meadow argues that lawyers in the United States and other countries such as the UK, where lawyers get paid per hour or per court session, "what might be more efficient dispute resolution for a client/party might not be economically profitable for lawyers."[839] Further, Menkel-Meadow explained that lawyers fear of losing money led to resistance to advising their clients to attempt mediation.[840] On the other hand, Brooker and Lavers's empirical research about commercial lawyers' attitudes and experience with mediation show that the notion of lawyer's resistance to mediation due to a 'loss of revenue' was unfounded among commercial lawyers that have experience and practice with mediation.[841] It is plausible that lawyers' resistance weakens as they become more familiar with the process of ADR, as the courts have enforced lawyers' duty under the CPR by imposing costs sanctions, and ADR becomes embedded in the English civil justice system.[842] There is also evidence that lawyers view mediation as a new revenue stream, and many have trained as mediators (See Section 6.6.2, 220-223).

Current research in Scotland resembles early research in England. In his empirical studies about Scottish lawyers and mediation, Clark found that some lawyers' resistance to engage in mediation is due to money considerations, as mediation is viewed as a threat to their income.[843]

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[837] Louis Visscher, 'The Duty of Lawyers to Serve Their Clients' Interests an Economic and Psychological Account' (January 30, 2014). RILE Working Paper Series 2014/03, 24. Available at SSRN: <https://ssrn.com/abstract=2418952 > accessed 19 May 2021.

[838] ibid 24. See also, Robert A. Kagan, 'Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry' (1994) 19 (1) Law & Social Inquiry 1, 53. Kagan argues that lawyers acting in their own self-interests are a secondary factor that maintains the adversarial legal system by 'lobbying to preserve adversarial legalism' that financially benefits themselves.

[839] Carrie Menkel-Meadow, 'Variations in the Uptake of and Resistance to Mediation Outside of the United States' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation*: The Fordham Papers, vol 8 (Brill Nijhoff 2015) 210.

[840] ibid 210.

[841] Penny Brooker and Anthony Lavers, 'Commercial Lawyers' Attitudes and Experience with Mediation' (2002) Web Journal of Current Legal Issues 4; Penny Brooker and Anthony Lavers, 'Commercial and Construction ADR: Lawyers' Attitudes and Experience' (2001) 20(Oct) Civil Justice Quarterly 327, 329.

[842] CPR 1.4 (2)(e). "Encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."; CPR 26.4(2)(a) Stay to allow for settlement of the case grants power to the court on its own initiative to impose a stay on proceedings while parties attempt to solve their disputes using ADR if the court considers that such a stay would be appropriate; CPR 26.4(a) Referral to the Mediation Service for Small Claims and pre-action conduct and protocols encourage the parties to settle their disputes without proceeding to trial by various methods including the use of ADR.

[843] Bryan Clark, *Lawyers and Mediation* (Springer2012) 40-46. See also, Clark, 'Mediation and Scottish Lawyers (n 827) 256-257. See also, Andrew Agapiou and Bryan Clark, 'An Empirical Analysis of Scottish Construction Lawyers' Interaction with Mediation: A Qualitative Approach' (2012) 31 (4) Civil Justice

In addition, Clark argues that "lawyers are often coy about the potentially deleterious financial implications that mediation might hold for their own practice" despite the evidence that shows lawyers earn more money via litigation than from mediation.[844] As Scotland is much earlier in its mediation practice, it is possible that lawyers' acceptance of mediation will follow the path of lawyers in England. The same may be applicable to Jordan, if mediation becomes embedded within the civil justice system there.

6.6 Lawyers control over mediation

6.6.1 Lawyers' control over mediation in Jordan

As explained previously, lawyers act as gatekeepers to mediation, because they appear before the court when the offer to participate in mediation is made during the first judicial session. Therefore, lawyers control the decision on whether to resort to mediation. This was confirmed in the judges' interviews, where 11 out of 17 judges stressed that lawyers have control over their clients and, as a result, it is they who decide whether to discuss ADR forms and, ultimately, whether to resort to mediation.[845] Results from the lawyers' questionnaire also support this finding, as 35% percent of the respondents said the advice of their lawyers is the main factor behind clients' decisions to engage in mediation.[846] Furthermore, the lawyers' questionnaire shows that more than half of the lawyers reported that they control the mediation sessions, whereas few respondents (12%) said the disputants are in control of the mediation

Quarterly 494,512; Bryan Clark and Charles Dawson, 'ADR and Scottish Commercial Litigators: A Study of Attitudes and Experience' (2007) 26(Apr) Civil Justice Quarterly 228, 239. The survey shows that 16% of respondents agree that "lawyers will lose money if ADR becomes popular" while 65% disagreed.; Bryan Clark, 'Lawyer Resistance to Mediation: A Scottish Perspective' (2nd AMA Conference Rediscovering Mediation in the 21st Century, Kuala Lumpur, February 24-25, 2011) 4-5 < http://barcouncil.org.my/conference1/pdf/6.LAWYERSRESISTANCETOMEDIATIONASCOTTISHPERSPECTIVE.pdf > accessed 28 July 2021; Margaret Ross and Douglas Bain, *In Court Mediation Pilot Projects: Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Government, Social Research, 2010) para 7.6. "There was an impression amongst a few mediators that certain lawyers steered parties away from mediation due to self-interest in retaining the case for the fees that it would generate".

[844] Clark, *Lawyers and Mediation* (n 843) 45: Clark's view is shared by Ross, as she considers the resistance of lawyers to engage in mediation due to money consideration is one of the reasons that hinders the growth of mediation in Scotland. See Margaret L. Ross, 'Mediation in Scotland: An Elusive Opportunity?' in Nadia Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 329.

[845] Chapter 4, 93-96.

[846] Lawyers' Questionnaire, Figure 14.

sessions.[847] In addition, lawyers approached during the fieldwork confirmed to the researcher that they control the cases, and they are in charge of making the decision to mediate disputes.[848]

It is beyond doubt that lawyers play a central role in mediation sessions, as the attendance of clients is optional,[849] and nearly half of respondents to the lawyers' questionnaire (47%) reported that none of their clients participate in mediation sessions.[850] This is a clear indication of the lawmakers' intention for lawyers to control mediation, instead of their clients. This position is at odds with the self-determination principle of mediation which requires that parties have the power to resolve their own disputes.[851] Al-Ahmed and Hamadneh argue that the lawmakers should require the attendance of the parties as a condition of conducting the mediation sessions, instead of lawyers.[852] Because procedures for mediation are completely different from court procedures, the presence of lawyers should not be required unless the parties request help from their lawyers in drafting the final agreement.[853] They support the view that there is a positive aspect of having a lawyer in the mediation sessions to clarify, explain, and advise their clients about legal issues, and to help them to reach a settlement.[854] This view is supported by De Girolomo as he emphasised the importance of party participation in the mediation process.[855] On the other hand, Al-Mundhir argues that the presence of lawyers in mediation sessions has a negative impact by encouraging clients to withdraw from the mediation process and continue with litigation without any valid justification.[856] This underlines the lawyer's significance in mediation, and explains why the success or failure of the mediation process depends mainly on their actions. To ensure parties are aware of ADR options and have the right of self-determination, the lawmakers should amend the CPL, Magistrates Courts Law and Mediation Law to require parties' attendance at the first judicial session and all mediation sessions.

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[847] Lawyers' Questionnaire, Figure 20.
[848] The researcher's fieldnotes while conducting the empirical research in Jordan.
[849] The Mediation Law. Art. 5 requires the attendance of lawyers as a condition to conduct mediation sessions.
[850] Lawyers' Questionnaire, Figure 8.
[851] Henry Brown and Arthur Marriott, *ADR Principles and Practice* (3rd edn, Sweet & Maxwell 2011) 161.
[852] Rola Al-Ahmed, 'Mediation for Settling the Civil Disputes in the Jordanian Law: A Comparative Study' (PhD thesis, Amman Arab University 2008) 196-197; Abdullah Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes, A Comparative Study' (PhD thesis, University Hassan 2015) 204-205
[853] ibid 196-197; Hamadneh (n 852) 204-205.
[854] ibid 194-195; Hamadneh (n 852) 206.
[855] Debbie De Girolamo, 'The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice' (2019) 39(4) Oxford Journal of Legal Studies 834, 838-839.
[856] Hadi Al-Mundhir, *Alternative Solutions to Legal Disputes: A Practical Guide: Negotiations, Mediation, and Arbitration* (Chemaly Publishing 2004) 55.

6.6.1.1 The power of lawyers in the House of Parliament to dilute the Jordanian Mediation Law

One way that lawyers impact the legal system is by holding decision-making positions in the executive and legislative branches of government.[857] Lawyers in the House of Parliament have influenced the development of mediation policies in Jordan to maintain the status quo of their profession. This section will examine amendments to the Provisional Mediation Law which made the presence of the parties optional before the referral judge and at the mediation sessions, and their rejection of two proposals to establish mandatory mediation to weaken the practice of mediation in favour of lawyers.

In Art. 3 of the Provisional Mediation Law No. 37 of 2003, the Council of Ministers required the referral judge to meet with the parties to the dispute *and* their legal representatives to discuss the referral to mediation.[858] Once the House of Parliament reconvened in 2005, it debated the provisional law and made amendments before making the law permanent.[859] It should be noted that the Legal Committee includes eleven members, and historically the majority are lawyers.[860] The wording of this provision was changed by the Legal Committee to require referral judges to "meet with litigants *or* their legal representatives" to discuss the referral to mediation.[861] Thus, the attendance of the parties was no longer required at the referral stage. During the discussion of the draft amendment at the plenary session, the Minister of Justice failed to persuade the Members of Parliament that having parties attend the judicial session at the referral stage before the Magistrate Judge or the CCMJ gives them the chance to learn about the mediation offer, and, in most cases, the disputes end with an amicable solution without going through the full stages of the trial.[862] One lawyer-member of the House of Parliament supported the Minster of Justice as he argued that the attendance of the parties

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[857] Clark, *Lawyers and Mediation* (n 843) 86; See also, Kagan (n 838) 7. Kagan noted that" the prevalence of lawyers in high places–lobbying firms, legislatures, commissions, legislative and administrative staffs–generates steady pressures to preserve and expand the realm of legal rights and remedies, due process protections, and opportunities for challenging the legal basis for governmental action."

[858] The Provisional Mediation Law No. (37) 2003, Art 3. Emphasis added.

[859] The Jordanian Parliament, Stages of the legislative process. <https://representatives.jo/Ar/Pages/مراحل_عملية_التشريع > accessed 30 April 2021. In brief, the stages of the legislative process start when the Council of Ministers refer a draft law to the Speaker of Parliament attached with a memorandum and explanatory notes explaining the reasons for submitting the draft to the House. Then the Speaker refers the draft to the legal committee to express their opinions and they have the authority to edit, delete and amend the draft. Next, the Parliament discusses the draft in the plenary session and vote on it.

[860] The Jordanian Parliament, Legal Committee members. <https://representatives.jo/Ar/Pages/اللجان > accessed 30 April 2021.

[861] The House of Parliament discussion of the Provisional Mediation Law No. 37 of 2003 (March 6, 2005) to Ashraf Abu Hazeem (27 January 2020) 70-72. Emphasis added.

[862] ibid 73.

before the referral judge eases the way to reach a friendly solution via reconciliation or mediation as many lawyers seek to prolong litigation and delay conflict resolution.[863] A similar view was expressed by another member of the Legal Committee, a well-known lawyer in Amman, when the House discussed a separate amendment to the CPL. He said frankly that allowing the CCMJ to meet with parties is not in his interest, nor the interest of any lawyer, but that having the parties present before the court would make it easier for the court to deliver justice quickly by offering reconciliation or referral to mediation, as many lawyers use the law to prolong the litigation procedures for their own benefit. He added that a bad compromise is better than a good lawsuit.[864] Despite these arguments, the lawyer-members of Parliament enthusiastically defended the change to this provision, and they argued that the court should not require the presence of the parties with their lawyers before the referral judge as the legal power of attorney is sufficient to represent the parties to the dispute before the court.[865] Unfortunately, the lawyers in Parliament had the final say, as they made the lawyers' presence at the referral stage mandatory, and the parties' presence optional.[866] This ensured that lawyers would become the gatekeepers to mediation by controlling the decision to accept or reject an invitation to mediate the dispute.

Initially, Art. 5 of the Provisional Mediation Law No. 37 of 2003 required the presence of the parties as a condition for conducting the mediation session, though the attendance of lawyers was optional.[867] In debating the provisional law, the Ministry of Justice explained that requiring the disputing parties, not lawyers, to attend the mediation sessions would help to facilitate negotiations and increase the possibility of reaching a solution.[868] This conclusion was supported by the judges interviewed, who confirmed the presence of the parties to the dispute often helps and makes it easy to settle.[869] However, the Legal Committee in the House of Parliament changed the wording of the text to require lawyers, not the parties, to be present as a condition for conducting the mediation session.[870] The lawyer-members of Parliament supported the change, arguing that it is unnecessary for the parties to attend the mediation sessions as the presence of the lawyers is sufficient. As a result, the Parliament agreed to this

[863] ibid 73.
[864] The House of Parliament discussion of the Provisional Law No. 26 of 2002 that amended the CPL No. 24 of 1988 (February 27, 2005) to Ashraf Abu Hazeem (31 December 2019) 46-47.
[865] The House of Parliament discussion of the Provisional Mediation Law (n 861) 68.
[866] ibid 73-75.
[867] The Provisional Mediation Law No. (37) 2003. Art. 5(a).
[868] The House of Parliament discussion of the Provisional Mediation Law (n 861) 5-6.
[869] Chapter 4, 93-96.
[870] The House of Parliament discussion of the Provisional Mediation Law (n 861) 5-6.

amendment to the Provisional Mediation Law to make the attendance of lawyers a requirement of conducting the mediation sessions,[871] again making lawyers the dominant actors in court-based mediation.

Lastly, as explained previously in Chapters 4 and 5, the lawyers on the House of Parliament's Legal Committee have been particularly influential in rejecting two proposals that introduced mandatory mediation. The more recent proposal in 2017 rejected the establishment of mandatory mediation within the Mediation Law on the grounds that it breached Arts. 101 and 102 of the Constitution. The Legal Committee argued that mandatory mediation would prevent the fundamental right of access to the court as protected by the Constitution, and the House of Parliament agreed with the committee's decision.[872] Together, these amendments have contributed to weakening the Mediation Law and shaped the practice of court-based mediation in favour of lawyers.

6.6.1.2 The power of lawyers to control the legal system in Jordan

Efforts to block a new amendment to the CPL that aimed to increase the capacity of the court notification system illustrates how lawyers continue to exert control over legislation that is against their interests. On 21 July 2019, the Council of Ministers published a policy memorandum in support of an amendment to the CPL that would allow a private company to deliver judicial documents to resolve the delay and backlog in the system.[873] The Legal Committee in the House of Parliament, along with other lawyer-members, fiercely rejected this proposal on the grounds that the goal of establishing this company would be to benefit a private owner. The Minister of Justice rebutted this argument by stating that the government could entirely own such a company, and the bailiffs appointed in this company would be treated the same as the bailiffs appointed by the court in terms of civil and criminal penalties in the event of a breach duties.[874] It is plausible that the actual intent of the lawmakers was to prevent the

[871] The provisional law was introduced by the Council of Ministers to the House of Parliament to make it a permanent law, which became the Mediation Law No. 12 of 2006 after the Parliament passed it with some amendments.
[872] The House of Parliament discussion of the amendment to the Mediation Law of 2017 (4 July 2017) to Ashraf Abu Hazeem (27 January 2020). 41-43.
[873] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment of 2019 of the CPL* No. 24 of 1988.
[874] The House of Parliament discussion of the 2019 amendment for the CPL Law No. 24 of 1988 (21 July 2019) to Ashraf Abu Hazeem (27 January 2020) 99-107.

establishment of such a company within the civil justice system to extend the litigation time as much as they could. For example, lawyers use the court's bailiff to delay delivery of judiciary notifications such as serving witnesses and other parties. This was observed by the Jordanian National Centre for Human Rights in a 2006 report that found negligence on the part of some court bailiffs to adhere to provisions of the law, and instances of bribery among bailiffs in carrying out the notifications.[875] Other research confirmed there were many judicial hearings postponed due to the spread of bribery among bailiffs to delay delivery of notifications.[876] In this case, lawyers used their power in Parliament to prevent developments of the legal system that were not in their favour.

