# POWER IMBALANCE AND ITS IMPACT ON MEDIATION OF FAMILY DISPUTES INVOLVING FAMILY VIOLENCE: AUSTRALIAN PERSPECTIVE

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***Abstract:*** *Gender based power imbalance exists in human civilization from a time immemorial. Women in an advanced country like Australia are also not liberated from such kind of prejudice. Imbalance of power between male and female may escalates because of the existence of family violence characterized by a process of male dominance and control. The objective of this article is to accentuate how the existence of family violence in Australian society magnifies their already existent gender based power imbalance and make mediation ineffective as a tool for resolving family disputes involving family violence. It will also suggest some measures to screen out disputes involving family violence and to deal with such family violence cases when effective screen out is not possible. Finally, some recommendations have been provided to address this family violence issue by taking measures ranging from short to long term solutions with an ultimate goal of women's empowerment in the society.*

## Introduction:

Australia, a country with a history of using non-litigatious alternative forms of dispute settlement from a time immemorial,[1] has formally recognized the use of Alternative[2] Dispute[3] Resolution[4] (ADR)[5] from

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1 Alternative forms of dispute resolution system, complementing the formal adjudicative system, is found to be practiced in Australia from a time that might dates back as much as 40 thousand to 100 thousand years. See more detail in Spancer, D., and Altobelli, T., *Dispute Resolution in Australia: Cases, Commentary and Materials*, Lawbook Co., Pyrmont, NSW, 2005, p. 2.

2 ADR processes are *'alternative'* to formal adjudicative trial in two important aspects. Firstly, people enter into formal trial with a win-lose strategy, whereas the objective of different ADR techniques is to attain more consensual solutions to a problem with a win-win strategy. Secondly, in formal court trial, parties assign third parties- lawyers and judges- to control the process and outcome of the dispute. Respective lawyers advocate on behalf of the parties and judge makes a binding decision to the dispute for the parties. But, parties can exert more control about the process and outcome of their dispute resolution process by getting recourse to various ADR processes. See more detail in Stintzing, H., *Mediation – A Necessary Element in Family Dispute Resolution?*, Peter Lang, Berlin, 1994, p. 37.

3 Dispute arises when acts or events made by one person are injurious to another person and in detriment to his rights, persons sustained injury claim some

its first constitutional journey[6] started more than a century ago. Over more than ten decades' experiments have been made with various alternative forms, such as ombudsman, tribunals, arbitration, mediation, counseling etc. Although the major impetus on the use of ADR has started only over the last 30 years,[7] it has been claimed that one major breakthrough attained in the use of ADR in Australia was initiated after the passage of the Family Law Act 1975 (Commonwealth) that for the first time uses the option of *'mediation'* in resolving disputes.[8] Mediation, after its initiation in 1975, has spurred great enthusiasm among people, as it provides the ultimate control of making any decision on the hands of the parties concerned.[9] It also fascinated the policy makers by offering an apparently cheaper and quicker means of resolving disputes complementing the formal adjudicative system. Practitioners and policy makers sometimes show

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remedy from the injurer and the person causing injury deny to honor such claim. See for more detail ibid, p. 39.

4 A dispute is resolved if both the parties to a dispute consider its solution as acceptable. Since in ADR parties participate directly in the decision making process and make more consensual decision, it is more oriented to resolve a dispute than the formal adversarial system where parties enter with a win-lose strategy and the third party binding decision made by a judge is more intended to *settle* the dispute than to *resolve* it. It is more likely that decision made under adversarial system will not resolve the dispute, for the loosing party may have some reservation about the decree made. See for more detail ibid, p. 41.

5 ADR refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. See also PDR, (NADRAC's brochure: What is ADR?); NADRAC, Terminology: A Discussion Paper, 2002, at p. 29.

6 According to section 51 of the Constitution of Commonwealth of Australia, "The Parliament shall, subject to the Constitution, have power to make laws for peace, order, and good government of the Commonwealth with respect to:- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes beyond the limits of any state", cited in supra note 1.

