

Alternative Dispute Resolution versus Litigation: A Conflict Theory and Gendered Critique of Power and Access to Justice

Authors: Simra Sohail and Sibghat Ullah

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Introduction

The interaction between litigation and Alternative Dispute Resolution ('ADR') is one that reflects a wider societal conflict concerning power, access, and justice, rather than just a difference in method. Both disciplines claim to represent fairness, yet they are situated in and perpetuate the existing structures of class and gender. This paper applies conflict theory and feminism to analyse how both ADR and litigation are not as much means of seeking justice as they are mechanisms that perpetuate society's power structures unless they are actively altered to benefit the oppressed. While litigation has been criticised for proffering preferential treatment to the rich, ADR faces criticism for being a private mode of dispute resolution, thus favouring the interests of large corporations. In the context of gender analysis, both litigation and ADR continue to silence women's voices and their interests. ADR mechanisms for domestic and workplace disputes often suppress women under the pretext of compromise and neutrality. Although litigation holds the potential to empower them, it remains largely out of reach for women who lack the financial or social means to access it.

Law as a Reproduction of Class and Gender Hierarchies

The conflict theory of law does not view law as an objective mechanism for handling disputes but as an institution that supports the existing social order of class and power. Although litigation is theoretically accessible to all, it is, in reality, largely controlled by those possessing significant economic and social capital. The ability to access the courts depends on the abundance of financial and social capital, both of which are predominantly concentrated in the hands of the upper class. Therefore, the contemporary legal system works in favour of the elite while denying the rest an effective chance to have their voices heard in the pursuit of justice.¹

¹ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 HLJ 805.

Access to legal resources, including the court system, requires significant monetary investment which makes them inaccessible for the poor. Legal aid services, if at all available, are often limited in funding and capacity, compounding the problems faced by those who cannot afford private legal representation.² These problems are felt most acutely by women because, apart from economic vulnerability, they are culturally and socially restrained in exercising legal power.³ Conflict theorists argue that the legal system serves to legitimise inequality by cloaking structural injustices in the rhetoric of formal equality and due process.⁴ In this way, litigation sustains the illusion of fairness while facilitating the protection of private property, corporate interests, and institutional power.⁵

A gendered reading of conflict theory shows how patriarchal norms are embedded in legal structures. As Catherine MacKinnon notes, the law is not gender-neutral—it often reflects male-centric experiences and definitions of harm.⁶ For instance, procedural rules in litigation, such as evidentiary standards in sexual assault cases, frequently discredit or silence women’s testimony. Even when legal mechanisms appear impartial, they reproduce gendered expectations and reinforce systemic exclusions.⁷ Thus, from a conflict and feminist perspective, both class and gender stratification are entrenched in the very architecture of litigation. Law becomes not merely a tool for resolving disputes, but an instrument of social control that legitimises domination.

ADR: A Flexible System or a Quiet Enabler of Inequality?

ADR is furthered as a faster, cheaper, and harmonious alternative to litigation. However, conflict theory provides a lens through which ADR can be viewed as promoting the interests of the capitalist elite while subjugating people with less social and economic capital.⁸ By taking disputes away from the formal judicial system and into informal and sometimes clandestine settings, ADR limits accountability and public scrutiny of disputes involving corporate actors and vulnerable people.⁹

² Deborah L. Rhode, *Access to Justice* (OUP 2004).

³ Ibid.

⁴ Karl Marx, *Capital: A Critique of Political Economy* (Penguin Classics 1990).

⁵ Ibid.

⁶ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987).

⁷ Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 SLR 1241.

⁸ Richard Abel, *The Politics of Informal Justice* (Academic Press 1982).

⁹ Ibid.