More recently, the Bar Association blocked an order issued by the Prime Minister to facilitate access to the court during the pandemic. Defense Order No. 21 was issued on 14 November 2020 to ensure the continuation of the right to litigation and the regular functioning of the courts in light of the spread of the coronavirus.[877] Under this order, electronic communications such as WhatsApp, email, SMS and video calls could be used in legal notifications, hearings, exchanging documents between the parties to the disputes and their legal representatives, while the registration of cases could be completed using the Ministry of Justice platform.[878] The Minster of Justice, Bassam Talhouni, said that this order was necessary to protect judges, court employees, and lawyers as the number of individuals testing positive for Covid-19 was increasing. The Minister of Justice explained that employing the use of e-communications would be a positive step to avoid face-to-face interaction among all stakeholders, keep the litigation process moving, and these measures would facilitate access to justice. He added that these procedures would end as soon as the Covid-19 cases dropped.[879] However, before the order came into force, the Bar Association demanded the withdrawal of Defense Order No. 21,[880] and threatened to stop registering cases and pleading before all the Kingdom's courts if

[875] Jordanian National Centre for Human Rights, The human rights situation in the Kingdom (2006). Section C. <https://english.cdfj.org/المركز-الوطني-لحقوق-الانسان-يصدر-تقري/> accessed 30 April 2021.
[876] Mohamed Mahmoud Al-Damour, 'The Attitudes of Judges, Lawyers and the Convicted of Reasons that Lead to the Slow Litigation Procedures (Master's dissertation, Mutah University 2007) 3.
[877] The Defense Order No. (21).
[878] The Defense Order No. (21).
[879] Editorial, The Defense Order No. (21) is instrumental in the continuity of courts' operations–Talhouni, *The Jordan Times* (Amman, 8 December 2020) < https://www.jordantimes.com/news/local/pm-issues-defence-no-21-ensure-continuity-courts%E2%80%99-operations > accessed 9 December 2020.
[880] The Bar Association approves escalatory measures to demand the withdrawal of the Defense Order No 21. < http://jba.org.jo/News/NewsDetails.aspx?PID=16498 > accessed 9 December 2020.

the Minster of Justice did not acquiesce to their demands.[881] Further, the President of the Bar Association added that Defense Order No. 21 would violate the Constitution, interfere with the work of the judicial authority, infringe on its procedures, disrupt the work of lawyers, and prevent them from attending the courts permanently.[882] In his response, the Minister of Justice argued that using electronic means in the litigation system would ensure the continuity of the litigation process and the right to litigation via the court, which would facilitate access to justice with speedy proceedings.[883] On 13 December 2020, the Bar Association issued an order to all of its members to stop pleading before the courts for a week as an escalatory action to pressure the government to withdraw its Defense Order No. 21.[884] On the second day of the lawyers' strike, the Bar Association reached an agreement with the Judicial Council and the Ministry of Justice regarding the litigation procedures before the courts in light of the pandemic.[885] The agreement favours lawyers, as lawyers now have the right to choose between in-person or online registration of cases, submission of legal documents or payment of court fees. Most importantly, the court needs the lawyers' permission to use audio-visual communication services to conduct hearings, examine witnesses and experts and interrogate litigants.[886] In contrast to Jordan, in England during the Covid-19 pandemic, the use of telecommunications in the court is increasing to facilitate the litigation process.[887] Further, the Master of the Rolls Sir Geoffrey Vos explains that the future of litigation in England will be based on an online civil justice system to reduce delay and expenses, and make the system accessible to

[881] The Bar Association approves escalatory measures to demand the withdrawal of the defense order No 21. < http://jba.org.jo/News/NewsDetails.aspx?PID=16498 > accessed 9 December 2020.
[882] Editorial, Justice Crisis ... "Remote Litigation" ... After the Failure of Distance Education! *Agwarnews* (Amman, 9 December 2020) < http://agwarnews.com/index.php/details/763-2020-12-09-00-05-51 > accessed 9 December 2020.
[883] Editorial, Justice Crisis ... "Remote Litigation" ... After the Failure of Distance Education! *Agwarnews* (Amman, 9 December 2020) < http://agwarnews.com/index.php/details/763-2020-12-09-00-05-51 > accessed 9 December 2020.
[884] The Jordanian Bar Association, Circular No. 90/9370/2020 (Issued on 13 of December 2020) <https://www.jba.org.jo/CMS/UploadedFiles/Document/58876d3f-d466-4796-87c7-8430c07b5afa.pdf >accessed 16 December 2020.
[885] The President of the Bar Association Agrees to Litigation Procedures in Light of Corona. The Jordanian Bar Association. < https://www.jba.org.jo/CMS/UploadedFiles/Document/cf872bb3-3bc3-49a7-8dce-70ca4c47b759.pdf> accessed 17 December 2020.
[886] The President of the Bar Association Agrees to Litigation Procedures in Light of Corona. The Jordanian Bar Association. < https://www.jba.org.jo/CMS/UploadedFiles/Document/cf872bb3-3bc3-49a7-8dce-70ca4c47b759.pdf > accessed 17 December 2020.
[887] For example, on 22 March 2020, the Judiciary of England and Wales published Civil Justice in England and Wales Protocol Regarding Remote Hearings. See Courts and Tribunals Judiciary, Civil Justice in England and Wales Protocol Regarding Remote Hearings (20 March 2020) < https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/ > accessed 15 February 2022; HMCTS weekly operational summary on courts and tribunals during coronavirus (COVID-19) outbreak. < https://www.gov.uk/guidance/hmcts-weekly-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak#hmcts-operational-summary-for-week-commencing-monday-17-may-2021 > accessed 15 February 2022.

everyone.[888] This agreement leaves no doubt of the power of the Bar Association to control and dominate the civil justice system in Jordan, and confirms this study's hypothesis that lawyers are the main gatekeepers to improving and developing the practice of mediation. For this reason, any plan to develop the mediation practice and increase the uptake of court-based mediation in Jordan should seek the cooperation of the Bar Association, and education, training and awareness about the advantages of mediation among lawyers would have a significant impact on making mediation an attractive alternative to litigation. This is the focus of Chapter 7.

6.6.2 Lawyers' control over mediation in England

In England and Wales, the legal profession was early to promote a system of ADR in the judicial process, and wanted to ensure that lawyers were well-positioned to capitalise on the provision of ADR services.[889] In 1991, the General Council of the Bar established a Committee on Alternative Dispute Resolution to conduct a study on the feasibility of implementing court-based ADR in civil disputes.[890] The committee concluded that "legal mediators should be chosen from lawyers with at least seven years' post qualification experience."[891] Roberts criticised the report's recommendation that lawyers play a dominant role in any proposed court-based ADR system.[892] In his response to the report he wrote, "There is a breathtaking arrogance in the assumption that lawyers can effortlessly take on a delicate, complex, unfamiliar form of intervention as if it were just another part of legal practice."[893] Roberts was concerned that lawyers would not easily transition from their traditional adversarial role as litigators to a facilitative role as mediators without sufficient training, as mediation requires a different set of skills from litigation.[894] A decade later, the Law Society established a civil and commercial mediation board to promote the use of mediation, and as a way to endorse 'solicitors as ADR

[888] Sir Geoffrey Vos, MR, 'Reliable Data and Technology: The Direction of Travel for Civil Justice' Law Society Webinar on Civil and LawTech (28 January 2021) para 2. < https://www.judiciary.uk/wp-content/uploads/2021/01/20200128-MR-to-Law-Society-Lawtech-data-technology-economic-effect.pdf> accessed 15 February 2022.; also, Sir Geoffrey Vos added "My vision for civil justice in England and Wales will allow all claimants to start their claims online, creating a single transferable data set, allowing vindication of their legal rights either within the online space or…." Para 31.
[889] Roy Beldam, 'Report of the Committee on Alternative Dispute Resolution' (1992) 58 (3) (CIArb) Kluwer Law International 178, 178.
[890] ibid 178.
[891] ibid 184.
[892] Simon Roberts, 'Mediation in the Lawyers' Embrace' (1992) 55 (2) The Modern Law Review 258, 259.
[893] ibid 261.
[894] ibid 261.

providers.'[895] The Law Society's family mediation accreditation for solicitors is another example of how the professional association attempts to control the mediation marketplace.[896] Similarly, in the Scottish context, Clark found that the Law Society of Scotland ensured that lawyers were positioned to dominate the mediation market by authorising lawyer-mediators ahead of large development in the field.[897] In particular, professional associations were "lobbying policymakers to formulate rules that favour lawyer-mediators … against non-lawyer-mediators."[898] This is supported by Brooker, who argues that legal professional associations are strategically placed to shape mediation development, as many policies take place in "the shadow of the courts."[899] Further, Clark suggests that as mediation has become embedded in the judicial system, lawyers have sought to claim mediation as work performed by lawyers as part of their legal practice.[900] Despite Roberts' concerns, lawyers account for the lion's share of providers in the mediation marketplace. For example, the King's College London survey of construction disputes shows that the majority of mediators for disputes in the Technology and Construction Court (TCC) have a legal background, as 75% of the mediators are solicitors or barristers.[901] Wall et al. corroborated these findings in their empirical research, which found that the mediation practice in the construction field is dominated by legal professionals, and their influence extends to acting as advisors to clients during the mediation process,[902] as will be discussed below. Also, the CEDR Mediation Audit of 2021 found that 44 percent of the survey respondents were qualified lawyers.[903]

Lawyers have also made their way into the field of ADR by representing clients at mediation sessions. In an international comparative study of mediation practice, Schonewille and Schonewille found that civil and commercial mediation sessions are typically conducted with

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[895] Paula Rohan, 'Law Society Launches New Panel to Push use of ADR' The Law Society Gazette (30 May 2002) < https://www.lawgazette.co.uk/news/law-society-launches-new-panel-to-push-use-of-adr/37125.article > accessed 1 October 2021.
[896] The Law Society, 'Family Mediation Accreditation' < https://www.lawsociety.org.uk/career-advice/individual-accreditations/family-mediation-accreditation > accessed 1 October 2021.
[897] Clark, *Lawyers and Mediation* (n 843) 85.
[898] ibid 84.
[899] Penny Brooker, Mediation law: Journey through Institutionalism to Juridification (Taylor and Francis Ltd 2013) 248.
[900] Clark, *Lawyers and Mediation* (n 843) 96.
[901] Nicholas Gould, Claire King and Philip Britton (eds), *Mediating Construction Disputes: An Evaluation of Existing Practice.* (Centre of Construction Law & Dispute Resolution, King's College London 2010) 10-11.
[902] Ray Wall, Nii Ankrah and Jennifer Charlson, 'An Investigation into the Different Styles of the Lawyer and Construction Specialist when Mediating Construction Disputes, (2016) 8(2) International Journal of Law in the Built Environment 137, 155.
[903] Centre for Effective Dispute Resolution (CEDR), The Ninth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom. (20 May 2021) 8. < https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf > accessed 13 August 2021.

lawyers in attendance, though some mediation sessions are conducted without the presence of lawyers.[904] These findings were confirmed by Brown and Marriott, who found that lawyers represented clients in most mediation sessions held by mediation services, though lawyers were less likely to attend mediation sessions of a personal nature, or those related to small claims.[905] In recognition of the significant role solicitors and barristers play in ADR in England, the SRA and BSB have provided training to their members about identifying appropriate ADR methods (See Chapter 7).

Another way that lawyers exercise control over mediation is through their influence over their clients. In her evaluation of the Central London County Court-Pilot Mediation Scheme, Genn found that legal representatives were the gatekeepers to mediation because of their role informing and advising clients about the mediation process. She stated, "Since the court's offers of mediation were filtered largely through solicitors, and since those parties who accepted mediation often did so on the advice of their solicitor, the role of the solicitor as a gatekeeper to the mediation process…certainly is, very important."[906] Clark suggests that lawyers act as gatekeepers to mediation by legitimising alternative approaches via "law talk."[907] He further noted that lawyers' expertise with legal issues, including ADR, gives them influence over their clients,[908] as was seen in Jordan. However, Clark cautioned that the lawyer's ability to exert control over their clients depends on the individual clients.[909]

In their 2017 online survey, the International Mediation Institute Global Pound Conference Series found that lawyers, governments and judges have the "potential to be most influential

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[904] Manon Schonewille and Fred Schonewille, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing 2014) 380.
[905] Brown and Marriott (851) 209.
[906] Hazel Genn, *The Central London County Court -Pilot Mediation Scheme Evaluation Report*, Lord Chancellor's Department Research Series No. 5/98, July 1998, 39.
[907] Clark, *Lawyers and Mediation* (n 843) 36; Similarly, research in the US shows that lawyers have influence to motivate their clients to try ADR and lawyers dominate the mediation process. See for example, Nancy A Welsh, 'Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value' (2004) 19 Ohio St J on Disp Resol 573, 590-491.
[908] Clark, *Lawyers and Mediation* (n 843) 35-36; This was evident in the CEDR survey which showed that solicitors are the main source of advice to solve disputes. The data are no longer available online, however, the survey results are available in Loukas A. Mistelis, ADR in England and Wales: A Successful Case of Public Private Partnership' in Nadia Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 175. Also, US research shows that clients get information about ADR from lawyers as lawyers are the major source of information about ADR. See John Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 Harv Negot L Rev 137,169.
[909] Clark, *Lawyers and Mediation* (n 843) 37-39.

in bringing about change in commercial dispute resolution practice."[910] For example, the survey cites the considerable power lawyers have to influence parties to choose ADR based on their advice.[911]

6.7 The Civil Justice Council Promotes Mandatory Mediation in England

As mentioned previously, the Civil Justice Council's June 2021 report concluded that mandatory mediation is lawful and compatible with Art. 6 of the ECHR.[912] The report emphasised that ADR should not be viewed as an alternative to litigation, and supported the penalisation of parties that refuse to take part in ADR. "ADR can no longer be treated as external, separate, or indeed alternative to the court process. For our part, an order that is made requiring participation in ADR should be enforced, and parties who fail to attend in breach of such an order should be sanctioned."[913] The authors also made a case for mandatory judge-led ADR.[914] This report could have a significant impact on the development of mediation in England if compulsory ADR becomes further embedded in the civil justice system. In a recent development in November 2021, the CJC issued an interim report reviewing Pre-Action Protocols which proposed to make compliance with pre-action protocols mandatory.[915] Similarly, the recent CJC final report on the resolution of small claims recommended that the attendance of the parties should be mandatory for claims less than £500.[916] In the foreseeable future, it is likely that the culture of dispute resolution may change, such that resorting to ADR would become the main method for solving certain disputes, and litigation would become the alternative, thus increasing the use of ADR, particularly mediation. Lawyers will have to adapt

[910] International Mediation Institute (IMI), Global Pound Conference Series, Global Data Trends and Regional Differences (2017)17. < https://imimediation.org/research/gpc/ > accessed 5 August 2021.
[911] ibid 10. See also, International Mediation Institute (IMI) Global Pound Conference (GPC) (2017) The Singapore Report shows the greatest factor behind parties choosing ADR is based on the advice of the lawyer, 36. <https://imimediation.org/research/gpc/series-data-and-reports/ > accessed 8 August 2021.
International Mediation Institute (IMI) Global Pound Conference (GPC) (2017) The Singapore Report,
[912] Civil Justice Council (CJC) Report on Compulsory ADR (June 2021) para 7,10. < https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 26 August 2021.
[913] ibid para 63.
[914] ibid para 13.
[915] Civil Justice Council (CJC) Review of Pre-Action Protocols, Interim Report (November 2021) para 3.13 < https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf > accessed 14 January 2022.
[916] Civil Justice Council (CJC) the Resolution of Small Claims, Final Report (January 2022). Para 4.12. < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf > accessed 11 February 2022.

to the new expectations to be more cooperative and non-adversarial. In her book 'The New Lawyer: How Settlement Is Transforming the Practice of Law,' MacFarlane predicts:

> The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, who are persuasive and skilful negotiators, thoroughly prepared advocates for good settlements, who are able and willing to work in a new type of professional partnership with their clients, and aware of the need to constantly update their knowledge of conflict management processes and techniques as well as substantive law. This is the lawyer as conflict resolution advocate, and whom this book calls the new lawyers.[917]

The clear argument for the legality of compulsory mediation opens the way for adopting mandatory mediation in the English civil justice system. This change will be closely watched by other jurisdictions such as Jordan, who are interested in promoting earlier settlements with lower costs.

6.8 Conclusion

This chapter discussed the role of lawyers as gatekeepers to mediation. The study concluded that in Jordan lawyers act as gatekeepers to mediation because parties typically are not present during the referral stage, and cannot attend mediation sessions without the presence of their legal representative. The main reason is that the Provisional Mediation Law was changed to make the presence of parties optional and the presence of lawyers mandatory. In England, lawyers do not strictly act as gatekeepers because ADR, particularly mediation, is embedded in the civil justice system.

The study also found that the English CPR 1.3 imposed a duty upon parties and their legal representatives to help the court save expense and time through several means, including ADR. In England, lawyers play a significant role in informing clients about mediation. Furthermore, the study observed that costs sanctions provide an incentive for parties and their legal representatives to attempt ADR to avoid breaching their duty to the court. These requirements should be incorporated into Jordanian Law under certain conditions, as there is currently no statutory or ethical duty for Jordanian lawyers to inform or advise clients regarding the use of mediation.

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[917] Julie MacFarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press 2008) 244.

The Jordanian lawyer's "path deems successful" can be more adversarial than the English approach that requires a joint duty between disputants and their legal counsels, as the "joint initiative to help" balances interests among parties, their lawyers, and the court. In contrast, disputants in Jordan are not required to exercise their "initiative to help", therefore, lawyers and disputants have no obligation to act in the interest of the civil justice system. This deficiency in the law allows lawyers to act in their self-interest first and in the interest of clients or the court second, therefore, the researcher would recommend amending the Bar Association Law to include an "initiative to help" as success should have to include the interest of the civil justice system.

Focus should be placed on the Jordanian outdated professional codes, compared with the most recent professional codes introduced in the SRA Standards and Regulations, and the BSB Code of Conduct in England. Both brought in the requirement of acting in the best interest of the client, and may be interpreted to require members to advise clients on ADR in their most recent updates. Thus, the researcher would recommend that future amendments to the Jordanian Bar Association Code of Ethics and Conduct include explicit guidance to its members, because mediation is not yet established in the Jordanian civil justice system as it is in England.

Lawyers' financial interests control access to mediation in both Jordan and England. However, the English civil justice system uses the CPR, professional codes, guidelines, and case law to reduce lawyers' resistance to encouraging the use of mediation, so their influence over their client's decision facilitates engagement with mediation in order to achieve a balanced and collective interest. The researcher would recommend that Jordan incorporate these principles to learn from the English system.

Under both jurisdictions, lawyers have influenced the development of mediation to benefit themselves. Despite these efforts, there has been a shift in the culture of litigation in England that has led to the greater uptake of mediation. The study also found that the English civil justice system is taking steps to adopt compulsory mediation. For Jordan to realise this cultural shift, education, awareness and training among all stakeholders could have a significant impact on the use of mediation, as will be discussed in the next chapter.

CHAPTER SEVEN: MEDIATION EDUCATION, TRAINING AND AWARENESS AMONG STAKEHOLDERS IN JORDAN AND ENGLAND

7.1 Introduction

The previous chapters revealed that the main reasons for the low uptake of mediation in Jordan are the lack of authority of the referral judges to refer cases to mediation without the parties' consent, lack of a duty to refer or encourage parties to use mediation as referral to mediation is based on judicial discretion, and lack of authority to impose costs sanctions upon parties that unreasonably refuse to engage in mediation. Moreover, the study found a complete absence of a legal or ethical duty upon lawyers to encourage or introduce the option of using mediation to resolve their clients' disputes. Deficiencies in the law, regulations and professional codes led to a lower uptake in mediation, as lawyers have no obligation to advise their clients to resort to mediation. In addition, the lack of interest among lawyers in attempting mediation due to conflicts of interest, lawyers' influence in the House of Parliament, and the power of the Bar Association to control the litigation system make lawyers gatekeepers to mediation in Jordan. On the other hand, English judges and lawyers have a duty to encourage parties to use mediation, and lawyers do not strictly act as gatekeepers because ADR, mainly mediation, is embedded in the civil justice system. These requirements reflect positively on the uptake of mediation, and the likely move to adopt mandatory ADR would significantly increase the use of mediation.

