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

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Abstract

This paper explores the challenges that undermine the use of mediation in Jordan. The main goals of this article are to fill in the gaps in the Jordanian literature regarding the use of mediation and, significantly, to learn how mediation works within the Jordanian civil justice system. The study employs a qualitative approach in conducting semi-structured interviews with seventeen Jordanian judges with experience in court-based mediation, 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, 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 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 for the further development of court-based mediation in Jordan.

Keywords: Mediation, Jordanian Civil Justice System, Access to Justice, Court-Based Mediation, Legal Reform.

INTRODUCTION

This article 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 paper, 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 paper 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 article presents the views and experiences of referral judges and judge-mediators and suggests solutions for identified problems that prevent the expansion of the use of mediation within the Jordanian civil justice system.

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This paper 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.

1.1 Introduction to the Judge Interviews

Following ethical approval, the research fieldwork began in Jordan. Data were collected through semi-structured interviews with 17 Jordanian judges (8 referral judges, 9 judge-mediators).

These judges were from courts in Jordan that have mediation departments and were purposefully[1] chosen because they self-reported having experience in referring cases to mediation as a referral judge or conducting mediation sessions as a judge-mediator. The empirical data were analysed using thematic analysis[2].

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.

The Arabic transcriptions were translated into English. Using thematic analysis,[3] 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 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.

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 that 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 article begins by presenting a summary of the key findings of the qualitative study, and examined below.

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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 future research by the author of this paper.

2. SUMMARY OF KEY FINDINGS OF QUALITATIVE STUDY

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 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, although court-based mediation was established in Jordan more than 13 years ago.

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.

2.2 Lawyers act as gatekeepers to court-based mediation

Lawyers play a central role in the use of court-based mediation in Jordan. 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 resolution.

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.

2.3 Judges act as gatekeepers to court-based mediation

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

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The judge's 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.

2.4 Jordanian lawmakers did not establish clear standards for the 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 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. However, cases with complicated legal issues require court procedures.

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. 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.

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

The results of the data show that judges agree that court-based mediation does not affect the quality of justice. Judges emphasised that the quality of justice is not negatively affected due to the monitoring of court-based mediation by the civil justice system. 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 agree that court-based mediation should be continued for various reasons, including reducing the caseload of the court, which improves access to justice.

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.[4] 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

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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.

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.

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

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.

The majority of referral judges (6 out of 8) interviewed noted they always refer cases to mediation when requested by the parties.[5]

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.[6]

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)

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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 is an interesting finding because it demonstrates that the discretionary referral to mediation has resulted in only a limited number of disputants using mediation.

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 labor disputes are types of cases that are most suitable for mediation.

In the money claims and labor cases both the plaintiffs and the defendants know the amount of money disputed. Each party knows its rights and obligations. For example, in the labor dispute as the 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)

Generally, it was found that judges 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.[7]

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 labor… 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

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conflict down and remind them of the personal relationship that binds them. (Referral Judge 6)

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

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.

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 property disputes, construction disputes, claims for 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, a 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 mediation. For example, there are conflicts where there are differences on many points, and it is not easy to bring the views closer, as well as disputes where the plaintiff is insistent on proceeding with the trial proceedings. (Referral Judge 1)

Although many judges (6 out of 17) agree that labor 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.

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Therefore, parties to the dispute want to proceed to litigation to win their claim. (Judge-Mediator 5)

These results indicate that 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 believe some cases require court proceedings and are not appropriate to mediate.

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.[9] Judges encourage the use of 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 judgment 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 the 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)

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 that the referral judges respect the voluntary principle of mediation and may explain the partial opposition to mandatory mediation examined later in this article.

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.[10] 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.[11] Some interviewees (8 out of 17) say referral judges are not offering or encouraging the use of mediation, or

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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 reconcile and encourage them to do so to save time and effort for the parties and the court. Also, I rarely refer parties to mediation. The reason is that I do not see that there is sufficient awareness among the litigants of 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[12], 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 self-interest, such as the judge's record for resolving cases, or by a lack of conviction in court-based mediation.[13]

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 who attend 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 not surprising, bear in mind, the Jordanian Mediation Law requires only the presence of lawyers, not clients, as a condition to conduct mediation sessions.[14]

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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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. 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.[15]

The 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 from resorting to mediation, due to financial considerations that predominantly benefit the lawyers.[16] According to the interviewees, lawyers consider litigation 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 their client. Consequently, many lawyers believe mediation will adversely affect their income.

The lawyers have control over their clients and do not urge or encourage them to use mediation. For example, in several cases, the disputants are willing to use mediation, but unfortunately, the control of their lawyers prevents 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 that 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)

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 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)

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The findings show that judges believe lawyers act as gatekeepers to mediation by controlling the decision to use mediation, often being motivated by their financial interests, and therefore discouraging the use of mediation. A statutory duty for lawyers to encourage the use of mediation, as one method of addressing the reluctance of lawyers to recommend mediation to their clients.