7 Ibid., p.5.

8 Ibid.

9 According to the National Alternative Dispute Resolution Advisory Council (NADRAC), "Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.... Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement." Supra note 5, p. 34.

a great concern and enthusiasm to solve family disputes through mediation.[10] They advocate for using mediation to get advantage of time and cost[11] savings that can be achieved through mediation. Another important reason that the proponents of mediation in family dispute present is their desire to rescue and keep intact family bondage in Australian society[12]. According to them, mediation can be a more suitable dispute resolution method where a family is involved, for mediation facilitates consensual decision by reducing hostility and antagonism between the participants through successful negotiation under a win-win strategy. But, in case of formal court trial the discord between the parties increases as it follows a win-lose strategy. *Family Law Act 1975* (Cth.) also sets principle to protect the intact family tie by advising any court exercising its jurisdiction under this Act, to consider *'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into life'*.[13] As time passes and as mediation has been practiced to settle disputes with diversified natures, several controversies have emerged regarding the validity of the claim as to the relative benefits of mediation over adversarial system, in resolving disputes. Some of these issues still remain as an open concern to be dealt with by the scholars and policy-makers in Australia. But the objective of this paper is confined only to the critical issue of power imbalance caused by family violence and its impact on successful mediation.

Mediation is a process where two parties sit together to achieve a mutually acceptable consensual solution to a dispute.[14] To make such

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10 The Alternative Dispute Resolution Conference held in October 1990 defined mediation as "an empowering voluntary process which involves the intervention of a trained, impartial and neutral third party or parties, who have no authoritative decision making power. The mediator assists the disputing parties to reach their own mutually acceptable settlement..... the mediator systematically breaks down the dispute into manageable issues to help the parties generate options and consider alternatives. The disputants are seen to take responsibility through actively participating" (in the mediation process). Cited in Stintzing, H., *Mediation – A Necessary Element in Family Dispute Resolution?;* Peter Lang, Berlin, 1994, p. 46.

11 Astor H., "Swimming against the tide: keeping violent men out of mediation", in Julie Stubbs *Women, male violence and the law,* (ed.), Federation Press, Sydney, 1994, p. 154.

12 Ibid, p. 163.

13 Section 43(a) of the Family Law Act 1975 (Cth.).

14 According to NADRAC, mediator is a person who "has no advisory or determinative role in regard to the content of the dispute or the outcome of its

consensual decision under the assistance of a neutral mediator who can not directly influence such decision, parties should have fairly equal bargaining power to ensure their respective rights from others. So, the problem arises when mediation is applied to a family dispute even when there is existence of a wide power imbalance that makes successful mediation impossible. Before going to discuss about such problem, we should first consider something about *'power'*, its relevance with mediation, and how a mediator can address the issue of power imbalance between the parties to mediation.

**What power is all about:**

To understand the issue of power imbalance between sexes and its implication on family mediation, first of all we should define the term *'power'*. Power itself is a very complex issue to operationalize, for an individual it is not a constant phenomenon rather changes depending on whom a person is dealing with and also on the basis of time, place, and circumstance where that particular person stands[15]. For example, to cite Professor Astor on explaining how power of the same person with relation to different other individuals might differ, "a Supreme Court judge is powerful in relation to those in the courtroom but much less powerful when in conflict with his teenage daughter."[16] Likewise, the power of a company secretary, who is more robust than his subordinate staff in the office, may change towards that subordinate staff when both of them join a local dance party and the company secretary who is a novice dancer seeks for some practical tips from his subordinate. In the office, the company secretary can dictate his subordinate about how to draft a letter or report, while in the dance party the subordinate can instruct the secretary about how to make movement of his arms to adopt a specific technique of dancing. So, the power may change or even shift depending on the circumstances, even when all other positional identities between the individuals remain same.

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resolution, but may advise on or determine the process of mediation whereby resolution is attempted". See for more detail in supra note 5, p. 34.