Building on the empirical study, the aim of this chapter is to examine other reasons for the low uptake of mediation by answering several key questions related to mediation education, training and awareness of stakeholders. The first question raised by the empirical study is about the statutory obligation for judges to acquire education or training related to mediation. This question requires an examination of the Code of Judicial Conduct of 2021 and the Judicial Institute in Jordan, and the Constitutional Reform Act 2005 and Tribunals Courts and Enforcement Act 2007 in England. The second question raised by the empirical study is about awareness and the statutory duty or obligation for lawyers to acquire education or training related to mediation. Here, the Mediation Law, the Bar Association law, professional ethics and codes of conduct in Jordan and the Legal Service Act of 2007 and professional codes of conduct in England will be the focus of the investigation. This will be followed by a study on the prevalence of mediation in legal education curricula. Finally, the chapter will conclude with

an assessment of the awareness of lay citizens of the existence of mediation within the civil justice systems in both jurisdictions.

7.2 Statutory obligation for judges to acquire education and training

7.2.1 Statutory obligation for judges to acquire education and training in Jordan

Judges in Jordan have a statutory obligation to obtain continuing professional development (CPD) in order to deliver competent service to the court's users. Art. 9 of the Code of Judicial Conduct of 2021[918] states that judges should always seek to develop and improve their scientific and practical capabilities by attending training courses, seminars and workshops that will increase their efficiency in keeping up with the development of new legislations.

The Jordanian Judicial Institute is the official body responsible for preparing qualified judges to assume judicial positions, and raising the efficiency of judges.[919] In cooperation with the Judicial Council, the Judicial Institute is responsible for training judges through courses, workshops, and lectures for the purpose of developing their judicial skills.[920] The Judicial Institute offers training for judges on the subject of mediation. For example, the training plan for judges for the year 2017 included a twelve-hour training course on mediation in civil disputes.[921] Similarly, the training plan for judges for the year 2019 included three sessions totaling 24 hours of training on judicial mediation. The first two sessions were an introduction to court-based mediation and referral to mediation. The third session covered mediation skills for judges, the process of the mediation sessions and principles of mediation, such as impartiality and confidentiality of the sessions.[922] More recently, the training plan for judges for the year 2021 includes three sessions totaling 12 hours on judicial mediation that focus on the Mediation Law, principles of mediation ethics, and mediator skills.[923]

[918] Code of Judicial Conduct of 2021. Art 9.
[919] Jordanian Judicial Institute Law No. 49 of 2020. Art 3(a).
[920] ibid Art. 3(b).
[921] Jordanian Judicial Institute, The Training Plan for Judges for the Year 2017. 4. < http://www.jij.gov.jo/sites/default/files/lkht_ltdryby_llsd_lqd_llm_2017.pdf > accessed 28 October 2021.
[922] Jordanian Judicial Institute, The Training Plan for Judges for the Year 2019.14. < http://www.jij.gov.jo/sites/default/files/lkht_ltdryby_llqd_2019.pdf > accessed 28 October 2021.
[923] Jordanian Judicial Institute, The Training Plan for Judges for the Year 2021. 18. < http://www.jij.gov.jo/sites/default/files/kht_ltdryb_lqdyy_lm2021.pdf > accessed 28 October 2021.

Although there is no specific requirement for judges to undertake training on judicial mediation, all the judges interviewed for the empirical study had attended basic mediation training courses. The judges expressed the need for more specialised courses for referral judges to develop the skills needed to convince the parties to choose mediation, and training courses for judge-mediators for conducting mediation sessions.[924] These results are supported by the lawyers' questionnaire, which shows that only 20% of respondents reported that all referral judges have the skills and training to assess the suitability of cases for mediation.[925] In addition, Amman Mediation Week indicated some judges do not have the skills to convince parties to refer their disputes to mediation, and there is a lack of training in referring cases to mediation.[926] The United States Agency for International Development (USAID) conducted an evaluation of Civil Case Management in Jordan, and found that there is a lack of training and experience among CCMJs in performing their functions of managing cases, which includes referring cases to mediation.[927] Further, Hamadneh called for the Jordanian Judicial Institute to provide mediation courses to vest judge-mediators with the skills to conduct mediation sessions and courses that focus on the referral judges, to provide them with the necessary skills to convince the parties to mediate. He reasoned that having skilled judges would contribute to increasing the use of mediation in Jordan.[928]

Having referral judges with the skill to persuade parties to choose mediation, and having judge-mediators well-equipped with the necessary skills to conduct mediation sessions will certainly reflect positively on the use of mediation in Jordan. Since conducting the empirical study, the Judicial Institute has delivered more advanced training in judicial mediation skills, which is an improvement upon the prior years' training. It remains to be seen if these courses provide the specialised skills the judges require.

7.2.2 Statutory obligation for the provision of judicial education and training in England

[924] Chapter 4, 107.
[925] Lawyers' Questionnaire, Figure 26.
[926] Amman Mediation Week, Recommendations, Status quo, and Suggested Solutions (18-19 March 2017) to author.
[927] Ernie Friesen, *Case Management in Jordan: An Assessment and Recommendations.* (United States Agency for International Development 2009) 14. 6< https://pdf.usaid.gov/pdf_docs/PA00JCWB.pdf> Accessed 7 January 2022.
[928] Abdullah Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes, A Comparative Study' (PhD thesis, University Hassan 2015) 381.

As in Jordan, English judges have the obligation to continue professional development throughout their judicial careers. The Lord Chief Justice is responsible for the provision of judicial training under the Constitutional Reform Act 2005.[929] A similar responsibility falls on the Senior President of Tribunals under the Tribunals Courts and Enforcement Act 2007.[930] The Judicial College is the independent body that conducts the training of judges in England and Wales.[931] The Judicial College provides an education programme for all judges to continually improve their skills and knowledge to provide competent judicial service.[932] Regarding ADR, the Judicial College provides resources and training seminars to all judges. For example, under the "Judicial Skills and Abilities Framework" the college offers materials on the subject of online dispute resolution, which includes audio recordings, publications and interviews that give insight into the process, legal issues, and development of online ADR.[933] Moreover, the college provides training and support for judges to strengthen their judicial mediation skills. In 2021, specialised and targeted mediation training was offered by the Land Registration Division,[934] and the Property Chamber Training Programme offered refresher training for Tribunal Mediators.[935] The Employment Tribunals Division will offer judicial mediation training in January and February 2022,[936] and Land Registration will host a half day refresher training in March 2022.[937] Lord Jackson argued that training judges on mediation is a vital element for the successful implementation of mediation in the civil justice system.[938] In contrast to Jordan, the English judges are provided with more advanced and specialised courses to support the practice of mediation in the jurisdiction.

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[929] Constitutional Reform Act 2005, Part 2, section 7 (2)(b) states that the Lord Chief Justice is responsible "for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor."
[930] Tribunals Courts and Enforcement Act 2007, chapter 6, section 47 (2)(a) states that the Senior President of Tribunals is responsible for "making arrangements for training of judiciary of a territory is a courts-related activity, and the corresponding tribunals activity is making arrangements for training of tribunal members".
[931] Courts and Tribunals Judiciary, 'Judicial College' < https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/ > accessed 13 October 2021.
[932] Courts and Tribunals Judiciary, 'Judicial College'- Civil. < https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/civil/ > accessed 28 October 2021.
[933] Courts and Tribunals Judiciary, 'Judicial College' ODR - Online Dispute Resolution < https://www.judiciary.uk/subject/odr-online-dispute-resolution/ > accessed 28 October 2021.
[934] Courts and Tribunals Judiciary, Judicial College Summary of Training Events April 2020 to March 2021. 24 < https://www.judiciary.uk/wp-content/uploads/2021/09/Summary-of-Training-Events.pdf > accessed 28 October 2021.
[935] Judicial College Prospectus 2021-2022. 101 < https://www.judiciary.uk/wp-content/uploads/2021/04/Judicial-College-Prospectus-2021-22.pdf > accessed 14 November 2021.
[936] ibid 88.
[937] ibid 102.
[938] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) ch 36, para 3.9.

7.3 Statutory obligation for lawyers to acquire education and training

7.3.1 The lack of statutory obligation for lawyers to acquire education or training related to mediation in the Jordanian Mediation Law

As explained previously, the Jordanian legislation required the presence of lawyers at the referral stage and at the mediation sessions. In this way, lawyers have an essential role throughout the mediation process. However, the Policy Memorandum that accompanied the Mediation Law did not address education and training for lawyers. [939] Furthermore, there is a complete absence in the Mediation Law regarding legal education and mediation training for lawyers.[940] This is a statutory deficiency. Bearing in mind that court-based mediation is a new system implemented in the civil justice system, and mediation principles and processes are significantly different from litigation, education and training of lawyers to engage with and encourage their clients to use mediation and to understand their roles and responsibilities during mediation sessions would likely have an impact on the uptake of mediation.

Al Sleby argues that only a small number of lawyers in Jordan are educated, trained or understand mediation mechanisms and concepts; the lack of mediation skills among lawyers has contributed greatly to the low uptake of court-based mediation.[941] Al Qatawneh and Al-Ahmed support this argument, as they stress the need to train and educate lawyers to increase the uptake of mediation, since the success of the mediation programme depends mainly on the competency of the lawyers because of their central role in the mediation process.[942]

7.3.2 The lack of statutory obligation for lawyers to acquire education or training on mediation in the Jordanian Bar Association Law

In contrast to judges, lawyers do not have a statutory duty to acquire education, training or even CPD after passing the bar exam in accordance with the Bar Association Law.[943] Therefore, there is no obligation for lawyers to obtain education or training in mediation or other forms of ADR. Interestingly, the main condition of remaining as a practicing lawyer is to pay the annual

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[939] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law* (2006) to author (5 July 2017)
[940] The Mediation Law.
[941] Bashir Al Sleby, *Alternative Dispute Resolution ADR* (Darwael 2010) 43.
[942] Mohammad Al Qatawneh, *Mediation in Settling Civil Disputes* (Department of the National Library 2008) 186. And Rola Al-Ahmed, 'Mediation for Settling the Civil Disputes in the Jordanian Law: A Comparative Study' (PhD thesis, Amman Arab University 2008) 252.
[943] The Bar Association Law.

fees prescribed under this law.[944] The subject of training is discussed in the Bar Association Law in relation to law trainees. Before becoming eligible to attempt the bar, lawyers must serve as a trainee in the office of a practicing lawyer who has been registered with the bar for a period of no less than five years.[945] The period of training in the profession is two years for the holder of a first university degree in law, and one year for the holder of a master's or doctoral degree.[946] However, nothing in the law requires the law trainee to acquire, or their supervisors to provide, training related to ADR as an alternative to litigation. The researcher searched the Bar Association archive and website and found no general training programme or introduction to mediation programme provided.[947] All judges interviewed for the empirical study indicated that there is a lack of mediation education, training and awareness amongst lawyers.[948] This view is consistent with the lawyers' questionnaire that showed 76% of the lawyers reported having little or no knowledge of mediation before their involvement in court-based mediation.[949] In fact, on May 5, 2017, 500 trainee lawyers started an open sit-in after they failed the bar exam. Among other issues, they claimed that negligence on the part of the Bar Association in failing to provide bar exam preparation lectures and courses for the trainees was one of the reasons for failing the exam.[950] Although the exam and training are focused on litigation, the same can be said for the lack of preparation for mediation.

This corresponds with the empirical data obtained from the court judges. Some of the judges interviewed (7 out of 17) emphasised the negligence of the Bar Association in failing to provide training to lawyers on mediation, in particular the process of court-based mediation. Further, these judges said that the Bar Association has no education or training sessions for lawyers on their role in mediation sessions, nor have they courses for lawyers that want to practice as a mediator. The judges commented that having lawyers familiar with mediation would have a

[944] The Bar Association Law. Art. 21.
[945] ibid Art. 29.
[946] ibid Art. 27.
[947] Jordanian Bar Association < https://www.jba.org.jo/ > accessed 7 October 2021.
[948] Chapter 4, 107-109. Further, while the researcher was collecting data in Jordan the majority of lawyers pointed out the failure of the Bar Association to hold training as none of the lawyers mentioned having any mediation training.
[949] Lawyers' Questionnaire. Figure 24
[950] Editorial, '500 trainee lawyers start an open sit-in' *Gerasa News* (Amman, 5 May 2017) <https://www.gerasanews.com/article/266474 > accessed 13 May 2021. During the process of data collection, the researcher met an 80-year-old lawyer and asked him about his experience in mediation, which he confirmed he had none. Among other things he said that he was never invited to any training held by the Bar Association, and he went on to say that the last time he visited the Bar Association was 15 years ago. He continued to say that the Bar Association does not care to develop the skills of its members as they're all about collecting annual fees.

significant impact on the uptake of mediation, as lawyers would be more willing to resort to mediation and convince their clients to resort to mediation.[951]

7.3.3 The lack of guidance on mediation in the Jordanian Lawyer's Code of Ethics and Code of Conduct

As explained in the previous chapter, the Lawyer's Code of Ethics and Code of Conduct includes a practice guideline for lawyers regarding the ethics of the legal profession in dealing with the court, their clients and other lawyers.[952] Critically, there is nothing in the code that discusses education, training or CPD, as lawyers have no duty or obligation to keep updating their skills and knowledge regarding their profession. This was demonstrated by the President of the Bar Association on December 13, 2020, when he stated that 80% of practicing lawyers do not have the capabilities and skills to navigate the new online court system and to keep up with the new regulations due to the lack of education and training among lawyers.[953] In fact, this is a very dangerous indicator from the President of the Bar Association, but it is not a surprise as there is no statutory or ethical obligation requiring lawyers to continue to develop their skills in order to provide legal services. Most importantly for this thesis, the Code does not mention the subject of education and training in alternative dispute resolutions. Also, as stated previously, the Code has not been updated, revised, or amended since it was established.

7.3.4 The lack of awareness among Jordanian lawyers on the use of mediation

The general consensus (17 out of 17) among all interviewees is that there is a lack of awareness among the court's users (lawyers and disputants) regarding the concept and advantages of mediation. According to the judges interviewed, many litigants and their lawyers are not aware of the existence of court-based mediation in Jordan, as they often hear about it for the first time from the referral judge.[954] The lawyers' questionnaire shows that 76% of the lawyers that responded to the questionnaire reported having little or no knowledge of mediation before their involvement in court-based mediation.[955] Furthermore, during data collection, the researcher of this study spoke to more than 200 lawyers to get a sense of their lack of participation in mediation. The lack of awareness was cited as one of the reasons for their low participation, as

[951] Chapter 4, 107-109.
[952] Lawyer's Code of Ethics and Code of Conduct of 1979.
[953] Editorial, Irsheidat reveals shocking information about lawyers in Jordan, *Rum News Agency* (Amman,13 December 2020) < http://www.rumonline.net/article/544901 > Accessed 14 December 2020.
[954] Chapter 4, 107-109.
[955] Lawyers' Questionnaire, Figure 24.

some lawyers had never heard about court-based mediation.[956] Al Sleby, Al Qatawneh and Al-Ahmed agreed that there is a lack of awareness among the majority of the Jordanian lawyers on the concept of mediation, the mediation procedures and the existence of court-based mediation.[957] Moreover, Al-Ahmed and Al Qatawneh call for collective efforts between the Ministry of Justice, the Judicial Council, and the Bar Association to hold training courses and awareness sessions for lawyers to give them adequate understanding about using mediation to resolve disputes.[958] Remarkably, in 2017 the House of Parliament discussed an amendment to the Mediation Law regarding the retrieval of the judicial fee for cases resolved via mediation and issues related to private mediators. Nevertheless, the former long-term president of the Bar Association and current Member of Parliament attacked the entire Mediation Law, claiming that it is useless and the law should be repealed. He also attacked private mediators. He argued that it is unconstitutional to refer cases to private mediators, as Jordanian courts have jurisdiction over all civil commercial and criminal matters according to the Constitution Art. 102, and he argued that mediation sessions should not be confidential.[959] This is evidence of the lack of knowledge among Members of Parliament and the Bar Association of basic mediation concepts and principles. Unfortunately, the lack of awareness, education and training among leaders is also evident in trial lawyers, which may contribute to the limited use of court-based mediation.

One could argue that the lack of education and training negatively impacts a lawyer's ability to provide the best service to his client. For example, the lawyer's lack of knowledge and training about mediation deprives a client of taking advantage of the free court-based mediation service that could help to save money, time and effort, and may resolve the dispute in a friendly manner.[960] In addition, the lack of education, training and awareness about mediation among

[956] The researcher's fieldnotes while conducting the empirical research in Jordan.
[957] Al Sleby (n 941) 43; Al Qatawneh (n 942) 186; and Al-Ahmed (n 942) 252-253.
[958] Al-Ahmed (n 942) 252; and Al Qatawneh (n 942) 186.
[959] The House of Parliament discussion of the amendment to the Mediation Law of 2017 (4 July 2017) to Ashraf Abu Hazeem (27 January 2020) 41-43
[960] For example, according to the UK Government, "The mediation sector in the UK was estimated to be worth £17.5bn in 2020, and it is estimated that mediation can save businesses around £4.6 billion per year in management time, relationships, productivity and legal fees." See, The UK Government, 'Open Consultation: The Singapore Convention on Mediation' (2 February 2022) <https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation > accessed 24 February 2022.

lawyers is an obstacle to the goal of the government to widen access to justice for citizens, as stipulated in the Policy Memorandum of the Mediation Law.[961]

7.3.5 Awareness among English lawyers on the use of mediation

Unlike their Jordanian counterparts, it would be far-fetched for English lawyers to claim that they are unaware of mediation, as it is deeply embedded within the civil justice system. For instance, as explained in previous chapters, pre-action conduct and protocols require disputants and their lawyers to consider using ADR before resorting to litigation.[962] In addition, Directions questionnaires and the main court guides emphasise the need to use ADR, mainly mediation, before resorting to the court.[963] Moreover, the previous chapters presented a good number of cases that showed the judiciary has been active in encouraging the use of ADR and imposing costs sanctions upon parties that refuse to attempt ADR unreasonably. Further, in their research on lawyers' attitudes and experience in commercial and construction ADR, Brooker and Lavers found that there is increasing awareness among legal representatives about ADR and mediation.[964] Mediation awareness and training is also provided by the legal regulators. As Brown and Marriott explained,

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[961] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law* (2006) to author (5 July 2017)

[962] Practice Direction – Pre-Action Conduct and Protocols, para 8 Settlement and ADR < https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#8.1 > accessed 17 November 2021.

