

# Weighing the Gender Hypothesis on Mediators: Insiders' View from District Legal Aid Offices in Bangladesh

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## 1. Introduction

Alternative Dispute Resolution (ADR), especially mediation, is often considered an effective tool to enhance access to justice for women.<sup>1</sup> Legal aid and public interest litigation were the two other tools used to promote access to justice and were initiated much earlier than ADR. It is, therefore, claimed that ADR denotes the advent of the third wave of access to justice.<sup>2</sup> Although the practice of an indigenous form of out-of-court ADR has existed in this sub-continent from time immemorial, the practice of court-connected ADR through mediation is a new addition to the 21<sup>st</sup> Century<sup>3</sup>. The third wave of access to justice relating to court-connected mediation started in Bangladesh with its *mandatory* application in both family and civil courts.<sup>4</sup> Gradually, a *mandatory* practice of ADR was introduced in various other laws of Bangladesh, for instance, the *Labour Act, 2006*, the *Money Loan Courts (Amendment) Act, 2010*, *Income Tax Ordinance, 1984 (through the Finance Act, 2011)*, *Value Added Tax Act, 1991*, *Arbitration Act, 2001*, and the *Overseas Employment and Migrants Act, 2013* etc. All these laws have provisions for resolving through ADR, especially mediation, after the filing of a case but before the initiation of the trial process<sup>5</sup>.

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<sup>1</sup> Jamila A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing 2012); See also *Mediation to Enhance Gender Justice in Bangladesh: Navigating Wisdom in Asia and the Pacific* (London College of Legal Studies 2018).

<sup>2</sup> Mauro Cappelletti,; Bryant and Garth (eds), *Access to Justice, Vol I: A World Survey (Book I & II)* (1st edn, Giuffrè Editore/ Sijthoff/ Noordhoff 1978) 21-54; see also Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56(1) *Modern Law Review* 282; See also Jamila A. Chowdhury, 'Three Waves of Access to Justice in Bangladesh: Call for a System Approach to Success' (2012) 26(1) *The Dhaka University Studies Part F* 73-96.

<sup>3</sup> Sheikh G. Mahbub, *Alternative Dispute Resolution through Civil Courts in Bangladesh*, (1st edn, Bangladesh International Arbitration Center 2019) 208.

<sup>4</sup> Jamila A. Chowdhury, *ADR Theories and Practices: A Glimpse of Access to Justice and ADR in Bangladesh* (3<sup>rd</sup> edn, London College of Legal Studies 2020).

<sup>5</sup> *ibid.*

Against the backdrop of a huge backlog of cases in the formal courts, mediation was introduced to promote our constitutionally guaranteed rights to a *speedy and fair trial*<sup>6</sup> and a right to be treated equally according to law.<sup>7</sup> However, the inception of ADR, especially mediation, after the filing of cases may systematically exclude those women from accessing low-cost, accelerated justice who are financially incapable of filing cases in the formal courts.<sup>8</sup> Thus, the *Legal Aid Services Act, 2000* was introduced in Bangladesh to ensure a pre-filing mediation option for the poor, vulnerable, and other critically disadvantaged people.<sup>9</sup> According to rule 3(4.a) of the *Legal Aid (Legal Counselling and Alternative Dispute Resolution) Rule 2015*, a District Legal Aid Officer (DLAO) evaluates the suitability of a dispute for resolution through mediation.

A DLAO may advise parties to apply for legal aid for cases not suitable for mediation. According to Section 2 of the *Legal Aid Services Act, 2000*, legal aid includes fees for lawyers, fees for mediators, and court fees and other associated costs of filing cases in the formal courts.<sup>10</sup> If found suitable, the DLAO sends notice to parties, invites them to come to his/her office on a specific date and time and makes an initial attempt to resolve the dispute through mediation. At this initial stage, s/he will act as a mediator (hereinafter referred to as DLAO-mediator). However, once parties attempt a mediation session, the dichotomy between the modes of mediation (i.e. facilitative mediation v evaluative mediation) was a matter of controversy in the literature.<sup>11</sup>

Facilitative mediators are supposed to perform a neutral and impartial role only by facilitating the mediation process and not suggesting or evaluating the content or outcome of a mediation.<sup>12</sup> Evaluative mediators, on the other hand, bring their evaluation into the mediation process.<sup>13</sup> The facilitative versus evaluative mediation controversy was later mitigated by Chowdhury (2011) under the cultural context<sup>14</sup>.

<sup>6</sup> The Constitution of the People's Republic of Bangladesh, art. 35(3).

<sup>7</sup> *ibid*, art. 27 and 31.

<sup>8</sup> Jamila A Chowdhury, 'Legal Aid and Women's Access to Justice in Bangladesh: A Drizzling in the Desert' (2012) 1(3) *International Research Journal of Social Sciences* 8-14.

<sup>9</sup> Bisheswar Singha, 'Legal Aid Empowers the Critically Disadvantage People in Bangladesh' (*NLASO*, 2018)

<<http://nlaso.gov.bd/site/publications/387c5119-24bf-4d3e-a972-5d174e7cd65a/Legal-Aid-mpowers-the-Critically-Disadvantaged-People-of-bd>> accessed 10 September 2021.

