

RESOLUTION OF FEMALE GENDER INEQUALITY IN THE WORKPLACE THROUGH ALTERNATIVE DISPUTE RESOLUTION*

Abstract

Dispute resolution in the workplace is an attempt by employees in the workforce to resolve a problem in the employment relationship. The notion of alternative dispute resolution (ADR) comprises of any form of dispute resolution mechanism that is not the formal process of adjudication in a court of law. Gender equality in the workplace means that employees of all genders have access to same rewards, opportunities and resources at a company which is inclusive of equal pay and benefits for equivalent roles with comparable responsibilities. ADR as a tool in the workplace provides a way of bringing justice to more employees and this is done at a lower cost and faster than the conventional methods. This paper is concerned with looking at the issue of female gender inequality in the workplace such as discrimination, sexual harassment, gender pay gap and the manner in which ADR could be used to resolve these issues. It also considers the eagerness or otherwise of female employees to participate in any such ADR put in place and the likely outcomes of such processes. The degree to which such dispute resolution mechanisms function equitably for women as well as for men in the workplace would also be examined.

Keywords: Dispute Resolution, Gender bias, Discrimination.

Introduction

Gender differences between men and women, socially constructed roles ascribed to men and women in society, are the normative standards that have been used to justify sexual stratification and the unequal treatment of women. This has led to the systemic subordination, domination and exclusion of women by men.¹ The principle of the equal rights of women and men is contained in

* Chioma A.I.Olumide-Ajibola, PhD, Department of Private and Commercial Law, Faculty of Law KolaDaisi University, Ibadan. Email- chioma.olumide-ajibola@koladaisiuniversity.edu.ng

¹ Lorber J. *Paradoxes of Gender*. Yale University Press. (1995) 6.

the Charter of the United Nations.² It is most comprehensively elaborated in the Convention on the Elimination of All Forms of Discrimination against Women,³ which codifies women's rights to non-discrimination on the basis of sex, and equality as self-standing norms in international law which include critical areas, such as political participation and access to equal opportunity in public life, and in the professions. Importantly, the Convention obliges States parties to take all appropriate measures to ensure that women do not experience discrimination in certain areas of private life. Thus, State parties are required to ensure that all contracts and other private instruments which restrict the legal capacity of women "shall be deemed null and void," while they are also obliged to take steps to eliminate discriminatory practices in the family.

Women in the workplace need to be treated in the same manner as their male colleagues. There are however certain discriminatory policies and rules that exist in the workplace. There are also certain circumstances and situations that could occur in the workplace that can lead to dissatisfaction among colleagues. These inequalities and discriminations could be settled within the workplace without any external interference. This is where ADR comes in. The fundamental concern of ADR is seeking and applying peaceful methods of settling disputes and resolving conflict situations by using the least expensive methods. This is normally done in a manner that will bring satisfaction to the parties involved while preserving the existing relationships between them even when the settlement or the agreement has been reached.⁴ It has been observed that numerous organisations are going the way of ADR to resolve disputes and conflicts in the workplace in Nigeria.⁵ It is very essential that the workers should operate in a peaceful and pleasant environment. This will enhance the productivity of the workers as organisations are the building blocks where all economic and production of goods and services takes place. It is therefore essential that the environment be peaceful without conflicts or discriminations. As such certain companies have set up ADR mechanisms but the issues to be considered by this paper are whether

² UN Charter 1945.

³ Adopted 18th Dec 1989, entered into force 3rd Sept 1981. G.A Res 34/180, 34 UN GAOR supp (No 46) UN DOC A/34/46 at 193, (1979) reprinted in 19 ILM 33(1980) (Article 10).

⁴ Natukunda-Togboa, E "The linkage between research and peace policy advocacy, "In Shedrack, G. B. *Introduction to peace and conflict studies in West Africa*, Ibadan: Spectrum Books Limited (2017).

⁵ Oni-Ojo, E. E., Iyiola, O. O. & Osibanjo, A. O, "Managing workplace conflicts in business environment: The role of alternative dispute resolution (ADR)," (2014) 6 (26) *European Journal of Business and Management*, 74-83.

these mechanisms are gender friendly and whether the female workers feel comfortable with the practice and procedures of these ADR mechanisms.

What is Gender Equality in the Workplace?