[963] For example, Form N181, Directions questionnaire (Fast track and Multi-track) Section states, "Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees." < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953456/n181-eng.pdf > accessed 20 October 2021; For example, The Commercial Court Guide, tenth edition (2017), para G1.4. "Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and should ensure that their clients are fully informed as to the most cost-effective means of resolving their dispute". See also, Chancery Guide 2016, Para 18.1. "Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed about the most cost-effective means of resolving the dispute". A similar statement was found in The Technology and Construction Court ("TCC") Guide, second edition. Issued 3rd October 2005, fifth revision. Para 7.1.3; The Circuit Commercial (Mercantile) Court Guide, para 7.3 and The Patents Court Guide issued April 2019, para 9.2.

[964] Penny Brooker and Anthony Lavers, 'Commercial and Construction ADR: Lawyers' Attitudes and Experience' (2001) 20(Oct) Civil Justice Quarterly 327, 332; The researchers of the Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme found that "Overall, solicitors in our sample had high levels of awareness and experience of mediation, using both court-based (predominantly Birmingham) and independent mediation schemes. Knowledge was said to be rising within the profession due to recent case law". Lisa Webley, Pamela Abrams and Sylvie Bacquet, '*Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme*.' (Final Report, Report to the Department for Constitutional Affairs, September 2006). 84.

> Both the Law Society of England and Wales and the Bar Council have incorporated mediation into their structures, and few solicitors or barristers can legitimately claim not to be aware of the availability and benefits of the mediation process, especially as there have been many cases in which the use of mediation and other ADR mechanisms has been referred to with approval, as well as others imposing potential costs sanctions for a failure to consider the use of ADR where it is appropriate.[965]

7.3.6 Statutory obligation for legal regulators in England to provide education and training

The Legal Service Act of 2007[966] established the Legal Service Board (LSB) to approve and provide oversight on regulators of legal services.[967] One of the duties of the LSB is to provide standards for regulators regarding the education and training of lawyers.[968] According to the LSB, education and training help to achieve regulatory objectives such as promoting and protecting the clients' best interest, improving access to justice, and promoting competition among legal service providers.[969] The purpose of requiring professionals to acquire education and training is to ensure that they have competency to provide the best legal service.[970] As the SRA and BSB are the main authorities that regulate solicitors and barristers respectively, these regulators are under a statutory obligation to provide education and training for their members. The section below will focus on mediation education and training provided by the SRA and BSB.

7.3.7 Professional codes that oblige legal representatives to acquire education and training in England

In their empirical research "Mediation outcomes: Lawyers' experience with commercial and construction mediation in the United Kingdom," Brooker and Lavers found that 29 out of 30 lawyers had completed one or more training courses in mediation.[971] In contrast to Jordan,

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[965] Henry Brown and Arthur Marriott, *ADR Principles and Practice* (3rd edn, Sweet & Maxwell 2011) 211.
[966] Legal Services Act 2007.
[967] Legal Services Act 2007, part 2. See Legal Services Board < https://www.thelegaleducationfoundation.org/grantee/legal-services-board > accessed 11 October 2021.
[968] Legal Services Act 2007, part 2 (4).
[969] Legal Services Board, Education and training < https://legalservicesboard.org.uk/our-work/work-related-to-previous-years/education-and-training > accessed 11 October 2021.
[970] Legal Services Board, 'Education and training – Legal Education and Training Review' < https://legalservicesboard.org.uk/our-work/work-related-to-previous-years/education-and-training/education-and-training-legal-education-and-training-review > accessed 12 October 2021.
[971] Penny Brooker and Anthony Lavers, 'Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom' (2005) 5 Pepp Disp Resol LJ 161,187. Also, the evaluators of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme found that "The majority of the solicitors

solicitors and barristers in England are required to update their knowledge, develop their skills and acquire training to uphold strong standards and to continue providing legal services. To fulfil such a requirement, opportunities are provided to the legal profession in England by means of professional codes.

The BSB Handbook mandates that practicing barristers must engage in CPD.[972] Rule Q130.2 defines CPD as "work undertaken over and above the normal commitments of barristers with a view to such work developing their skills, knowledge and professional standards in areas relevant to their present or proposed area of practice," which is critical to remaining up to date and exercising high standards of professional practice.[973] CPD includes training inside or outside of the university, taking part in conferences, seminars, workshops and lectures, teaching courses and publishing legal papers.[974]

The Bar Council, the professional body for barristers, acknowledged that mediation has become embedded in the civil justice system, and it is vital to vest barristers with the skills to cope with practice. Therefore, the Bar Council provides training in mediation,[975] and offers workshops, courses, and training sessions for barristers that want to practice as mediators.[976] Moreover, the Bar Council demonstrated its commitment to mediation training by including ADR as a mandatory subject of the Bar Training syllabus and curriculum of 2020-2021.[977] The course discusses principles, processes, referral, and planning for mediation using the Jackson ADR Handbook.[978] In addition, the preparatory material includes stay for settlement, referral

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in our sample had previous experience of mediation through independent organisations". See Webley, Abrams and Bacquet (n 964) 80.

[972] The Bar Standards Board, The BSB Handbook - Version 4.6, Part 4-C The CPD Rules < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/74d6bc6f-c64e-427b-a5c3926eb822b664/second-edition-test31072019104713.pdf > accessed 12 October 2021.

[973] The Bar Standards Board, The BSB Handbook - Version 4.6, Part 4-C, R Q130.2 < https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/74d6bc6f-c64e-427b-a5c3926eb822b664/second-edition-test31072019104713.pdf > accessed 12 October 2021.

[974] The Bar Standards Board, Continuing Professional Development < https://www.barstandardsboard.org.uk/for-barristers/cpd.html > accessed 12 October 2021.

[975] The Bar Council, 'Alternative dispute resolution' < https://www.barcouncil.org.uk/policy-representation/policy-issues/alternative-dispute-resolution.html > accessed 12 October 2021.

[976] The Bar Council, 'Mediation courses' < https://www.barcouncil.org.uk/training-events/training-and-workshops/mediation-courses.html> accessed 12 October 2021.

[977] The Bar Standards Board, 'Civil litigation and evidence: Bar Training syllabus and curriculum 2020-2021.' < https://www.barstandardsboard.org.uk/uploads/assets/7eb0523c-8144-4e6d-a9d4e7faf47206cb/Bar-Training-Civil-Litigation-Syllabus-and-Curriculum-2020-2021-Paper-1-and-Paper-2-White-Book-2020-Version-26-June-2020.pdf > accessed 12 October 2021.

[978] The Bar Standards Board, 'Civil litigation and evidence: Bar Training syllabus and curriculum 2020-2021.' 7< https://www.barstandardsboard.org.uk/uploads/assets/7eb0523c-8144-4e6d-a9d4e7faf47206cb/Bar-Training-

to mediation, the power of the court to impose costs sanctions, the tracks system, and the power of the court to make orders on its own initiative,[979] as the BSB exam covers ADR forms, including mediation.[980]

Similar to the BSB, the SRA Code of Conduct for Solicitors, Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs) requires solicitors to maintain their competency by keeping their legal knowledge and skills up to date.[981] Since 2016, solicitors are no longer required to count CPD hours. Instead, they should identify their development needs and acquire the necessary training and education.[982] As mentioned in the previous chapter, the SRA Code of Conduct is less prescriptive, and relies on solicitors to assess their own competence and determine the appropriate training.

The Law Society, which is the professional body that represents solicitors, has a great deal of information on ADR, mainly mediation, on its website,[983] and offers webinars, workshops, events, and courses related to mediation.[984] Additionally, the SRA requires aspiring solicitors to pass a legal practice course that includes mediation practice within its core;[985] trainees gain knowledge of settling disputes using mediation to save time and cost for the benefit of the client.[986] For example, as part of the SRA Legal Practice Course Outcomes 2019, students need

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Civil-Litigation-Syllabus-and-Curriculum-2020-2021-Paper-1-and-Paper-2-White-Book-2020-Version-26-June-2020.pdf > accessed 12 October 2021.

[979] The Bar Standards Board, 'Civil litigation and evidence: Bar Training syllabus and curriculum 2020-2021.' 15< https://www.barstandardsboard.org.uk/uploads/assets/7eb0523c-8144-4e6d-a9d4e7faf47206cb/Bar-Training-Civil-Litigation-Syllabus-and-Curriculum-2020-2021-Paper-1-and-Paper-2-White-Book-2020-Version-26-June-2020.pdf > accessed 12 October 2021.

[980] The Bar Standards Board, 'BSB announces new opportunities to sit Bar Professional Training Course (BPTC) exams' < https://www.barstandardsboard.org.uk/resources/resource-library/bsb-announces-new-opportunities-to-sit-bar-professional-training-course-bptc-exams.html > accessed 13 October 2021.

[981] Solicitors Regulation Authority, SRA Code of Conduct for Solicitors, RELs and RFLs. Section two 'Dispute resolution and proceedings before courts, tribunals and inquiries' para 3.3 < https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ > accessed 12 October 2021.

[982] Solicitors Regulation Authority, SRA 'Continuing competence' < https://www.sra.org.uk/solicitors/resources/cpd/tool-kit/continuing-competence-toolkit/ > accessed 12 October 2021.

[983] Law Society of England and Wales, Civil Justice Section 'Alternative Dispute Resolution' < https://communities.lawsociety.org.uk/civil-litigation/practice-areas/alternative-dispute-resolution > accessed 12 October 2021.

[984] Law Society of England and Wales, Civil Justice Section < https://communities.lawsociety.org.uk/searchresults?qkeyword=mediation&PageSize=10&parametrics=WVFACET1%7C1003486&cmd=GoToPage&val=1&SortOrder=2 > accessed 12 October 2021.

[985] Solicitors Regulation Authority, 'Legal Practice Course Information Pack' Core Practice Areas (September 2021) < https://www.sra.org.uk/become-solicitor/legal-practice-course-route/resources/legal-practice-course-information-pack/ > accessed 13 October 2021.

[986]Solicitors Regulation Authority, ' Practice Skills Standards' Dispute resolution (September 2021) < https://www.sra.org.uk/become-solicitor/legal-practice-course-route/period-recognised-training/managing-trainees/practice-skills-standards/ > accessed 13 October 2021.

to be able to identify the right form of ADR to solve the dispute, compare the costs of litigation and ADR, and understand the overriding objective of the CPR.[987] Moreover, ADR and mediation are subjects tested on the SRA Solicitors Qualifying Examination.[988]

7.4 Mediation within legal education

7.4.1 Mediation within legal education in Jordan

The result of the interviews with judges underscores the importance of legal education in helping stakeholders better understand the process and concept of mediation, in overcoming their misconceptions, and in increasing their demand for court-based mediation.[989] This lack of education was evident from the lawyers' questionnaire, which showed that over three-quarters of respondents reported having had little or no knowledge about mediation before their involvement in court-based mediation.[990] Mahasneh laid out the challenges to legal education in Jordan. First, while the curricula of law faculties in Jordan are to some extent identical as they offer similar obligatory and elective courses, Mahasneh explained that the content of current courses is outdated and does not reflect local and international developments and legal practice. Thus, many of these courses are detached from real life.[991] Moreover, the current law modules are devoid of key skills required for successful legal professionals, such as legal writing and clinical legal education, as just two universities provide opportunities for students to gain practical experience in the law.[992] This challenge was also observed by Olwan, as he argued that there is a need to implement new courses within the curricula of law faculties to align with the modern era. He added that there is a need to introduce legal clinics to improve the practical skills of law students, which may also help with solving citizens' disputes.[993]

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[987] Solicitors Regulation Authority, 'Legal Practice Course Outcomes 2019' 18-19 < https://www.sra.org.uk/globalassets/documents/students/lpc/lpc-outcomes-2019.pdf?version=4a5c48> accessed 12 October 2021. Also, this core was listed in the Legal Practice Course Outcomes 2011. See, Solicitors Regulation Authority, 'Legal Practice Course Outcomes' 18-19. <https://www.sra.org.uk/globalassets/documents/students/lpc/LPC-Outcomes-Sept2011.pdf?version=4a5b05 > accessed 12 October 2021.

[988] Solicitors Regulation Authority, Solicitors Qualifying Examination: Draft Assessment Specification (June 2017) 22.< https://www.sra.org.uk/globalassets/documents/sra/news/sqe-draft-assessment-specification.pdf?version=499d74> accessed 13 October 2021.

[989] Chapter 4, 111-113.

[990] Lawyers' Questionnaire, Figure 24.

[991] Nisreen Mahasneh, 'Prospects and Challenges of Legal Education: Jordanian Experience' (2014) 1 (2) Asian J Legal Educ 115,119. See also, Nisreen Mahasneh and George Critchlow, 'A Dialogue on Jordanian Legal Education' Gonzaga University School of Law, Legal Studies Research Paper No. 2014-2.

[992] Mahasneh, 'Prospects and Challenges of Legal Education (n 991) 120.

[993] Mohamed Y. Olwan, 'Legal Education in Jordan for the 21st century' (IALS Conference on the Role of Law Schools and Law Schools Leadership in a Changing World, Canberra, May 25 – 27 2009) < https://www.ialsnet.org/meetings/role/papers/OlwanMohamed(Jordan).pdf > access 7 January 2022.

According to Mahasneh, the second challenge to legal education in Jordan is the classic methods of teaching adhered to by many law professors, which emphasise memorisation, and minimise discussion between the students and the lecturer. This technique is preferred by professors of law from older generations; they are resistant to change, and efforts to use interactive methods are limited to 'a few young law professors.'[994] This issue was also noticed by Olwan, who claimed the old methods of teaching are preventing law students from developing critical and analytical legal thinking skills.[995] Other challenges noted were financial difficulties faced by Jordanian universities which prevent the administrations from spending money on designing flexible learning environments,[996] and the modest salaries of law professors that hinder their ability to continue developing their skills.[997] Olwan pointed to the same challenges, and commented that the lack of spending money to subscribe to legal journals affects the skills and knowledge of the law professors.[998]

Mahasneh and Olwan, who agree that these challenges have negatively impacted legal education, therefore suggest several changes to overcome these challenges and improve legal education in Jordan. First, universities must overhaul the curricula by providing courses that reflect developments in the current domestic and international regulations. For example, the introduction of legal clinics through partnerships between law faculties and civil society organisations would allow students to develop their legal practice skills while at the same time providing legal services to people who may otherwise not be able to afford legal advice. Another recommendation is to build cooperation between the law schools, the judiciary and the Bar Association such that judges and lawyers advise the law schools of relevant courses based on their perspectives, and teach legal practice courses to train law students on the practical application of the law.[999] The authors both suggest increasing the use of technologies such as legal databases to prepare students for conducting legal research, and developing teaching approaches to support understanding, analysis and criticism of legal issues.[1000] Lastly, improving the professors' salaries would encourage them to devote more time to their profession and the development of their skills.[1001]

[994] Mahasneh, 'Prospects and Challenges of Legal Education (n 991) 120-121.
[995] Olwan (n 993).
[996] Mahasneh, 'Prospects and Challenges of Legal Education (n 991) 121-122.
[997] ibid 122.
[998] Olwan (n 993).
[999] Mahasneh, 'Prospects and Challenges of Legal Education (n 991)124-125. And Olwan (n 993).
[1000] ibid 124. And Olwan (n 993).
[1001] ibid 123. And Olwan (n 993).

Hamadneh, in calling for incorporating mediation into the judiciary system, explained that law faculties should modify their curricula to include mediation and ADR as mandatory courses for all law students. In this way, the impact of legal education would be to raise awareness about the concept of mediation and alternative solutions among the next generation of lawyers.[1002] Al-Ahmed argued, moreover, that mediation's success depends on the integration of mediation training into universities, industrial and commercial institutions.[1003] Despite these calls for the reform of legal education, mediation and ADR are not core courses in the law faculties in Jordan.

In researching all 21 universities in Jordan that offer a Bachelor of Laws degree, it was found that the study plans for law students are similar, and none of the law schools in Jordan offer mediation courses. Instead, three universities have a mandatory arbitration course. Another six universities offer an elective arbitration course, three universities have an elective ADR course, and three universities offer a combined optional ADR and arbitration course.[1004] A review of the course descriptions reveals that arbitration is the focus of all elective ADR or arbitration and ADR courses.[1005] It should be noted that while some universities offer elective ADR courses in their study plans, in practice, few courses are available. This finding was supported by Mahasneh in her analysis of the study plans of law schools in Jordan. She found that although a large number of courses were listed in the study plans, only a handful were offered each year.[1006] For example, of the four universities that offer an elective ADR course in their study plans (Yarmouk University,[1007] Al-Hussein Bin Talal University,[1008] Jerash University[1009] and Irbid National University[1010]) it was found that none offered the course in

[1002] Hamadneh, 'The Role of Mediation in the Settlement of Civil Disputes (n 928) 384. See also, Abdullah Hamadneh, 'The Jordanian experience in the field of alternative solutions to conflict resolution' (The Seventh Conference of Chiefs of Supreme Courts in the Arab Countries, Sultanate of Oman, October 23-26, 2016)
[1003] Al-Ahmed (n 942) 252-253.
[1004] Appendix 2.
[1005] See for example, Yarmouk University Faculty of Law where the focus of the course on arbitration and a short overview on the other forms of ADR. < https://lawfaculty.yu.edu.jo/images/docs/tahkeem.pdf > accessed 16 May 2021.
[1006] Mahasneh, 'Prospects and Challenges of Legal Education (n 991) 119.
[1007] Yarmouk University Faculty of Law < https://lawfaculty.yu.edu.jo/index.php/2021-01-10-09-27-38> accessed 16 May 2021.
[1008] Al-Hussein Bin Talal University Faculty of Law < https://ahu.edu.jo/View_ArticleAr.aspx?type=1&ID=1791&name=القانون الخاص&Ic=1> accessed 16 May 2021.
[1009] Jerash University Faculty of Law < http://www.jpu.edu.jo/jpu/dept-courses.php?id=71#gsc.tab=0 > accessed 16 May 2021.
[1010] Irbid National University Faculty of Law, < http://www.inu.edu.jo/FViewer.aspx?token=54&page=293&sub=261 > accessed 16 May 2021.

the current academic year. Perhaps it is not surprising that there are no mandatory or elective courses on mediation due to the outdated content of the law curricula, and, as Mahasneh concluded, adding new courses is rare in Jordanian law schools.[1011] In fact, the researcher graduated from Mut'ah University Law School 18 years ago, and the same study plan is largely in place today.[1012] This is a clear example of how the curricula of the law faculties are not connected to developments in the legal system. Given these challenges in legal education in Jordan, it is highly unlikely that many law students are aware of the existence of court-based mediation.

