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# **CULTURAL AND PATRIARCHAL PRESSURE ON WOMEN DURING MEDIATION PROCESSES TO SETTLE**

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## **1. INTRODUCTION / STATEMENT OF RESEARCH PROBLEM**

Mediation has been rapidly being identified as a key element of alternative dispute resolution (ADR) processes in India specifically in relation to matrimonial/family disputes. The Indian judicial system has gone a step further to support the use of conciliation and mediation to reduce the number of cases pending adjudication and also to reach amicable solutions to help diminish the number of cases brought before the courts, by underlining the benefits of conciliation and mediation as effective cost-efficient and time-saving processes that are less adversarial and hence help preserve family ties.<sup>1</sup>

Nevertheless, mediation is not neutral, in spite of these perceived advantages. Researchers have long asserted that the informal systems of dispute resolution can reproduce the existing patterns of inequalities but not eliminate them, especially when we deal with the family-related disputes whereby the norms of patriarchal society impact and maintain the imbalance between the parties (a phenomenon that is strong in the Indian socio-cultural context). In mediation, therefore, the space encounters significantly more problems in the assumption.<sup>2</sup>

Women often find themselves in structurally disadvantaged positions in the process of mediation, in a highly patriarchal society such as India. Their bargaining power is often undermined either through economic dependency or by lack of access to legal means, social conditioning, and through the model of cultural expectations of marriage in terms of the family honor maintenance, the stigma that surrounds divorce in the community and through the individual mediators that persist that the women are encouraged or rather coerced to give in.

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<sup>1</sup> Flavia Agnes, Law and Gender Inequality: The Politics of Women's Rights in India 198–210 (1999).

<sup>2</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545, 1548–52 (1991).



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The women in matrimonial conflicts, such as domestic violence, cruelty, or abandonment, are mostly advised to value reconciliation, rather than justice, due to this tendency, which is engrained in the legal and social focus on preserving the marriage institution in general. Mediators and courts can easily reinforce this bias by encouraging settlement as the best situation, notwithstanding backgrounds of unequal power or experience of abuse. As a result, the voluntariness of consent in mediation is at risk, as settlements may be influenced more by coercion of any form (social, emotional, economic) than by free will.

This dynamic is what the feminist legal scholars have critically addressed as it is possible that under certain circumstances, processes claimed to be informal or collaborative justify coercion and conditions the normalization of unequal results<sup>3</sup>.

The main research issue, hence, consists in questioning whether mediation is truly a disempowering practice of women or is, in fact a masked form of coercion in a patriarchal system. This paper will critically examine the overlapping of mediation interactions with the socio-cultural forces of power, paying specific attention to how gendered expectations mediate and affect the results. It also seeks to point out the dangers of tainted justice, one side practicing unequal bargaining and coerced settlements, and also challenges the general presumption that mediation is fair and helpful in every situation.

## **2. REVIEW OF LITERATURE**

The currently available literature on mediation and gender justice demonstrates that there is a multifaceted and frequently disputed interconnection between alternative dispute resolution and women rights. Although mediation has become a very popular approach of settling disputes in a non-confrontational and harmonious way, some academics have taken a critical look at the effect it has on the vulnerable groups especially women in patriarchal societies.

Owen M. Fiss provides one of the most powerful and ancient criticisms of settlement-

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<sup>3</sup> Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 161–67 (1995).

based dispute resolution by arguing that the push toward settlement can compromise pursuit of justice by emphasizing compromise over fairness. Fiss argues that adjudication can play a social role in proclaiming and enforcing rights, contrary to settlement processes, which can obscure structural inequalities and conceal weaker voices. This criticism is especially applicable in the setting of mediation on family conflicts when there is unequal power between spouses in most cases.<sup>4</sup>

Feminist jurists have added to this criticism by investigating the ways in which the informal channels of dispute resolution can reproduce social hierarchies. Martha Albertson Fineman emphasizes that a family, along with any other type of institute, is thoroughly encrypted into gendered power structures, and any process of dispute resolution carried out within such a framework is likely to be reflective of such imbalances<sup>5</sup>. Catharine A. MacKinnon is of the opinion that formal equality is not the foundation of the institutions of legal proceedings, but instead, an attempt to rationalize the outcomes,<sup>6</sup>

The fact that mediation is perceived as quite friendly and even relaxed can easily turn detrimental to women, as Trina Grillo warns that the informality and flexibility of the process can be taken to an extreme where they enable coercion and manipulation to prevail. The argument holds particular importance in scenarios related to domestic violence or emotional abuse, where the lesser party can be under duress to accept unfriendly settlements.<sup>7</sup>

Flavia Agnes critically examines how the family law and dispute resolution frameworks in the Indian context have mostly not served to attain justice in matrimonial disputes despite the abuse or inequality that might be involved in the marriage.<sup>8</sup> Agnes indicates that mediation in family disputes has been prone to immediate reconciliation instead of justice in a situation which is characterized by abuse or inequality. In her

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<sup>4</sup> Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1075–78 (1984).