The right against discrimination is both a legal right and internationally recognised human right, which falls under both civil and political rights and social, cultural, and economic rights. Economic rights are those rights, which provide economic security to the people. This empowers all citizens to make use of his or her civil and political rights. The right against unfair discrimination in the workplace emphasizes economic, social, and cultural development. Women should have the same legal rights at work as their male counterparts. The promotion of rights at work is one of the four pillars of the ILO Decent Work Agenda.⁶ Decent work is a totality of the aspirations of people in their working lives. It involves opportunities for work which yields much and provides a fair income, security in the workplace and social protection for families. It also has to do with better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. These rights could also be infringed while at the workplace.

Employment discrimination is defined in economic terms by the International Labour Organisation (ILO) as a violation of a human right that involves a waste of human talents, with detrimental effects on productivity and economic growth, and generates socioeconomic inequalities that undermine social cohesion and solidarity and act as a brake on the reduction of poverty.⁷ According to ILO,⁸ despite the increasing number of women in jobs globally, there still exists a persistent gap in status, job security, wages and education on gender basis leading to what may be termed “feminization of working poverty.” Gender inequality is a socio-cultural phenomenon that divides people into various categories such as male and female with a very high bias placing one specifically less than the other.⁹ Gender inequality remains an issue within labour markets globally.

⁶ *ILO's Decent Work Agenda* (www.ilo.org). Retrieved 3rd June 2022.

⁷ Article 1(1) International Labour Organisation, Convention concerning Discrimination in Respect of Employment and Occupation (C111), 1958.

⁸ ILO 2017. World Employment Social Outlook: Gender gaps in the labour market Trends and impacts of improving outcomes for women. Retrieved 19th May, 2022 from http://www.ilo.org/wcmsp5/groups/public/---dgreports/--inst/documents/publication/wcms_557245.pdf.

⁹ Sibani C. M, “Gender Inequality and its Challenge to Women Development in Nigeria: The Religious Approach,” <https://www.ajol.info/index.php/ujah/issue/view/16030> Retrieved 4th November 2022.

Gender equality in the workplace means that employees of all genders have access to same rewards, opportunities and resources at a company which is inclusive of equal pay and benefits for equivalent roles with comparable responsibilities. This can be seen in gender pay gaps, human resource recruiting policies, lack of respect for women, almost unachievable targets for women as well as imbalanced career opportunities. The issue of gender inequality and how to overcome it involves an understanding of the factors that could cause it. It also involves a development of certain approaches that could aid in confronting the restrictions.

Existing Laws on Gender Equality in the Workplace

The international legal framework for women's rights can be found in economic, social, and cultural rights.¹⁰ At the international level, there are certain laws that have been enacted that could help curb gender inequality in general and workplace gender inequality specifically. Member states have a legal obligation to respect, protect, and fulfill economic, social and cultural rights and they have the obligation to take "progressive action" towards their fulfillment. Some of the international treaties and conventions that deal with gender equality include but are not limited to the following: Universal Declaration of Human Rights (UDHR),¹¹ Underground Work (Women) Convention,¹² Night Work (Women) Convention (Revised) 1948,¹³ Equal Remuneration Convention,¹⁴ Discrimination (Employment And Occupation) Convention,¹⁵ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁶ Workers with Family Responsibilities Convention,¹⁷ and the Maternity Protection Convention.¹⁸

¹⁰ Economic, social, and cultural rights are socio-economic human rights such as the right to education, right to work and etc.

¹¹ Universal Declaration of Human Rights G.A Res 217, UNGAOR 3rd Session. No 127 at 71 UN Doc A/80 (1948).

¹² 1936 (No. 45), Convention concerning the Employment of Women on Underground Work in Mines of all Kinds (Entry into force: 30 May 1937), adopted 1935, Geneva, 19th ILC session.

¹³ Convention on Night work of Women Employed in Industry (Revised 1948), entry into force 27th Feb. 1951, adopted 1948, San Francisco, 31st ILC Session.

¹⁴ 1951 (No. 100), Equal remuneration convention 1951 (No. 100), (Entry into force: 23 May 1953), adopted 1951, Geneva, 34th ILC Session.

¹⁵ 1958 (No. 111), Discrimination (Employment and occupation) Convention 1951 (No. 100), entry into force 23rd May 1953, adopted 1951, Geneva, 34th ILC session.

¹⁶ The Convention on the Elimination of All Forms of Discrimination Against Women, adopted 1989, entered into force 3rd Sept 1981.