<sup>10</sup> *ibid*.

<sup>11</sup> Kenneth M. Roberts, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007) 39(1) *Loyola University Chicago Law Journal* 187-213.

<sup>12</sup> Ellen A. Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82(1) *Marquette Law Review* 155-170.

<sup>13</sup> *ibid*.

<sup>14</sup> Jamila A Chowdhury, 'Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?' (Rare Collection, Unpublished PhD Thesis, University of Sydney 2011).

As observed by her, while facilitative mediation is more suitable in the western cultural context due to their cultural orientation, people from Asia, Africa, or Latin America may prefer to attend evaluative mediation.<sup>15</sup> Hence, according to the cultural theory of mediation, parties attending mediation from high power distance<sup>16</sup> countries, including Bangladesh, prefers evaluative mediation.<sup>17</sup> Such preference gets even more robust when any person holding formal authority<sup>18</sup> (e.g. judge-mediators, DLAO-mediators) conducts mediation. Therefore, evaluative mediation is generally considered an ideal mode of mediation in Bangladesh, where a mediator puts his/her efforts to control power play at the mediation table and empower weaker parties by promoting principled negotiation techniques between parties.<sup>19</sup> Although no detailed mediation process was suggested in the *Legal Aid (Legal Counselling and Alternative Dispute Resolution) Rules 2015*, a closer look at rules 9(2) and 9(3) indicate that DLAOs may bring their evaluation during a legal aid mediation. However, parties are free to accept or reject the suggestions made by a DLAO-mediator during the mediation session/s.<sup>20</sup>

Despite a practice of evaluative mediation, it is sometimes argued that even mediators are not free from the '*cultural stereotypes*' based on '*gender*' embedded in dominant social discourses. For instance, a recent study on several prospective judges and lawyers in Bangladesh revealed that even highly educated lawyers and judges struggle against their '*gender roles*' while performing dual responsibilities at home and office.<sup>21</sup> Thus, this paper examines whether the stereotyped gender roles that affect the female judges to balance work and professional life also create a similar gender role expectation during in-court mediation. If so, it opens up a probability that

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<sup>15</sup> Jamila A Chowdhury, 'Paradox of 'Neutrality' in Mediation: An Analysis of High Power-Distance versus Low Power Distance Cultural Dichotomy' (2015) 15(1-2) *Bangladesh Journal of Law* 1-20; See also, *ibid*.

<sup>16</sup> Disputants in high-power-distance cultures place more reliance on high-authoritative third party intervention in resolving their disputes, than on their own negotiation capabilities. See John Adamopoulos and Yoshihisa Kashima, *Social Psychology and Cultural Context* (Sage 1999).

<sup>17</sup> Chowdhury (n 1).

<sup>18</sup> Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often attorneys who have legal expertise in the area of the dispute. See Katie Shonk, 'Types of Mediation: Choose the Type Best Suited to Your Conflict' (*Daily Blog: Harvard Law School*, 9 August 2021) <<https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/>> accessed 12 September 2021.

<sup>19</sup> Chowdhury (n 4) 86.

<sup>20</sup> As stated in rule 9(2), a DLAO may not insist parties to take his suggestions; i.e. unlike facilitative mediators a DLAO may not limit his role to mere facilitation. Rule 9(3) also extended the *modus operandi* beyond neutrality and extended to ethics, and fair evaluation.

<sup>21</sup> Jamila A Chowdhury and Ifat M. Eusuf, 'Women's Empowerment in the Justice Delivery System of Bangladesh: Social Milieus and Women's Sluggish Progression in Bar and Bench' (2018) 51(3) *Kanagawa Law Review* 57-94.

the gender of judge-mediators may impact the outcome of court-connected mediation attained through evaluative mediation. A similar inference may even be extended to the court-connected (in-court) mediations conducted by DLAO-mediators and trial judges.

However, due to limited accessibility under the COVID-19 pandemic, this paper concentrates only on DLAO-mediators who serve the more vulnerable quarters of the society. Unlike many other dominantly cited contemporary literature discussing the impact of gender on mediation, the focus of this paper is not the gender of parties attending mediation – rather the gender of mediators conducting mediation. In this paper, insiders' view indicates the perceptions of DLAO-mediators currently acting as DLAOs or were assigned as DLAOs in their early careers. Nonetheless, all of them have regular interaction with DLAOs in referring cases to legal aid.

Thus, this paper examines whether female DLAO-mediators are equally competent, compared to their male counterparts, to control this gendered power disparity despite the gendered role expectation attached to their identity. Furthermore, due to close similarity, lessons from this study would be equally applicable to other female mediators conducting pre-trial mediation after filing cases in different trial courts (e.g. family courts, civil courts). Hence, the following section starts with a discussion on the meaning of mediation in the context of dispute resolution. It further discusses the meaning of mediated outcome in the high-context<sup>22</sup> Eastern culture where parties usually prefer evaluative mediation, the theory of gender and how it may affect the evaluative mediation depending on the gender of a mediator (i.e. male mediator versus female mediator). Finally, the article contains an empirical analysis of different tiers' judge-mediators' perceptions, including DLAO-mediators of whether gender differences between male and female mediators may significantly affect the outcome of court-connected mediation at district legal aid offices in Bangladesh.