<sup>5</sup> Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 161–67 (1995).

<sup>6</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 237–40 (1989).

<sup>7</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545, 1548–52 (1991).

<sup>8</sup> Flavia Agnes, Law and Gender Inequality: The Politics of Women's Rights in India 198–210 (1999).



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work, she brings out the strain between cultural demands of maintaining marriage and the legal necessity in upholding the rights and dignity of individuals.

These critiques are also backed up by empirical research and institutional accounts. According to reports made by the National Commission on Women, women are often under implicit pressure during mediation to resolve conflicts by a means that is acceptable to society and not necessarily in their own interest and this may also result in the influence of other family members.<sup>9</sup>

The Law Commission of India, too, has recognized the role of mediation not only in decongesting the judicial system but has also warned that safeguards are required to maintain mediation as a voluntary means of coercion.

Similar concerns are reflected in the international literature. Research, on the ADR mechanisms in developing economies, has indicated that cultural norms and gender roles can largely determine the results of dispute resolution. Lack of gender-sensitive protection can in patriarchal societies make the mediation process supportive of rather than a challenge to existent inequalities.

Meanwhile, other researchers are more moderate in their views, as they acknowledge possible benefits of the mediation process but insist on reforms. They state that such mediation with due caution (informed consent, legal representation, gender sensitive training and so on) may offer a more accessible and less adversarial form of dispute resolution.

Despite expanding body of literature, there is a big gap in the Indian context in terms of thorough, empirical study of how the patriarchal pressures play a specific role in the experiences of women in mediation. The current literature is mostly theoretical or it is based on the overall ADR processes, yet it is not well researched on the combination of gender, culture and mediation practices.

In this research, I aim to bridge this gap by critically analyzing the mediation processes in a gendered perspective through the cultural and patriarchal influences of how the

<sup>9</sup> National Commission for Women, Report on Family Courts and Mediation Practices 32–38 (2015).



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women engagement and role are affected. Through a combination of feminist legal theory and socio-legal analysis, the study will serve to add to a more subtle investigation into the mediation and its status in gender justice.

### **3. STUDY OBJECTIVES.**

- To discuss whether mediation can be used to solve the conflicts between women.
- To examine how cultural and patriarchal norms affect decision-making by women during mediation.
- To define that the processes of mediation provide voluntary and informed consent.
- To measure the equity of settlements that are obtained by social pressure.
- To propose gender-sensitive mediation reform proposals.

### **4. RESEARCH QUESTIONS**

- Is mediation a safe and fair among women in resolving disputes?
- What is the effect of cultural and patriarchal pressures on the decision making of women under mediation?
- Do mediation settlements make any sense?
- What protection is in place to deter the coerced and to promote fairness?
- What can be done to overhaul mediation procedures that will help safeguard the rights of women?

### **5. RESEARCH METHODOLOGY**

This paper will use an integrated approach in conducting a doctrinal and socio-legal research to evaluate how mediation can be used in matrimonial disputes and the effects of cultural and patriarchal forces on the women involved in the dispute. Working through the two approaches enables a multifaceted examination that involves not just the legal framework that functions as the mediation framework but also the social realities that

carry implications on the working of the laws in reality.



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The purely doctrinal side of the study implies a thorough analysis of legal norms and legal rules of the Indian family law and mediation. Some of the fundamental laws like the Family Courts Act, 1984, the Protection of Women against Domestic Violence Act, 2005, and the Hindu Marriage Act, 1955 are evaluated to have an insight of the conceptualization of the matrimonial case laws and the dispute settlement tools. Such an analysis is useful in establishing whether legal provisions are sufficiently strong to comply with the rights of women during the mediation process or they unknowingly provide an opportunity to coerce and engage in unequal bargains.