¹⁷ 1981 (No. 156), Workers with Family Responsibilities Convention.

¹⁸ 2000 (No. 183), Convention concerning the revision of the Maternity Protection Convention (C183), revised 1952, entry into force 2002, adoption: Geneva, 88th ILC session.

In Africa at the regional level, there are some laws that have been enacted such as: African Charter on Human and People's Rights,¹⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) adopted by the African Union in 2004 and The African Union Decade for Women in 2010, Solemn Declaration on Gender Equality in Africa (SDGEA),²⁰ The African Union's Strategy on Gender Equality and Women's Empowerment (GEWE)²¹ where emphasis is made on the need for economic empowerment of women for Africa to achieve its goals for inclusive and sustainable development as envisioned in Agenda 2063. The African Union Assembly of Heads of States and Governments when it had its meeting in February 2020 declared the years 2020 to 2023 as the Decade on Financial and Economic Inclusion for African Women. In Nigeria, The legal framework governing women and their employment comprises of two major instruments which are The Constitution of the Federal Republic of Nigeria²² and the Labour Act 2004.²³

Alternative Dispute Resolution (ADR)

The term "Alternative Dispute Resolution" (ADR), is used generally to describe the methods and procedures used in resolving disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases supplementary to such mechanisms. It arose largely because the litigation process was and still is, unduly expensive in the long-run and especially prolonged as a result of judicial technicalities embedded in that method of dispute resolution. It is stated that "ADR differs fundamentally from the adversarial system in that it seeks a mutually satisfactory process and resolution to a dispute" and that because it is faster, more flexible, and less costly than litigation, ADR serves clients and their lawyers; the justice system (through a reduced case load); and provides dispute resolution opportunities to the broader community.²⁴ It is simply a process of initiating alternative methods and procedures of resolving a civil or commercial dispute without resorting to litigation, which can be expensive, cumbersome, and time-consuming. ADR processes and litigation cannot run together, it has to be one process at a

¹⁹ African Charter on Human and People's Rights Section 15, 16, 17, and 19.

²⁰ The Solemn Declaration on Gender Equality in Africa (SDGEA) was adopted by AU Heads of State and Government at their July 2004 Summit.

²¹ African Women's Decade on Financial & Economic Inclusion | African Union Retrieved from au.int.

²² The Constitution of The Federal Republic of Nigeria, 2004 and The Third Amendment 2010.

²³ Labour Act Cap. L1 Laws of the Federation of Nigeria, 2004.

²⁴ Schneider, A.K. "The intersection of therapeutic jurisprudence, preventive law and alternative dispute resolution," (1999) 5 *Psychology, Public Policy, and Law*, 1084–1102., p.1086.

time. Ideally, ADR is usually resorted to before instituting a court action but subject to the circumstances of each case, it can be resorted to before judgment is given in a matter. If litigation is pending and the parties resort to ADR, the terms of the settlement reached by the parties would be brought to court and entered as a consent judgment.

ADR in Nigeria

Alternative Dispute Resolution is regulated by the Arbitration and Conciliation Act (ACA), applicable to the whole federation. The Constitution of the Federal Republic of Nigeria²⁵ also gives constitutional backing to ADR in Section 19, which provides for the settlement of international disputes by Arbitration, Mediation, Conciliation, Negotiation, and Adjudication.

Forms of ADR

ADR comes in many forms, so it is important to consider the details of the grievance and what the parties want from the resolution when deciding which process would best suit them. The following are the main methods of alternative dispute resolution methods available for settling disputes in Nigeria:

- a. **Negotiation** – this is a process of problem-solving in which the parties to a dispute or an imminent conflict voluntarily come together either personally or by their representatives, to discuss their differences and attempt to reach a joint decision or resolution of the conflict, on their own and without the involvement of a third party. Negotiation is different from other types of alternative dispute resolution mechanisms as no third party is involved.²⁶
- b. **Conciliation**- Conciliation involves a neutral third party who can give an opinion or suggestion. It is a system of ADR where a third party known as the conciliator does his best to bring the disputing parties to a voluntary settlement of their dispute.²⁷ The opposing parties collaborate to seek a high-quality solution that meets their mutual needs while preserving their relationship. The collaborative approach to conflict is to manage it by

²⁵ The Constitution of the Federal Republic of Nigeria 1999 (as amended).

