
FEMINIST PERSPECTIVES ON ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

Alternative dispute resolutions (ADR) have seen a major surge in the contemporary society that we live in. It has acted as a significant mechanism to people who do not want to go through with in-court proceedings or litigation for dispute resolution. People hear about marginalisation faced by women and other genders in court proceedings. This paper on the flip side will explore feminist perspectives of ADR, the challenges faced by them and how gender, power, and justice intersect in the various restorative processes. It will also discuss how the patriarchal norms embedded in ADR mechanisms deter women and marginalised genders from attaining true justice. The confidentiality clause in arbitration agreements further make gendered harm and limiting legal recourse rather dubious. This paper will further explore gender sensitive reforms and more representation of women as mediators and arbitrators to make the process more inclusive and to ensure fair scrutiny. Feminist legal theories, case studies and other important objectives are covered in this paper to give an insight on the contemporary situation on women in ADR. Ultimately, this paper discusses the inclusivity of women in ADR, gender biases faced, how these gender biases can be curbed and how a more feminist perspective can be incorporated in this growing form of dispute resolution.

Introduction and brief background

ADR has become prevalent contemporarily in cases of private autonomy to prevent formal judicial scrutiny and biases. This form of resolution is not only legally binding but also settles disputes quickly, neutrally, and efficiently. This method initially remained unnoticed due to the preference of traditional in-court proceedings. However, people over time, recognised its advantages in conflict resolution finding it beneficial and more efficient in comparison to the rest. Feminist jurisprudence has always critiqued traditional legal systems for its male centric perspectives and biases that influences the substance of law. However, ADR has proved to be an avenue of inclusivity when it comes to women and gendered biases. Although ADR is supposed to be an inclusive platform, it still faces constraints in its delivery of justice due to the patriarchal legal framework. Traditionally, courts were controlled by men and their perspectives too, were male centric which embedded their male standards into law making and delivering judicial scrutiny. The legal system has often justified such male centric perspectives by being oblivious about the reality and regarding such patriarchal norms as neutral and just. However, many scholars and feminists came forward to claim these perspectives and lawmakers as unjust and biased. They pointed out that these claims of neutrality are in fact deterring women from achieving justice and disregards a woman's experience in the society. Carol Gilligan provides a theory of moral development to provide further insight on this situation. ADR approach is such that it encourages dialogue and more composed form of dispute resolution which resonates with feminist principles. ADR with its newly gained recognition will always have its limitations if there still exist male centric norms in the legal system. By fostering a dispute resolution culture of inclusivity, ADR can serve as a more equitable legal platform with its efficient scrutiny.¹ The key questions that this paper will be answering is

- Can ADR be fair in gender powered imbalances?
- Can ADR promote gender justice?
- Can ADR act as a catalyst for women and feminists?

¹ Loyola Marymount University, Hill, Eve L. Hill, Eve L. - Loyola Marymount University, <https://www.lls.edu/faculty/distinguishedretiredfaculty/hillel/> (last visited Jul 9, 2025).

Contrast of power dynamics in dispute resolution

Number of women who have experienced sexual assault have wanted to use ADR as a discourse to attain justice as they might not have the belief in judicial scrutiny. They have even turned to human rights tribunals instead of filing charges against the sexual violence that they have faced. ADR was initially considered inappropriate as a discourse for such cases due to power imbalances and the security of the survivor. There is moreover an obvious imbalance between the victim and the perpetrator. Unlike in courtrooms, ADR methods cannot impose legal restrictions or injunction orders against the perpetrators. There can merely be negotiation amongst the parties which can plausibly lead to mental atrocity, coercion, and intimidation especially when the perpetrator holds a more social, economic, or institutional power over the victim. There also exist gender-based stereotypes in ADR. One assumes that stereotypes may not exist in ADR methods as its very existence to give a neutral and nuanced resolution as compared to courtrooms although, mediators and arbitrators may subconsciously uphold societal norms which may in turn downplay a woman's experience and end up favouring reconciliation over accountability.²

There is a definite absence of a neutral playing field. The assumption that ADR creates a voluntary space for dispute resolution is a flawed fallacy. Many aspects of power dynamics play a role in shaping the flow of the negotiation process in existence. Without certain safeguards, ADR methods can replicate the same injustices that are systemically seen in formal court proceedings. An instance of the same can be seen in the governance of The Australian National Mediator Standards that disclose inherent contradictory expectations of the standards. There is a failure in acknowledging patriarchal norms existing in legal systems, that mediators even with the right intentions normalise power imbalances existing in a judicial structure. These structural inequities assert the fact that mediation and other forms of ADR do not just obscure other power imbalances but also sustains them.³

Contrary to all points discussed above, many still think that ADR can use its power dynamics to make hearings and delivery of justice more inclusive. It is said that, opposed to the

² Jennifer A. Orange & Sabrina K. Khela, Women talking: An alchemy for feminist alternative dispute resolution *Journal of Law & Equality*, <https://jps.library.utoronto.ca/index.php/utjle/article/view/44875> (last visited Jul 9, 2025).