7.4.2 The importance of legal education on the uptake of mediation in England

Like Jordan, legal education in England is considered an important factor in increasing the uptake of mediation. Some members of the judiciary and academia were early supporters of using education to integrate mediation into the litigation culture. Lord Jackson, in his final report, highlighted the importance of education among stakeholders to increase the use of mediation.[1013] In his speeches, Lord Jackson also emphasised the importance of ADR education to change the culture of litigation such that stakeholders choose mediation due to its benefits, not because they are compelled to do so.[1014] A similar view was expressed by Sir Anthony Clarke who argued that mediation should be embedded in the litigation culture as a method of solving disputes. He explained, "This will require education; education on the part of litigants, lawyers and the judiciary. Lawyers and judges will need educating so that mediation becomes part of the culture; so that it becomes second nature to us all."[1015] The same opinion was

[1011] Mahasneh, 'Prospects and Challenges of Legal Education (n 991) 119.
[1012] University of Mut'ah, Law School Study Plan. < https://www.mutah.edu.jo/ar/law/StudyPlans/lawbest-ar15.pdf > accessed 2 November 2021.
[1013] Lord Justice Jackson, *Review of Civil Litigation Costs* (n 938) ch 36, paras 3.9 and 3.10; Also, as observed by Friel, "The Dispute Resolution Commitment also includes an obligation on government departments and agencies to '[educate] their employees and officials in appropriate dispute resolution techniques'. Indeed, education is a constant theme of the pronouncements from the judiciary and the government on ADR." See, Steven Friel, 'Arbitration in Context' in Julian D.M. Lew, Harris Bor, et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (Kluwer Law International 2013) 48.
[1014] Judiciary of England and Wales, 'Civil justice Reform and Alternative Dispute Resolution Lecture by Sir Rupert Jackson: Chartered Institute of Arbitrators' (20-9-2016) 5; Judiciary of England and Wales, Lord Justice Jackson, The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review (Eleventh Lecture in The Implementation Programme: Rics Expert Witness Conference, 8 March 2012) para5.
[1015] Sir Anthony Clarke MR, 'The Future of Civil Mediation' (The Second Civil Mediation Council National Conference, Birmingham, May 2008) paras 5 and 6; A similar view was expressed by Lord Neuberger of Abbotsbury "Education should also put mediation in its context – a new means of resolving disputes, but not one that replaces well- established means - settlement, litigation, capitulation. Education should include when not to mediate, and when to cease mediation, as well as how not to mediate". See Lord Neuberger of

expressed by Lord Clarke of Stone-Cum-Ebony as he explained that the reason for mediation's underuse is lack of education; thus he saw educating judges, lawyers and litigants as essential to increasing the uptake of mediation.[1016] Furthermore, Genn, in her empirical research, found that education is an important factor in increasing the demand for mediation.[1017] More recently, Agapiou and Clark's empirical research in Scotland found that education is a vital tool in overcoming the lack of awareness and knowledge of mediation in the field of construction.[1018] Brooker emphasised that since the CPR came into force, legal professionals have driven the growth in mediation, and mediation training is important so that users make the process work in their best interests. "Therefore, education is crucial, not only for lawyers who are involved in a representative capacity, but also in other professional courses where dispute resolution and negotiation is taught."[1019] A significant body of literature calls for law faculties to provide legal education on mediation, but so far few have shown willingness to give mediation the same status in the curricula as litigation, as will be taken up in the next section.

7.4.3 Mediation within legal education in England

In 2009, Lord Clarke of Stone-Cum-Ebony expressed his view that mediation should become part of the litigation system, and taught in the faculties of law: "These considerations lead to the conclusion that mediation and other forms of ADR should become second nature to litigators, litigants and the courts…I suggest that we should start with the law schools and the professional parties and their lawyers."[1020] He believed that educating future lawyers was the key to embedding mediation in the English civil justice system. In addition, in early 2010, Sir

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Abbotsbury, 'Educating Future Mediators' (Speech to the Fourth Civil Mediation Council National, London, 11 May 2010) para 7.

[1016] Lord Clarke of Stone-Cum-Ebony, Master of the Rolls Mediation – An Integral Part of Our Litigation Culture (Littleton Chambers Annual Mediation Evening, Gray's Inn, 08 June 2009) para 2 (5); A similar view was expressed by del Ceno and Barrett who called for more education for legal representatives to overcome their resistance to take part in mediation. See, Julian Sidoli del Ceno and Peter Barrett, 'Part 36 and Mediation: An Offer to Settle Will Not Suffice: PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) 78(4) Arbitration 401,403.

[1017] Dame Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray and Dev Vencappa, *Twisting Arms: Court Referred, and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series 1/07 May 2007) 204; Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report*, (Lord Chancellor's Department Research Series No. 5/98, July 1998) 41.

[1018] Andrew Agapiou and Bryan Clark, 'A follow-up Empirical Analysis of Scottish Construction Clients Interaction with Mediation' (2013) 32(3) Civil Justice Quarterly 349,368.

[1019] Penny Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries' (2014) 43 Comm L World Rev 120, 152.

[1020] Lord Clarke of Stone-Cum-Ebony (n 1016) para 15; Similarly, the 2018 CJC final report on ADR recommended that "Law faculties throughout England and Wales should be encouraged to regard ADR as an essential part of any professional training". Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018) para 9.5.

Henry Brooke, former Chairman of the Civil Mediation Council, emphasised the importance of legal education on the practice of mediation, and the need for cooperation with the academic community to develop and spread the practice of mediation.[1021] In the same year, Lord Neuberger observed that there is a lack of legal education in the English law schools concerning ADR, mainly mediation.[1022] He recommended that lawyers gain knowledge about ADR during the early stages of their careers at the undergraduate level.[1023] Later that year, in the speech "Has Mediation Had its Day?" Lord Neuberger stated:

> It seems to me that it is time for those who accredit law degrees to consider whether there should be a requirement for such courses, and for courses in ADR to become compulsory elements in any qualifying law degree. If we want to develop a truly effective litigation and mediation culture for the future, that development should start sooner rather than later, and it should start at the outset of any lawyer's legal career.[1024]

While judges were heralding the importance of teaching mediation, several scholars observed that mediation was not included in the core curricula of most law schools. For example, Clark explained that mediation was not a core subject in law school curricula worldwide, which instead focused on teaching 'traditional legal content.' This was true in jurisdictions such as the USA, England, Scotland and other European states.[1025] A similar finding was noted by Waters, who remarked that UK law schools mainly focus on substantive law, with little focus on teaching ADR to law students.[1026] Nolan-Haley and Volpe also observed that "mediation has been widely neglected in legal education."[1027] As a result, many scholars called for ADR to be made a mandatory subject in law school curricula. Clark called for legal education in the UK to be reformed to incorporate mediation as a core subject, and not an optional module. He

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[1021] Sir Henry Brooke, 'Mediation in the UK today: An Authoritative Review of the UK Mediation Scene Today from the CMC's Perspective' (CMC Academic Seminar, 20th January 2010) 14.
[1022] Lord Neuberger of Abbotsbury (n 1015) Para 10.
[1023] ibid Para 11.
[1024] Lord Neuberger of Abbotsbury, 'Has Mediation Had its Day?' (Speech at the Gordon Slynn Memorial Lecture 11 November 2010). Para 31.
[1025] Bryan Clark, *Lawyers and Mediation* (Springer 2012) 51; A similar point was made by Choong as she stated that "Legal education in the United Kingdom has, for a long time, been organized around litigation in the higher courts. This has led to a curriculum which places an almost exclusive emphasis on the adversarial system of law that has, at its heart, a rights-based approach to dispute analysis." See, Kartina Choong, Mediation in the Law Curriculum, (Learning in Law Annual Conference 2007)1. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013295 > accessed 4 December 2021.
[1026] Ben Waters, 'The Importance of Teaching Dispute Resolution in a Twenty-First-Century Law School' (2017) 51(2) The Law Teacher 227,228; Likewise, in the USA, Kraemer argued that "The traditional law school curriculum is primarily geared to preparing students for legal combat". See Karen D. Kraemer, 'Teaching Mediation: The Need to Overhaul Legal Education' (1992) 47(3) Dispute Resolution Journal 12,13.
[1027] Jacqueline M. Nolan-Haley and Maria R. Volpe, 'Teaching Mediation as a Lawyering Role Developments' (1989) 39 Journal of Legal Education 571, 571.

argued this change would help to expand the use of mediation, and would transform the practice of solving disputes.[1028] Similarly, Waters suggested that there is a case for making ADR a mandatory module for undergraduate law students in the UK on the basis of "research opportunities, its socio-legal significance and the opportunity that such an academic subject presents in terms of skills acquisition."[1029] Nolan-Haley and Volpe, in advocating for a mandatory mediation course for law students, explained that having knowledge of mediation would provide lawyers additional skills for solving clients' disputes in more holistic ways.[1030] Furthermore, Duffy and Field put forward 10 reasons why ADR should be mandatory in law schools in Australia; several are applicable to the English context: current legal education does not reflect legal practice,[1031] participation in ADR processes is mandatory under certain circumstances,[1032] lawyers have a duty to advise their clients about ADR options[1033] and, similar to the CJC Report on Compulsory ADR in England,[1034] independent agencies in Australia support mandatory ADR courses in the law curriculum.[1035]

Despite these calls to make mediation a mandatory subject in law schools, the author of this study examined the curricula of universities in England that offer LLB law degrees to determine the current status of ADR within English law schools. The inquiry found that out of 99 universities, only five have mandatory ADR embedded within their study plans as a core module – the University of Plymouth,[1036] Canterbury Christ Church University,[1037] Newman

[1028] Clark, *Lawyers and Mediation* (n 1025)178; See also, in the USA, Kraemer called for changing legal education to embed mediation within the law schools' curricula as she argued that "Mediation must be seen not as an 'alternative' or unusual sidetrack from litigation, but as a natural and integral step in the process of resolving disputes". See, Kraemer (n 1026)14.
[1029] Waters (n 1026) 245; also, in family law Cohen called for making ADR a mandatory subject in the legal education and within the Bar exam topic. See Dori Cohen, 'Making Alternative Dispute Resolution (ADR) Less Alternative: The Need for ADR As Both a Mandatory Continuing Legal Education Requirement and A Bar Exam Topic' (2006) 44(4) Family Court Review 640, 640-652.
[1030] Nolan-Haley and Volpe (n 1027) 572.
[1031] James Duffy and Rachael Field, 'Why ADR must be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the non-Believer' (2014) 25(1) Australasian Dispute Resolution Journal 9, 9-10.
[1032] ibid 10-11.
[1033] ibid 11.
[1034] Civil Justice Council (CJC) Report on Compulsory ADR (June 2021) para 7. < https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 3 November 2021.
[1035] Duffy and Field (n 1031) 16-17.
[1036] University of Plymouth, LLB (Hons) Law Course details. < https://www.plymouth.ac.uk/courses/undergraduate/llb-law > accessed 5November 2021.
[1037] Canterbury Christ Church University, LL. B Module information < https://www.canterbury.ac.uk/study-here/courses/law > accessed 5 November 2021.

University, Birmingham,[1038] Northumbria University[1039] and Sheffield Hallam University.[1040] Moreover, 30 have optional ADR modules, only five of which are dedicated to mediation. Another four universities have an optional arbitration module.[1041] Surprisingly, although the new landscape of the civil justice system intended to make the court a last resort, and despite the fact the CPR took effect 22 years ago, few law schools have ADR as a mandatory module, and less than one-third offer ADR as an optional course. Similar to the finding presented by Duffy and Field in the Australian context, current legal education in England does not reflect legal practice, and is far behind in integrating mediation in law faculties.

7.4.4 The Impact of the Civil Justice Council reports on law schools in England

As mentioned previously, the 2021 Civil Justice Council (CJC) Report on Compulsory ADR concluded that the fact parties can be compelled to participate in ADR and mandatory mediation does not conflict with Article 6 of the ECHR. The report thus paves the way for making mediation mandatory within the English civil justice system.[1042] The report emphasised that legal education is vital in introducing mandatory mediation within the legal system. "Lack of public familiarity can be said to weigh in in favour of introducing compulsion rather than against it. Greater education about the process and its advantages are essential," the report declared.[1043] The last CJC interim report reviewing the Pre-Action Protocols proposed, moreover, to make compliance with pre-action protocols mandatory.[1044] Similarly, the CJC final report on the resolution of small claims recommended that the attendance of the parties should be mandatory at mediation sessions for claims valued at £500 or less.[1045] In light of these reports, it is likely that ADR will become compulsory within the English system in the near future, and, as mentioned previously, English universities are far behind in making ADR a core module. English law schools which have been resistant to change should update their

[1038] Newman University – Birmingham, Law LLB (Hons) Modules < https://www.newman.ac.uk/course/law-llb-hons/september-2022/ > accessed 5 November 2021.
[1039] Northumbria University, Law LLB (Hons) Modules < https://www.northumbria.ac.uk/study-at-northumbria/courses/law-llb-hons-uuslwz1/#modules > accessed 5November 2021.
[1040] Sheffield Hallam University, Law LLB (Hons) Modules < https://www.shu.ac.uk/courses/law/llb-hons-law/full-time > accessed 5 November 2021.
[1041] Appendix 2.
[1042] Civil Justice Council (CJC) Report on Compulsory ADR (n 1034) paras 7,10. <.
[1043] ibid para 83.
[1044] Civil Justice Council (CJC) Review of Pre-Action Protocols, Interim Report (November 2021) para 3.13 < https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf > accessed 14 January 2022.
[1045] Civil Justice Council (CJC) the Resolution of Small Claims, Final Report (January 2022). Para 4.12. < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf > accessed 11 February 2022.

curricula to incorporate compulsory ADR courses to prepare law students for the future of dispute resolution.

7.5 Public awareness of mediation services within the civil justice systems of Jordan and England

7.5.1 Public awareness of court-based mediation in Jordan

There is a lack of general legal awareness among Jordanian citizens. According to the CEO of Lawyers Without Borders in Jordan, lack of knowledge of the law hinders Jordanian citizens from getting access to justice via the judiciary. He suggested that in order to increase legal awareness among Jordanians, society needs legal literacy to introduce people to the methods of accessing justice, litigation procedures, types of courts, and other important legal information. He recognized that awareness-raising and education are among the tasks of the Ministry of Justice, the Bar Association and civil society institutions, indicating that there are efforts being made in this regard that do not rise to the required level.[1046]

In regard to court-based mediation, public awareness and understanding is severely limited in Jordan.[1047] Many business owners, even, are unaware of the existence of mediation as an alternative to litigation.[1048] This was confirmed by the empirical study of this thesis, as there was unanimous agreement (17 out of 17) among the judges interviewed regarding the lack of awareness among Jordanian citizens about the availability of court-based mediation. To overcome the lack of awareness, the judges interviewed stressed the need to educate society regarding the concept, advantages and existence of court-based mediation in Jordan. The judges called for national efforts to promote mediation through collaboration with the Ministry of Justice, Judicial Council, Bar Association, Chamber of Commerce, industry ,and insurance unions by using social media campaigns, newspaper ads and radio programming.[1049] Similarly, Al Qatawneh and Abu Rumman called for conducting information and awareness campaigns

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[1046] Saddam Abu Azzam, 'Poverty and Lack of Legal Awareness Hinder Resorting to the Judiciary in Jordan' Amman Net News (Amman, 2 May 2020) < https://ammannet.net/أخبار/الفقر-و غياب-الوعي-القانوني-يعيقان-اللجوء-للقضاء-في-الأردن> accessed 10 May 2021

[1047] The monthly symposium of the Association of Banks, 'The Experience of Jordanian Courts in Using Mediation to Settle Civil Disputes' (2008). <https://abj.org.jo/echobusv3.0/systemassets/ تجربة المحاكم الأردنية في استخدام الوسائط لتسوية النزاعات المدنية - شباط 2008.pdf> accessed 10 May 2021

[1048] Tariq Hammouri, Dima A. Khleifat and Qais A. Mahafzah, 'Chapter Four Jordan' in Giuseppe De Palo and Mary B. Trevor (eds), Series Editor Nadja Alexander, *Arbitration and Mediation in the Southern Mediterranean Countries* (Kluwer Law International 2007) 87.

