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OBJECTIONS TO MEDIATION: A PERUSAL OF THE PROCESSUAL LIMITATIONS

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ABSTRACT

In recent years, the idea and practice of mediation have gained significant acceptance in legal systems across the globe. This non-adversarial consensual process of dispute resolution is largely employed to reduce the overburdened docket system. Its rapid proliferation is grounded in the belief that process being creative and partly-driven can generate consensual outcomes which are mutually long lasting in contrast to adjudicatory results. No denying, mediation does offer many a benefit to the participants, yet the propriety of the process is often critically challenged in certain situations. In the light of this background, the present paper discusses and explores these situations wherein beneficial claims of the mediation process might and should be questioned. To this end, it peruses the nature of objections surrounding the mediation process, and thereby endeavours to analyse the certain processual limitations of this fast emerging method of Alternative Dispute Resolution.

I. INTRODUCTION

The recognised advantages of mediation include time and cost savings, privacy, confidentiality, self-empowerment, reduction of court backlogs, and preservation of future relationships. However, while acknowledging these advantages, there are certain situations where the propriety of mediation is challenged. It is contended that mediation can be detrimental, especially when mandated.[1] Examples of the problem include situations where there is an imbalance of power between the parties or where individuals may fare worse in mediation than in adjudicatory or rule guided process. Since mediation is private and the process flexible, no procedural safeguards exist.

Although many reasons exist for the use of mediation and its practice has vastly increased over the last two decades, there are many situations where mediation may not be a preferred choice. In some instances, courts have ordered the parties to participate anyway, and resolutions have been reached in several of the cases. At other times, courts may consider the

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[1]As for example where parties are sent for mandatory mediation, the process and outcome may lead to compromising with one of the essential elements of mediation, i.e., the voluntariness of the parties to choose this mode of ADR.

objection, and excuse the party from participation. A few of the more common objections to use of mediation are discussed below:

Procedural Considerations

One concern voiced by critics of mediation is that the process lacks procedural safeguards. Some feel that compelling parties to meet with one another may be detrimental, particularly where the parties are not represented by the advocates. Another consideration is that gender, race, and culture may dictate that some parties are not treated as fairly as they might be in a courtroom. One contention is that prejudicial attitudes are more prone to be acted upon in informal settings like mediation.[2]

Another procedural objection concerns discovery.[3] In some cases, it is paramount to a realistic consideration of alternatives for settlement that certain information be learnt or exchanged. If it is not, then the parties are unwilling to even consider a proposal of resolution. One solution is that the mediator oversees an informal method of information exchange prior to the mediation session.

Another concern surrounds the issue of procedural justice, particularly in court-annexed cases. The concern is that in mediation, the procedure may not be fair. Yet, research indicates that the parties' participation is the key to assurance of procedural justice, or at least their perceptions of justice. One method advocated to assure procedural justice in mediation is party participation.[4]

Power Imbalances[5]

Often mediation is criticized for there is a high possibility of one party unduly dominating the other during the mediation process. This might lead to skewed settlement agreement or an agreement which is an outcome of power imbalance of the parties. Some of the instances could be mediation involving a woman and her husband over a matrimonial dispute; or an employment dispute between a small level employee and the corporation itself; or a business

[2]*See generally*, Delgado, Richard *et al*., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", *Wisconsin Law Review* 1359 (1985).

[3]Discovery in the civil suits is a procedural device whereby each party can obtain evidence from the opposite party through requests for answers to interrogatories, production of documents, admission and depositions. When discovery requests remain un-addressed or objected by the opposite party, the requesting party may apply for the assistance of the court by filing an application to compel discovery. *See*, CPC, 1908, Order XI, Discovery and Inspection.

[4]*See*, Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?", 79 *Washington Univ. Law Quarterly* 787 (2001).

[5]Author presented a paper on "Power Imbalances in Mediation" at the *International Council of Jurists Conference*, held at VigyanBhawan, New Delhi, Dec. 4, 2012.

dispute between large and small trading companies etc. Power imbalance can also occur where one of the parties is state government or its powerful machinery. Thus the question of power imbalance in mediation has posed a serious challenge to its growth and acceptance. It is contended that this negative feature of mediation makes it a tool in the hands of a powerful party to achieve its skewed purpose, which it may not get through court process.

