



## **MEDIATION OR MASKING? A FEMINIST CRITIQUE OF ADR IN GENDER-BASED DISPUTES\***

### **Abstract**

This paper, *Mediation or Masking? A Feminist Critique of ADR in Gender-Based Disputes*, critically examines the increasing reliance on Alternative Dispute Resolution (ADR), particularly mediation, in addressing gender-based conflicts. While ADR is often praised for its efficiency and flexibility, the paper argues that its institutionalization can obscure structural inequalities and reinforce patriarchal power relations.

Using a threefold framework, the study analyses ethical, procedural, and jurisprudential concerns. Drawing on Carol Gilligan’s “ethics of care,” it highlights how mediation’s focus on harmony pressures women into compromising their rights. It further critiques the illusion of neutrality, showing how formal equality masks real disparities in power and resources. Additionally, the paper explores how the privatization of justice through confidential settlements limits public scrutiny and weakens the development of feminist legal precedents.

The paper concludes that without safeguards such as screening for power imbalances and equity-based models, ADR risks perpetuating injustice rather than ensuring substantive equality.

**Keywords:** Alternative Dispute Resolution (ADR), Feminist Legal Theory, Gender-Based Disputes, Power Imbalance, Privatization of Justice.

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## Introduction

The advancement of the Alternative Dispute Resolution (hereinafter ADR) as an effective method of dispute resolution marks a structural shift in the modern legal scenario. Earlier, the courtrooms and the system of justice administration lagged behind due to overcrowding of litigation characterized by rigid evidentiary rules.<sup>1</sup> The idea of adopting ADR as a dispute resolution mechanism was first proposed in 1976 presented by the Pound Conference. This emerged as a practical solution that remedied the growing dissatisfaction.

ADR due to its inherent collaborative and expeditious nature gained quick institutional momentum. Alternative modes of dispute resolution such as mediation have emerged as an important recourse to resolve domestic and family disputes. Thus, mediation as an ADR mechanism has been championed as efficient and humane providing a viable alternative to the adversarial court system. The heralded flexibility, uniquely therapeutic, amicable and ethical approach of ADR soothes the parties who are already victims of a sour and breaking relation.

As the rigid and often sluggish adjudicatory system results in exacerbating the relational disputes, the ADR options stand in stark contrast by providing a forum where the disputants as brought on a table to adopt a collaborative way to preserve their relationship, focus of resolving dispute by finding the mid-way and retain agency over post conflict lives.<sup>2</sup> Initially, the early feminist legal scholars welcomed the procedural shift as it stood as an alternative to a system of justice that was deeply rooted in patriarchal and hierarchical powers and ethos.<sup>3</sup> However, the theoretical dilemma arose when the subsequent widespread institutionalization of mandatory ADR resulted in undermining the female stance in gender-based disputes.

The central objective of the paper explores the systematic and vital procedural safeguards that were

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<sup>1</sup> Danya Shocair Reda, *Critical Conflicts between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 195 (2011)

<sup>2</sup> Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. 21, 21 (1984); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162, 163 (1988).

<sup>3</sup> Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 461-62 (2001); Eve Hill, *Alternative Dispute Resolution in A Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337, 339 (1990).

necessary to protect the vulnerable parties, when removed or bypassed, resulting in masking systemic gender inequality, coercive control and intimate partner violence.<sup>4</sup> While the traditional adversarial system utilizes formal evidentiary rules and judicial oversight subject to appellate review; the ADR on the other hand strips away structural protection by pushing the dispute behind closed doors. Such informal settings are highly susceptible to intrusion of biases.<sup>5</sup> The fundamental nature of ADR is to treat inherently unequal negotiating parties as equals. This does not empower women rather frequently coerces the vulnerable party to relinquish their substantive legal entitlements in pursuit of an expedited settlement.

The paper through a three-fold analysis aims to systematically deconstruct whether ADR empowers women or merely masks their subjugation. *First*, the paper explores “ethics of care”, to examine the psychological underpinnings of mediation. Carol Gilligan’s foundational theory of women’s moral development, how ADR’s emphasis on relation preservation and amicable resolution demonstrates a normative framework that weaponized against women in gender-based disputes.<sup>6</sup> The society conditions women to be the peacemaker which is also reflected during the informal setting of mediation which demands a forward-looking approach. The problem-solving orientation, focusing victims to prioritize harmony between parties, overshadows the redressal of past harms. The goal of settlement is bartered with women’s financial entitlements negotiating for basic physical safety to achieve the goal of settlement.