15 Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce", (1992) 9(3) *Mediation Quarterly*, at pp. 230-31.

16 Astor, H., "Some contemporary theories of power in mediation: a primer for the puzzled practitioner", (2005) 16(1) *Australian Dispute Resolution Journal*, at p. 32.

From the above discussion we can understand that power is the ability of one person to influence other *to get what one wants.*[17] John Haynes, one of the most prominent mediators in the United States, has given a very brief but worthy list of factors on which one party may have a control or access to influence the will of the other. According to Haynes, power can be defined as the *"control of or access to emotional, economic and physical resources desired by the other party."*[18] One traditional belief may be that, power is always negative and coercive;[19] that is to say, it is used to dominate others' will with a threat to do harm otherwise. However, scholars have identified three different avenues of exerting power on others namely, *reward, punishment* and *persuasion.*[20] It is the function of a negotiator to determine, depending on specific circumstances, about how to use these different avenues to impose power on the counterpart so as to attain the best outcome from a negotiation.[21]

Different intellectuals have defined power on various ways while mentioning about how it arises and how it can be used etc. One influential listing about the sources of power related to mediation has been given by Mayer. In his article, *The Dynamics of power in Mediation and Negotiation* he has identified ten different sources of power to an individual negotiator.[22] These includes *formal power* vested to a position; *expert/information power* generated through the access to information or having expertise in some area related to the dispute; *associational power* generated when people as a group have some power and one person get associated with that group; *resource power*

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17 Parenti, M.J., *Power and the Powerless.* St Martin's Press, New York, 1978, p. 4; cited in Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce", (1992) 9(3) *Mediation Quarterly,* at p. 229.

18 Haynes, J., *Power Balancing,* in Folberg J. and A. Mitro (eds.) *Divorce Mediation: Theory and Practice,* Guilford Press, New York, 1988, p. 278; cited in Neumann, D., "How mediation can effectively address the male-female power imbalance in divorce" (1992) 9(3) *Mediation Quarterly,* at p. 229.

19 See above, note 16, p. 32.

20 Mayer, B. "The dynamics of power in mediation and negotiation", (1987) 16 *Mediation Quarterly,* at p. 78.

21 Ibid.

22 Ibid, p. 78. In one of his later works, *The Dynamics of Conflict Resolution: A Practitioners Guide* (Jossey Bass, 2000), pp. 50-70, as cited in supra note 5, at p. 33, Mayer has identified legal prerogative, perception of power and definitional power as three more forms of power that exist in negotiation. See also Spencer, David. *Dispute Resolution in Australia: Cases, Commentary and Materials.*

generated from the control over resources while those resources need not to be the controller's own; *procedural power* to control the mechanism or procedure through which a decision can be made; *sanction power* or the power to deter one party to enjoy some benefit; *nuisance power* to create some problem to other while enjoying some benefit, although not able to deter from enjoying such benefit all together; *habitual power* arises when one person has something in his possession and try to maintain the *status quo*;[23] *moral power* arises from the belief that the negotiator is right in her position;[24] and *personal power* arises out of a variety of personal characteristics such as self-assurance, determination and endurance etc.

**Power imbalance and its relevance to family mediation:**

Family mediation is sometimes rejected by some feminists as a standard tool for ensuring equitable justice for women on the ground that male and female have power imbalance in the society and a mediator as a neutral person, without having any decisive power, can not ensure *equitable* justice for women. They are skeptical about *equity* in mediation, for men are considered to be rational, while women are considered to be emotional.[25] Men are usually authoritative and dominating, while women are passive and submissive.[26] When men and women interact between themselves, men are found to interrupt more frequently than women and speak for a longer period;[27] again men usually have access to more economic resources and information over their female counterpart. Since existence of significant power imbalance may cause hindrance to effective mediation, the question emanates that whether a mediator has any role to play in minimizing such gender based power imbalance through mediation.