Besides statutory analysis, the paper engages in a review of judicial rulings to comprehend how the matrimonial conflicts have been interpreted and used through mediation by courts. Court decisions give a clue of how the judiciary deals with mediation and reconciliation, and how much the courts acknowledge and deal with gender-based disparities in accessing meditations. In this analysis, the paper assesses the effectiveness of encouraging mediation by courts in protecting the interests of women or is more prone to promoting settlements at the expense of substantive justice.

The study also includes socio-legal approach, as law is not a vacuum and cannot be absolutely explained independently of another social environment. The society, culture and family relations play a critical role in the mediation, especially regarding the patriarchal society such as that in India. In this way, this line of inquiry will enable the research to understand the impact of variables like economic dependence, social stigma surrounding divorce, and ingrained gender roles on the role women play in mediation. It also aids in learning that informal influences by members of the family and the community can influence decision-making, which in most cases, is that women are expected to accept settlements that are not necessarily in their best interests.

The research is based on the secondary sources, namely academic literature, books, journal articles, government reports, and policy documents, to construct the holistic concept on the topic. The literature of feminist legal theory, as well as alternative dispute resolution, forms a critical view of the constriction of mediation as a means of combating gender inequality. Institutional body reports and studies also add to the knowledge of the practical operations of mediation mechanisms, and the difficulties women encounter in such processes.

They also take a comparative outlook in the discussion of the mediation practices in other jurisdictions and also to determine the best practices that would enhance fairness and gender sensitivity. The study attempts to assess the applicability of the same safeguards in the Indian context by examining the international mediation strategies to understand how to counter the problem of power disparity and coercion.

Although this approach will allow conducting a multidimensional and detailed analysis, it is mainly grounded on secondary data and lacks the use of empirical field-work like interviews or surveys. Consequently, the conclusions are drawn based on the prevailing literature and quoted experiences and not on actual observation. Still, the different and reliable resources used guarantee the rigor and applicability of the analysis to the research problem.

## **6. DISCUSSION / ANALYSIS**

### **6.1 Mediation and Gender Power Imbalance**

Mediation is considered more of a voluntary and participatory process where disputing parties negotiate on a level playing-field to strike a mutually acceptable settlement. Nevertheless, this hypothetical premise of equality commonly fails when it comes to matrimonial conflict in India where socially and economically ingrained inequalities determine the bargaining power of the two parties. Most women, especially, often find themselves in structurally disadvantaged mediator roles, which severely limits their freedom to negotiate and exercise their legal rights.<sup>10</sup>

Economic dependency contributes to such an imbalance one of the most important factors. The percentage of women in India who are still financially dependent on their husbands or families restricts their ability to endure a long litigation process, or to accept adverse deals on settlements, which has been used to force women to accept a deal that could override their rights to maintenance and/or residence among other rights. This pressure is further enhanced by the fear of economic instability which is more pronounced in the lack of proper state institutions to take care of them.<sup>11</sup>

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<sup>10</sup> Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India 198–210* (1999).

<sup>11</sup> Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century*

Allied to economic dependency is the problem of low level of legal knowledge and availability of efficient legal representation. Women lack the necessary awareness of their rights and remedies, especially on matrimonial laws and protective legislations and this informational asymmetry puts them in a disadvantageous position on the mediation table when the results are determined by negotiation skills, and legal entitlement knowledge. Without an appropriate guidance, women will be unable to comprehend the consequences of agreements they sign properly, which will weaken the principle of informed consent.

In addition to economic and informational factors limiting women, society has been conditioned to impact female involvement in the mediation processes. Patriarchal norms of Indian society, which demand that women be obedient, self-sacrificing and that their role in ensuring family unity should be their main concern, still come to play even when the rights of women are at stake. This pressure is more acute in the case of matrimonial conflicts, where the women are often urged to compromise with an aim of saving the marriage, irrespective of the situation that caused the conflict.

The mediation institutional set up (family courts in particular) may unconsciously support these inequalities. The focus on reconciliation and friendly resolution, although having good intentions, may put aside the focus on fairness and justice. Courts have expressed their support of mediation as a viable means of resolving disputes but failed regularly to contravene the reality of unequal bargaining power.<sup>12</sup> Accordingly, mediation processes often focus on resultant settlement as a goal, instead of figuring in equitable and truly voluntary settlements.

Also, conversely, the informal and flexible character of mediation that is often considered one of the abilities can be a weakness. In contrast to court proceedings, mediation does not provide a certain level of procedural protection as it is easier to introduce pressure onto weaker sides through the inclusion of familial interlocutors in the process, who are likely to add a greater number of strata. It can be challenging to be open about their problems in these environments, and especially when women are

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Tragedies 161–167 (Routledge 1995).