*Secondly*, the paper addresses the illusion of neutrality analyzing the ethical mandate of the mediator.<sup>7</sup> ADR presupposed that disputants possess relatively equal bargaining power. However, the external realities showcase stark economic disparities, asymmetric access to legal information, history of domestic violence and emotional coercion. The structural disparities deny the mediator capacity to intervene and advocate for the weaker party.

*Lastly*, the paper investigates the precedential deficit caused by the pervasive privatization of justice.<sup>8</sup> The

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<sup>4</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991); Shaffer, *supra* note 2, at 166.

<sup>5</sup> Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367 (1985); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 16 (2009).

<sup>6</sup> CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24–63 (1982), as cited in McCabe, *supra* note 3, at 471.

<sup>7</sup> Sania Naidu, *Feminist Perspectives on Alternative Dispute Resolution*, 7 INDIAN J.L. & LEGAL RSCH. 1, 3 (2025).

<sup>8</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Michal Alberstein, *The Jurisprudence of Mediation:*

strict confidential operation of agreements has a macro level of impact on feminist jurisprudence and legal reforms. Public adjudication of disputes empowers courts to perform the declaratory function whereby they define the societal norms, identify structural harms, and develop judicial precedents that are binding in nature. Thus, the privatization often boosts the patriarchal power structures as they remain unchallenged hindering the collective legal advancement for women.

## 1.The Co-optation of Care: Mediation as a Mask for Control

The Alternative dispute resolution (ADR) frameworks, particularly family mediation, rely heavily on the psychological and sociological “ethics of care” model. This theoretical concept was first conceptualized by the feminist psychologist Carol Gilligan, who stated that women’s moral development often prioritizes interconnectedness, relational responsibility, and empathy.<sup>9</sup> This social perspective of intimate relationships stands in stark contrast to “ethic of justice”, which relies on abstract rights, rigid procedural rules, and decision-making ultimately catering to the traditional, male-centric system of justice.<sup>10</sup>

Early feminist legal scholars adopted mediation with the expectation that it would provide a therapeutic dispute resolution to the women. However, in the guise of therapeutic jurisprudence, the process in itself incorporates socially embedded gender discrimination and power divide. Proponents contended that mediation is a consensus-building process designed to foster mutual understanding and preserve family relationships. However, the Critical Feminist theorists argue that in gender-based disputes, this “ethics of care” framework is used against women. The chief reason for this is that women are systemically socialized to adopt the role of a peacemaker.

They often view their legal rights through the lens of relational maintenance and conflict resolution rather than strict individual rights.<sup>11</sup> When a woman is placed in an informal mediation setting with a male counterpart, the process actively exploits her structural social conditioning.<sup>12</sup> Women routinely exhibit a

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*Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 2–3 (2009).

<sup>9</sup> CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24–63 (1982); Eve Hill, *Alternative Dispute Resolution in A Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337, 345–46 (1990).

<sup>10</sup> Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 13–14 (2009); Hill, *supra* note 1, at 374.

<sup>11</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1603 (1991).

<sup>12</sup> Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162, 180–81 (1988).

behavior pattern where their identity is strongly tied to approval through familial notions such as saving the breaking marriage, family or advocating for child custody, meanwhile they may refrain from advocating for their own economic security or personal safety.<sup>13</sup> In order to maintain peace, preserve

family women are usually coerced into bargaining away legal rights, for a swift settlement.<sup>14</sup>

This reality gets hidden behind the informal nature of mediation that masks the systematic violence and coercive control over women. Anthropologist Laura Nader has criticized ADR noting that informal justice systems habitually reshape profound structural inequalities and severe statutory violations into mutual “communication problems”.<sup>15</sup> With the aim to achieve rapid settlement, mediators frequently discourage discussions of past abuse, labelling such factual history as adversarial to the objective.<sup>16</sup>