Owen Fiss (1984) commenting on the issue of power imbalance has contended that ADR processes in general and mediation in particular are highly problematic and should not be institutionalized on a wholesale and indiscriminate basis. He observed:

> "The disparities in resources between the parties can influence the settlement agreement in three ways: First, the poorer party may be less able to amass and analyse the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is far less than the ordinary values, one may have secured through court judgment. Third, the poorer party might be forced to settle because he does not have the resources to sustain the litigation. It might seem that mediated settlement benefits the plaintiff by allowing him to avoid the litigation costs, but this is not so…."[6]

Cases of the power imbalance between the parties to mediation can arise due to various factors apart from commonly visible economic or social status. These rather hidden factors may include disparity in knowledge resources, communication skills, cognitive abilities, personality traits, cultural values etc. Examples may be cited of mediation between a literate party and an illiterate one, where the former is very expressive with better communication and understanding skills compared to the latter. Similarly, mediation between a company's powerful owner and a small level employee may get skewed due to disparity in the above factors.

[6] *See*, Owen M. Fiss, "Against Settlement", 93 *Yale Law Journal* 1076 (1984).

It must be acknowledged that every time a mediator attempts to assist two parties resolve a dispute the issue of a potential power imbalance can emerge. Indeed there will always be some inequality between disputants.[7] The impact of this unequal bargaining power on the mediation process has led to an enormous amount of discussion and controversy amongst commentators, ranging from those who view mediation as simply not an appropriate ADR method in these (power imbalance) situations to those who believe that, even in severe cases of inequality, for example, where domestic violence is involved in a family dispute, mediation is still a preferable resolution process to adjudication, for the purpose of understanding the nature and extent of the marital problem and for narrowing down the issues to few.[8]

It is submitted that the best approach lies somewhere between these two extreme positions. It cannot be said that mediation is never appropriate where a power imbalance exists, because the result of that thesis would be simply that mediation should never be used as a dispute resolution process. There will always be some degree of inequality of power between disputants. However, in cases of severe imbalance of power, for example, in cases involving severe domestic violence (one that involves recurring physical and verbal abuses) or child abuse, mediation will not be an appropriate process and court adjudication should be preferred in such instances.

A more definitive list of situations where mediation should be terminated due to severe power imbalance is as follows:

i. Where a party is unwilling to honour mediation's basic guidelines (for example, continuous attempts to intimidate the other party during the mediation process);

[7] *Ibid*.

[8] Some advocates take the position that cases involving domestic violence are simply inappropriate for mediation. Adherents of this view argue that domestic violence is not the result of interpersonal conflict but of a culture of dominance and control. Mediation's focus on resolving interpersonal conflict is therefore misplaced in this context. Second, since mediation de-emphasizes the criminal aspects of the behaviour and is future-oriented, the abuser is allowed to escape responsibility for his past behaviour. Third, the power imbalance that exists by virtue of the intimidation simply cannot be effectively remedied in the process. Finally, the effects of domestic violence on children are exacerbated when an abusive parent is allowed to use the children to retain control over their mother. Others, however, argue that domestic violence ought to provide grounds for seeking a waiver but should not result in automatic disqualification. The proponents of this approach believe that screening mechanisms to identify abuse and appropriate intervention techniques on the part of the mediator can ameliorate the harm. Another, argument is that lawyer's representation in mediation involving domestic violence can also ensure that no imbalanced bargaining happens between woman and her husband. Finally, they argue that if none of the mediation techniques works then the court-door can always be knocked. *See generally*, Joe Folberg, Ann L. Milne & P. Salem (eds.), *Divorce and Family Mediation: Models, Techniques and Applications*, 304-336 (Guilford Press, 2004).

ii. Where one of the disputants is so seriously deficient in information that any ensuing agreement would not be based on informed consent;

iii. Where domestic violence or fear of violence is suspected; or where a party indicates agreement, not out of a free will, but out of fear of the other party;

iv. Cases involving child abuse or sexual abuse;

v. Where the parties are hoping to gain some tactical or strategic advantage which is not related to the subject-matter of the dispute, for example, as a "fishing expedition" to gain information, or as an attempt to, delay proceedings.