## **2. Meaning of Mediation *vis-à-vis* Mediated Outcome: The Theoretical Underpinning**

The term mediation belongs to the Latin root "*Mediare*", which means to "halve". In Chinese, it refers to the process of stepping between two parties.<sup>23</sup> However, in

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<sup>22</sup> In high-context (Eastern) cultures such as Japan, Korea, China or African America, people may not express all their feelings and emotions through words, and inference, gesture, or even silence may have a specific cultural meaning which warrants a culturally specific response. See, Lary A. Samovar, Richard E Porter and Edwin R McDaniel, *Intercultural Communication: A Reader* (13<sup>th</sup> ed, Wadsworth 2012).

<sup>23</sup> Jamila A. Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh* (n 1).

contemporary meaning, mediation has been alleviated from an adversarial sense to a process where the output is halved between the parties. Instead, it is defined as a principled approach that endeavours to reach an agreement by identifying the disputed issues, developing multiple options, and considering parties interests under different alternatives.<sup>24</sup>

As mentioned earlier, depending on the role of the mediator, mediation can be broadly defined as facilitative mediation and evaluative mediation. The '*facilitative*' mediators *merely* facilitate the mediation process by only controlling the process. Whereas under '*evaluative*' mediation, the mediator provides his/her evaluation on the content of the dispute and lets parties decide on their mediated outcome.<sup>25</sup> Though '*therapeutic*' mediation is another particular type of mediation applied to bring behavioural changes, especially in the case of frequent and prolonged violent relationship disputes between intimate partners, the process of such mediation requires therapy. Therefore, it is markedly different from the dialectic approach used under the '*facilitative*' and '*evaluative*' forms of mediation.<sup>26</sup> Due to the substantially different techniques used in '*therapeutic*' mediation compared to the other two types, it is kept outside the purview of the discussion made in this paper.

Despite the assumption that mediators primarily follow evaluative mediation in Bangladesh, a significant issue remains for further consideration relating to the quality and fairness of the '*mediated outcomes*'. The outcomes of mediation may be fair when it is in the form of a consensual agreement in which both parties participate equally without fear or control from the other party. Moreover, no party takes a rigid approach to their rights, emphasizing and sustaining the '*shared interests*' of all the parties concerned.<sup>27</sup> Without assuring the interests of all the parties concerned, a mediated resolution may not provide a fair outcome.<sup>28</sup>

As analyzed by Fisher:

Principled negotiation has four elements; firstly, mutual trust has to be established between the parties. Secondly, the negotiator has to create or maintain a positive relationship with the parties. Thirdly, negotiators have to discover shared interests (goals or objectives) that will work as common ground between the parties. [Lastly] the negotiator must identify the zone of the possible agreement between the parties.<sup>29</sup>

The above are the factors that parties may consider to perceive whether the mediated outcome was fair to them. Some scholars have termed mediated outcome as "*a contract as the exchange of mutual opinion for a common consideration*" in a

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<sup>24</sup> Sriram Panchu, *Mediation Practice and Law: The Path to Successful Dispute Resolution* (1st edn, Lexis Nexis 2011) 5-6.

<sup>25</sup> Mahbub (n 3) 174.

<sup>26</sup> Chowdhury (n 4) 85.

<sup>27</sup> David L. Spencer, *Essential Dispute Resolution* (2nd edn, Cavendish Publishing 2005) 45-83.

<sup>28</sup> Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement without Giving In* (2<sup>nd</sup> edn, Random House 1991) 4-8.

<sup>29</sup> *ibid.*

mediation agreement.<sup>30</sup> Nonetheless, the outcome of mediation can be influenced by various factors, including gender stereotypes, power disparity, violence, silence, fear and control that may limit parties' capacity to negotiate effectively during mediation.<sup>31</sup>

As less empowered parties, especially women, may remain silent out of fear or may sometimes be controlled due to their usual gender role identity in the society, it is assumed that an evaluative mediator may neutralize these adverse effects of 'gender' during mediation.<sup>32</sup> A voluminous literature employs this gender theory to analyze this primary view of mediation, i.e. how gender role and cultural expectations may affect the effective negotiation practice between parties during mediation. However, less explored is the notion of whether this gender theory is cross-cutting with the roles of mediators in mediation. In other words, the gender theory that applies to 1<sup>st</sup> party and 2<sup>nd</sup> party is equally applicable to the 3<sup>rd</sup> party mediators, while compared side by side in shaping a mediated outcome. After a brief theoretical discussion on the gender theory of negotiation and its implication for mediation, the paper elaborates the result obtained through empirical data collected from expert interviews in this regard.

### **3. Mediators' Gender and Mediation: Gender Stereotyping and Cultural Expectations at Cross-roads**

Theoretically, the context of a dispute, the gender of the parties, and the existence of power disparity might affect the quality and outcome of the mediation. Thus, to better understand the present concept, the notions of 'sex' and 'gender' need to be elaborated. The term 'sex' refers to a person's biological status. On the other hand, 'gender' is a term that society attributes to the 'sex' depending on the cultural expectation of a particular society.<sup>33</sup>

Behaviour that is compatible with cultural expectations is referred to as gender-normative; behaviours that are viewed as incompatible with these expectations constitute gender non-conformity.<sup>34</sup>

In our society, males are presumed to be more powerful than their female counterparts. This trait prevalent in the society is known as patriarchy, which

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<sup>30</sup> David Spencer and Michael Brogan, *Mediation Law and Practice* (1<sup>st</sup> edn, Cambridge University Press 2006) 348.