<sup>12</sup> *Afcos Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd.*, (2010) 8 SCC 24, 40–42.

expected to conform and be obedient.

Indian institutional observations also show that mediation processes are not necessarily encoded with societal prejudices. It has been reported that mediators can facilitatively and consciously or unconsciously promote reconciliation in a way that dictates cultural norms, instead of engaging in a critical assessment of the issues of power inequity or abuse that contributed to the eventual results.<sup>13</sup>

On this the mediation concept of consent turns out to be very controversial. Although settlements are officially advanced as being based on a voluntary agreement, the existence of economic dependence, the influence of social pressure, and unequal bargaining power casts serious doubts on the validity of such consent. Resolution of agreements under such circumstances can be based on acquiescence and not necessarily out of a choice essentially discrediting the process of mediation.

The issue of gender sensitivity of mediation is finding its way into legal discourse in India, where there is a growing recognition of these issues. Nevertheless, the lack of overall protection and best practices remains a problem. In the absence of discussing the structural inequalities which are assumed to mediate events, there is a danger that mediation can serve as an empowerment tool that is applied and continues to legitimize current patriarchal norms.

## 6.2 Cultural Strain to maintain Marriage.

The Indian society has a high normative emphasis on the maintenance of marriages, in society marriage is not just a personal affair but a social institution concerning family honor, cultural continuity and the stability of the community. In this context, women are often required to uphold marital relations at all costs. This pressure is especially acute in mediation where the accent often does not revolve around conflict resolution but rather around repairing the marital relationship which is not necessarily done with a proper approach to the reasons behind the conflict.

The gender ideal of the successful marriage is very gendered. Women have been

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<sup>13</sup> Law Commission of India, Report No. 238: Amendments to the Code of Civil Procedure, 1908 for  
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Expeditious Disposal of Civil Cases 42–45 (2011).



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socialized to internalize the value of patience, sacrifice, and endurance, which can be construed as virtues needed to be able to coexist in the family instead of enforcing their rights granted by the law, in case of conflict. This is translated in mediation environments in devout yet impactful forms, including language focused on change, compromise and forgiveness, even where cruelty acts of omnipresent emotional negligence, or economic deprivation have taken place.<sup>14</sup>

The stress is also compounded by the fact that there is a stigma attached to divorce, and separation within the Indian society. Women who desire to leave marriages tend to suffer social rejection, kinship and the need to remain in the marriage because of their future self-security such as remarriage and economic self-sufficiency. These factors, develop a mental atmosphere where the marriage seems the less risky or more socially acceptable choice, even in the case of harmful relationships. Women are therefore likely to go to mediation not as a way of negotiating on equal terms but as a means through which reconciliation is anticipated to be expected of them.

These cultural expectations are frequently supported by the organization and the way the mediation process of family disputes works out. Often, family courts in India strive to provide a promotion of conciliation, and mediation is often placed to defend instead of judging rights, which cannot be marginalizing to women, especially when such aspects of domestic violence or coercive control are involved. When this happens, the focus on reconciliation could override the demand of safety, accountability, and justice.<sup>15</sup>

The attitudes of the judges in this landscape have also contributed. Although keenly observed, courts have not always adequately taken notice of the fact that in many cases, unequal power relations exist and that reconciliation may not always be in the best interests of the woman concerned. The institutional bias in favor of settlement can thereby result in a situation in which women may be forced to accept the consequences of actions that comply with judicial desires and not their requirements.

Secondly, extended family members and community also contribute to the mediation

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<sup>14</sup> N.R. Madhava Menon, *Clinical Legal Education* 120–135 (Eastern Book Co. 1998).

<sup>15</sup> Paras Diwan, *Modern Hindu Law* 320–340 (Allahabad Law Agency 2016).

process, complicating it further. More often than not in most situations, conflict is not only internalized between the couple but rather between the extended family set ups. Women can directly or indirectly be pressured by family members to save the marriage during or surrounding mediation processes, which might be done in the context of reputations, chastisement of children, or social status considerations.<sup>7</sup> This outside pressure can greatly restrict women to freely explore their issues and arrive at an autonomous decision.<sup>16</sup>

Surveys and reports of institutions indicate that mediation practices are not necessarily immune to such biases in the society. The participation of mediators, who should be non-partisan, can lead to the fact that unconsciously they can take the reconciliation-based approach which corresponds to the common cultural principles. This is worsened by the fact that there is no gender-sensitive training and standardized guidelines and that interpretation of the issue and practice inconsistencies are not avoided.