While some of the mediation literature discusses methods that a mediator may utilise to equalize the above mentioned imbalances,[9] the fundamental problem remains, in that he may not always be able to so. The reason being that if he attempts to rectify the imbalance that may be taken as an act of siding with a particular party.[10] Thus it would seem that power imbalance, in one form or another, is likely to remain present in most of the types of mediation, just as it exists in litigation or arbitration. It is the duty of the mediator to address this problem in a skilful manner without compromising with his neutrality. If, however, power imbalance remains unaddressed or intolerable, the mediator should terminate the process and let parties explore the court system.

Problem of Unwilling Partners

In several instances, one or more of the parties involved in a dispute may be unwilling to go to mediation. In other words, mediation will not work if the parties are unwilling or unable to negotiate. This may occur for a number of reasons. If a party to the conflict is unwilling to participate, the mediation will not be able to go ahead.

Further, there can be a situation where the conflict may have escalated too far that the parties are no longer able to communicate with each other. The parties may be so firmly entrenched

[9]*See generally*, Jacqueline M Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making", 74 *Notre Dame Law Review* 775 (1999) (Author arguing that one of the most effective method to minimize the risk of power imbalance is to take the well informed consent from the parties before mediation is to start and also to ensure that any resulting settlement is well understood by both the parties. Mediator may then ask the parties as to whether they are fully satisfied with the outcome, or they still hold any clarifications. In short, mediator has a key role in diminishing the power imbalances between the parties.).

[10]This may be seen as a loss of neutrality on the part of mediator. However, mediation theorists have also suggested that neutrality does not mean a 'non-active mediator', but rather a mediator who facilitates exchange of information between the parties in a very candid manner, without hiding anything from either party. He has to make sure that some fundamental problems like unequal-bargaining positions of the parties are also discussed freely, either in separate session or joint meeting. He thus has to conduct himself as an agent of reality. *See*, Joseph B Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind", 6 *Vermont Law Review* 85-87 (1981).

in their positions that they refuse to accept or acknowledge the other side's perspective. Where a party has a very firm view of who is right and who is wrong and is unlikely to change his or her opinion on this, no amount of facilitation or encouragement from the mediator may enable the mediation to proceed.

Parties may be unwilling to mediate, precisely because as Bernard Mayer (2004) reasons that mediation could be, in fact, an opportunity for 'fishing expeditions', delays, offering false hopes, pretending to collaborate, and so forth.[11] According to him, most often participants in mediation are often not trying to make any genuine progress on a conflict but to gain an advantage so that they can pursue the 'gains' made in mediation in more serious forums like litigation.[12]

Further, a party may be unwilling to mediate where he/she has limited capacity to negotiate effectively, where there is a significant power imbalance or risk of physical or emotional abuse. In some cases, a party's cultural background may also be incompatible with mediation. Where parties have a history of acting in bad faith in negotiations or it seems that compliance by one or both of the parties with any possible agreement is unlikely, mediation then cannot be considered a good option.

The problem of an unwilling partner is too rampant in mediation. This problem cannot be addressed by compelling parties to mandatorily explore mediation for any possible solution, as that would compromise the very essential tenet of mediation i.e., voluntariness.

Lack of Fairness

Arguably, the most serious criticism of mediation relates to the fairness of the process. Critics say that mediation represents secondary justice- that only the courts provide first class justice. Owen Fiss for example, cautions that the thrust of mediation is towards the surrender of legal rights. He observes:[13]

> "I do not believe that settlement as a generic practice is preferable to judgment… It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice

[11]Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*,98 (Jossey-Bass, 2004).
[12]*Ibid.*
[13]*Supra* note 6

> may not be done…settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised."