<sup>31</sup> Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh* (n 1).

<sup>32</sup> *ibid.*

<sup>33</sup> Penelope Eckert and Shally McConnell-Ginet, *Language and Gender* (2<sup>nd</sup> edn, Cambridge University Press 2003) 2.

<sup>34</sup> *ibid.*

recognizes male dominance over females<sup>35</sup> regarding family matters and other important societal issues.<sup>36</sup> Alternatively, in matriarchal societies, females are presumed to be dominant over males. This type of gender role of women in patriarchal and matriarchal societies is attributable to '*gender stereotypes*'. Generally, '*stereotypes*' are the beliefs regarding people on the sole basis of their membership in any particular social category.<sup>37</sup> Consequently, it constrains the ability to view and perceive matters from a broader viewpoint.

Society dominantly creates the stereotypical division between genders. Children are taught to maintain specific socially approved dominant rules depending on their sex, i.e., male or female. Through these dominant rules and socialization processes, males and females gradually adopt such '*gender stereotypes*' practices into their behaviours.<sup>38</sup> For example, males are taught to be confident, aggressive, assertive, dominant and controlling, while females are taught to be emotional, submissive, patient, and passive. All these behavioural patterns create disparities among males and females. In every corner of society, the roots of this evil dogma are being implanted. As a result, the same gender role may influence their behaviour when defending their rights in mediation.

Due to cultural stereotypes, women, in many cases, feel shame to share their personal matters and keep silent instead. Therefore, power remains in social discourses. As explained by Bagshaw:

Stories and "truths" are inevitably framed by dominant cultural discourses that specify what is normal and what can or cannot be talked about, by whom and in what contexts. This notion of power suggests that power remains in a social network and so cannot be possessed by an individual<sup>39</sup>.

The power disparity between parties may exist even when violence or oppression is not present in the relationship. It may happen due to widely prevalent gender role stereotypes in society and consequent lower reward expectations by female parties attending mediation. Social discourses may portray women as soft, submissive, and more compromising. Further,

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<sup>35</sup> Dale Bagshaw, 'The Three M's- Mediation, Postmodernism, and the New Millennium' (2007) 18(3) *Conflict Resolution Quarterly* 205.

<sup>36</sup> Abeda Sultana, 'Patriarchy and Women's Subordination: A Theoretical Analysis' (2011) 4(1) *The Arts Faculty Journal* 3.

<sup>37</sup> Dina L. Anselmi and Anne L. Law, *Questions of Gender: Perspectives and Paradoxes* (1<sup>st</sup> edn, McGraw-Hill 1997) 195; see also Margaret L. Andersen & Howard F. Taylor, *Sociology: Understanding a Diverse Society* (4<sup>th</sup> edn, Thomson and Wadsworth 2008) 275.

<sup>38</sup> Pat Boland, *Gender Stereotypes: The Links to Violence* (1<sup>st</sup> edn, WEEA Publishing Center 1995) 2.

<sup>39</sup> Foucault cited in Jamila A. Chowdhury, *Gender Power and Mediation*, (n 1) 75.

[A]t a decided disadvantage in this patriarchal society... [where women have] little access to material resources, women lack autonomy and decision-making power and are therefore disempowered within the family, community, and society at large.<sup>40</sup>

Despite this general scenario, it is pertinent to mention that power is contextual. Therefore, it is not expected that the same person can exert the same level of power with every other person in all different contexts.<sup>41</sup> Earlier studies to examine the gender role in negotiation also end up with contrasting gender theories.

The *gender role socialization theory* assumes a compromising role of women with low reward expectations, as they are socialized by their family and society<sup>42</sup>. According to *gender plus power theory*, different power factors such as income, education, employment etc., work on top to define his/her role in mediation. Therefore, it is expected that between same-gender persons, one having a better income, education, and employment may overpower the other party during mediation.<sup>43</sup> The *expectation states theory*, however, impose more weight on gender stereotypes. According to this theory, in most cases, gender may overpower the impact of other moderating variables such as income, education or social status of a counterpart in negotiation. On the other hand, the *situational power theory* defines gender power as contextual to the situation under which a person is making his/her negotiation during mediation. In line with Watson's gender theories, in her writings, Bagshaw viewed the issue of power disparities as primary consideration within the culture, context, and structures in which mediation takes place. In such a situation, the mediator must try to balance power disparity by providing information, encouragement, and reminding the parties about their legal entitlements through evaluative mediation.<sup>44</sup>

However, when a female mediator plays the role of an evaluative mediator, arguably, gender theory suggests that they have to take a '*gender non-confirmatory*' position to bring more evaluation to the negotiation table. Unfortunately, the

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<sup>40</sup> The Asia Foundation. *Access to Justice: Best Practices under the Democracy Partnership*, (The Asia Foundation 2000).