This systematic exclusion of past conduct trivializes the conflict to merely a mutual relationship breakdown for which both parties share equal responsibility. Thus, it normalizes domestic violence, depriving the victims of their right to protection against the abuser.<sup>17</sup> Treating domestic violence merely as a breakdown of mutual communication perversely forces women to negotiate for their own physical safety, a fundamental human right that should never be compromised with.<sup>18</sup>

Ultimately, the informal and peace-oriented process of mediation focuses on strong-held values of family obligations, reinforcing the norms of patriarchy. In her analysis Laura Ravelo-Fuentes states that family mediators frequently fail to recognize how gender-specific socialization patterns render women inherently vulnerable in apparently gender-neutral practices.<sup>19</sup> Since mediation rests on the assumption of pre-existing equal bargaining power, a mediator’s professional adherence to “neutrality” while dealing with

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<sup>13</sup> Isobel Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlement for Women*, in *DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD* 49, 52–54 (Craig A. Everett ed., 1985); Maxwell, *supra* note 3, at 69–70.

<sup>14</sup> Shaffer, *supra* note 5, at 181; Maxwell, *supra* note 3, at 69.

<sup>15</sup> Danya Shocair Reda, *Critical Conflicts Between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 *TEX. J. WOMEN & L.* 193, 221 (2011) (discussing Laura Nader's critique of therapeutic language in ADR).

<sup>16</sup> Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 *SMU L. REV.* 2117, 2160–61 (1993).

<sup>17</sup> Leigh Goodmark, *Alternative Dispute Resolution and The Potential for Gender Bias*, 39 *JUDGES' J.* 21, 24–25 (2000).

<sup>18</sup> Fischer, Vidmar & Ellis, *supra* note 9, at 2153.

<sup>19</sup> Laura Ravelo Fuentes, *FAMILY MEDIATION: THE IMPACT OF FEMINIST CRITIQUE ON ITS PRACTICE* 48 (2005) (unpublished LL.B. thesis, Carleton University) (citing Zoe Hilton, *Mediating Wife Assault: Battered Women and the New Family*, 9 *CAN. J. FAM. L.* 29, 35–36 (1991)).

inherently unequal parties, inevitably reproduces and sustains male dominance.<sup>20</sup>

Ravelo-Fuentes further highlights that the mediation process does not effectively address the traditional patriarchal structure of the legal system. Rather, this system allows the power imbalance to thrive behind closed doors.<sup>21</sup> The procedural expectation that a woman can sit face-to-face with her abuser and negotiate rationally ignores the reality of the “culture of battering”. In these dynamics, the abuser exerts a pervasive psychological control over the victim party rendering the concept of voluntary, uncoerced consent impossible.<sup>22</sup> While ADR is marketed as an inclusive platform, its practical application frequently reinforces traditional domestic roles and economic inequities.<sup>23</sup>

The ideological shift toward the informal justice system operates on the flawed premise that ADR creates a truly voluntary and neutral space for dispute resolution.<sup>24</sup> In reality, mediators and arbitrators subconsciously end up upholding the societal norms that downplay a woman’s lived experiences of oppression..<sup>25</sup> The absence of judicial oversight ends in replicating the systemic injustices, stripping women of their legal rights.<sup>26</sup> The “ethics of care” in this context is transformed into a tool of forced dispute settlement. Therefore, rather than serving as a catalyst for women empowerment, the sociological frameworks utilized in mediation act as a means of control.<sup>27</sup>

## 2.The Illusion of Neutrality: Formal Equality versus Substantive Equity

Alternative dispute resolution (ADR) mechanisms are fundamentally based on the assumption that the negotiating parity arrive at the negotiating table with an equal capacity <sup>28</sup> to bargain for a mutually acceptable resolution.<sup>29</sup> In order to facilitate this environment, mediators are rigorously trained to

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<sup>20</sup> *Id.* at 49 (citing Hilary Astor, *Violence and Family Mediation: Policy*, 8 AUSTL. J. FAM. L. 3, 5 (1994)).

<sup>21</sup> *Id.* at 41–44.

<sup>22</sup> Fischer, Vidmar & Ellis, *supra* note 9, at 2120; Fuentes, *supra* note 12, at 50–51.

<sup>23</sup> *Feminist Perspectives on Alternative Dispute Resolution*, at 1–2.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 2–3.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> Danya Shocair Reda, *Critical Conflicts between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 212 (2011).