This issue is exacerbated within gendered situations. Women who seek accountability for workplace sexual harassment or domestic violence are often forced to turn to private mediation or arbitration instead of the courts.¹⁰ ADR mechanisms often lack legal protections, such as formal documentation, evidence rules, or impartial judges.¹¹ In cases involving sexual harassment, private arbitration may lead to situations wherein the employers win due to non-disclosure agreements silencing victims, thus rendering the issue less visible.¹² The problem becomes particularly severe in scenarios where arbitration is compulsory, as is the case in many employment and consumer relationships. Pre-dispute arbitration clauses are consistently used in denying workers and consumers legal recourse for enforcing their rights, thus reinforcing corporate power rather than protecting individual rights.¹³ For example, in the United States, corporations like Uber and Google came under heavy public criticism for using forced arbitration to resolve sexual harassment claims internally, thus effectively shielding themselves from litigation and class action lawsuits.¹⁴

Feminist legal scholars have raised serious concerns about the use of ADR in cases involving gender-based violence and sexual harassment. While ADR is often promoted for its informality and emphasis on settlement, these very features can become dangerous when power imbalances are deeply entrenched.¹⁵ In mediation, for example, the pressure to maintain relational harmony or reach a middle ground may coerce women into settling disputes on terms that favour abusers or employers. This is especially problematic when the setting lacks formal procedural safeguards and transparency. Lisa Gormley argues that ADR processes may be wholly unsuitable in such contexts, as they can deprive women of the protections afforded by judicial processes, including the right to a fair hearing and legal remedies that address the seriousness of abuse or coercion.¹⁶ When framed as a gender-neutral tool, ADR can obscure

¹⁰ Ibid.

¹¹ Lisa Gormley, 'Judging Women: Are ADR Mechanisms Suitable in Cases of Gender-Based Violence?' (2011) LSE Working Paper Series <<https://www.lse.ac.uk/women-peace-security/assets/documents/2011/lisa-gormley-paper.pdf>> accessed 21 April 2025.

¹² Nancy Chi Cantalupo, 'For the Title IX Civil Rights Movement: Alternatives to Discriminatory School Discipline and Unfair Procedures' (2019) 38 YLPR 281.

¹³ Nancy Chi Cantalupo, 'For the Title IX Civil Rights Movement: Congratulations and Cautions' (2016) 125 YLJF 281.

¹⁴ American Association for Justice, 'Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and People of Color' (2021) <<https://www.justice.org/resources/research/forced-arbitration-report>> accessed 21 April 2025.

¹⁵ Ibid.

¹⁶ Lisa (n 11).

structural inequalities and reinforce patriarchal norms that prioritise social peace over accountability.

Litigation: Pathway to Justice or a Fortress of Privilege?

Litigation is widely regarded as the cornerstone of formal justice, especially in democratic societies that value the rule of the law and the establishment of legal precedent. From a conflict theory perspective, however, courts are not neutral arenas.¹⁷ Rather, they are institutional spaces where access, success, and legitimacy are often determined by one's social and economic capital. Those with wealth and legal knowledge can better navigate complex procedures, hire skilled representation, and bear the cost of prolonged proceedings, resources that remain out of reach for many marginalised individuals and communities.¹⁸

Although landmark decisions such as *Brown v. Board of Education*¹⁹ in the United States and *Vishaka v. State of Rajasthan*²⁰ in India highlight the courts' potential to advance public interest and protect human rights, such breakthroughs often need assistance from non-governmental organisations or elite lobbying networks.²¹ Thus, litigation's potential to bring such change is still contingent on the prior attainment of financial resources to sustain legal action.²²

Although women's rights litigation by female activists has sought to gain rights for women in areas such as employment discrimination, reproductive rights, and violence prevention, the courts are still operating within patriarchal frameworks, thereby limiting any meaningful progress. As Catharine MacKinnon asserts, the standards by which laws are applied, for example the rules of evidence, are male-dominated and unresponsive to women's lived realities.²³ This is starkly visible in the handling of rape trials, where women continue to face structural distrust, invasion of their privacy, and shifting of responsibility back to the victims.²⁴ A recent example is Pakistan's Supreme Court's judgment in *Muhammad Imran v.*

¹⁷ Alissa Pollitz Worden, 'Courts and Communities: Toward a Theoretical Synthesis' in Christopher J. Schreck (ed), *Criminal Justice Theory* (2nd edn, Routledge 2015).