<sup>41</sup> Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16(1) *Australian Dispute Resolution Journal* 32.

<sup>42</sup> Penelope Bryan, 'Killing us softly: Divorce Mediation and the Politics of Power' (1992) 40(2) *Buffalo Law Review* 441.

<sup>43</sup> Carol Watson, 'Gender Versus Power as a Predictor of Negotiation Behaviour and Outcomes' (1994) 10 (2) *Negotiation Journal* 117.

<sup>44</sup> Alison Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215.

available literature on this issue is still scarce.<sup>45</sup> Almas explained how women mediators face gender bias and stereotypes while conducting mediation.<sup>46</sup> In another study, Petkeviciute and Streimikiene revealed that in more than 70 per cent of cases, clients show less respect for female mediators than their male counterparts.<sup>47</sup> Unlike Petkeviciute and Streimikiene, Stuhlmacher and Morrisett identified no significant difference between male and female mediators capacity to attain initial settlement through mediation. However, female mediators showed a better capacity to successfully mediate emotionally thorny issues, such as divorce or sexual harassment.<sup>48</sup>

Wall and Dehurst also asserted the insensitivity of mediators' gender on their ability to conduct successful mediation. The authors found a strong correlation between the number of formulations used by mediators and the rate of successful mediation.<sup>49</sup> Although no significant difference was ascertained in the number of male and female mediators in the case of the rate of a successful mediation, there was a qualitative difference in formulations used by male and female mediators. While formulations from female mediators were more precise, formulations used by male mediators were more authoritative in nature. Hence, as long as the rate of a successful mediation is concerned, there may be a balance between these two factors and, therefore, no difference depending on the gender of a mediator.

However, contemporary literature from Bangladesh or any other neighbouring country does not shed light on which of these two contrary views may prevail in the cultural context of Bangladesh. Thus, this paper explores the issue further based on the mediator's opinions at various district legal aid offices in Bangladesh.

#### **4. Quantitative Approach to the Gender Ratio of Beneficiaries under Legal Aid Mediation: A Popular View on Gender Parity**

To further highlight the impact of mediators' gender on the mediated outcome, if any, both published and empirical data were incorporated in this paper. In addition,

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<sup>45</sup> Alice F. Stuhlmacher and Melissa G. Morrisett, 'Men and Women as Mediators: Disputant Perceptions' (2008) 19(3) *International Journal of Conflict Management* 249; See also Katalien Bollen, Martin Euwema, and Lourdes Munduate, 'Promoting Effective Workplace Mediation' in Katalien Bollen, Martin Euwema, and Lourdes Munduate, (eds), *Advancing Workplace Mediation through Integration of Theory and Practice* (Springer International 2016); See also Katalien Bollen, & Martin Euwema, 'Workplace Mediation: An Underdeveloped Research Area' (2013) 29(3) *Negotiation Journal* 329.

<sup>46</sup> Roselynn Almas, *Promoting Conflict Management Competencies within Informal Structures and Informal Networks Doctoral Dissertation* (Pepperdine University 2018).

<sup>47</sup> Nijole Petkeviciute and Dalia Streimikiene, 'Gender and Sustainable Negotiation. Economics & Sociology' (2017) 10(2) *Journal of Scientific Papers Economy and Sociology* 279.

<sup>48</sup> Taylor (n 44).

<sup>49</sup> Victor D. Wall and Marcia L. Dewhurst, 'Mediator Gender: Communication Differences in Resolved and Unresolved Mediations' (1991) 9(1) *Mediation Quarterly* 63.

quantitative data on legal aid applications over the years, as indicated in Table 1, demonstrates that mediation through district legal aid offices has gained momentum, which will be apparent from the statistics shown in the Table below:

**Table 1: Mediation under Legal Advice and Alternative Dispute Resolution Regulation, 2015: A Six years' Evaluation (2015 to 2020)<sup>50</sup>**

Year	Pre-Cases	Post Cases	Total Disposal through mediation (Pre-Cases)	Total Disposal through mediation (Post-Cases)	Total Number of Beneficiaries	
					Pre-Cases	Post-Cases
<b>2015 (July-Dec)</b>	454	251	336	190	290	168
<b>2016</b>	2276	333	1832	270	1420	294
<b>2017</b>	3841	321	3572	292	2342	268
<b>2018</b>	5992	516	4877	467	7474	823
<b>2019</b>	11999	1265	10403	932	18434	1565
<b>2020 (December)</b>	12306	1870	10893	1740	21098	3354
<b>Total</b>	36868	4556	31913	3891	51058	6472

Source: National Legal Aid Services Organization, Yearly Report December 2020, p.4.

In 2015, only 454 pre-case legal aid applications were filed for 290 beneficiaries, whereas in 2020, 12306 pre-case applications were filed for 21098 beneficiaries. Likewise, in 2015, 251 post-case legal aid applications were filed with 168 beneficiaries, whereas in 2020, 1870 post-case applications were filed for 3354 beneficiaries. That means, there has been a significant increase in the number of pre-case applications filed and beneficiaries involved over the years. However, this aggregate data on legal aid applications over the years is not enough to reach a conclusion on the gender issue of mediators. Because, while vulnerable women apply for legal aid, they do not have any option of choosing male or female mediators; instead, they apply to their respective legal aid offices.