<sup>29</sup> Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?* 70 SMU L. REV. 891, 895 (2017).

maintain strict standards of neutrality and impartiality. It is significant to ensure procedural uniformity, so that both the parties receive equal speaking time and are treated as absolute equals throughout the process of mediation.<sup>30</sup> This foundational premise is fundamentally defective as treating parties with strict formal equality during a mediation session willfully ignores the substantive inequity.<sup>31</sup>

The reliance on informal procedures in ADR actively strips away the institutional protections that marginalized groups rely upon to counterbalance dominant parties. Formal judicial proceedings, while imperfect, recognize inherent societal disparities.<sup>32 33</sup> Without the strict rules of evidence or the threat of cross-examination, ADR environments can easily succumb to unchecked prejudice.<sup>34</sup> When parties lacking economic parity come to negotiating tables, the lack of procedural safeguards often induces the weaker party to sacrifice their legitimate entitlements merely to secure peace and mitigate the conflicts.<sup>35</sup> The structural disparity is particularly devastating when economic power dynamics are introduced into the mediation room. Thus, the imbalance of power often distorts the process of mediation.<sup>36</sup> Women in gender-based disputes are inherently disadvantaged due to the systematic wage-gaps and the discriminatory societal obligations imposed on them. The position of the parties is lopsided to such extent that a woman more often cannot independently fund independent valuation of assets. This is because India still lags behind in education for women, a lack of which disables her to analyses or predict the outcome of the process.<sup>37</sup> The patriarchal structure of society, where men usually acquire a financially dominant position, lack of procedural safeguards bring in a loophole which is exploited to conceal assets, adding to the disadvantage of the weaker party.

Additionally, a party in the need of immediate financial support may be coerced into settling for less than what she is truly entitled to. Thus, even if there is a legal merit in her claim or she has endured abuse, these added factors force her to accept a situation of compromise.<sup>38</sup> In many cases, mediation or any other

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<sup>30</sup> Reda, *supra* note 1, at 220–21.

<sup>31</sup> *Id.* at 218–19.

<sup>32</sup> Craver, *supra* note 2, at 894–95 (discussing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359).

<sup>33</sup> *Id.* at 895.

<sup>34</sup> *Id.* at 894.

<sup>35</sup> *Id.* at 895–96.

<sup>36</sup> Reda, *supra* note 1, at 198.

<sup>37</sup> Craver, *supra* note 2, at 895.

<sup>38</sup> *Id.*

process of amicable dispute resolution is preferred only due to the in-ability of the party to afford litigation. Although it concludes in pacifying the dispute, it is pertinent to note that it acts as a tool of systemic injustice against women, as it is generally their position which is compromised on grounds of familial pressure, emotional vulnerability or financial depravity.<sup>39</sup>

Therefore, the systematic imbalance overrides mediator's neutrality by automatically favoring the stronger party, ultimately reinforcing patriarchy.<sup>40</sup> The constitution in order to promote equality has adopted a system of positive discrimination where unequals are equally protected before the law. When a mediator remains strictly neutral between two inherently unequal parties, the mediation process violates the principle of equality.<sup>41</sup>

These inadequacies are prevalent in cases involving gendered violation that encompass heightened emotional coercion. The procedural expectation that a victim of violence in an intimate relationship can sit face-to-face with their abuser and negotiate on equal footing is practically impossible. The abusers frequently utilize subtle, non-verbal cues which may be invisible to the mediator but exert psychological control, eliciting the victims to make concessions out of fear.<sup>42</sup>

Furthermore, even well-intentioned mediators may also often fail to recognize their own unexamined biases. Trina Grillo, has highlighted the setbacks caused due to mediator's partiality. Grillo notes that a mediator, constrained by their own "internal processes" and professional mandate to bring a settlement, may lack a sufficiently clear vision to judge the coercive interactions between disputing spouses which deteriorates their capacity to make considered decisions about how power needs to be balanced.<sup>43</sup>

ADR processes individualize systemic conflicts, deeply entrenched societal, class, and gender inequalities are reduced to the personal cognitive autonomy of the mediator. Without any obligation to follow a legal precedent or the option of the mechanism of appellate review, the weaker party is left to the mediator's

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<sup>39</sup> *Id.*

<sup>40</sup> Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162, 186 (1988).