Fiss asserts that underlying all ADR processes, including mediation, is an assumption of rough equality between the contending parties and that, as a result, it is the rich who can afford first class justice via the court system, and the poor who cannot finance litigation settle for second best- that includes mediation.[14]

It is submitted, this theory misses some essential underlying reasons. Firstly, it is assumed that only a resolution based on law is first class justice. Surely a better definition of a dispute resolution process will be that which is most satisfying to the disputing parties. Secondly, there is a difference between theoretical justice and applied justice. In practice, litigation often falls short of the ideal. In theory, justice is accessible to all, however, in a country like India, it seems to be accessible only to the rich, and the poor are often provided legal aid at state expense which may not be compatible with first class justice. The danger is that disputants in the court process can only obtain the justice they can afford. Furthermore, an inexperienced junior advocate could easily be defeated in court contestation by an experienced senior. The practical reality is such that "nothing can reasonably be done to eliminate whatever advantage can be obtained by the richer litigants', access to the more expensive, and therefore presumably more expert legal assistance."[15]

In the background of harsh realities of litigation practice, the mediation theorists are in agreement with the proposition that if one accepts mediation as more economical and speedier than litigation, it is arguable that where a disparity in wealth exists between the disputants, it is actually mediation which may be the fairer way of resolving the dispute-not litigation.[16] This is possible because mediation may provide an environment of free discussions wherein a less equal party can raise all his concerns, and actually see his most serious concerns addressed before the mediation can proceed further.

Finally, it is argued that, theoretically, legal system is a far safer path for a disputant than mediation if there is any question of the parties being of different "intelligence, articulation and ingenuity."[17] Yet, as has already been illustrated, the litigation process as practised falls

[14] *Supra* note. 6 at p. 1075
[15] C.W. Pincus, "Judge Asks why Old Methods are Still Used to Resolve Disputes", 23 (10) *Australian Law News* 11 (1988), *available at*http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1053&context=adr (last accessed Jan. 9, 2017).
[16] Maxwell J. Foulton., *Commercial Alternative Dispute Resolution* 90 (Law Book Co., Sydney, 1989).
[17] *Id*., at104.

short of the theoretical ideal and may not protect disputants any better than as mediation in this situation.

If these questions of equity are of concern to a disputant, he/she may withdraw from the mediation process. But before withdrawing, the concerned party must weigh up the probable gains in terms of financial cost, speed of resolution, flexibility and informality, self-determination, privacy, avoidance of stress and preservation of future relationships with what that party sees as a lack of fairness in the mediation process.

Lack of Precedent

Certain types of disputes require that a determination be made by an outside third party, such as a court. For a variety of reasons, parties sometimes have a need for developing case law and setting a precedent. Mediation, however, does not set any precedent like courts.[18] This is mainly due to the confidential nature of mediation proceedings which prevents the establishment of a useful body of case law on mediated outcomes. As a result, disputants lack the knowledge as to how disputes similar to their own have been resolved in mediation at an earlier point of time.

Thus, mediation may not be the best process to deal with certain substantive issues. For example, where the dispute involves a constitutional or human rights issue, or a matter directly affecting the public interest, a public forum might be more appropriate. In some cases, an advocate or mediator needs to make an immediate decision to protect the interests of a disputant or of the public. For example, a precedent may be desirable for deterrence, or injunctions may be urgently required to stop certain behaviour. A public resolution may also be needed to preserve or restore a party's reputation.

Further, where a matter involves a significant or novel legal question, a judicial interpretation of a statutory question, the creation of an important legal or policy precedent or where there is need for a final decision on past events, litigation is and will be more appropriate.

[18]In India, only Supreme Court and High Courts have the constitutional jurisdiction to set precedent through case laws. There is a possibility that such courts may rule specifically about mediation in general in litigations arising out of mediated outcomes. In that sense courts may set a precedent which has theoretical and practical implications for mediation, thus supplementing the academic developments on mediation. But such precedents will be highly different from the ones actually needed. What we need is a body of case law on mediation that decides if an act (fact) 'X' has happened between A & B leading to mediation in the year 2014, then what would happen in similar fact and situation between L & M in the year 2016. This is actually least likely to happen given the confidential nature of mediation. So, in that sense, mediation by its very nature, discourages precedent-setting.

Regarding this particular criticism of mediation that it lacks any precedential value, one may concede that not all cases are suitable for mediation. While some cases are to be adjudicated upon by court so as to set a precedent, still a vast number of cases may be suited to a less formal resolution through mediation.