³ Laura E Fox, Patriarchy at the table: The role of gender dynamics in Mediation Medium (2024), <https://lauraefox.medium.com/patriarchy-at-the-table-the-role-of-gender-dynamics-in-mediation-f071d4f0f4cc> (last visited Jul 9, 2025).

adversarial system, ADR promotes mutual understanding and foster cooperation between parties. An arbitrator's or a mediator's role can be used to give a more neutral resolution to avoid waste of time and money. Its core interest is said to be meeting needs and desires of all parties involved rather than just adjudicating to the needs of one party. ADR is not the most perfect solution but it surely does facilitate a gender sensitive outcome if the negotiators are trained properly and do not have biases. ADR can become a meaningful step towards justice that respects the agency of women and other marginalised sections in the society. It is further argued that ADR might not do away with the grass root level of gender discrimination, it can although resolve episodes of such gender biases in a human centred way.⁴

These difference in opinions create a stark contrast between various perspectives of feminists.

Case studies and restorative justice

A case study was performed in India to assess the exploitation performed upon women and in this case study it was founded that even though India has been developed in a way that there operates fast-track courts, no sensitive or timely justice was provided. An exorbitant number of 32000+ rape cases were discovered while the conviction rate was merely 27% in 2019. This shows that not only are traditional courts overburdened but a number of cases were received in an unresponsive manner. Fast-track courts are designed mainly for speedy justice delivery but there is always a surface level rigidity along with gender biases which do not help the case of such unnoticed incidents. Victims in fact face secondary victimisation where the credibility of their incidents are judged, ignored, and doubted. Even though criminal cases are not arbitrable, ADR methods can be used as a way to attain restorative justice. Often, these victims face more mental agony than physical ones, the power of ADR can centre these victims' voices along with holding the perpetrators accountable. Plausibly not like a traditional jail-style accountable but rather explaining them the implications of their actions and shift the focus from punishment to healing and accountability.⁵

Again, the ADR model is not entirely immune to gender patriarchy and may have biases instilled in opinions which can deem dangerous for restorative justice. ADR methods can be

⁴ Multilevel Regulation, ADR in a feminist voice. Arbitras (2020), <https://www.arbitras.org/blog/2020/6/5/adr-in-a-feminist-voice> (last visited Jul 9, 2025).

⁵ Vismitha Rathi, ADR and its applications to women-related disputes Justact, <https://justact.co.in/blog/ADR-and-its-applications-to-women-related-disputes> (last visited Jul 9, 2025).

equipped with multiple counters to prevent any such discrimination. There should exist gender sensitivity training for negotiators in order to give more equitable decisions and resolutions. There should be trauma informed protocols and there must be survivor advocacy which can prevent the survivor from facing any coercion and re-traumatisation. The ultimate aim of restorative justice should not just be to address gender-based harm but to also adjudicate the root cause of this gender-based violence. Scraping the grass off the surface may temporarily provide relief but in the long run it may implicate the system as a whole. ADR is seen to have potential to alleviate any such gender-based discrepancies, but to achieve that the arbitrators and the mediators must be ready to confront societal norms to create space for community level conversations about justice and healing while addressing implications to the perpetrators.

Thus, this case study may act as a critique as well as the reality of why ADR should be instilled in such situations and with what measures. ADR can account for a brilliant form of restorative justice with a feminist-centred space for survivors. Restorative justice if implemented critically, can be a powerful step towards building justice and trust in the judicial system of today's society.

Arbitrators vs. Judge's gender influence

The question of whether gender of arbitrators have a different effect on an outcome is a tricky yet revealing inquiry on ADR. Studies in a traditional courtroom has displayed an obvious "gender effect" in the decision making with female judges being more likely to pass judgements in the favour of the plaintiff. This may usually arise due to their lived experiences as well as sensitivity towards the women gender. There is an absence of such gender-based divergence in arbitration which clearly portrays a difference between judiciary and arbitration. One reason to this can be the structural nature of arbitration is very different from that of judiciary. Arbitrators are usually freelancers or private panels who rely on continued appointments to succumb to their livelihood. Judges on the other hand enjoy institutional protection and lifetime appointments and not limited ones. Arbitrators are pressurised into giving more neutral opinions to continue getting appointments as the whole point of arbitration is neutral scrutiny. There exists a systemic duty for them to suppress gender biases in order to secure such future appointments.