<sup>50</sup> National Legal Aid Services Organization, Yearly Report December 2020, 4.

This section further analyzes gender-sensitive quantitative data on applications for legal aid made by eligible male and female litigants and gender breakdown of ultimate beneficiaries who have resolved their cases through mediation held at district legal aid offices. As legal aid is generally targeted more for the vulnerable, especially women in our context, it is expected that the ultimate beneficiary from the process would also reflect this normative preference. *Hence, it appears that there is no apparent impact of the mediators' gender on the mediated outcome, and it actually works for the benefit of all the parties involved in the dispute.*

**Table 2: Disposal Rate of District Legal Aid Office<sup>51</sup>, Cumilla<sup>52</sup>: An Overview from Last Two Years (2019-2020)**

Year	Number of Applicants/ Litigants			Disposal Rate			Number of Beneficiaries		
	Total	Male	Female	Total	Successful	Kept with record	Total	Male	Female
<b>2019%</b>	453 (100)	100 (22.1)	353 (77.9)	435 (100)	123 (28.3)	312 (71.7)	380 (100)	174 (45.8)	206 (54.2)
<b>2020%</b>	403 (100)	86 (21.3)	317 (78.7)	369 (100)	100 (27.1)	269 (72.9)	485 (100)	228 (47.0)	201 (41.4)

Source: District Legal Aid Office, Cumilla Yearly Statistics (2019-2020).

As demonstrated in Table 2, according to recent statistics from the district legal aid office of Cumilla, more than three-fourth of applications for legal aid were made by females. The rate of applications made by female disputants has even increased from 77.9 per cent in 2019 to 78.7 per cent in 2020. From this brief account, it is unclear whether this higher rate of the application indicates increased vulnerability or more confidence of women that may encourage them to apply for legal aid. However, a thorough analysis of the second and third columns of Table 2 indicates that the success of mediation conducted at the district legal aid office of Cumilla remains less than 30 per cent, with a declining trend from 2019 to 2020. The COVID-19 pandemic situation might have attributed to this slight decline during this period.

<sup>51</sup> District Legal Aid Office, Cumilla Yearly Statistics (2019-2020).

<sup>52</sup> Government of People's Republic of Bangladesh, 'Extra-Ordinary Gazette ' (*Bangladesh Government Press*, 10 September 2018) <[https://www.dpp.gov.bd/bgpress/index.php/document/get\\_extraordinary/27772](https://www.dpp.gov.bd/bgpress/index.php/document/get_extraordinary/27772)> accessed 20 July 2021.

For the purpose of this paper, it is pertinent to mention that the legal aid officer of the relevant district (i.e. Cumilla) was a female. That indicates that mediation applications made by female parties may have a low rate of success even when the mediator remains a female.

**Table 3: Disposal Rate of District Legal Aid Office (Narsingdi) (January 01 to December 31, 2020: Pre-cases)<sup>53</sup>: A Glimpse from the Last Year (2020)**

Nature of Suits	Pending Disputes (Pre-Cases)	Applications Received (Pre-cases)				Disposed			Unresolved pending pre-cases
		Female	Male	Child	Total	Successful	Kept with record	Total	
<b>Civil</b>	4	4	6		14	2	2	4	10
<b>Criminal</b>	5	23	5		33	11	9	20	13
<b>Family</b>	11	105	14	1	131	17	41	58	73
<b>Total</b>	20	132	25	1	178	30	52	82	96

Source: District Legal Aid Office, Narsingdi (Yearly Statistics January 2020-December 2020).

According to Table-3, the total number of pre-cases pending before the district legal aid office, *Narsingdi*, was 178, amongst which 132 applications were received from female applicants, and 25 were from male applicants. Thus, 82 cases were resolved where 30 were successful, and 52 were kept on record for a further transfer to litigation. This quantitative analysis in another district re-confirms that mediators' gender may not have any impact on the successful resolution of disputes filed by women. Thus, from the light of these analyses, though not conclusive, a hypothesis can be formed that mediators' gender may not have any practical impact on the mediated outcome at the district legal aid offices.

## 5. Impact of Mediators' Gender on Mediation through the Lens of Insiders: A Qualitative Analysis

The authors have interviewed thirty judicial officers, of which sixteen were female, and fourteen were male. These groups include legal aid officers, assistant and senior assistant judges and joint district and sessions judges. While interviewing, the authors have tried to maintain uniformity between the number of male and female mediator-judges or mediators from legal aid offices to be able to draw a conclusion on this issue, which has not surfaced in contemporary literature on mediation.

<sup>53</sup> District Legal Aid Office, *Narsingdi* (Yearly Statistics January 2020-December 2020).

Among the various questions asked, this paper mainly focused on clients' attitudes towards mediators' gender (male mediators versus female mediators) and mediators' mindset towards clients of different genders. Respondents were further asked about mediators' role in mitigating the extraneous effects that might impact the process of mediation, the reliance and preference of the clients on the mediator of the same gender, whether the presence of a female mediator kept the mediation process friendlier with female clients. Participants were also asked about the mechanism that the mediators are applying to make the process gender-neutral.