<sup>41</sup> *Id.*

<sup>42</sup> Reda, *supra* note 1, at 220; *see also* Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2162 (1993).

<sup>43</sup> Reda, *supra* note 1, at 221.

volition.<sup>44</sup>

Ultimately, by focusing merely on procedural “equality”, ADR mechanisms systematically fail to achieve substantive “equity”. Substantive equity requires ensuring a fair, safe, and materially just outcome. This objective is impossible if the procedural framework structurally refuses to acknowledge the real-world disparities that govern the parties’ lives.<sup>45</sup> A substantially unequal world does not empower marginalized groups; instead, it silences them, trading equitable justice for a superficial harmony.<sup>46</sup>

### 3.The Privatization of Justice and the Deficit of Precedent

The confidential nature of alternative dispute resolution is accorded greater significance. ADR, being a confidential procedure, shields the parties from the public gaze, social backlash and hindrance to personal life. However, it is pertinent to note that there are deeper implications of this privacy and secrecy. Women's issues, particularly related to abuse and violence, have struggled to bring domestic violence as a matter of public concern requiring direct state intervention. The growing faith in the Alternative Dispute Resolution (ADR) mechanisms risks undoing these hard-won gains.

By placing disputes to private, confidential settings rather than public courtrooms, ADR might sabotage the cases involving gender-based violence, including intimate partner abuse, workplace sexual harassment, and systemic discrimination, as the fear of public backlash, humiliation and legal sanction create a social as well as psychological pressure on the perpetrators.<sup>47</sup> Legal scholar Leigh Goodmark argues that the compulsory mediation of domestic violence cases effectively causes the “re-privatization of family law.”<sup>48</sup>

Consequently, the shift towards confidential dispute resolution can be seen as a regressive move as it undermines the legal and political achievements secured by women after years of immense struggle.<sup>49</sup> The

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<sup>44</sup> *Id.*

<sup>45</sup> Craver, *supra* note 2, at 895.

<sup>46</sup> Reda, *supra* note 1, at 225.

<sup>47</sup> Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 16 (2009).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

removal of such violence from the public scrutiny makes it alarmingly easy for the perpetrator to evade the legal system and for the society to remain ignorant of its existence. Confidentiality agreements further enhance this opaqueness by restricting the circulation of knowledge about recurring patterns of abuse, thereby limiting public awareness and collective recognition.

Moreover, private settlements often function as protective shields for perpetrators, protecting them from public sanction and eliminating the possibility of broader social accountability. Thus, the shift not only individualizes harm but also depoliticizes it, eliminating the transformative potential of feminist socio-legal interventions. Perhaps the most significant consequence of this is the impact lies on setting legal precedent. The adjudicatory system is not merely designed to resolve disputes between private parties but it performs a vital role of shaping the society by establishing judicial precedents.

Judicial decisions state emerging social values, and recognize structural harms contributing to the development of a coherent and protective jurisprudence that can drive broader societal transformation. Thus, courts actively shape the relationship between law, social norms, and justice. However, when complex gender-based disputes are diverted to Alternative Dispute Resolution (ADR) forums and resolved through confidential and informal settlements, the purpose of setting a precedent to guide and direct the society on the legally upright path is jeopardised. This also results in restricting the law's capacity to evolve in response to systemic inequalities.<sup>50</sup> As Owen Fiss articulated in his seminal critique of settlement, that when the parties choose legal attorneys to represent their case in a public forum, it contributes to giving force to the constitutional and civil rights values enshrined in authoritative texts.<sup>51</sup> In effect, there's a gradual shift from norm production and social accountability to rather privatised settlement ultimately undermining the transformative potential of legal intervention in cases of gendered harm further impacting the development of civil rights and family law.

This widespread phenomenon of the “vanishing trial” fundamentally undermines the ability of the courts to fulfil their role in promoting the public good.<sup>52</sup> In the absence of public adjudication and the possibility of appellate review, the legal system is deprived of opportunities to evolve through reasoned judgments.

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<sup>50</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984), as cited in Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 2–3 (2009).

<sup>51</sup> *Id.*

<sup>52</sup> Goodmark, *supra* note 1, at 16.