[1049] Chapter 4, 111-113.

for all segments of society about the importance of mediation, and the need to encourage its use due to its advantages in resolving disputes in a simple, fast and less costly manner.[1050] Further, the Jordanian International Chamber of Commerce (ICC,) in cooperation with the International Mediation Institute (IMI), held Amman Mediation Week on March 18 and 19, 2017, which was attended by legal experts, lawyers, judges, lawmakers and industry representatives. The attendees indicated that lack of awareness among citizens is one of the challenges that impacts uptake in the use of mediation. Thus, the attendees recommended organising awareness-raising campaigns, and creating a department at the court that would inform parties at the outset of the possible alternatives to litigation.[1051]

While the Bar Association is responsible for raising awareness of legal issues among citizens, in practice the Bar plays a limited role in general awareness-raising, and, as explained before, there is no information or legal resources on the Bar Association's website regarding mediation. By comparison, there are two non-profit organisations that provide free legal advice, hold awareness lectures and advocate for legal issues in Jordan.[1052] One of the organisations, the Justice Centre for Legal Aid, has an extensive number of resources on its website regarding legal information, legal research and legal awareness concerning many issues, much more so than the Bar Association.[1053] Although neither of these organizations discuss court-based mediation in their literature, at the beginning of 2018 private mediation services were introduced by the Justice Centre for Legal Aid to resolve disputes between individuals in a peaceful manner.[1054] Despite these efforts to educate the public on legal matters, the Bar Association is working to close these institutions and dismisses any lawyer who cooperates with these organisations. The Bar Association president claimed these institutions are illegal, because they allegedly rely on foreign funding to carry out their duties,[1055] but the real intention may be to eliminate competition for their members. For example, in 2011 the Jordanian Bar Association dismissed one of its members on the pretext

[1050] Al Qatawneh (n 942) 187; Rola Saleh Ahmed Abu Rumman, 'The Role of the private Mediator to Solve the Civil Disputes' (Master's dissertation, Middle East University 2009) 147-148.
[1051] Amman Mediation Week, Recommendations, Status quo, and Suggested Solutions (18-19 March 2017) to author.
[1052] Legal Aid Foundation in Jordan. < http://www.civilsociety-jo.net/ar/organization/458 > accessed 29 October 2021.
[1053] Justice Centre for Legal Aid. < https://www.jcla-org.com/ar > accessed 29 October 2021.
[1054] Justice Centre for Legal Aid, Annual Report of 2018. <https://www.jcla-org.com/ar/publication/annual-report-2018 > accessed 8 December 2021.
[1055] Hazem Akroush,'Controversy between (lawyers) and legal aid centres' *Alrai (*Amman, 12 June 2017) < http://alrai.com/article/10394229?PageSpeed=noscript > accessed 29 October 2021.

that her work with the Justice Centre for Legal Aid would negatively affect the work of lawyers who receive their income from litigation.[1056] Instead of upholding their duty to inform the public about their legal rights and ways to access justice, the Bar Association acts as an obstacle to the very citizens that may benefit the most from mediation services. Unsurprisingly, citizens are unaware of the public mediation service due to the failure of the government, the Bar Association and civil society institutions to actively encourage the use of court-based mediation. This should be corrected by a nationwide public outreach campaign to educate the general public about the availability of court-based mediation in Jordan.

7.5.2 Public awareness of mediation services in England

The lack of public awareness of mediation has been a concern since the introduction of the Woolf reforms. Lord Jackson, for instance, explained that "many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily."[1057] Sir Lightman similarly predicted that the development of mediation would be linked with increasing the public's awareness of the advantages of mediation.[1058]

Early research confirmed there was a lack of awareness among the public regarding mediation services in England.[1059] More recently, the 2018 CJC final report on ADR came to a similar conclusion. The report acknowledged the existing forms that encourage the use of mediation within the court system.[1060] Despite these practices, the challenge of public awareness remains,

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[1056] Mohamed Shamma, 'Bar Association Dismiss a Female Lawyer ecause her Association Provides Free Legal Aid' *ammannet* (Amman, 29 March 2011) < https://ammannet.net/-العون-جمعيتها-لتقديم-محامية-تفصل-المحامين-أخبار/القانوني-مجانا> > accessed 29 October 2021.

[1057] Lord Justice Jackson, *Review of Civil Litigation Costs* (n938) ch 36, para 1.2.

[1058] Gavin Lightman, '\'Mediation: An Approximation to Justice' (2007) 73(4) Arbitration 400, 402.

[1059] See for example, Doyle in her evaluation of the Small Claims Mediation Service at Manchester County Court, she found that one of the challenges to the use of mediation is a lack of awareness about the Mediation service among the public. Margaret Doyle, *Evaluation of the Small Claim Mediation Service at Manchester County Court* (Final Report to the Better Dispute Resolution Team, Department for Constitutional Affairs 2006). 117; A similar finding was observed in Hazel Genn, *The Central London County Court-Pilot Mediation Scheme Evaluation Report*, Lord Chancellor's Department Research Series No. 5/98, July 1998.15. Also, Christopher Hodges and Magdalena Tulibacka*, English Justice System – Beyond the Courts Mapping out the Non-Judicial Civil Justice Mechanisms* (European Civil Justice Systems Research Programme at the Centre for Socio-Legal Studies, University of Oxford 2009) 8. A similar finding was observed in the Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme "Parties expressed low levels of awareness of mediation prior to it being suggested to them in their dispute." See. Webley, Abrams and Bacquet (n 964) 14; Similarly, Prince in her evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court found "…the lack of knowledge about mediation reflected generally throughout this research." See. Sue Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Final Report Prepared for the Department of Constitutional Affairs, September 2006). 97.

[1060] Civil Justice Council, ADR and Civil Justice, CJC ADR Working Group Final Report (2018). Para 1.2.1

and the authors called for greater efforts to increase public legal education about available ADR forms.[1061] The limited public familiarity with ADR processes was also noted in the 2021 CJC Report on Compulsory ADR,[1062] which recommended legal education outside of the court system to further increase the public's awareness of ADR.[1063]

In contrast to Jordan, ADR is becoming more well-known among the general public in England.[1064] English citizens have the opportunity to learn about the existence of mediation within the court system through the Small Claims Mediation Service,[1065] the Rental Mediation Service Pilot,[1066] the Directions questionnaire, [1067] and various court guides.[1068] Moreover, as explained in the previous chapter, legal representatives have the duty to inform their clients about ADR forms before resorting to litigation.

English citizens also have many external sources of free legal information. For instance, Citizens Advice provides free advice on legal issues, and directs citizens on the process of filing a claim before the court, and settling claims outside the court using ADR forms.[1069] The Law Centres Network also offers free legal advice, including the use of ADR, and represents citizens before the court.[1070] Moreover, there are mediation clinics in existence across the UK that provide mediation services for free, such as King's College London Legal Clinic

[1061] ibid Para 6.
[1062] Civil Justice Council (CJC) Report on Compulsory ADR (June 2021) para 83.
[1063] Civil Justice Council (CJC) Report on Compulsory ADR(n 1034) para 116. < https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 28 October 2021.
[1064] Tony N Guise, *Breaking the Backlog and Overcoming the Tsunami of Civil Litigation in England and Wales: An Empirical view of the Civil Justice Response to the Lockdown:* A White Paper from DisputesEfiling.com, June 2020) para 73(c).
[1065] Small Claims Mediation Service. < https://www.gov.uk/guidance/small-claims-mediation-service > accessed 20 October 2021.
[1066] The UK Government, Rental Mediation Service Pilot < https://www.gov.uk/guidance/rental-mediation-service > accessed 8 December 2021.
[1067] For example, Form N181, Directions questionnaire (Fast track and Multi-track) Section states, "Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees." < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953456/n181-eng.pdf > accessed 20 October 2021.
[1068] For example, The Commercial Court Guide, tenth edition (2017), para G1.1 states the judge will encourage parties to consider the use of ADR such as mediation.
[1069] Citizen Advice, Law and Courts, < https://www.citizensadvice.org.uk/law-and-courts/legal-system/small-claims/the-rules-about-making-a-court-claim/ > accessed 28 October 2021. See also, Citizen Advice, "Solve an ongoing consumer problem with a business seller." One recommendation to the consumer is using one ADR form to solve disputes. < https://www.citizensadvice.org.uk/consumer/get-more-help/Solve-an-ongoing-consumer-problem/> accessed 1 November 2021.
[1070] Law Centres Network, < https://www.lawcentres.org.uk/about-law-centres > accessed 28 October 2021.

Mediation Project,[1071] and the Mediation Clinic of the University of Sussex.[1072] In addition, Brown and Marriott noted that ADR organisations have been actively involved in raising public awareness via seminars, publications, media, and workshops.[1073] Further, the aim of the Civil Mediation Council is to promote and encourage the solving of disputes through the use of mediation, and this organisation is a rich source of information regarding mediation.[1074] Together, these organisations contribute to the promotion of mediation and awareness of the existence of ADR services among the public in England, though, as the CJC argues, more is needed.

7.6 Conclusion

This chapter highlighted mediation education, training, and awareness among stakeholders in Jordan and England. The study recognised that judges in Jordan obtain education and training on mediation, but there is a need for advanced and specialised mediation training. However, there is a complete absence of education, training, and awareness for lawyers and the general public related to court-based mediation. In contrast, English judges acquire specialised training about mediation; the SRA and BSB require practicing lawyers to keep their legal knowledge and skills up to date, and provide their members with mediation training, but there is limited awareness among the general public about mediation within the civil justice system. Moreover, legal education in both jurisdictions fails to reflect the current developments in their civil justice systems by not making mediation a core module in their law school curricula.

The study also found that judges in both jurisdictions are required to complete CPD throughout their careers to develop their judicial skills, and may attend mediation training. However, English judges have access to more advanced mediation courses in comparison to Jordanian judges. I would recommend, and the empirical study confirmed the need for, offering specialised and advanced mediation training for judges in Jordan.

[1071] King's College London Legal Clinic Mediation < https://www.kcl.ac.uk/legal-clinic/how-we-can-help/mediation > accessed 28 October 2021.
[1072] Mediation Clinic of University of Sussex, < http://www.sussex.ac.uk/law/clinical-legal-education/peermediationclinic > accessed 28 October 2021. In Scotland, there is a Mediation Clinic at the University of Strathclyde, see University of Strathclyde, Law School Mediation Clinic < https://www.strath.ac.uk/humanities/lawschool/mediationclinic/ > accessed 7 January 2022.
[1073] Brown and Marriott (n 965) 211. For example, the Mediation Awareness Group holds a Mediation Awareness Week in October each year in the UK to increase the awareness of mediation within the community. See, Mediation Awareness Group (MAG), Mediation Awareness Week. < http://www.mediationawarenessweek.co.uk/about-mag.html > accessed 20 December 2021.
[1074] Civil Mediation Council, < https://civilmediation.org/ > accessed 12 November 2021.

The study also found that English lawyers have the statutory and professional obligation to acquire education and training through CPD to maintain their competency to provide the best services to their clients. Although not explicitly stated, the requirement to keep their legal knowledge and skills up to date can be understood to include mediation training, given the centrality of ADR in the civil justice system. The requirement for attending CPD should be incorporated into Jordanian Law, as there is currently no duty for lawyers to acquire education or training in general, or mediation training specifically. Furthermore, I would recommend the establishment of an independent regulatory body in Jordan similar to the Legal Services Board in England, with the aim of providing oversight of the Bar Association, creating standards for the education and training of lawyers, and protecting the clients' best interests.

It is further concluded that English lawyers have greater awareness of mediation because ADR is embedded within the civil justice system, and due to the efforts of legal regulators to provide training on mediation. By comparison, this study found limited awareness of mediation among the Jordanian lawyers approached during the fieldwork, which was confirmed by the literature and the judges interviewed for this thesis.

Furthermore, emphasis should be placed on updating the curricula of law schools in both jurisdictions to reflect current legal developments. Despite mediation being introduced into the civil justice systems decades ago, universities in both countries continue to focus on traditional legal content. In Jordan and England, calls have been made to introduce the subject of mediation at an early stage by embedding it in the study plans of the law faculties as a mandatory course. The researcher would recommend immediate reform of legal education in both countries to incorporate mediation as a core subject, to further promote and encourage the use of mediation.

Finally, the chapter concluded that there is limited awareness of mediation in England, though there are efforts both within and outside of the court system to raise awareness amongst the public about the mediation services that are available. In Jordan, by contrast, there is a complete lack of awareness amongst the public on the existence of court-based mediation due to the failure of the government, Judicial Council, and Bar Association in promoting mediation. There is, therefore, an urgent need for awareness-raising in both jurisdictions, through media campaigns in collaboration with public and non-profit organisations, to increase access to justice for citizens via mediation services that are offered through the civil justice systems.

CHAPTER EIGHT: CONCLUSION

8.1 Introduction

The purpose of this research has been to investigate the challenges undermining the use of mediation in the Jordanian civil justice system by comparing mediation in Jordan and England, based on the findings of the empirical study. This chapter will, firstly, summarise the key findings of the study through reviewing the research aims and answering the research questions:

- What are the barriers that undermine the use of mediation in Jordan?;
- What are the roles and responsibilities of the court to encourage parties to use mediation?;
- What are the roles and responsibilities of lawyers to encourage their clients to use mediation?;
- What roles do education, training and awareness play in encouraging the use of mediation?; and
- Should mandatory mediation be introduced in the civil justice system, and what are the potential limitations?

Next, this chapter will discuss the contribution of this research, recommend reforms to the Jordanian civil justice system based on lessons learnt from the English practice of mediation, and suggest lessons England could learn from Jordan. Finally, this chapter will conclude with avenues for further research.

8.2 Key Findings of the Research in Relation to the Research Aims and Questions

8.2.1 Research aims achieved

Mediation in Jordan has deep roots in solving individuals' problems, and is widely used to resolve civil and commercial disputes.[1075] Based on the success achieved by mediation outside the courts, the government decided to implement mediation within the judicial system to expedite the resolution of disputes, reduce the burden on the courts, and expand access to

[1075] Mohammad H. Abu Hassan, *Bedouin Customary Law: Theory and Practice* (3rd edn, Ministry of Culture and Arts, Amman 2005) 37. See also, Alaa Al Bataineh, 'Mediation in Jordan' (Al Tamimi & Co, November 2012) < https://www.tamimi.com/law-update-articles/mediation-in-jordan/ > accessed 9 January 2022.

justice through judicial mediation.[1076] However, mediation has not taken root in the civil justice system. Such limited uptake was evident in the number of cases referred to mediation, as described in Chapter 1. Understanding why judicial mediation has not been widely used is important not only for achieving the government's objectives, but also for advancing the broader field of dispute resolution.

As explained in the chapter on methodology, there is a dearth of literature regarding the use of mediation in Jordan in general, and no research had been conducted to explain the factors that hindered the use of mediation within the civil justice system. The available literature focused primarily on the history of ADR, the mediation process, the advantages of mediation, the role of private mediators, and the role of the judge-mediator.[1077] These research gaps led the researcher to focus this study on understanding the challenges that undermine the use of mediation in Jordan. The findings of the empirical study successfully identify the main barriers to the use of mediation in the Jordanian civil justice system, and inform the design of the comparative study, while the findings of the comparative study with the English system inform recommendations for increasing the uptake of mediation in Jordan, and, accordingly, the research has achieved its objectives.

8.2.2 Research questions answered

What are the barriers that undermine the use of mediation in Jordan?

From the empirical research, it was found that judges and lawyers act as gatekeepers to mediation, and there is a lack of education, training, and awareness about mediation among stakeholders. Most of the research participants agree there is limited referral to mediation, as inviting disputants to mediate is only a formality for some judges. The majority of judges that were interviewed also considered lawyers' refusal to advise their clients to choose mediation due to their own financial interests as the biggest obstacle to mediation. Notably, most participants supported the view that there is a complete lack of awareness of the existence of court-based mediation amongst the public, limited education and training for judges, and lack of education and training resources for lawyers.

[1076] Jordanian Council of Ministers, *The Policy Memorandum and Explanatory Notes that Accompanied the Amendment of the Provisional Mediation Law No. 37 of 2003*.
[1077] See Chapter 2, 22-23.

The comparative study also identified several factors that hinder the use of mediation. These impediments can be divided into three themes: The lack of a statutory duty imposed upon the court to encourage the use of mediation, the lack of a statutory and professional duty imposed upon lawyers to inform, discuss or encourage their clients to use mediation, and the need for mediation education, training, and awareness for stakeholders. Together, these obstacles have effectively contributed to limiting the use of mediation in Jordan.

What are the roles and responsibilities of the court to encourage parties to use mediation in Jordan?

Findings from the study revealed that judges have no statutory duty to offer or encourage parties to use mediation. Instead, referral to mediation is based on judicial discretion or the request of the disputants. Moreover, referral judges have no power to refer parties to mediation without their consent, as the mediation process from referral to settlement is entirely voluntary. Referral judges also have no authority to impose costs sanctions on parties that unreasonably refuse to engage with mediation.

What are the roles and responsibilities of lawyers to encourage their clients to use mediation in Jordan?

Another finding of the research is that lawyers have no statutory or professional duty to inform, advise, or encourage their clients to use mediation. Crucially, the law requires the lawyer's presence at the referral stage and at the mediation sessions, whilst disputants are not allowed to attend before the trial judge alone, and parties are not required to attend the mediation sessions. The lawmakers made lawyers the main gatekeepers to mediation, yet lawyers have no incentive to resort to mediation. Mediation is absent from the Bar Association Law and the Lawyer's Code of Ethics and Code of Conduct, and litigation is more profitable. The study also indicated that the influence of lawyer-members of the House of Parliament had negatively impacted the development of mediation in the lawyers' favour.

What roles do education, training and awareness play in encouraging the use of mediation in Jordan?

The findings of the study showed that having stakeholders who were educated, trained and aware about the use and benefits of mediation would positively reflect on its uptake. It was also found that Jordanian judges have a statutory duty to acquire CPD, and thus many obtain

education and training in mediation, but more advanced courses and specialised training are needed. On the other hand, it was found that lawyers are not required to obtain CPD and, as a result, there is limited awareness about the existence of court-based mediation amongst lawyers. Further, the study found that the Bar Association fails to provide training or issue publications related to mediation. Moreover, the study concluded that law faculties have not kept pace with the development of mediation in the civil justice system. Finally, the study indicates there is a complete lack of awareness amongst the public of the existence of court-based mediation.

Should mandatory mediation be introduced in the civil justice system in Jordan, and what are the potential implications?

The findings of the empirical research show the judges interviewed were divided over the issue of mandatory mediation. The majority of the judge-mediators (7 out of 9) supported a proposal to introduce mandatory mediation for certain types of disputes that can be solved without the need for court procedures. These judges felt that mandating such disputes would help to ease the pressure on the court, saving time, money, and effort. On the other hand, the majority of the referral judges (7 out of 8) were against mandatory mediation; they believed that forcing parties to mediate would be counterproductive, as these cases would return to the court unsolved.

The study concluded that the House of Parliament, the Constitutional Court, and the Court of Cassation oppose the introduction of compulsory mediation based on the traditional view of the concept of justice as identified in Art. 101 and 102 of the Constitution, which asserts that access to justice can only be found through litigation. The Ministry of Justice, in contrast, has supported the establishment of mandatory mediation consistent with the broader view of access to justice that views mediation as another way to access justice.

8.3 Contributions to the Field

8.3.1 Contributions of the comparative study

The purpose of the comparative study was to understand why the use of mediation declined in Jordan while it increased in England. A comparative approach was ideal because it draws attention to commonalities and differences between the two comparators. England has robust case law, legal research, and empirical studies, facilitating this approach. This is especially true

with respect to mediation, where the CPR of 1998 transformed the landscape of the English civil justice system.[1078] In contrast to England, Jordan does not have a long tradition of conducting scholarly research, which proved challenging when applying the same methods in both jurisdictions. This study makes a valuable contribution to the limited existing research on mediation in Jordan, and contributes to the advancement of knowledge about factors that facilitate and hinder the use of mediation in disparate jurisdictions. This study also provides a base for researchers to build upon and for the policymakers to use its outputs in order to develop the legislative framework necessary to overcome the challenges that undermine the use of mediation.