As mentioned earlier, amongst the thirty judicial officers interviewed, there were both male<sup>54</sup> and female officers<sup>55</sup>. The first group of interviewees involved judicial officers who are currently serving as DLAO-mediators. The findings are highlighted in Table 4.

**Table 4: Impact of a Mediators' Gender on Mediated Outcome from Clients and Mediators' perspectives (DLAO-mediators)<sup>56</sup>**

Question	Yes	No	May be	It would depend on the type of disputes
<b>Preference of same gender mediators by the parties</b>	60 %	0 %	0 %	40 %
<b>Reliance on same gender mediators by the parties</b>	20%	40%	20%	20%
<b>Gender bias of the mediators and impact on the outcome</b>	0 %	100 %	0%	0 %
<b>Whether the presence of female mediators make the mediation process friendly</b>	20 %	80 %	0 %	0%

From the above analysis, it is evident that 60 per cent of currently serving DLAO-mediators<sup>57</sup> opined that clients might prefer the same gender as mediators, whereas 40 per cent viewed that it varies on a case-by-case basis. As also mentioned by the DLAO-mediators, clients might prefer the same gendered mediator in cases involving sexual harassment, marital life issues or family matters. However, they affirmed that it does not make any difference in all other cases. That means the presence of female mediators would not make the process friendlier in all other cases except a few.

<sup>54</sup> Interviews with male legal aid officers were conducted at district legal aid offices.

<sup>55</sup> Interviews with female legal aid officers were conducted at district legal aid offices.

<sup>56</sup> Table prepared based on interviews taken from the male and female legal aid officers.

<sup>57</sup> In the district legal aid offices, DLAO-mediators only act as mediators and take a mandatory attempt for mediation between the parties prior to refer the case to trial.

The crucial point here is whether the presence of same-gender mediators has anything to do with the outcome of mediation or not. The interviewees mostly shared that the DLAO-mediators are, *per se*, judicial officers whose primary duty is to uphold justice. The thin line here is that DLAO-mediators do not provide any judgment; instead, they play the role of an impartial third-party mediator. Apart from that, the traditional and paramount characteristics of a judge, i.e. honesty, integrity, neutrality and impartiality, are highly maintained in mediation too. Hence, there is no question of bias from the mediators' gender perspective. Moreover, all of them unanimously denied the issue of bias, which implies that the mediators' gender has no impact on the mediated outcome.

The second group of interviewees involved Assistant Judges and Senior Assistant Judges. It is essential to mention here that this group of judicial officers mostly conduct mediation in family matters and some civil matters. Further, they performed the role of mediator as former district legal aid officers during their tenure. Thus, based on their experiences, they have shared their views. In this segment, the authors interviewed both male and female Assistant and Senior Assistant Judges<sup>58</sup>. The findings are summarized in Table 5:

**Table 5: Impact of Mediators' Gender on Mediated Outcome from Clients and Mediators' Perspectives (Assistant Judges and Senior Assistant Judges)<sup>59</sup>**

Question	Yes	No	May be	Would depend on the type of disputes
Preference of same-gender mediators by the parties	70%	20%	0%	10%
Reliance on same gender mediators by the parties	30%	45%	15%	10%
Gender bias of the mediators' gender and impact on the outcome	5%	90%	0%	5%
Whether the presence of female mediators make the mediation process friendly	35%	50%	5%	10%

From the breakdown as indicated above, it is clear that most of the respondents from Assistant Judges to Senior Assistant Judges have observed a preference by the parties for a mediator of the same gender. However, from the response obtained on

<sup>58</sup> Interviews were conducted with both male and female Assistant Judges and Senior Assistant Judges of Dhaka Court.

<sup>59</sup> Table prepared based on the combined responses of Assistant Judges and Senior Assistant Judges of Dhaka Court.

the question of reliance, it is clear that party preference on mediators' gender does not impact their reliance on the mediators' impartiality while formulating the mediated outcome. Instead, the mediators explained that depending on the types of disputes, although it may create a comfort zone for the clients – it does not lessen their reliance on the outcome of mediation or reduce its impact. Furthermore, it becomes more evident by the ratio of the negative response received on the issue of bias.<sup>60</sup> Hence, this group (Assistant and Senior Assistant Judges formerly acting as legal aid officers) also agreed with the previous group (i.e. those currently serving as legal aid officers) that the mediators' gender does not impact the outcome of the mediation.

In order to triangulate the views from the earlier two groups, the authors have interviewed an even more experienced tier of judges (i.e. Joint and District and Sessions Judges) to substantiate more robust perceptions in this regard. This tier also comprised both male<sup>61</sup> and female judicial officers<sup>62</sup> with extensive experience in district legal aid offices and case management. The findings of this group were arranged in Table 6:

**Table 6: Impact of Mediators' Gender on Mediated Outcome from Qualitative Approach (Joint and District and Sessions Judges) <sup>63</sup>**

Question	Yes	No	May be	Would depend on the type of disputes
Preference of same gender mediators by the parties	20%	80%	0%	0%
Reliance on same gender mediators by the parties	20%	80%	0%	0%
Gender bias of the mediators and impact on the outcome	0%	100 %	0%	0%
Whether the presence of female mediators make the mediation process friendly	40%	20%	0%	40%

<sup>60</sup> However, 5 per cent of judges opined that they are sometimes more sympathetic to an issue involving a person of a particular gender, especially women, in family disputes.