²⁶ Oddiri, R. E, "Alternative dispute resolution." The Annual Delegates Conference of the Nigeria Bar Association, Abuja. Retrieved from www.nigerianlawguru.com.

²⁷ Inyang, B. J, *Organizational behaviour: A managerial perspective* (2nd Rev. Ed.). Calabar: Merb Publishers.

maintaining interpersonal relationships so that all parties to the conflict achieve their interests. Conciliation is regulated by the Arbitration and Conciliation Act (ACA).²⁸

- c. **Mediation-** Mediation is a process whereby a neutral and impartial third party called the mediator is invited by the disputing parties to assist in the resolution of the dispute by the self-determined agreement of the disputants. The mediator facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem-solving techniques to enable the parties to reach their own mutual settlement/agreement. A mediator works with both parties to come up with a resolution. The mediator offers advice and solution ideas, but the ultimate decision is up to the parties. Also, the parties are not obliged to accept and concede to the mediator's suggestions.²⁹

It should be noted that in some organisations, some managers and employees are trained in mediation to function as internal problem solvers.³⁰ While internal mediators are likely to provide benefits for peer-to-peer disputes, their ability to effectively resolve more "charged" disputes, such as discipline or termination, is in doubt. Although unable to impose a binding decision on the parties, mediators employ win-win bargaining strategies in an attempt to achieve a mutually agreeable solution.³¹ As such, mediation is often less adversarial than other third-party forums such as arbitration and is frequently a pre arbitration step. Moreover, mediation is being adopted by an increasing number of organisations.

- d. **Arbitration-** This is the most initiated method of ADR where parties to a dispute submit to a third party called an arbitrator or arbitral tribunal for the resolution of their dispute. An arbitrator hears from both parties and makes either a binding or non-binding resolution decision. Both parties must sign an agreement to abide by the arbitrator's decision. The decision of the arbitrator or arbitral panel called an award, is binding on the parties and enforceable by the courts. Arbitration is regulated by the Arbitration and Conciliation Act (ACA).³²

²⁸ Arbitration and Conciliation Act (ACA), Laws of the Federation of Nigeria (LFN) 2004.

²⁹ Oni-Ojo, E. E., Iyiola, O. O. & Osibanjo, A. O., "Managing workplace conflicts in business environment: The role of alternative dispute resolution (ADR)," (2014) 6 (26) *European Journal of Business and Management*, 74-83.

³⁰ Lipsky, D.B., & Avgar, A.C, Commentary:" Research on employment dispute resolution: Toward a new paradigm," (2004) 22 *Conflict Resolution Quarterly* 175-189.

³¹ . Lewicki, R.J., Weiss, S.E., & Lewin, D, "Models of conflict, negotiation and third party intervention: A review and synthesis," (1992) 13 *Journal of Organizational Behavior* 209-252.

³² Arbitration and Conciliation Act (ACA)³² Laws of the Federation of Nigeria (LFN) 2004.

Benefits of ADR

There are certain advantages of ADR such as:

- a. It is much faster than litigation: ADR is less time-consuming in contrast to instituting a court action which can be time-consuming due to such issues as long adjournments, the unwillingness of parties, etc. also getting a court date can be stressful. The easy and quick nature of resolving the issue is less disruptive to the lives of the parties and their families.
- b. It is less formal: The courtroom where litigation is carried out is usually tense as there are a lot of rules and procedures which must be followed. It is less formal which is less intimidating to some people.
- c. The parties to the dispute can determine the mediator or arbitrator or conciliator who will preside over their case, but in the case of disagreement, there are provisions of the law for such appointments to be done either by the court or an agency.
- d. Involvements of people: ADR processes are parties driven. Parties can determine the time, venue, and pace in the ADR process, unlike in litigation where the court is in control and not the parties. The parties have control over their own outcome.
- e. Preservation of the relationship between the parties: Most ADR have a win-win situation on both sides of parties to the dispute, as it preserves the pre-dispute relationship that existed between the parties before the dispute. The focus is on compromise rather than a win-lose situation.
- f. Privacy of the parties: The privacy of the parties is preserved in ADR unlike in litigation where the process must be held in public except under certain conditions.
- g. It promotes friendliness: This is especially so in the commercial area of law, as there might still be a need to continue the business relationship.