¹⁸ Deborah L. Rhode, *Access to Justice* (Oxford University Press 2004).

¹⁹ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

²⁰ *Vishaka and others v. State of Rajasthan and others* AIR 1997 SC 3011.

²¹ Rajeev Dhavan, 'The Supreme Court of India: An Assessment and a Critique' (2008) 10(1) LPAALA 5.

²² Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 HLJ 814.

²³ MacKinnon (n 6).

²⁴ Vanessa Munro, 'Judging Rape: Public Attitudes and Sentencing Frameworks' (2010) 11(1) NCLR 1.

The State,²⁵ where the majority converted a rape conviction into one of fornication on the assumption that the complainant had consented, despite DNA evidence and concurrent findings of guilt by lower courts. Justice Ayesha Malik, in her powerful dissent, rejected the majority's reasoning, emphasising that such interpretations reinforce patriarchal stereotypes, particularly the belief that a victim's credibility depends on physical resistance and thereby deny women the fair trial standards envisaged under the Convention on the Elimination of All Forms of Discrimination ('CEDAW').²⁶ The case illustrates how deeply embedded gender biases continue to distort judicial reasoning and obstruct women's access to justice in sexual violence cases.

Further, intersectional analysis reveals that class, race, and gender coalesce to determine the outcome of the law. Kimberlé Crenshaw's concept of intersectionality demonstrates how Black women and other intersectionally oppressed people are doubly disadvantaged in litigation.²⁷ Procedural formality and adversarialism may thus reproduce inequality even while appearing neutral.²⁸

Therefore, without structural reforms—such as legal aid expansion, gender-sensitive procedures, and increased representation of marginalised groups, the courtroom remains, in many cases, a fortress of privilege masquerading as a forum for justice.

The Myth of Neutrality: Who Designs the Rules of Dispute?

A central critique offered by conflict theory is that legal systems present themselves as neutral and objective, while in reality, they reflect and enforce dominant power structures. Both litigation and ADR are often framed as impartial modes of dispute resolution, but their rules and processes are shaped by those who already hold institutional, economic, and cultural power.²⁹ This myth of neutrality conceals how these systems may function to exclude, silence, or disadvantage the marginalised.³⁰

In litigation, procedural rules such as evidentiary standards, courtroom conduct, and adversarial strategies have historically been designed by and for the legal elite. These

²⁵ 2024 SCP 226.

²⁶ *Ibid.*

²⁷ Crenshaw (n 7).

²⁸ Bourdieu (n 1),

²⁹ Abel (n 8).

³⁰ *Ibid.*

procedures presume access to legal knowledge, comfort with confrontation, and the resources to endure protracted litigation.³¹ As a result, individuals from working-class or marginalised backgrounds—especially women and minorities—may find the process alienating or disempowering.

On the same note, ADR mechanisms, despite the common perception of them being more approachable and less formal, are not immune to the menace of power dynamics.³² The proceedings of arbitration, for example, are usually private, and the arbitrators are generally members of elite legal networks.³³ Without judicial review, decisions can be subject to bias on the part of the arbitrator or the more powerful party, and there are only a few ways to appeal the decision. Feminist critics have observed that the focus on harmony and compromise within the ADR can be used to maintain the status quo and silence legitimate claims, particularly in gender-based conflicts.³⁴

The idea of intersectionality proposed by Kimberle Crenshaw is especially helpful in such cases, as it demonstrates that even seemingly neutral systems can contribute to the disadvantage of individuals who belong to several marginalised groups.³⁵ The legal field is mirrored in the social field, whether in formal courts or informal arbitration, and the legal field tends to favour those who already hold social, economic, or gender capital. Thus, the ideals of neutrality in dispute resolution mechanisms must be challenged. Without meaningful reforms and structural consciousness, neutrality serves the preservation of inequality, not justice.