8.3.2 Contributions of the empirical study

As previously discussed, there have been a few studies that examined mediation in Jordan. However, those studies were concentrated on the development and process of mediation in the civil justice system, narrowly focused on the role and responsibilities of mediators, and compared mediation between Jordan and other Middle Eastern countries.[1079] As the existing research was limited and there were no comprehensive studies that explored the practice of mediation, the researcher conducted empirical research to fill the gaps in the literature in preparation for the comparative analysis. This study is the first of its kind to empirically investigate mediation in Jordan by conducting semi-structured interviews with 17 Jordanian judges (8 referral judges, 9 judge-mediators), and collecting questionnaires from 99 lawyers. Most importantly, the empirical study added a methodological contribution to the field of mediation in Jordan; its results advance existing knowledge by documenting stakeholder perspectives of mediation, and revealing several reasons that undermine the use of mediation in Jordan.

8.4 Lessons Learned

8.4.1 What could Jordan learn from the English practice of mediation?

[1078] CPR 1.4 (2)(e). "Encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."; CPR .26.4(2)(a) Stay to allow for settlement of the case grants power to the court on its own initiative to impose a stay on proceedings while parties attempt to solve their disputes using ADR if the court considers that such a stay would be appropriate; CPR 26.4(a) Referral to the Mediation Service for small claims and pre-action conduct and protocols are to encourage the parties to settle their disputes without proceeding to trial by various methods including the use of ADR.

[1079] See the Methodology Chapter, 22-23.

There are several lessons that Jordan can learn from the English practice to increase the uptake of mediation.

First, the law should be amended to strengthen the role of the court. The law should impose a duty upon the court to encourage the use of mediation, similar to the duty placed upon judges under the English CPR Rule 1.4(2)(e) to address the issue of low uptake of mediation. Power should be vested in judges to refer parties to mediation if the dispute is solvable via mediation, as provided by English CPR Rule 3.1(2)(m). Reform should, furthermore, grant the judge the power to impose costs sanctions on parties that refuse to take part in mediation unreasonably, as set out in English CPR Rule 44.3(4), not solely as punishment, but to promote the parties' participation in mediation.

Second, the law should impose new duties upon lawyers that balance the interests between the clients, the lawyer's self-interest, and the civil justice system. A requirement should be introduced that imposes a duty upon lawyers and disputants to help the court that is similar to the English CPR Rule 1.3. Also, lawyers should have a professional duty to inform their clients about the option of using mediation, to act in the best interests of their clients, and avoid wasting the court's time, as listed in the English SRA and BSB Codes of Conduct.

Third, reform is needed to increase mediation education, training, and awareness among stakeholders. The availability of training should be improved for Jordanian judges to include advanced and specialised mediation training as is offered to English judges through the Judicial College. The reform should also include an obligation for lawyers to acquire CPD to remain competent and stay up to date on changes in the law, including mediation, as mandated by the English BSB and SRA requirements. Furthermore, new legislation is needed to establish an independent authority to provide oversight of the Bar Association, and create standards and training for lawyers similar to the Legal Services Board in England. To increase awareness about mediation among the public, information should be provided within the court system to encourage the use of mediation, as is currently the practice in England through the Directions questionnaire and various court guides, for instance.

Finally, Jordan should take steps towards adopting semi-mandatory mediation, in a manner that is similar to England, to increase the uptake of mediation. Pre-Action Conduct and

Protocols should be introduced to the Jordanian civil justice system for certain disputes, and compliance should be mandatory, as proposed in the recent CJC Interim report.[1080] As previously stated, English judges have the power to impose costs sanctions on parties that do not comply with or carry out court orders. A similar provision should be introduced to the Jordanian law to enforce compliance with the law. Additionally, the Jordanian House of Parliament, the Constitutional Court and the Court of Cassation should take into consideration the strong arguments for adopting mandatory mediation in the 2021 Civil Justice Council (CJC) Report on Compulsory ADR, which concluded that mandatory ADR does not conflict with the right of access to the court.[1081] Adopting these reforms would help to overcome the challenges that undermine the use of mediation in Jordan, and increase its uptake.

8.4.2 What lessons could England learn from Jordan?

At the same time, there are reforms that England can adopt based on the Jordanian practice of mediation. One lesson the English civil justice system could learn from the Jordanian experience is the establishment of court-based mediation for civil and commercial disputes that is conducted by a judge-mediator, and that follows an evaluative style, as provided by Art. 2 and 6 of the Jordanian Mediation Law. In fact, the English system may be better suited to implement court-based mediation, because mediation is already embedded within its civil justice system. Benefits of judicial mediation include keeping mediation under the umbrella of the court, and silencing concerns about privatisation of the civil justice system. The value of the evaluative mediation style is that the judge would evaluate the legal position of the disputants, and help them weigh the costs and benefits of pursuing litigation or resolving their dispute via mediation. Further, England may soon implement court-based mediation if the CJC recommendation for compulsory judge-led ADR processes is adopted.[1082] Furthermore, the reform should include the refund of court fees if the case settles before returning to the court,

[1080] Civil Justice Council (CJC) Review of Pre-Action Protocols, Interim Report (November 2021) para 3.13 < https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf> accessed 14 January 2022. The report proposed to make compliance with the protocols mandatory. Similarly, the recent CJC final report on the resolution of small claims recommended that the attendance of the parties should be mandatory "at mediation for small value claims of £500 or less". See Civil Justice Council (CJC) the Resolution of Small Claims, Final Report (January 2022). Para 4.12. < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf > accessed 11 February 2022.
[1081] Civil Justice Council (CJC) Report on Compulsory ADR (June 2021) para 7, 10. < https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf > accessed 2 January 2022.
[1082] ibid para 13.

as provided by Article 9 of the Jordanian Mediation Law. If this reform is introduced, more parties would be likely to resort to mediation, due to the high costs of litigation in England.

8.4.3 Real-world applications – the outlook

As noted above, the aim of the comparative study is to draw lessons from the English practice of mediation, and evaluate Jordanian law. The researcher therefore proposes a package of reforms for the Jordanian civil justice system to strengthen the law and increase the uptake of mediation by amending several laws, and introducing new provisions.

Specify Overriding Principles to the Jordanian CPL

1-The Jordanian legal approach has been to deliver substantive justice at any cost. However, as the Policy Memorandum and Explanatory Notes that Accompanied the Mediation Draft Law noted, the courts cannot keep up with the number of new cases. As a result, the civil justice system is slow to resolve disputes. Accordingly, this study proposes to adopt the concept of the overriding objective from the English CPR. This would enable the court to deal with cases justly and at proportionate cost, with consideration of procedural justice by encouraging the use of mediation to save costs, time and resources. It is proposed that lawmakers adopt the overriding objective as the first reform of the civil justice system; this change is essential to allow the court to consider procedural justice when managing cases.

2-The study also proposes to adopt the English practice of imposing the duty of furthering the overriding objective on all stakeholders, including the court, lawyers, and disputants. The proposed article could read: The parties and their lawyers are required to assist the court to further the overriding objective by attempting to mediate the dispute to avoid litigation. This change is significant for making litigation the last resort, as lawyers and their clients would be required to engage in mediation before litigation, and it allows sanctions costs to be applied for breach of this duty.

Establish a Duty to Inform, Discuss and Encourage the Use of Mediation

1-As discussed in Chapter 5, Jordanian judges have no statutory duty to encourage parties to use mediation, unlike in England. The study suggests the lawmakers amend the Mediation Law Art. 3 (a) to read: After meeting with the disputants and their legal representative, it is the duty of the Civil Case Management Judge and the Magistrate Judge to refer the dispute to the judge-

mediator or to a private mediator, in order to reach an amicable settlement to the dispute. By imposing such a codified duty on both judges, a clear message about the court favouring the use of mediation would be communicated to both parties and lawyers. The use of "and" demands judges acting in different roles must take an active role in encouraging the use of mediation. This would address the inherent weakness in granting judges discretionary authority over referral to mediation.

2-As mentioned above and in Chapter 5, Jordanian lawmakers based referral to mediation on passive judicial discretion. The study proposes adopting the approach used in England of imposing a statutory duty on judges, by amending the Magistrates' Courts Law Art. 7(a). The amendment could read: After meeting with the disputants and their lawyers, the Magistrates' Judge has a duty to invite parties to attempt mediation before starting litigation procedures, if the dispute is suitable to mediate. Consequently, the issue of judicial discretion to refer cases to mediation would be settled for cases that do not require court proceedings.

3-Similarly, the study proposes to amend Art. 59(bis)(3) CPL to read: The Civil Case Management Judge has a duty to meet the parties to the conflict and their lawyers, and offer to settle the dispute between them amicably, or to refer the case to mediation if the subject of the dispute is suitable for mediation, before referring the case to the trial judge. This change emphasises the power of the court to order mediation, but does not foreclose access to the court for cases with legal issues that require the application of the law.

4-As demonstrated in Chapter 6, Jordanian lawyers have no duty to encourage the use of mediation, unlike their English counterparts. Accordingly, the study suggests adding a provision to the Mediation Law, CPL, Magistrates' Courts Law, and Bar Association Law to read: Lawyers are under a statutory obligation to inform, discuss and encourage their clients to attempt mediation, and to inform their clients of the financial consequences in the event of an unjustified refusal. This would overcome the potential of lawyers to act in their own self-interest when deciding the path they deem successful in defending their clients before the court.

5-As the study shows in Chapters 6 and 7, the Jordanian Lawyer's Code of Ethics and Code of Conduct is outdated and does not reflect developments of the profession and the civil justice system. Accordingly, the study proposes that the Bar Association update the code based on learnings from the English SRA and BSB Codes of Conduct in order to address weaknesses in

lawyers' professional duty to their clients and the courts. To do so, the code should include standards and core duties that regulate the professional conduct of lawyers, including a duty to inform and advise their clients about using mediation, the availability of free court-based mediation, and a duty to avoid wasting the court's time, for instance.

6-As this study proposes to learn from the English jurisdiction, this study suggests the Jordanian courts introduce a standard court form similar to the Directions Questionnaire that each lawyer must sign, declaring that he has discussed ADR options with his client. This form would signal to legal professionals that they will be held accountable for upholding their obligation to their clients and the court in terms of encouraging the use of mediation.

Institute Parties' Best Interest as a Priority

1-As the study shows in Chapters 5 and 6, the CPL requires the attendance of the lawyers at the referral stage. However, the law fails to require the attendance of the parties. The study proposes to amend Art. 59(bis)(3) of the Civil Procedure Law to read: The Civil Case Management Judge has a duty to meet the parties to the conflict and their lawyers, and offer to settle the dispute between them amicably, or to refer the case to mediation if the subject of the dispute is suitable for mediation, before referring the case to the trial judge. This change would allow parties to hear first-hand from judges about the benefits of mediation. Consequently, the issue of lawyers acting as gatekeepers would be minimised and, as the judge interviewees noted, would be likely to result in an increase in the uptake of mediation.

2-As the study revealed in Chapters 5 and 6, the Jordanian approach has been to make disputants' attendance at mediation sessions optional. However, judges interviewed for the empirical study recognised the importance of the parties' presence in facilitating the negotiations. Accordingly, the study proposes that the lawmakers amend the Mediation Law Art. 5 to make the attendance of the parties a condition of conducting the mediation session. The aim of this amendment is to emphasise the direct self-determination of the parties in resolving their own dispute, rather than being determined by lawyers due to legislative defects.

3-As Chapter 6 shows, in addition, the Bar Association Law does not mitigate conflicts between the lawyer's responsibility to his clients and his own self-interests. Consequently, the study proposes to learn from the English experience by imposing a statutory duty upon legal representatives to act in the best interests of their clients, as is established in the English Legal

Services Act 2007. This change would require the Jordanian lawyers to take into consideration the best interest of clients when defending the client before the court, which would include advising clients to use mediation even if it may not prove a financial gain to the lawyer.

4-The study proposes that lawmakers create an independent body responsible for providing oversight of legal services in Jordan, similar to the Legal Services Board in England. The aim of this body is to oversee reform of the Bar Association to achieve several goals, such as promoting access to justice through the use of mediation, and protecting the client's best interests in resolving disputes. This change would mitigate potential conflicts of interest regarding the Bar Association by allowing the independent body the authority to regulate legal services, and protect the interests of the public.

5-As mentioned above, the study proposes to update the Jordanian Lawyer's Code of Ethics and Code of Conduct to strengthen the lawyers' professional duty to their clients. The proposed amendment should include a duty to act in the best interest of their clients, such as advising their clients to resort to mediation if this option is in their clients' interest, and it saves them money, time, and effort.

Address Gaps in Knowledge Among the Legal Profession and Future Lawyers

1-As shown in Chapter 7, the Jordanian Bar Association law does not require lawyers to continue their professional development after passing the bar exam. This study proposes requiring lawyers to obtain CPD throughout their careers, in order to provide the best legal service to their clients, as is required by professional codes in England. The law should mandate that lawyers keep up with new regulations such as mediation, and keep their skills up to date by acquiring training and education. This would address the lack of awareness and knowledge about mediation amongst lawyers.

2-Another aim of the independent body responsible for providing oversight of legal services in Jordan is to set standards for education and training for lawyers to better meet the needs of citizens and the civil justice system. This body's mandate is to reform legal education with consideration to the overriding principles of the CPL. By doing so, future lawyers would be well qualified to provide legal services in accordance with the new landscape of the civil justice system that promotes procedural justice via mediation, and advances to litigation as a last resort.

3-As Chapter 7 shows, both Jordan and England are negligent in introducing mediation to law faculties. Accordingly, the study proposes to reform legal education in both countries. Legal educational reform is important, because exposing law students to ADR at an early stage in their careers would impact the way future lawyers think about resolving disputes. First, ADR, mainly mediation, should be implemented as a mandatory course for all law students, and law schools should offer multiple optional advanced courses about ADR and mediation. Second, the approach of teaching mediation should emphasise that mediation is a primary method, not an exceptional one, for solving disputes, and focus on the value of mediation in empowering the parties to have a say in the outcome. Furthermore, Jordanian law schools could learn from the English law schools' practice of establishing mediation clinics. The aim of such clinics is to provide free mediation services for the disputes that arise at university, to solve the community disputes that are suitable for mediation, to train law students and lawyers on mediation, and to spread awareness of mediation among the public.

4-As mentioned earlier, the study proposes to update the Jordanian Lawyer's Code of Ethics and Code of Conduct. The study proposes to include standards for professional conduct during the mediation process, to provide guidance about the lawyer's role in mediation, and require lawyers to obtain CPD in order to keep their skills and knowledge up to date, including acquiring education and training related to ADR and mediation.

5-As the study shows in Chapter 7, the Bar Association has failed to provide appropriate training and education for its members. Accordingly, the study proposes to learn from the English Bar Council and Law Society practice of offering a range of workshops, training courses, seminars, and conferences for lawyers as guided by the Legal Services Board. For instance, the study proposes the Bar Association create a section on its website to introduce its members to court-based mediation, covering its objectives, benefits, disputes suitable for mediation, and to post books, articles, blogs, and reports about the subject. The study also proposes an update to the professional code of conduct to offer guidance for lawyers that participate in mediation sessions, as stated above, workshops to practice mediation skills, seminars, and training courses for lawyers who want to become mediators. Further, it is proposed that the Bar Association include ADR in its exam. This would expose the Jordanian legal profession to the international jurisprudence of mediation, bridging the gaps of knowledge in the Jordanian system.

Impose Costs Sanctions to Enforce Compliance with the Overriding Principles of the CPL

As the study shows in Chapters 5, under Jordanian law judges do not have the power to sanction parties that unreasonably refuse to attempt mediation. The study proposes to learn from the English CPR by adding a provision to Art. 59(bis) of the CPL and the Mediation Law that reads: The Civil Case Management Judge and Magistrates Judge have the power to impose costs sanctions on parties based on their conduct before and during litigation procedures that impede furthering the overriding principles, including parties' refusal to attempt mediation unreasonably. A similar provision would be added to the Magistrates' Courts Law. This would predispose the parties to consider the referral to mediation seriously, to avoid paying the penalty.

Launch a Campaign for Raising Awareness of Mediation in Jordan

As the study shows in Chapter 7, there is limited awareness of mediation amongst the public in Jordan, while in England there are ongoing activities from several organisations aimed at raising awareness about mediation. Accordingly, the study proposes to increase the efforts to raise awareness among the Jordanian public about the existence of the court-based mediation service and its advantages. To overcome the lack of awareness, effort and cooperation is needed between the Bar Association, Ministry of Justice, Judicial Council, commercial sector, insurance sector, industrial sector, and law schools. It is proposed that the Ministry of Justice and Judicial Council provide courses and lectures on mediation to the various sectors, and that these sectors promote the concept of solving disputes via mediation through holding training courses and issuing publications to their members. Moreover, the study proposes to establish a partnership between the Judicial Council and the Bar Association and law schools to contribute to teaching mediation courses. Further, it is proposed that civil society organisations help to increase awareness among the community by holding seminars and workshops for the general public.

Introduction of Compulsory Mediation

As the study shows in Chapter 5, there is reluctance in the Jordanian House of Parliament to introduce mandatory mediation. The argument that compulsory mediation contradicts the right of access to the courts can be refuted based on the conclusion reached in this thesis and the 2021 Civil Justice Council (CJC) Report on Compulsory ADR. Accordingly, the study proposes the lawmakers should embed mediation within the civil justice system, and view it as

an essential component of the dispute resolution process, not a secondary way to resolve disputes. The researcher suggests implementing a court-based mandatory pilot scheme for two years for certain types of disputes, such as labour, money claims, leases and landlord-tenant disputes. After the trial period, the programme must be evaluated in terms of access to justice, settlement rate, time, costs, and user satisfaction. The pilot would be instrumental in reducing the case backlog caused by Covid-19.[1083] The study expects the program to achieve excellent results, and to contribute to increasing the use of mediation within the civil justice system, spreading awareness among all stakeholders.