Problem of Defining Party's Self-Determination

Party control in mediation reflects understanding about parties' competence to deal with the mediation process. All fields of mediation practice place central importance on party control, which is variously described as 'party autonomy', 'empowerment', 'self-determination', 'responsibility' and 'party authority'. The authority of the mediator is derived from the parties themselves. It is the central task of the mediator to ensure that by engaging voluntarily in the mediation process, the parties' participation is equal and fair and that they retain control both over the content of their communication and over the decision-making outcome. It is the task of mediator to ensure too that the vital but limited role of mediator in managing the process is not exceeded.

While in mediation parties are presumed to have competence in matters of decision-making and control of the process, yet the same has attracted several problems in exceptional situations, such as, gross imbalance of power, poor negotiation skills, lack of adequate mental resources, etc. In such exceptional situations, pre-mediation screening may be offered to parties in order to measure the party's competency in mediation.[19]Consequently, this can limit the risk of lack of competency of the party.

It remains a case that in mediation decision-making authority must stay with parties. If the third party (mediator) makes a binding determination of the issues, the process is not mediation. As for instance, if parties jointly ask a mediator to decide the issues on a binding basis, as in med-arb,[20] and the mediator agrees to do so, then the process changes from mediation to one of the adjudicatory forms such as arbitration.

This should, however, be distinguished from the situation in which the mediator is asked by the parties to make a non-binding settlement recommendation, which is part of the mediation procedure of some organizations and individual mediators.[21] Such a recommendation allows

[19]It is described as preparing the parties for mediation.
[20]Mediation-Arbitration or Med-Arb is combination of mediation and arbitration processes. In such hybrid form, failed mediation attempts are quickly followed with arbitration if parties so decide.
[21]Mediation process in this sense can be suitably designed by the parties themselves. Even the mediator can let parties know that he/she will put forward his non- binding settlement recommendations.

the parties the freedom to accept or reject it, and consequently does not diminish their self-determination.

Parties may be advised and assisted by their lawyers and perhaps other professionals in the process. This does not detract from the parties' role as the ultimate arbiters of how the matters should be resolved or from their self-determinative function.[22]

If, however, a party is coerced into making a decision, then that would generally undermine the principle of self-determination as negotiation should not be a coercive process.[23] Mediators may sometimes encourage parties towards settlement- if done appropriately this is a standard element of the process- but if they try to coerce a party into settling, or become so directive that their actions amount to coercion, then that would undermine the principle of party self-determination and would frustrate the very essence of mediation process. The point which may be unmistakably highlighted in this context is that parties' self-determination is essentially a fundamental characteristic, yet in absence of proper receptivity of its actual meaning among the mediating community, the process will tend to become a mere branch of arbitration.

Other Disadvantages

i. *Additional Cost if Unsuccessful*: If the mediation does not result in a settlement then the costs will be in addition to any litigation costs.[24] However, the mediation process usually increases the parties' understanding of each other along with their mutual needs and demands, and this can be very helpful in the litigation process or in promoting settlement later.

ii. *Fishing Expeditions*: Occasionally, someone will come to mediation to attempt to extract useful information from the other party, rather than with the desire to reach an agreement. An experienced mediator can usually spot this and may call a halt to the mediation. Mediations are usually confidential and without prejudice, but will involve giving some information about one party's position to the other party. Of course, this works both ways. However, real risks remains that an unscrupulous party might

[22] *Seegenerally*, Michael Moffitt & Dan Dozier, "Information, Autonomy and the Unrepresented Party", in Ellen Waldman (ed.), *Mediation Ethics: Cases and Commentaries*, 155-176 (Wiley Publishers, 2011).

[23] *See*, Mediation, Conciliation Rules of Delhi High Court, 2005, Rule 27 provides, The mediator/conciliator shall recognize that the mediation/conciliation is based on principles of self-determination by the parties and that the mediation/conciliation process relies upon the ability of parties to reach a voluntary agreement.