Workplace Conflicts and ADR

In the present global business world, workplace conflict has become a significant and major issue. Handling workplace conflicts is therefore very essential in corporations as failure to address and settle these disputes amicably can lead to numerous problems. To settle these conflicts, a lot of corporations have resolved to the use of ADR. If not properly managed, conflict in the workplace can become a complex matter having damaging effects on the organisation's employees' physical, emotional, and mental wellbeing escalating into unmanageable heights, thus harming the mission

and goals of an organization.³³ A psychologically healthy and safe workplace has been defined as one in which organisational support exists for the physical, social, personal and developmental needs of employees.³⁴ Conflict in the workplace can result in damaged relationships, loss of productivity and job satisfaction for the individual.³⁵ This also has consequences for employers and society in general.

Workplace dispute resolution processes differ significantly in structure and design, yet little is known concerning how these differences affect employees.³⁶ ADR comes in various forms (as discussed earlier), so it is important to consider the details of the grievance and what the parties want from the resolution when deciding which process would best suit them. The managers can evaluate the effectiveness of the leading dispute resolution procedures to provide employees with voice and workplace justice and then consider how outcomes may differ. ADR can enhance workplace justice; however, justice can be denied when employers institute mandatory systems and require employees waive their right to pursue claims through the courts. Much of the variation in outcomes between these procedures is attributable to the decision makers who, across these systems, emphasize different factors when evaluating a case. To address the situation of disputes, many organizations are turning to the application of alternative dispute resolution mechanisms in resolving workplace disputes and conflicts in Nigeria.³⁷ A pleasant workplace that guarantees satisfaction of workers' and employers' aspirations is very vital for enhanced productivity and when the interest of either or both of the parties involved in industrial relations is unsatisfied, disputes as well as industrial crisis becomes imminent.³⁸ Dispute or conflict in today's world is a

³³ Caulfield, N, Chang, D, Dollard, M, & Elshaug, C, "A review of occupational stress interventions in Australia," (2004) 11 *International Journal of Stress Management*, 149–166.

³⁴ Kelloway, E.K., & Day, A.L, "Building healthy workplaces: What we know so far," (2005) 37 *Canadian Journal of Behavioural Science*, 223–235.

³⁵ Kidder, D.L "Restorative justice: Not 'rights,' but the right way to heal relationships at work," (2007) 18 *International Journal of Conflict Management*, 4–22.

³⁶ Mahony, D.S., & Klaas, B.S "Comparative dispute resolution in the workplace," (2008) 29 *Journal of Labor Research*, 251–271.

³⁷ Oni-Ojo, E. E, Iyiola, O. O. & Osibanjo, A. O, "Managing workplace conflicts in business environment: The role of alternative dispute resolution (ADR)," (2014) 6 (26) *European Journal of Business and Management*, 74-83.

³⁸ Osabuohien, E.S.C. & Ogunrinola, I. O, "Cause and effects of industrial crises in Nigeria: Some empirical clarification,," (2007) 1 (4) *Nigerian Journal of Labour Law and Industrial Relations*, 75 - 93.

continuous process and inevitable in every organization, and there is need to find out how to work out harmonious or agreeable resolution to it without letting it escalate.³⁹

Types of ADR in existence in the workplace.

Apart from the above-mentioned types that have been stated⁴⁰ there are other forms that could be seen in the workplace such as:

- a. **Facilitation:** an informal process in which a third party (often someone familiar to the disputing parties, such as a manager) attempts to facilitate communication and the development of an interest-based resolution to the dispute.
- b. **Conciliation:** an informal process in which a passive third party is positioned between the disputing parties to create a channel for communication. This is generally done by conveying messages between parties who are unwilling to meet face to face, to identify common interests and to eventually re-establish direct communication.
- c. **Open door:** This occurs where the aggrieved party is allowed to walk up to the other party to air his grievances.
- d. **Ombudsman:** The ombudsman has the flexibility to construct approaches to situations that take into account the nature of the problem, the circumstances in which it occurs, and the underlying needs and interests of the parties involved. At the same time, the ombudsman understands that he or she intervenes not merely to address individual conflicts and problems but also to take account of the corporation so that if systemic problems—patterns of abuse or discriminatory practice—are identified, the ombudsman has the responsibility and the authority to bring these matters to the appropriate level of management and to recommend changes in policy or practice (or personnel) to rectify them. A well-designed and executed ombudsman program can go a long way to providing a meaningful outlet—producing an end or an informed next step in the process—for a woman who believes she may be experiencing discrimination. For the corporation, the benefit is clearly in providing a means to uncover practices that its policies do not condone and to retain employees that add value to its business line.