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

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

Art. 101 of the Jordanian Constitution grants citizens the right to access the court to settle all personal, civil, and commercial disputes[17]. 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.[18]

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.[19]

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.

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These findings indicate that the judges are in favour continuation of the service, as it reduces the caseload on the court and, as a result, improves access to justice.

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 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)

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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.[20]

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 constitutionality of mandatory mediation.

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.

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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 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. Significantly, these findings raise questions about the quality of justice achieved through private mediation.

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

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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 but, less encouraging is the finding that carrying out the introduction is contingent on the presiding judge.

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.[21] 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)

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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 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.

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.[22]

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.

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)

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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. 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 according to the mediation law Art. 6.

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

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reducing the caseload of the court and conducting, monitoring and enforcing mediation settlements under the civil justice system.

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

3.4.1 Judges' education, awareness and training about mediation

Although judges have a statutory duty to continue their professional development,[23] 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. This points to the need for specialised training for judges in the area of mediation.

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

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)

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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 indicates the need for education, awareness, and training for lawyers and disputants about the features of court-based mediation.

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 no room for a friendly or amicable solution. Therefore, introducing the idea of mediating from the

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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.[24] For example, mediation has been used by some disputants to prolong litigation to harm the other party, or to delay payment.

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 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.

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.[25]

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[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)

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

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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. CONCLUSIONS

The findings of this empirical study suggest that judges 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 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.

Judges 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 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.

Furthermore, judges insist there is no coercion on parties to accept the mediation invitation, as clients have not been compelled to mediate. Further, judges strongly believe lawyers are the biggest obstacle to mediation, and do not advise their clients to consider mediation due to their financial interests and lawyers 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.

This paper is not the final say on mediation practice in Jordan. It is the first of its kind 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.

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1) Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (3rd edn, Sage Publications Inc 2002) 230. See, also Creswell, demonstrates that purposefully selected sites or individuals "will best help the researcher understand the problem and the research question." See John W. Creswell, *Research design Qualitative, Quantitative, and Mixed Methods Approaches,* (4th edn, SAGE Publications, Inc 2014) 239.

2) Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77,91-99.

3) Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77,91-99.

4) 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 6 March 2023.

5) 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.

6) 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.

7) 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.

8) 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 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.

9) The power of the court to compel parties to mediate is a debatable issue in the English civil justice system. For example, (Halsey v. Milton Keynes Gen. NHS Trust, [2004] EWCA (Civ) 576, and Lomax v Lomax [2019] EWCA (Civ) 1467. This point has been made by Mantle. 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. See Marjorie Mantle, *Mediation: A Practical Guide for Lawyers* (2nd edn, Edinburgh University Press 2017)

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16; 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.

10) Civil Procedure Law (as amended). No (24) 1988.Art. 59(bis) (3).

11) The Magistrates Courts Law No. (23) of 2017. Art. 7(a).

12) Similar to the CPL and the Magistrates Courts Law, the Mediation Law. Art 3(a) based referral to mediation on judicial discretion.

13) Unlike Jordan, in England Judges have duty to encourage the use of ADR, for example 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.

14) The Mediation Law for Civil Disputes Resolution (as amended) No. (12) 2006. Art.5.

15) Unlike Jordan, in England parties have duty to attempt to resolve disputes using ADR before resorting to the court. For example, CPR 1.3"The parties are required to help the court to further the overriding objective".. 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].

16) 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. Also, Clark pointed out that lawyers resist mediation due to money consideration. See, Bryan Clark, *Lawyers and Mediation* (Springer 2012).40

17) The Constitution of the Hashemite Kingdom of Jordan of 1952 (as amended). Art. 101(i) states 'The courts shall be open to all and shall be free from any interference in their affairs'.

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

19) 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, Bryan Clark, *Lawyers and Mediation* (Springer 2012).51; Genn in her evaluation of the mediation services in Central London

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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. See, Lord Justice Jackson Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (The Stationery Office 2010) 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 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.

20) 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 6 March 2023.

21) Mediation Law. Art.6 allows the mediator to choose the appropriate style of mediation.

22) Katie Shonk, 'Types of Mediation: Choose the Type Best Suited to Your Conflict' (2022) Harvard Law School <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/> accessed 6 March 2023: See J.A. Wall and T.C. Dunn, 'Mediation Research: A Current Review' (2012) Negotiation Journal 28 217-244). As they explained three basic styles of mediation, of which there are in total about twenty-five, many with minor variations around the major themes facilitative (where the mediator merely encourages the parties to talk).

    - Evaluative (where the mediator has some input on the merits of the dispute); or
    - Transformative (where the mediator assists the parties in restoring their relationship).

23) Code of Judicial Conduct of 2021. Art 9. 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.

24) 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.

25) 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." See Hazel Genn, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (Ministry of Justice 2007)201. Also, Genn found that poor mediator skills is one of the reasons that parties failed to settle their disputes. 96.