Pakistan's Dispute-Resolution Reality: A Conflict and Gender Perspective

The same trend is observable in Pakistan whereby both formal and informal dispute-resolution forums recreate existing patterns of class, gender, and power hierarchies. Though recent movements like the court-annexed mediation centres in Islamabad³⁶, Lahore³⁷ and Karachi³⁸,

³¹ Rhode (n 2).

³² Ibid.

³³ Thomas Stipanowich, 'Arbitration: The "New Litigation"' (2010) 2010(1) UCLR 1.

³⁴ Lisa (n 11).

³⁵ Crenshaw (n 7).

³⁶ Malik Asad, 'Islamabad gets its first 'mediation centre' for dispute resolution' Dawn (Islamabad, 29 November 2023) <<https://www.dawn.com/news/1793401>> accessed 25 December 2025.

³⁷ International Mediation and Arbitration Center, 'Introductory Mediation Training in Lahore' (Jan 2025) <https://imac.molaw.gov.pk/training_detail/mediation-training-lahore-jan-2025#:~:text=About%20this%20Training,and%20essential%20techniques%20of%20mediation> accessed 25 December 2025.

³⁸ The Mediation Center, High Court of Sindh, 'Court-Annexed Mediation Center' (December 2025) <<https://mediation.shc.gov.pk/>> accessed 25 December 2025.

alongside the implementation of musalihati committees through local government legislations³⁹, ADR in practice tends to follow the same structural imbalances, as discovered by the conflict theorists. Women who come with complaints of domestic violence or harassment to the police are systematically coerced into “compromise” by informal mediation, which places more weight on family harmony rather than accountability and fails to offer an enforceable solution to the victim. Parallel systems like jirgas and panchayats, often presented as culturally acceptable ADR processes, have in the past led to results that marginalised women through practices, such as forced marriages, honour-based settlements, and forced reconciliation.⁴⁰ On the other hand, similar barriers also exist in formal courts. These often include the high cost of litigation, administrative delays, and male-dominated investigative and medico-legal practices, which limit women's access to justice in litigation. All these dynamics indicate that the critiques discussed by the conflict theory and feminist jurisprudence are not alien or distant; instead, they are in many ways in sync with the lived reality of dispute resolution in Pakistan, where neither ADR nor litigation offers an escape route from the entrenched socio-legal inequalities.

Conclusion

Although both litigation and ADR are framed as tools of administering justice, a conflict theory and gendered analysis indicate that they are inherently embedded in the current power hierarchies. Litigation, despite its capacity to generate systemic change, is still out of reach to many because of its cost, complexity and structural discrimination. Although informal and flexible, ADR can reinforce inequality when applied in an unequal bargaining situation, especially in gender-based conflicts. Both systems are put forward as neutral, but their rules and results are frequently influenced by people with social, economic, or institutional privilege. Without substantive reform, such mechanisms are likely to continue the process of exclusion under the pretext of efficiency and fairness.

Reclaiming justice demands more than procedural innovation—it requires structural awareness. Some of the steps needed include expanding access to legal assistance, prohibiting forced arbitration in gender-based claims, making adjudication gender sensitive, and

³⁹ Sadia Ashraf and Saira Iqbal, 'Local Government System in Pakistan during Musharraf Era' (2021) 5 Pakistan Languages and Humanities Review 525.

⁴⁰ Nazia Bano, Muhammad Ahsan Iqbal Hashmi and Hafiz Abdul Rehman Saleem, 'The Role of Jirgas in Honor Killing Cases: An Unconstitutional Parallel Justice System?' (2025) 3 Advance Social Science Archive Journal 2373.

diversifying legal power. Such reforms are the only way that the dispute resolution systems will cease to preserve the existing state of inequality and begin to challenge it in an actual sense.