8.5 Outlook of Further Research

As noted previously, this study is the first of its kind to conduct a comparative study of mediation between Jordan and England, and the first to conduct an empirical study of stakeholder perspectives of mediation in Jordan. In summary, this research study makes an original contribution to the field of mediation in Jordan, its implementation, and the challenges preventing its use. It is hoped that the findings of this study will guide policymakers in Jordan to improve and promote the use of mediation.

It is expected that the researcher will further engage with questions such as the lawyers' position on introducing mandatory mediation and the effect of mediation on lawyers' incomes, the resistance of lawyers to engage in mediation, the control of mediation sessions, the mediation style, the quality of judge-mediators and the fairness of mediation outcomes, necessitating further empirical study. These findings would close gaps in our knowledge on the use of mediation in Jordan.

[1083] Jordanian Judicial Council, 'Challenges that Emerged During the Corona Pandemic Crisis' (27 May 2021) < http://www.jc.jo/en/blog/judicial-council-news> accessed 20 February 2022.

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APPENDIX 1: DATA COLLECTION INSTRUMENTS

Referral Judge (Case Management and Magistrate Judges) Interview

1. Can you describe the referral process to court-based mediation? [Probe: Are there some cases that are not referred to court-based mediation? Can you give an example?]
2. In your experience, how often do you encourage parties use court-based mediation? [Probe: In your experience, what percentage of parties that are encouraged to use mediation opt out of court-based mediation?]
3. To what extent is the court encouraging mediation? What are the steps taken to encourage parties to use mediation? How successful are these steps, in your opinion?
4. What types of cases are suitable to refer to mediation? Why are these types of cases most suitable for mediation? [Probe: In your opinion, are Money Claims, Labor, Construction, or Housing cases especially suitable or unsuitable for mediation?]
5. What standards are set forth for determining which cases are suitable for mediation? Can you give some examples? [Probe: Do you consider the value of the case? Do you consider the nature of the dispute? Do you consider if there is a long-term relationship (family, neighbours, business contact, company, long-term contract, etc.)?]
6. What happens if parties refuse to mediate after being encouraged? [Probe: Does anyone explain the benefits of mediation to the parties such as the court fee discount, for example?]

7. What do you think are the main reasons parties do not choose mediation? [Probe: Only one party is willing to mediate? One party feels that he has a strong case to litigate? Previous mediation attempt failed? Power imbalance between the parties?]
8. In your experience, does the involvement of judge-mediators discourage or encourage parties to use court-based mediation? Why or why not? [Probe: Do the parties understand the difference between the roles of judges and judge-mediators? Do the parties expect a judgment rather than a settlement?]
9. Are there barriers that prevent the widespread use of court-based mediation within the Jordanian civil justice system? If so, what are they? [Probe: Lack of awareness about mediation among lawyers or disputants? Do lawyers behave in an adversarial manner, as if they were at trial, and limit or prevent their client's participation in the process? Is court-based mediation not widely available?]
10. What are the reasons for the decrease in the number of cases that are referred to court-based mediation? [Probe: Is there a lack of training among referral judges? Is there a shortage of judge-mediators?]
11. Should the court continue to offer court-based mediation? Why or why not?
12. Do you believe that court-based mediation affects the quality of justice? Why or why not?
13. In your opinion, what would be the advantages and disadvantages of automatic referral to mediation? Would you support the use of automatic referral to mediation in some types of cases if applied in the Jordanian civil justice system? Would automatic referral contribute to reduced caseloads? If so, why?

Judge-mediator Interview

1. Can you describe the mediation process from the time you receive the case until the end of the mediation session? [Probe: At the opening session do you explain to the parties your role as a judge-mediator and how that differs from your role as a judge? How often do you give this explanation?]
2. What types of disputes are referred to you? Which ones are most suitable for mediation–civil or commercial? Can you give examples? [Probe: In your opinion, are Money Claims, Labor, Construction, or Housing cases especially suitable or unsuitable for mediation?]
3. Do you advise parties about the case's likely outcome if the case were to proceed to trial? If not, why not? [Probe: Do you advise parties at the beginning of the mediation session? Do you advise parties at the end to help bring about a settlement?]
4. Does the influence of the judge-mediator help or encourage parties to reach a settlement? Can you give me an example of when it helps parties reach a settlement? Can you give me an example of when it does not help?
5. Do the parties ask you for legal advice/other advice to help them reach a settlement? [Probe: Do the parties ask you to evaluate the legal standing of their arguments?]
6. Are there barriers that prevent the widespread use of mediation within the Jordanian civil justice system? If so, what are they? [Probe: Lack of awareness about mediation among lawyers or disputants? Do lawyers behave in an adversarial manner, as if they were at trial, and limit or prevent their client's participation in the process? Is court-based mediation not widely available?]
7. If a case has many legal issues, do you use your knowledge of the law and evaluation

of the legal issues to help parties reach a settlement? [Probe: What other factors do you consider to help parties reach a settlement?]

8. As a judge–mediator, do you play more of a judge role or a mediator role? Can you give me an example? [Probe: Is it a challenge to play different roles: 1) as a judge-focusing on legal issues, evaluating evidence, and issuing rulings as a judge; 2) as a mediator-helping parties focus on the issues, closing the gaps between the parties, and reaching a settlement?]
9. Do you think the court should continue to offer court-based mediation? Why or why not?
10. Do you believe that court-based mediation affects the quality of justice? Why or why not? [Probe: In your experience as a judge-mediator, do you think that court-based mediation improves the quality of justice as both parties agree to the settlement compared with a one-sided verdict?]

11- In your opinion, what would be the advantages and disadvantages of automatic referral to mediation? Would you support the use of automatic referral to mediation in some types of cases if applied in the Jordanian civil justice system? Would automatic referral contribute to reduced caseloads? If so, why?

Lawyer Questionnaire

1. Do you have experience representing clients that have been referred to court-based mediation? (Court-based mediation is the judicial mediation system that runs at the First Instance Court and is facilitated by a judge-mediator.) If yes, please complete the questionnaire.
    a. Yes
    b. No
2. If yes, how many of your clients have been referred to court-based mediation?
    a. Less than 5
    b. 5-10
    c. More than 10
3. How many of your clients have participated in a court-based mediation session?
    a. Zero
    b. 1-5
    c. 6-10
    d. More than 10
4. Why did your clients decide to choose court-based mediation? (Choose all that apply.)
    a. Because your clients suggested it.
    b. Because you advised your client to do so.
    c. Because the referral judge recommended it.
    d. Because the other party suggested it.
    e. To save money and time.

f. To avoid court procedures.

g. Other reasons. Please specify _____

5. Roughly, how many of your clients have reached a settlement through court-based mediation?

    a. No settlement reached

    b. 25% or less

    c. 26-50%

    d. 51-75%

    e. 76-100%

6. How much did you know about mediation before your involvement in court-based mediation?

    a. I had no knowledge

    b. I had little knowledge

    c. I had a lot of knowledge

7. Do you advise your clients to use mediation before litigation?

    a. All the time

    b. Some of the time

    c. Never

8. In your experience, are there some cases that are more suitable for mediation?

    a. Yes, please specify _____

    b. No

9. In your experience, do judges suggest and encourage your clients to mediate?

    a. All the time

    b. Some of the time

c. Never

d. Unsure

10. In your experience, do judges explain the mediation process before referring a case to mediation?

    a. All the time

    b. Some of the time

    c. Never

    d. Unsure

11. In your experience, do judges refer your clients to mediation without consent?

    a. All the time

    b. Some of the time

    c. Never

    d. Unsure

12. In your experience, who controls the mediation sessions?

    a. The clients

    b. The lawyers

    c. The judge-mediator

13. In your opinion, does court-based mediation have a positive impact on reducing the caseload of the court? Why or why not?

    a. If yes, please specify _____

    b. If no, please specify _____

14. In your experience, do you think the referral judges have the skills and the training for assessing if a case is suitable for mediation?

    a. Yes, all of them do

b. Yes, some of them do

c. No, none of them do

15. At the mediation sessions, what do you consider the role of judge-mediator? Why?

a. As a judge, because _____

b. As a mediator, because _____

c. As both, because _____

16. If your client's case was settled, what are the main factors behind achieving the settlement? Please provide an example.

a. Because both parties agreed to settle, please specify

_____

b. Because of the influence of the judge-mediator, please specify

_____

c. Because of the status/authority of the judge-mediator, please specify

_____

d. Some other reason, please specify

_____

17. Who do you prefer to be a mediator in a dispute? Why?

a. A judge-mediator, because _____

b. A private mediator, because _____

18. How often do you advise your clients to participate in court-based mediation instead of litigation?

a. Never

b. Less than 25%

c. 26-50%

d. 51-75%

e. More than 75%

19. In your experience, were the settlements reached better or worse than your clients had expected?

    a. As expected

    b. Better than expected

    c. Worst than expected

20. Do you believe that court-based mediation affects the quality of justice for your clients? Why or why not?

    a. Yes, please specify the reasons _____

    b. No, please specify the reasons _____

21. In your experience, do you think the court should continue to offer court-based mediation? Why or why not?

    a. If yes, please specify the reasons

    _____

    b. If no, please specify the reasons

    _____

22. In your experience, would you encourage your clients to consider using court-based mediation in the future? Why or why not?

    a. If yes, please specify the reasons

    _____

    b. If no, please specify the reasons

    _____

23. What is your understanding of mediation?

a. Court-based mediation, taking place inside the court and facilitated by a judge-mediator
b. Private mediation, taking place outside the court and facilitated by a private mediator
c. Other types of mediation

APPENDIX 2: LLB PROGRAMME ADR MODULES

Jordanian LLB Programme ADR Modules

University Name	LLB Mandatory ADR Module	LLB Optional ADR Module
Ajloun National University	No Mandatory ADR Modules	No optional ADR modules
Al Albayt University	Mandatory Arbitration Module	No optional ADR modules
Al-Ahliyya Amman University	No Mandatory ADR Modules	Optional Arbitration
Al-Hussein Bin Talal University	No Mandatory ADR Modules	Optional ADR and Arbitration
Al Balqa Applied University	No Mandatory ADR Modules	Optional Arbitration
Al Zaytoonah University of Jordan	No Mandatory ADR Modules	No optional ADR modules
Amman Arab University	No Mandatory ADR Modules	No optional ADR modules
Applied Science Private University	No Mandatory ADR Modules	No optional ADR modules
Irbid National University	No Mandatory ADR Modules	Optional ADR
Isra University	No Mandatory ADR Modules	Optional Arbitration
Jadara university	No Mandatory ADR Modules	Optional Arbitration
Jerash University	No Mandatory ADR Modules	Optional ADR
Middle East University-Jordan	No Mandatory ADR Modules	Optional Arbitration
Mutah University	No Mandatory ADR Modules	Optional Arbitration
Philadelphia University	Mandatory Arbitration Module	No optional ADR modules
The World Islamic Sciences and Education University	No Mandatory ADR Modules	No optional ADR modules
University of Jordan	No Mandatory ADR Modules	No optional ADR modules
University of Petra	No Mandatory ADR Modules	Optional ADR and Arbitration
Yarmouk University	Mandatory Arbitration Module	Optional ADR
Zarqa University	No Mandatory ADR Modules	Optional ADR and Arbitration

English LLB Programme ADR Modules

University	LLB Mandatory ADR Module (Y/N)	LLB Optional ADR Module (Y/N)
Anglia Ruskin University	No Mandatory ADR Modules	No optional ADR modules
Arden University	No Mandatory ADR Modules	Optional Dispute Resolution
Aston University	No Mandatory ADR Modules	Optional Dispute Resolution
Bath Spa University	No Mandatory ADR Modules	Other
Birkbeck, University of London	No Mandatory ADR Modules	No optional ADR modules
Birmingham City University	No Mandatory ADR Modules	Optional ADR
Bournemouth University	No Mandatory ADR Modules	No optional ADR modules
Brunel University London	No Mandatory ADR Modules	Optional Arbitration
Buckinghamshire New University	No Mandatory ADR Modules	No optional ADR modules
Canterbury Christ Church University	Mandatory Dispute Resolution	No optional ADR modules
City, University of London	No Mandatory ADR Modules	Optional Mediation
City, University of London	No Mandatory ADR Modules	Optional Mediation
Coventry University	No Mandatory ADR Modules	No optional ADR modules
De Montfort University	No Mandatory ADR Modules	No optional ADR modules
Durham University	No Mandatory ADR Modules	No optional ADR modules
Edge Hill University	No Mandatory ADR Modules	Optional ADR
Goldsmiths, University of London	No Mandatory ADR Modules	No optional ADR modules
Keele University	No Mandatory ADR Modules	No optional ADR modules
King's College London	No Mandatory ADR Modules	Optional Arbitration
Kingston University	No Mandatory ADR Modules	Optional ADR and Mediation
Lancaster University	No Mandatory ADR Modules	No optional ADR modules
Leeds Beckett University	No Mandatory ADR Modules	No optional ADR modules
Leeds Trinity University	No Mandatory ADR Modules	No optional ADR modules
Liverpool Hope University	No Mandatory ADR Modules	No optional ADR modules

Liverpool John Moores University	No Mandatory ADR Modules	Optional ADR and Mediation
London Metropolitan University	No Mandatory ADR Modules	No optional ADR modules
London School of Economics and Political Science	No Mandatory ADR Modules	No optional ADR modules
London South Bank University	No Mandatory ADR Modules	Optional ADR and Mediation
Manchester Metropolitan University	No Mandatory ADR Modules	No optional ADR modules
Middlesex University London	No Mandatory ADR Modules	Optional ADR
Newcastle University	No Mandatory ADR Modules	Optional Mediation
Newman University - Birmingham	Mandatory Dispute Resolution	No optional ADR modules
Northumbria University	Mandatory Dispute Resolution	No optional ADR modules
Nottingham Trent University	No Mandatory ADR Modules	No optional ADR modules
Oxford Brookes University	No Mandatory ADR Modules	No optional ADR modules
Queen Mary University of London	No Mandatory ADR Modules	No optional ADR modules
Royal Holloway, University of London	No Mandatory ADR Modules	No optional ADR modules
Sheffield Hallam University	Mandatory Dispute Resolution	Optional Mediation
SOAS University of London	No Mandatory ADR Modules	Optional ADR
Solent University	No Mandatory ADR Modules	No optional ADR modules
St Mary's University Twickenham London	No Mandatory ADR Modules	No optional ADR modules
Staffordshire University	No Mandatory ADR Modules	No optional ADR modules
Teesside University	No Mandatory ADR Modules	No optional ADR modules
The Open University in London	No Mandatory ADR Modules	No optional ADR modules
The University of Manchester	No Mandatory ADR Modules	No optional ADR modules
The University of Sheffield	No Mandatory ADR Modules	Optional Arbitration
University College London	No Mandatory ADR Modules	Optional ADR

University of Bedfordshire	No Mandatory ADR Modules	No optional ADR modules
University of Birmingham	No Mandatory ADR Modules	Other
University of Bolton	No Mandatory ADR Modules	No optional ADR modules
University of Bradford	No Mandatory ADR Modules	No optional ADR modules
University of Brighton	No Mandatory ADR Modules	Optional ADR
University of Bristol	No Mandatory ADR Modules	No optional ADR modules
University of Buckingham	No Mandatory ADR Modules	No optional ADR modules
University of Cambridge	No Mandatory ADR Modules	No optional ADR modules
University of Central Lancashire	No Mandatory ADR Modules	No optional ADR modules
University of Chester	No Mandatory ADR Modules	No optional ADR modules
University of Chichester	No Mandatory ADR Modules	No optional ADR modules
University of Cumbria	No Mandatory ADR Modules	No optional ADR modules
University of Derby	No Mandatory ADR Modules	No optional ADR modules
University of East Anglia	No Mandatory ADR Modules	No optional ADR modules
University of East London	No Mandatory ADR Modules	No optional ADR modules
University of Essex	No Mandatory ADR Modules	No optional ADR modules
University of Exeter	No Mandatory ADR Modules	Optional ADR and Arbitration
University of Gloucestershire	No Mandatory ADR Modules	No optional ADR modules
University of Greenwich	No Mandatory ADR Modules	No optional ADR modules
University of Hertfordshire	No Mandatory ADR Modules	No optional ADR modules
University of Huddersfield	No Mandatory ADR Modules	No optional ADR modules
University of Hull	No Mandatory ADR Modules	Optional ADR and Mediation
University of Kent	No Mandatory ADR Modules	Optional ADR
University of Law	No Mandatory ADR Modules	Optional Dispute Resolution
University of Leeds	No Mandatory ADR Modules	No optional ADR modules
University of Leicester	No Mandatory ADR Modules	Optional Dispute Resolution
University of Lincoln	No Mandatory ADR Modules	No optional ADR modules

University of Liverpool	Other	No optional ADR modules
University of London	No Mandatory ADR Modules	Optional ADR
University of Northampton	No Mandatory ADR Modules	Optional ADR
University of Nottingham	No Mandatory ADR Modules	No optional ADR modules
University of Oxford	No Mandatory ADR Modules	Optional Dispute Resolution
University of Plymouth	Mandatory Dispute Resolution Skills Module	No optional ADR modules
University of Portsmouth	No Mandatory ADR Modules	Optional Dispute Resolution Skills
University of Reading	No Mandatory ADR Modules	Optional ADR
University of Roehampton London	No Mandatory ADR Modules	No optional ADR modules
University of Salford	No Mandatory ADR Modules	No optional ADR modules
University of Southampton	No Mandatory ADR Modules	Optional Arbitration
University of Suffolk	No Mandatory ADR Modules	No optional ADR modules
University of Sunderland	No Mandatory ADR Modules	Optional Dispute Resolution
University Of Surrey	No Mandatory ADR Modules	No optional ADR modules
University of Sussex	No Mandatory ADR Modules	Optional ADR
University of the West of England - UWE Bristol	No Mandatory ADR Modules	Optional Dispute Resolution Skills
University of Warwick	No Mandatory ADR Modules	No optional ADR modules
University of West London	No Mandatory ADR Modules	No optional ADR modules
University of Westminster	No Mandatory ADR Modules	No optional ADR modules
University of Winchester	No Mandatory ADR Modules	No optional ADR modules
University of Wolverhampton	No Mandatory ADR Modules	Optional ADR
University of Worcester	No Mandatory ADR Modules	No optional ADR modules
University of York	No Mandatory ADR Modules	No optional ADR modules
York St John University	No Mandatory ADR Modules	No optional ADR modules