The effects of such cultural pressure may be especially disastrous in the case of domestic violence. Promoting forgiveness at the expense of properly solving the abuse problems may subject women to further victimization and disregard the protectionist nature of the laws meant to protect them therefore can be directly counterproductive to the principles of justice and equality.

The end-result of all of these cultural and institutional influences is that mediation, rather than serving as a neutral platform, through which a dispute can be resolved, can serve as a process that legitimizes patriarchal culture. The stress to retain marriage not only influences the behavior of the parties participating in it but also the form and the results of the mediation process. Because of this, settlements obtained in this manner might be part of adherence to social norms as opposed to actual assent, which poses serious questions of voluntariness and fairness.

To overcome this challenge, the conceptualization and application of mediation need to be re-assessed critically within the Indian context. The role of cultural pressure should be heeded to, so that mediation is not transformed to facilitate inequality further but rather, it should be transformed to become a process that would genuinely consider

<sup>16</sup> Mayne, Mayne's Hindu Law and Usage 890–910 (Bharat Law House 2017).



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women in terms of their autonomy, dignity and rights.

### 6.3 Role of Mediators

The mediators play a strategic role in the dispute resolution process especially in the matrimonial issues where emotions, social expectations and legal rights converge. They are supposed to act as impartial intermediaries that can help parties to find a clearly acceptable compromise. But practically, the mediation work in India may not be as closely tied to facilitation as it may seem and the actions of the mediators tend to play a very important role in the mediation process and the end result. Mediators working in a socio-cultural context that dictates patriarchal norms may or may not consciously or unconsciously reinforce the norms and thus impact the fairness and voluntariness of settlements.<sup>17</sup>

One of such issues is institutional framing of mediation. Indian courts and legal systems greatly encourage mediation as a form of court-avoidance as well as protecting family relationships and suppressing litigation. Although this goal is justifiable, it usually leads to the excessive focus on settlement as an ultimate aim. Operating in this paradigm, mediators can internalize the belief that a successful mediation is one that leads to agreement, in particular, reconciliation in matrimonial conflicts. As a result, the mediation process becomes outcome-oriented as opposed to the justice-focused one and not much attention is paid to whether the settlement is fair or whether it addresses the rights of involved parties.

Another complication is the principle of neutrality that is the key aspect of mediation. Ideally, neutrality mandates that the mediator should be neutral and not commit to either side. In circumstances of unequal power relations, neutrality, however, might unwillingly reinforce inequality when both parties are treated as equal, the mediators do not realize that women are structurally disadvantaged in their lives and faced with economic dependency, poor legal education, and socialization. Such passive neutrality may serve to enable the more powerful side to shape the discourse and manipulate the result, whereas the less powerful one may be unable to be assertive about her position.<sup>18</sup>

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<sup>17</sup> B.M. Gandhi, Hindu Law 250–270 (Eastern Book Co. 2018).

<sup>18</sup> Upendra Baxi, The Crisis of the Indian Legal System 75–95 (Vikas Publ'g 1982).



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When handling matrimonial mediation, it is the norm of the mediator to use language and approaches that nudge towards reconciliation. The terms used in these situations are adjustment, compromise and save marriage and this is an expression of larger social values, which believe in marital stability at the expense of cruelty, coercion and domestic violence. Reconciliation should in such cases be encouraged without necessarily tackling the underlying concerns thus putting the women in danger and donning undermining the underlying protective nature of the existing legal frameworks.

The problem of the absence of standardized guidelines and gender-sensitive training of mediators is another serious problem. Though the concept of mediation is institutionalized in the Indian legal system, it does not establish a common scheme, according to which the mediators are expected to detect and manage power inequalities. Consequently, the mediation is frequently based on personal opinions, or culture, or experience that may inherently be biased towards patriarchy. The lack of organized measures in the management of the sensitive cases, including domestic violence or emotional abuse, makes this issue even worse.