[24] To counter this argument, one may say that a failed litigation is much more costly, futile and cumbersome, if the parties later prefer mediation for the same dispute. Parties should consider the potential additional costs if they are unsuccessful at trial and are required to pay the other side's legal costs and the potential additional costs and time of a potential appeal. *See*, Alan Sitt, *Mediation: A Practical Guide* 104 (Cavendish Publishing, 2004).

exploit the information, oral or documentary, discovered in the mediation to the possible detriment of another party.

iii. *Mediation Viewed as a Sign of Weakness*: Is going into mediation a sign of weakness? Some people (mistakenly) see an offer to mediate as a sign of weakness. Such an attitude can be for a variety of reasons. The party offering for mediation might be seen as having a weak case in terms of law and evidence. However, such a notion is misplaced in the face of other advantages of this process. This attitude, however, is becoming less common and can usually be dealt with by explaining the benefits of mediation.

iv. *Attitude of the Mediator*: If the mediator is not capable and efficient, the process of mediation can get derailed as he may not be able to guide the parties in a suitable direction and thus defeating the purpose of mediation. The parties will not be able to resolve their disputes and ultimately will have to resort to litigation or arbitration.

v. *Attitudes of the Parties*: The attitude of the parties determines the success of mediation. If they are reluctant to settle even the best efforts of the mediator will prove futile especially if they take positional stands[25] and refuse to budge from their settled position or do not treat the mediation process with the seriousness which it deserves. Refusal to see reason and lack of co-operation will leave the dispute unresolved.

vi. *Enforcement of Settlement*: At the conclusion of the mediation process, an agreement may be reached between the parties, but either of the party can still back out from mediation by refusing to sign the settlement agreement.[26] Moreover, if party does not fulfil its obligations under the mediated settlement, the other party will still have to take out execution proceedings as in the case of a court decree or award.

vii. *Social Apprehension*: Apart from the above general criticism, the wider criticism of mediation as a whole relates with ADR, and is concerned with the privatization and in in-formalization of dispute resolution. It is argued that the privatization of dispute resolution is problematic because the elaboration of law achieved in public trials and

[25] *See,* Roger Fisher & William Ury, *Getting to Yes* 82 (Random House Publisher, I[st]edn., 1981).

[26] This particular aspect of mediation that a party can back out even at the last moment before the settlement agreement is signed, is viewed both as a positive and negative feature of mediation. As a matter of fact a party has the last opportunity to think about the outcome reached in mediation, and if he decides to sign, he does so by applying his mind. If he refuses to sign, then again, he does so by understanding the potential consequences of not signing the agreement. In case of withdrawal from mediation, the entire process undertaken would seem futile. *See generally*, Cathleen Cover Paynee, "Enforceability of Mediated Agreements", *Journal of Dispute Resolution* 385 (June, 1985).

published decisions are necessary to protect and secure individual rights. Similarly, it is argued that treating disputes as matters of individual, rather than public concern eliminates important public accountability, and such a situation leads to erosion in education function of law and justice. Additionally, feminists have argued that women—traditionally less powerful members of society—may be worse off in mediation or other ADR processes than they are in litigation, especially in family law matters.[27]

II. CONCLUSION

The objections to mediation demonstrate the need to seek answers for the critical shortcomings of the process. While the process does provide opportunities for parties to explore tailor-made solution for the dispute, nonetheless, the limitations of the process must inform parties in advance before they seek mediated result. To this end, prospective parties should be able to appreciate all the critical aspects of mediation. This can happen through wide and sustained dissemination of mediation-related knowledge among the masses. This is particularly more required in a vast and diverse country like India, which of late, has seen a flurry of mediation-related activities, but where a large chunk of disputing populace still remains poor and resource-less.

The success of mediation system hinges on the awareness of the public in general and disputants in particular. If mediation is to become a popular dispute resolution mechanism, its glaring shortcomings should be spotted and minimized, or else it will merely reflect the adjudicatory process such as arbitration. In the end, it is submitted that the future development of mediation will require structured educational initiatives to teach the masses how to work through their disputes more effectively, more productively and with a sense of preserving the mutual relationships.

[27]Some feminist writers suggest that the powerless, the disadvantaged and discriminated against are further disadvantaged by this lack of public scrutiny. Women are included in this group. The argument is that disputes involving these categories of people demand the public arena because without public scrutiny and education, there will be no attempt to reform, legislatively or socially, entrenched discrimination in the society. There is certainly some merit in this proposition but each situation should be dealt with individually on a case by case basis. It is agreed that in case of severe power imbalances, domestic violence or child abuse, the proposition is correct. Mediation in such cases will not be suitable. In any case, it has never been suggested that mediation is always the answer. Many times, court adjudication is the only answer in such situations. *See*, *supra* note 6.