³⁹ Oni-Ojo, E. E. & Roland-Otaru, C, “Alternative dispute resolution strategies for sustainable development in Africa: Insight from Nigeria,” (2013) 3 (1) *Journal of Management and entrepreneurial Development*, 37-54.

⁴⁰ Mahony, D.S., & Klaas, B.S, “Comparative dispute resolution in the workplace,” (2008) 29 *Journal of Labor Research*, 251–271.

Mediation however is increasingly becoming a more noteworthy aspect of organisational integrated conflict management systems. It is generally considered to be effective in disputes that involve strong emotions and is a popular means of resolving discrimination and harassment complaints. Mediation may also help resolve the relational and emotional aspects of intractable conflict found in psychological injury claims.⁴¹ Mediation has also been found to produce better organisational outcomes than either no intervention or one involving judgement, such as arbitration, as it is often less expensive and more satisfactory to the parties involved.⁴²

Gender Inequality and ADR

Some women may generally want to weigh their options before proceeding to ADR. They would prefer to have someone they could talk with who seems to be very knowledgeable about the organisation and about the likely outcome of the ADR before they venture in. The person should be someone that keeps things confidential and is neutral. This is why the ombudsman model is very attractive. It provides a means to satisfy these concerns, not only because individuals may benefit from the assistance that an ombudsman office can provide, but because institutional change, where warranted, is more likely to result. In instances where there is discrimination, the ombudsman functions in multiple ways. He could function as a counselor by listening and identifying options that deal with, for instance, a denial of promotion. He could also function as a negotiator, to mentor and coach and guide a person through to an acceptable result. The ombudsman also functions as a mediator, to help create integrative solutions among the parties. He acts as a “risk manager,” an essential link in the corporation, to bring attention to issues that might present serious liabilities or, less grave, might warrant policy or procedural changes to improve conditions generally. These activities can be taken without any formal filing of a grievance, a step, as noted above, many women managers are loath to take.

Companies are making it increasingly difficult to litigate disputes in the workplace in ways such as making it a condition of employment for employees to first mediate and/or arbitrate their

⁴¹ Retzinger, S., & Scheff, T, “Emotion, alienation, and narratives: Resolving intractable conflict,” (2000) 18 *Mediation Quarterly* 71–85.

⁴² *Alternative dispute resolution*. (2019) Retrieved from www.courts.ca.gov/307 Cornell Law School, (2019).

grievances before proceeding to court. In view of the negatives associated with litigation, and the reluctance of women to go to court, this limitation can also be seen as a potential benefit.⁴³

In a sex discrimination situation, women are most likely going to choose mediation. This is because the woman may want to escape a prolonged investigatory process that occurs in the court system. She may also want a quick and immediate relief. She might want to preserve her privacy and avoid the stress of formal, adversarial proceedings; confront the situation, and possibly the person or persons involved, in a way that provides both an opportunity to relate directly what she feels and why so as to educate rather than to accuse and to preserve future working relationships. Discrimination, much like harassment, is often clouded by different perceptions of what took place and of what was expected or intended. Ordinarily, one would anticipate that parties holding different or even clashing opinions of a pattern, an occurrence, a problem, a conflict, or a complaint, would draw different conclusions as to how to deal with it and as such an agreement would seem unlikely. Discriminatory situations often fall into this category. Different perceptions may be genuine; in those situations, mediation affords an opportunity for the alleged discriminator to put his intentions aside and see what the woman who alleges that discrimination occurred and to see what she has experienced. Often, however, the question is not a difference in perception, but denial or intentional misrepresentation of what occurred. In both cases, though, mediation affords each party an opportunity to see the other's perspective without having to agree with it, and presumably, to reach an agreement that satisfies future needs and interests without having to share the same view of what took or did not take place. Sex discrimination is also often about power. Thus, a process that allows a woman to enter as an equal, that encourages dealing with discrimination and violations of trust, is essential. Mediation allows for respectful communication, and because solutions and remedies are voluntarily and mutually arrived at, compliance rests on and makes responsible and accountable, both parties. Thus, mediation can be empowering. Unlike formal systems, the way a problem is defined, interpreted, or "framed" in mediation, rests with the parties; so does control over the process and crafting remedies or solutions.⁴⁴

⁴³ Abelson R, "A Push from the Top Shatters a Glass Ceiling," *The New York Times* A1, (Aug. 22, 1999).