The role of judicial attitudes as well in mediator functioning has been experienced. Courts have been pushing towards the use of mediation in matrimonial disputes, which includes the importance of reaching settlement-oriented results and reconciliation, although this is also an implicit pressure on mediators to deliver the same. In other cases, mediators might have the urge to direct the parties into an agreement even in cases where such agreement might not serve the best interest of the weaker party.<sup>19</sup>

Empirical cases and reports of mediators in India suggest that they at times are not only the neutral facilitator of the process, but of an active influence. It can direct the discussions, propose possible outcomes, or frame issues in such a way that they fit the existing social norms when family disputes are involved in a mediation process, external influence of extended family members or community may further complicate the role of the mediation facilitator since these forces may influence how the discussion proceeds. Women especially are not able to express their issues publicly in such settings and when the mediators do not mediate actively to redress the power structure.

<sup>19</sup> Lotika Sarkar, Law and Women in India 140–165 (Deep & Deep Publ'g 2004).



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Mediation, though it is flexible, is informal and this is a factor in these challenges. Mediation, in contrast to formal judicial proceedings, is not obliged by strict procedural rules or standards expected of evidence. This has the benefit of a more open and collaborative process, but increases accountability and oversight since mediators have lots of leeway of how they run the proceedings, resulting in the disparity in their practices and outcomes. The absence of this structure could work against the women on the one hand when it is not noted that women are fully informed about the process, their right to take part and the fact that they do not feel pressured to do so.<sup>20</sup>

In this regard, the principle of informed consent is particularly applicable. To be fair in mediation, parties should not simply accept the outcome but need to be aware of their rights and the consequences of the settlement. But the validity of such consent is challenged when the mediators fail to make proactive attempts to combat power imbalances as well as to assure that both the parties have access to legal services. Women might be forced into settlements, not out of a willingness but out of not knowing or being afraid of the repercussions of not doing it.

These issues emphasize the fact that the traditional concept of neutrality in mediation should be reconsidered. Instead of having a completely passive stance, mediators need to have what might be described as impartiality of a substantive nature and this means that they need to actively identify and tackle inequalities among the parties. This will involve giving equal chance to both parties to take part, giving the required information and intervening when needed to avoid cases of coercion or undue influence.<sup>21</sup>

Mediation, in the context of an Indian context, where it is practiced in a highly patriarchal society, is a necessary aspect to guarantee that mediation process does not contribute to the status quo. The functions of mediators should thus change to those of mere facilitators to proactive custodians of fairness and equity. The absence of such a transformation will lead to mediation becoming a tool that will justify inequality in the name of voluntary agreement.

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<sup>20</sup> Geeta Ramaseshan, *Women and Law in India* 180–200 (Oxford Univ. Press 2011).

<sup>21</sup> Sandra Fredman, *Discrimination Law* 210–230 (Oxford Univ. Press 2011).



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## **7. CASE LAWS / CASE ANALYSIS**

In matrimonial disputes in India, judicial pronouncements have played a key role in influencing the role of mediation in such cases. Although throughout the time courts have been urging to use mediation as a powerful alternative dispute resolution tool, the underlying problem can be seen that judicial strategies tend to focus on the settlements and reconciling without venturing deep into the aspects of gender inequality and power dynamics. This part of the work will look at some of the most significant cases to gain an insight in how mediation has been viewed and implemented especially in reference to women rights.

The use of alternative dispute resolutions in the form of mediation is one of the most critical decisions in this respect as Salem Advocate Bar Ass. v. Union of India stated that the courts should proactively bring appropriate cases under ADR mechanisms. Although this ruling served a very important purpose in institutionalizing mediation in India, it was mainly concerned with efficiency and managing cases, but never with issues of disproportionate bargaining power or vulnerability of women in marital disputes.<sup>22</sup>

Likewise, in the case of Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., the Supreme Court established specific guidelines on applying the mechanisms of ADR and explained the type of cases, which are best to address through mediation as they are related to a family matter and a marriage case. Yet, mediation was mostly framed by the judgment as a harmonious and consensual process, and the inequalities of structure that could influence the voluntariness of consent were largely disregarded, particularly in reference to women.<sup>23</sup>

As earlier mentioned in K. Srinivas Rao v. D.A. Deepa the Court repeated its position as to the utility of the mediation in the matrimonial context and invoked the desire of the courts to have tried to reconcile the situation before adjudication is done. This time, however, the Court was also concerned with instances where reconciliation, on the part of the court, may not be the right way to go. The case indicates that judicial trend is to

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<sup>22</sup> Salem Advocate Bar Ass'n v. Union of India, (2005) 6 SCC 344.