This creates a significant lacuna allowing patterns of injustice to persist across cases rather than being collectively addressed. Thus, the harm experienced by one-woman risks being reproduced in the lives of others, as there is no authoritative legal voice to interrupt cycles.

Moreover, the reliance on private, contractual settlements within ADR mechanisms diminishes the constitutional responsibility vested in judicial bodies to interpret the law and declare public values. Courts are entrusted with affirming normative standards and condemning unlawful conduct. When disputes involving abuse and discrimination are resolved privately, such behaviors are neither formally denounced nor publicly recognized as violations of rights, enabling the continued normalization of gendered harm and undermining the emancipatory promise of the legal system.

Informal justice mechanisms handle problems on a case-to-case basis, separating them from similar cases and limiting the scope of inquiry completely to the parties direct relationship.<sup>53</sup> This purposely ignores the social basis of the dispute, ensuring that gender-based violence is framed merely as a private failure rather than a societal failure which requires legislative and legal change.<sup>54</sup> First-wave critics of Informalism, like Richard Abel, have pointed out that treating structural inequality as a personal issue prevents marginalized groups from recognizing their shared problems. This separation thereby frustrates collective political action, class-action litigation, and grassroots organizing.<sup>55</sup>

If an abuser or a discriminatory employer has a documented history of coercive control, confidential mediation conceals these serial patterns from the public record. It actively deprives lawmakers and public interest advocates of the empirical data necessary to recognize and correct failing social policies. The absolute necessity of accessible public courts cannot be overstated for marginalized groups. Historically, women and minorities have relied heavily on the formal, public communication of rights within the adversarial system to challenge embedded systemic oppression, secure legal standing, and catalyze societal change.<sup>56</sup>

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<sup>53</sup> Danya Shocair Reda, *Critical Conflicts between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 206 (2011).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 206 (citing Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 289 (Richard L. Abel ed., 1982)).

<sup>56</sup> *Id.* at 207.

The institutional push towards ADR threatens to dissipate these hard-won gains. It essentially prevents women from empowering themselves through the creation of new, legally enforceable rights or from enforcing their legal achievements in the public arena.<sup>57</sup> While ADR may successfully achieve the administrative goals of efficiently clearing the court's backlog offering a collaborative harmony, it achieves these bureaucratic ends at a systemic cost.<sup>58</sup> Anthropologist Laura Nader critically terms this phenomenon as harmony ideology, where the prioritization of pacification and settlement supersedes the pursuit of substantive justice.

The privatization of gender-based disputes ensures that the patriarchal dynamics governing these conflicts remain unchallenged. Ultimately, the ADR framework trades substantive, public justice for coerced settlement within the bounds of confidentiality, leaving the overarching structures of societal and economic inequality entirely intact.<sup>59</sup>

## Conclusion and Recommendations

While the advancement of alternative dispute resolution (ADR) was initially believed as a humane, cost-effective, and departure from the deficiencies of the adversarial legal system. The Critical Feminist analysis reveals that there exist some structural issues.<sup>60</sup> In the context of gender-based disputes, the over-reliance on ADR risks masking systematic coercive control and prioritizing administrative settlement over substantive legal justice.<sup>61</sup> By shifting family law and domestic violence matters into confidentiality and informal settings, mediation often weaponizes women's socially conditioned "ethic of care". This framework compels the marginalized parties into relinquishing their statutory rights in the pursuit of superficial harmony.<sup>62</sup>

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<sup>57</sup> Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 431 (1985).

<sup>58</sup> Alberstein, *supra* note 4, at 3.

<sup>59</sup> Reda, *supra* note 10, at 226 (discussing Laura Nader's critique of "harmony ideology").

<sup>60</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162, 166 (1988).

<sup>61</sup> Laura Nader, *The ADR Explosion – The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS JUST. 269 (1988), as cited in Danya Shocair Reda, *Critical Conflicts Between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 221 (2011).

<sup>62</sup> Nancy G. Maxwell, *The Feminist Dilemma in Mediation*, 4 INT'L REV. COMP. PUB. POL'Y 67, 69–70 (1992); Shaffer, *supra* note 1, at 180–81.