⁴⁴ Sternlight J.R, "Lawyers' Representation of Clients in Mediation," (1999) 14 (2) *Ohio State Journal on Dispute Resolution*, pp. 269-366. See, especially in this regard, pages 332-345.

The critical thing, in making mediation an attractive option, is the context in which it occurs. Commitment by the corporation to a workplace free from discrimination is essential which requires both policies and practices that make not only the managers aware but all employees as to what may constitute discrimination; that provide for services for employees (counseling, education, training); that encourage employees to bring up concerns with respect to advancement opportunities, among other things, and that include appropriate sanctions for failure to comply with core corporate values in this regard. Mediation can only be effective in a corporation if the workplace in which the dispute arises values freedom from discrimination as a serious goal.

Demerits of Resolving Female Gender Inequality in the Workplace through ADR

Many women reject bringing lawsuits that allege discrimination, even if they believe they have grounds, because they question whether the result is worth it.⁴⁵ They also are hesitant in speaking up because they are unsure of the outcome of sharing such information if indeed they are being discriminated against or they do not like the options made available for challenging decisions that are present in their firms or the potential negative impact. Promotions are not assured by any means and as such people may be bypassed for a variety of reasons. Therefore, looking for jobs in other organisations may seem the least burdensome way out. Mediation does not exist solely to offer quicker, easier resolutions and to relieve the burden on individuals, institutions, agencies, and courts, but also with respect to potential discrimination cases, to help individuals achieve better and more lasting resolutions of value to themselves, and to assist corporations in meeting and protecting their interests as well.

- a. Power Imbalance:** Successful mediation assumes that the parties to the mediation begin from equal positions of power. Power comes in a number of forms: economic, intellectual, physical, emotional, and procedural.⁴⁶ But many women are trapped in relationships and employments that are characterised by power imbalances. Mediating in the face of these power imbalances undermines the premise that mediation gives the parties greater control and self-determination than traditional litigation.

⁴⁵ Abelson R, "A Push from the Top Shatters a Glass Ceiling," (1999) *The New York Times* A1, 33.

⁴⁶ Irvine M, "Mediation: Is It Appropriate for Sexual Harassment Grievances?" (1993) 9 *Omo St.J.On Dis.Resol* 37.

- b. Marginalisation of Women's Issues:** Negotiation is often referred to as "bargaining in the shadow of the law." Using mediation, in many cases, increases the risk that legal issues involving women will be pushed further into those shadows. Using ADR can relegate women's legal issues in various ways. First and foremost, routinely using mediation in certain types of cases involving women increases the possibility that the issues involved will be characterised as "nonlegal" or unworthy of the attention of the adversarial system. Requiring mediation of such cases pushes them back into the shadows instead of sending the strong public messages that issues such as sexual discrimination or harassment will be punished as any other crime and that such complainants will be protected by the courts.⁴⁷
- c. Precedents in Areas of Law:** Channeling cases involving women's issues through ADR systems prevents advocates from developing strong precedents in areas of the law involving women. Without adjudication of cases in the adversarial system, advocates have no mechanism for developing the law and no cases to refer back to when trying to stretch the boundaries of the law. Some cases are better suited for a mechanism that involves fact finding and decision making.⁴⁸ This is particularly true where in the long run; there is a need to draw bright lines delineating acceptable behavior in the workplace. Sexual harassment is an example of such.
- d. Compromise:** Mediation encourages, and in a sense, demands, that the parties compromise in order to develop a solution.⁴⁹ But in some cases, and about some issues, there should be no compromise. Mediation of some categories of cases deprives women of the clear societal sanction that should accompany certain types of behavior. In mediation, a party is required to concede points in the interest of reaching an agreement. In sexual harassment cases, however, compromise means accepting part of the blame for the abuser's behavior. This is a blame that the victim does not deserve and guilt that she may be actively working to alleviate through counseling in order to cope with the after effects of the abusive treatment.⁵⁰ Moreover, it is the blame that the perpetrator has been trying to convince the

⁴⁷ Astor, "Feminist Issues in ADR" (1991) 65 *Law Inst J* 69 at 70.

⁴⁸ Scott H, "Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation, (1995) 8 *Geo. J. Legal Ethics* 553, 574; see also Irvine M, "Mediation: Is It Appropriate for Sexual Harassment Grievances?", (1993) 9 *Omo ST. J. on Dis. Resol.* 37.