<sup>23</sup> Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 SCC 24.

emphasize settlement at the expense of a thorough analysis of whether settlement or not fits the interests and safety of the parties.<sup>24</sup>

A less foistful approach is evident in *Rajnesh v. Neha*, which touched upon the matters of maintenance and highlighted the necessity of making the settlements in matrimonial conflicts just and knowledgeable. Nevertheless, it did not purely deal with mediation and underlined the significance of making settlements fair and knowledgeable. The decision in a way lays emphasis on the dangers of mediated settlements where women can emotionally input up with compromising their rights to money under pressure or ignorance.<sup>25</sup>

The case is important on the concept of cruelty under matrimonial law and the recognition of complexities surrounding marital relationships because not all disputes can be reconciled, especially those of mental or emotional harm. This also has repercussions on mediation in that there is a possibility that overemphasizing on settlement can prove inappropriate under some conditions.

A different dimension is also important due to domestic violence cases. Courts have concluded that cases, which contain solemn accusations of acts of abuse, should be handled in a careful manner and mediation may not be viable. The Protection of Women from Domestic Violence Act, 2005 framework insists on the importance of putting the safety and rights of women first and thus it is likely to be incompatible with any forced reconciliation.<sup>26</sup>

In general, the judicial practice in India is characterized by the high regard to mediation as the means of resolving disputes, in particular those related to matrimony. But there are also limitations shown by the case law. The advantages of mediation as far as efficiency and harmony is concerned have taken center stage by the courts without adequately looking at the alterations in gender inequality, social pressure, and balance of power. The lack of clear judicial principles on the need to ascertain voluntariness

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<sup>24</sup> *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226.

<sup>25</sup> *Rajnesh v. Neha*, (2021) 2 SCC 324.

<sup>26</sup> Protection of Women from Domestic Violence Act, 2005.

and fairness of mediated settlements in the mediation process imposes a lot of latitude on institutions and mediators.

Critical analysis of these cases would indicate that mediation has indeed been effectively incorporated in the Indian legal tradition, yet, its use ought to be more feminine and subtle. The courts need to go beyond the settlement-focused approach and explore the possibility of whether the women have rights and autonomy well safeguarded by taking an active role in the mediation processes. Without this approach, it can be risky because through mediation, there is a likelihood that inequalities may be reinforced instead of acting as a tool of justice.

## **8. FINDINGS**

The research uncovers that mediation practices in matrimonial conflict are not absolutely unbiased, but they are usually affected by the highly rooted patriarchal standards in the Indian society. Instead of being only fair and even-handed arenas, mediation spaces are inclined to represent established social structures, with traditional gender roles and expectations dominating the process and its results. This has seen women often bargain on a weaker footing.

One important observation is that women are subjected to explicit and implicit pressure to resolve conflicts. This pressure can be explained by the family members, intermediaries, and society that puts more emphasis on the preservation of marriage rather than on personal freedom. Women are usually pressured to compromise or make concessions even in cases where cruelty, neglect or abuse of emotion are the main factors. These expectations make settlement rather a mandate and not a matter of choice and restrict the freedom of the women to express their rights.

Another point to note in the study is that the consent in mediation is not necessarily voluntary and informed. Even though the concept of mediation revolves around the principle of mutual agreement, there are other factors, including economic dependency, legal ignorance, and fear of social stigma, which may drive the choices of women. Women in most instances, do not accept settlements because they believe that they are

fair, they do it out of necessity. This casts a great doubt on the validity of consent and legitimacy of mediated results.



The second valuable discovery is associated with the functions of mediators. Lack of proper training on gender sensitivity implies that mediators might not necessarily be able to appreciate and address disparity of power between parties. In others, the mediators can unintentionally cultivate patriarchal beliefs by promoting reconciliation and compromise without critically evaluating whether such results are fair and fair. This may result in settlements which are more harmonious than just as fair.

The paper also concludes that the current legal framework fails to adequately deal with the challenges of unequal bargaining power in mediation. Laws encourage conciliation and settlement but the laws do not have elaborate provisions to ensure that settlements are fair and conducted without coercion. Structured systems to inspect whether the agreements are made on a voluntary basis and whether the agreement is made with ultimate understanding of implications are lacking.

The results, in general, indicate that mediation, though its benefits are considerable, might not necessarily be a successful instrument to deliver substantive justice to women. Rather, it occasionally is a process which promotes compromise within an unequal social system, thus solidifying inequalities. Such observations reinforce the necessity to embrace a more rights-sensitive and gender sensitive mediation approach that is less biased and based on fairness, autonomy, and proper consent.