Furthermore, the rigid institutional adherence to mediator “neutrality” in the face of it favours the dominant party. Concurrently, private mediation halts the development of legal precedents which harms public scrutiny.<sup>63</sup> Ultimately, without structural reforms, standard practices mediation will continue to serve as a patriarchal adjudication rather than a genuine forum for women-empowerment. In order to prevent ADR from damaging what it is supposed to resolve, the legal system must implement rigorous structural reforms.

*Firstly*, prior to any ADR referral there must be a screening process to check on power imbalances and domestic violence.<sup>64</sup> However, this process must not be a mere administrative checklist; rather it should require continuous assessment by skilled professionals capable of identifying non-physical forms of coercive control. The rationale lies behind the psychological dynamics of abuse that destroy the foundational premise of negotiating parity. Therefore, it is advisable that mediation must never be mandatory when such dynamics are documented or suspected.

Instead, legal systems must adopt a strict presumption against mediation in specific categories of gender-based disputes, particularly those involving intimate partner violence and severe economic coercion.<sup>65</sup> Following the normative guidance of the CEDAW Committee and statutory frameworks in jurisdictions such as Maryland, cases flagged for severe physical, sexual, or psychological abuse must be explicitly exempted from mediation dockets. This statutory exemption ensures that victims are not procedurally forced to negotiate for their basic physical safety or trade legal justice for coerced relational harmony.<sup>66</sup> *Secondly*, for disputes that remain amenable to ADR, the system must focus towards “equity-based” mediation models in which dispute resolution moves beyond the idea that all parties stand on the same pedestal and should be treated in exactly the same manner. Instead, it should recognise that people often enter into dispute from unequal social, economic and cultural positions. Therefore, fair outcomes may

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<sup>63</sup> Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 14–16 (2009); Shaffer, *supra* note 1, at 186.

<sup>64</sup> Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 253 (2001).

<sup>65</sup> Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2153, 2159 (1993).

<sup>66</sup> Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 33 on Women's Access to Justice, ¶ 42, U.N. Doc. CEDAW/C/GC/33 (2015); MD. CODE ANN., FAM. LAW § 9-205(b)(2) (West 2008), *as cited in* Goodmark, *supra* note 4, at 21.

require different kinds of support and procedural safeguards.<sup>67</sup> A comparative model of this approach already exists in India in the form of *mahila adalats* (women's courts) and *mahila mandals*.<sup>68</sup> They provide a secure environment where women can articulate their grievances without the fear and stigmatization.<sup>69</sup>

In these alternative forums, peer mediators who share similar cultural backgrounds with the disputants, utilize their knowledge of local customs to fashion workable settlement. Crucially, these forums prioritize the female complainant's voice over strict legal neutrality.<sup>70</sup> The *mahila adalat* model demonstrates the necessity of employing multiple methods of resolution within the ADR landscape. It illustrates the viability of creating diverse and flexible dispute resolution forums where specialized mediators actively prioritize a vulnerable party's safety and dignity.<sup>71</sup> For ADR to fulfil its foundational promise of genuine empowerment, it must comprehensively restructure itself through the lens of a feminist jurisprudence.<sup>72</sup> Only by dismantling the procedural illusion of formal equality, recognizing the structural realities of gendered-biases, establishing equity-focused frameworks can legal systems ensure that alternative dispute resolution delivers true substantive justice, rather than merely masking systemic oppression behind closed doors.

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<sup>67</sup> Jennifer A. Orange & Sabrina K. Khela, *Women Talking: An Alchemy for Feminist Alternative Dispute Resolution*, 20 J.L. & EQUALITY 55, 69–70, 108 (2024).

<sup>68</sup> Sylvia Vatuk, *The "women's court" in India: an alternative dispute resolution body for women in distress*, 45 J. LEGAL PLURALISM & UNOFFICIAL L. 76, 76 (2013).

<sup>69</sup> *Id.* at 87.

<sup>70</sup> *Id.* at 88; Sania Naidu, *Feminist Perspectives on Alternative Dispute Resolution*, 7 INDIAN J.L. & LEGAL RSCH. 1, 6–7 (2025).

<sup>71</sup> Orange & Khela, *supra* note 8, at 71; Vatuk, *supra* note 9, at 94.

<sup>72</sup> Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 479 (2001).