<sup>61</sup> Interviews were conducted with male Joint and District and Sessions Judges.

<sup>62</sup> Interviews conducted with female Joint and District and Sessions Judges.

<sup>63</sup> Table prepared based on the combined responses of Joint District and Session Judges.

From the analysis of the Table above, only 20 per cent of litigants rely on and prefer mediators of the same gender. During the interview, the judges opined that a few illiterate women feel comfortable with female mediators. However, a well-conducted mediation session also mitigates the discomforts that may exist regardless of the mediators' gender. Furthermore, they all unanimously denied any inclination towards prejudice while dealing with clients of the same gender in mediation. This proposition re-confirmed that the parties' preference for same-gender mediators may lie in the gender role ideology of women attending mediation in a few thorny instances (e.g. personal and domestic violence). But that is not an issue of mediators' impartial and evaluative role as bestowed by the cultural theory of mediation. Hence, gender has no predictable impact on the mediated outcome.

## **6. Strategies Suggested by DLAO-mediators to Liberate Mediated Outcome from Typical Gender Role Ideology**

Though not conclusive, the quantitative and qualitative analysis above indicates that mediators' gender does not impact the mediated outcome. However, women mediators usually show higher ethical standards<sup>64</sup> and use more clarification to formulate issues. Mediators at different tiers of the judiciary were interviewed about the strategies and mechanisms they usually adopt to make the mediation process impartial and reach an amicable settlement in mediation. The DLAO-mediators spoke about their different techniques, beginning from listening and raising awareness about the parties' legal rights. Some of these observations were as follows:

- (a) The interviewees, i.e. DLAO-mediators, give the utmost importance to listening. By listening to the problems of both sides, it becomes easier to earn their confidence and increase reliance on the process of mediation. In this way, they also become comfortable with the mediator, and the mediator's gender then plays an insignificant role on the mediated outcome. Therefore, listening by giving them equal attention, respect and opportunity are crucial to attaining parties' confidence.
- (b) A successful dispute resolution requires the time and patience of the mediator. The mediator must listen to the parties with patience and give them time to open up without any fear or control from the other party. Consequently, the parties' reliance on the mediation process increases.

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<sup>64</sup> Jessica A. Kennedy, Laura J. Kray and Gillan Ku, 'A Social-Cognitive Approach to Understanding Gender Differences in Negotiator Ethics: The Role of Moral Identity' (2017) 138(1) *Organizational Behavior and Human Decision Processes* 28.

- (c) Motivating the parties has been demonstrated as one of the unique and vital techniques in mediation. Motivation includes helping the parties think beyond the fixed boundaries of the law. For example, sometimes sharing multiple viable options ranging from social norms to religious norms helps them thinking positively about resolving their disputes. That ultimately leads the parties to reach a settlement that otherwise would be difficult.
- (d) Sharing with the parties about the powers and functions of the DLAO-mediators, conveying success stories by DLAO-mediators through mediation also increase the parties' reliance on the process. Therefore, it is imperative to reassure the parties that they are of equal status before the mediator to attain their confidence.
- (e) More pertinently, the art of mediation requires specific attributes and qualities from the mediator himself/herself to make the mediation successful, which is not related to the gender of the mediator. The majority of the interviewees stated that the mediation's success rate depends on the mediators' skills and techniques – not on the mediators' gender role.

## 7. Conclusion

Resolving disputes through alternative ways, especially through mediation, has created momentum in the history of easing the way to access justice in Bangladesh. From the analysis demonstrated above, it is apparent that justice seekers' confidence in this alternative mode is increasing. Theoretically, gender power disparity might have an impact on the performance of parties attending mediation. Due to gender stereotypes among participants in mediation, clients' satisfaction with mediated outcomes may vary depending on the gender of a mediator.<sup>65</sup> However, as far as successful resolution through mediation and its outcome is concerned, existing literature, though scarce, have indicated no significant difference between male and female mediators. Thus, the current study re-examined this gender hypothesis of mediators at different district legal aid offices of Bangladesh to confirm the indifference.

As revealed from the study, while the authors interviewed the judicial officers, they observed that sometimes it is not unusual to sympathize with one party's sensitive story. Still, the very norm and vital requirement of a mediation process are

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<sup>65</sup> Bollen and Euwema (n 45).

to keep away from any sort of bias. The mediators' utmost priority is to assist the parties in reaching an amicable and fair agreement. The quantitative analysis further supports the qualitative analysis made by the authors. It shows that even where the male applicants are less in number, the number of male beneficiaries outweighs the number of female beneficiaries. This substantiates that the mediators' gender, in essence, does not have any impact on the mediated outcome. However, what affects the outcome of mediation is the lack of a mediator's skills and techniques. Undeniably, the skills and techniques of a mediator are the essential factors of a successful mediation. With the rising practice of mediation in the courts of Bangladesh, justice seekers, regardless of mediators' gender, would reap the benefits of this alternative way to access justice when a mediator gains the parties' trust with their efficiency and skills.