## **9. RECOMMENDATIONS / SUGGESTIONS**

This research makes it evident that considerable reform of such a process as mediation in matrimonial disputes is needed to make it a fair, voluntary, and gender-sensitive process. The recommendations made below are expected to curb the structural and procedural loopholes detected, and they point towards making women more autonomous and recover substantive justice.

One of the priorities is to introduce gender sensitive training of mediators. Mediators must be prepared to identify power imbalances, cultural pressures, and coerciveness of gentler types that can affect the participation of women. Training has to extend further than the simple mediation techniques and contain gender justice, domestic violence, psychological and socio-cultural influence modules. This would allow the mediators to

go beyond being passive to a more responsible and responsive approach that proactively protects fairness.

The need to institute more serious legal protections in the mediation processes is also pressing. Specific rules need to be made so that settlements are not done without free and informed consent. This might involve mandatory statements of voluntariness, mediator questioning in a structured way that might help to determine pressure or coercion, and judicial review of settlements to determine their fairness and not merely their procedural validity.

Another important step is to make sure that there is independent legal counsel. Mediation has to be equipped with qualified legal advice to enable the women to get all information about their rights and the repercussions of signing any agreement. Legal assistance may allow eliminating the informational asymmetry and make women a stronger and faster negotiator.

The other desirable reform is the pre-referral screening of cases before diversion to mediation especially in domestic violence or coercive control cases. Not every conflict can undergo mediation and situations involving abuse should be evaluated carefully so that the mediating process does not subject the women to additional damage. Reconciliation-focused strategies should be laid aside in such situations, in favour of other forms of legal remedy.

Monitoring and oversight mechanisms should be put in place to ensure accountability in the mediation processes. Supervisory bodies or independent review systems can assist in making sure that the process of mediation is fair and that settlements are not achieved under any undue pressure. Infrequent review of mediation practice can also help to ensure that standards and consistency are enhanced.

Moreover the advocacy must be amplified in the women awareness programs so that they can increase their knowledge of the law and recourse that is available to them. Legal literacy programs, community outreach and support services have the potential to influence the empowerment of women being involved in mediation on an informed and confident footing instead of a vulnerable one.

Lastly, separate sessions (caucusing) should be promoted as one of the norms of practice in mediation. One-on-one meetings help women feel welcome in a secure environment to relay their issues, share confidential data, give feedback, and be open to discussions and concerns without the fear of being intimidated and pressured. This can enhance the quality of their participation greatly and allow the mediators to more accurately gauge the very interest and needs of each party.

Combined, all these recommendations serve to stress that mediation should be shifted towards a rights-based and gender-sensitive process, instead of being a settlement. Through balancing the structural disparities and the gaps in the procedures, mediation would become more justifiable and efficient in solving matrimonial conflicts.

## **10. CONCLUSION**

Mediation has certainly become a worthy alternative dispute resolution tool especially where relationships and minimization of litigating conflict are the consideration in the matrimonial dispute. This paper however establishes that mediation is not necessarily neutral or fair in its workings. The process is usually manifested based on existing inequalities instead of being the means of eradicating them in a socio-legal climate of patriarchal norms.

Women can also be affected by their cultural background or society as well as the structural factors like economic reliance and less knowledge of the law, in terms of being able to participate in mediation. These reasons may considerably impact their freedom of negotiations and claims of their rights. Consequently, mediation settlements are not necessarily actually agreement, but compromise, which could be due to social influence, stigma, or unequal bargaining leverage.

The research also puts more emphasis on the fact that the present system of operation of mediation in India fails to address these challenges. The purported lack of robust protections, lack of gender-sensitivity of mediators and the absence of systems to provide (informed and) voluntary consent are some of the factors that lead to outcomes which can compromise substantive justice. Although it is being propagated that mediation is a more flexible and efficient process, its informality may in some cases tolerate coercion and

bias.



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To really see through the potentials of mediation being a fair method to settle disputes, it have to change to resemble more of a settlement process rather than a one-sided solution. There is the need to shift towards a rights-based and gender-sensitive approach. This means accepting the fact that power is unequal, providing the procedure protection, and making sure that the process is proactive in defending the autonomy and dignity of all parties, especially women.

After all, mediation can be effectively used as a valuable tool of justice only as long as it does not focus on the achievement of settlement at the expense of the principles of fairness, equality, and voluntariness. In the absence of such a transformation, it is feared that mediation will remain as a mechanism that perpetuates, as opposed to breaking down, social inequalities that already exist.

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