Arbitral process lacks transparency and is privately performed unlike judicial proceedings. The awards are confidential and are not disclosed to public view. This discretion while trying to

maintain privacy and respect for parties, often fail to explain reasoning to such decisions and holdings. For female arbitrators, even though they might be able to bring in their gender sensitivity towards such cases, they will have to maintain a veneer of strict impartiality while not being socially attuned. This lack of gender effect proves that there might not be gender irrelevance per se but there can exist overpowering institutional and structural factors which lead to suppressing the influence of gender sensitivity in arbitration compared to judicial proceedings. If the structure of arbitration neutralises the very perspective of gender injustice, one must be concerned with design of the structure of arbitration and not the gender biases that exist.⁶

Reformation of ADR towards a feminist framework

Several UN guidelines talk about male dominated resolution structure. ADR and in particular, mediation have a lot of scope of being more responsive to gender-based concerns as opposed to traditional courts. The UN guidance on gender and inclusive mediation strategies provide a comprehensive framework to inculcate this formation. The feminist approach to ADR should begin with a preparatory phase where the cultural and societal deficiencies that limit women's participation in ADR are identified. This can include community stigma and economic influence. ADR must take this into consideration and include equal representation of women in decision making.

During the mediation phase, lived realities, relation dynamics and emotional experiences should be taken into consideration by feminists as they are considered central to gendered disputes. This can be accomplished by acknowledging distinct effects of gender harms faced by women and collaboration with women and civil society organisations. In a feminist ADR paradigm, there then exists the post agreement phase that makes sure that women are involved even after a settlement is signed. This entails establishing forums for community discussion and for preserving representation of women and obtaining funding to receive gender parity in conflict resolution. In essence, a feminist framework will be unattainable in ADR if there is no

⁶ Pat K Chew, Comparing the effects of judges' gender and arbitrators' gender in sex discrimination cases and why it matters by Pat K. Chew :: SSRN Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012189 (last visited Jul 9, 2025).

first-hand participation of women. And it works to turn ADR into a place of justice and equality rather than just trying to fit women into preexisting systems.⁷

Conclusion

Beyond the strict and aggressive character of litigation, Alternative Dispute Resolution presents a hopeful path for a means of conflict resolution. Nonetheless, ADR is not free from patriarchal prejudices that contaminate the larger judicial system regardless of its supposed impartiality. The institutionalised gendered power relations in these systems keep women and underprivileged genders isolated and subject to tremendous disadvantage, therefore supporting the exact systems of inequality that these alternative conflict resolution techniques want to avoid. Although ADR techniques include mediation and arbitration provide anonymity, convenience, and a less combative approach, they also create challenges including coercion, imbalance of power, and the possibility of any injustice or foul play just based on gender to go unrecognised and unresolved.

The feminist analysis of ADR emphasises the difficulties that result from gender prejudices. The absence of defence against power imbalances, the informal character of discussions, and the implicit gender prejudices of mediators and arbitrators all help to explain the longevity of gender inequality. Case studies, like those seen in India, highlight how our court has neglected to give women especially in situations of gender-based violence due justice. Although ADR offers a friendly road to justice, its success depends on the use of such gender-sensitive procedures.

Reforms are necessary if ADR is to become an inclusive and fair forum. Trauma-informed procedures, survivor-centric advocacy, and gender-sensitive training for arbitrators and mediators should all be combined into the ways of several conflict resolution techniques. Instead of only supporting the current legal system, ADR should grow to solve the fundamental causes of gender inequality and provide a restorative justice framework stressing greater healing and responsibility than only reconciliation. Whether alternative dispute resolution (ADR) is successful in achieving gender justice will finally depend on the determination of

⁷ Constantin-Adi Gavrilă et al., The need for enhanced gender equality in ADR or how to get more women around a mediation table Kluwer Mediation Blog (2023), <https://mediationblog.kluwerarbitration.com/2023/09/14/the-need-for-enhanced-gender-equality-in-adr-or-how-to-get-more-women-around-a-mediation-table/> (last visited Jul 9, 2025).

legal systems and practitioners to critically scrutinise and destroy the patriarchal norms inherent in dispute settlement processes. Encouragement of an ADR framework more inclusive and feminist-informed would help everyone to find justice more fair, accessible, and transforming.