⁴⁹ Irvine M (Ibid).

⁵⁰ Edwards H.T, "Alternative Dispute Resolution: Panacea or Anathema?" (1999) *Harv. L. Rev.* 668, 680 cited in Andre R. Jibmgno, "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?" (1999) 14 *Omo ST. J. o\ DinsP. R.SOL.* 855, 873.

victim was hers all along. Pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor.

- e. **Insensitivity to Gender Bias issues:** In various other forms of disputes, however, mediation can also work to the disadvantage of women if the players in the process are not sensitive to issues of gender bias. Players include the Mediators who have the greatest impact on the process of mediation. The mediator helps the parties define the issues, generate potential solutions, validate feelings, and, in some cases, confront reality.⁵¹ The relative comfort levels of the parties and their sense that they are bargaining within an equal power structure hinges on the mediator's ability to create such a feeling in the minds of the parties and to remedy power inequities between the parties. The sensitivity to the treatment of women's issues in mediation depends largely on the sensitivity of the mediator to the concerns of women. Just as minority litigants bring different perspectives, values, and cultural histories to the mediation table, women have issues and insights that are unique to their gender that mediators should understand and appreciate.⁵² The potential for gender bias exists in both male and female mediators; all that is needed is training to perceive and address how their notions about women impact their ability to conduct fair mediations. Although the mediator strives to create a neutral environment within which to mediate, the mediator's own perspectives and biases will necessarily color how he or she perceives the positions of the parties. A mediator who embraces traditional gender roles might not see why the failure to hire available female contractors or construction workers is a form of gender-based employment discrimination, which could color his or her handling of the mediation.⁵³ All mediators should be thoroughly trained on gender and cultural issues to ensure that biases are not interfering with the mediation process.
- f. **Gender Differences and Roles:** These appear clearly in the processes used to resolve disputes in the workplace, and some of these differences may be related to gender roles.

⁵¹ Vincent M, "Mandatory Mediation of Custody Disputes: Criticism, Legislation and Support, (1995) 20 VT. L. REV 225,263.

⁵². Dominguez J.R, "The Role of Latino Culture in Mediation of Family Disputes," (1999) 1 J. LEGAL ADVOC. & PRAC 154.

⁵³ Leigh S, "Alternative Dispute Resolution and the Potential for Gender Bias, Part of the Dispute Resolution and Arbitration Commons Digital Commons" (2000) 39 *Judges' Journal* 21. Retrieved from (<http://heinonline.org>).

Women with workplace disputes would be less likely to pursue them due to gender role socialisation, the lack of provision for female-typed issues in formal procedures.

- g. Necessary Documentation:** Women encounter difficulty documenting discrimination and harassment situations which are needed in the ADR. This could lead to them being deterred and getting disillusioned and thereby stopping them from pursuing disputes through to resolution. They would rather prefer to live with their conflicts or resolve them informally.⁵⁴

Conclusion

Alternative dispute resolution, with its promise of quicker, cheaper, and more empowering interactions with the legal system, is a very good option in the workplace. There are instances when some women will be able to mediate effectively and some men involved in mediation will be sensitive to the issues discussed in this article, however it should be noted that there is a possibility for gender bias even in the ADR. The organisations have the duty to not only ensure that proper dispute resolution mechanisms are in place but that women are treated fairly and that these machineries meet their unique needs. If not it will lead to alienation by the women from alternative forms of dispute resolution and ultimately, from the legal system itself.

Recommendations

Organisations should ensure that in the contracts for employment, there should be a compulsory inclusion of ADR. Organisations should be made to adopt the various mechanisms of ADR to resolve disputes between management and workers of the organisations as well as between workers. Female workers should be encouraged to try the internal ADR option before thinking of taking the matter out of the workplace. The risks which face women in dispute resolution processes are direct reflections of the factors by which women's subordination is maintained in society generally. The real long term goal must be to attack the sources of women's vulnerability directly, by limiting violence against women, especially within the family and by providing real opportunities for economic independence and full participation in public life. Improving access to justice for women is one step towards creating full, true equality for women.

⁵⁴ Gwartney-Gibbs, Patricia A. and Lach, Denise H, "Workplace Dispute Resolution and Gender Inequality," (1992) 10 (1) *Sociological Practice* Article 9. Available at :<http://digitalcommons.wayne.edu/socprac/vol10/iss1/9>.