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23 The other party is just trying to change that *status quo* but the party having in possession may feel some power because maintaining a *status quo* by one person is easier than to make any change in that *status quo* by others.

24 The premise of such belief of being right can vary. It may be a religious belief or a decree by a court.

25 Payton, "Releasing excellence: Erasing gender zoning from the legal mind", (1985) 18 *Ind. L. Rev.* at p. 633; sited in infra 25, at p. 3.

26 Craver, C.B., "The impact of gender on clinical negotiating achcievement" (1990) 6 *Ohio State Journal on Dispute Resolution* at p. 3.

27 "Special Project, Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduate", (1988) 40 *Stan. L. Rev.* at p. 1227; cited in Craver, C.B., "The impact of gender on clinical negotiating achievement", (1990) 6 *Ohio State Journal on Dispute Resolution*, at p. 3.

**Minimizing power imbalance in mediation by mediator:**

One important point we have to bear in mind is that neutrality of a mediator does not mean that he is powerless. As pointed out by Stintzing, "it is important principle of our legal system to provide protection for the weak... Therefore, it can be accepted as the State's duty to ensure that the principle of protecting the weak is safeguarded in alternative dispute resolution methods; this should not be seen as undue influence by the state but as the provision of the appropriate framework for successful negotiations." Though he didn't clarify the term *'weak'*, as identified by Astor, women are usually those who constitute the weaker part of the society. So, a mediator can in many ways try to minimize this male-female power imbalance during mediation. If we compare the position of a mediator in a mediation session with the sources of power defined by Mayer, as discussed earlier, one very important power that a mediator possess is the procedural power, as both the parties to mediation voluntarily accepted him as a mediator and entrusted with him the duty to conduct mediation. According to Neumann, a mediator can use his/her *procedural power* in nine different ways during a mediation session.[28] These are:[29]

1. *Creating the ground rules*
2. *Choosing the topic*
3. *Deciding who may speak (first)*
4. *Controlling the length of time each person may speak*
5. *Allowing and timing a person's response*
6. *Determining which spouse may present a proposal to the other and*
7. *Presenting an interpretation of what the spouse said*
8. *Ending the discussion and*
9. *Writing down the statement.*

Analysis of a practical example given by Neumann from her own experience can show how a mediator can use such *procedural power* to minimize the power imbalance between parties during mediation. To quote in Neumann's own words:

> During a mediation session with Greg & Judy, I began by providing background information concerning alimony. I then asked, "How do you each feel about paying or receiving alimony?" Greg quickly

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28 See for details, on supra note 20, at p. 81.

29 See above, note 15, at p. 232.

> replied, "I won't pay it." I referred his statement to "you prefer not to make alimony payments?" He nodded his head vigorously. I turned to Judy, to respond to my inquiring expression by responding, "Well, what can I say? You heard him say that he won't pay alimony." I explained that Greg has stated his preference in response to my question, and then said, "What is your preference?" Judy then said "Well may be I do want support from Greg."

The example itself supports the arguments that men are usually intrepid enough to express their position, to take floor first and women are hesitant even when expressing their rights. At the same time, it has also put some light on how a mediator can help to empower the women during mediation. First of all, the mediator provided background information on alimony which is helpful to reduce the effect of power imbalance that might arise due to a lack of information to one party comparing to other. The mediator can also provide the parties with information about their legal prerogative and can enhance their *moral power* as well. Moreover, while Judy takes the comment of Greg that he will not pay alimony as granted, the mediator using her *procedural power to interpret* has explained Greg's comment just as a response to her question. By this, the mediator indirectly reduced Greg's *personal power* that evolved out of her determination and endurance. Although initially Judy was silent and Greg took the floor to express his opinion, the mediator induced Judy to give comment. This improves Judy's perception of power that she also has a right to say something that Greg has to consider. Lastly, by asking Judy directly about her preference on alimony, the mediator actually provoked Judy to use her *nuisance power* that Greg might not enjoy all his wealth without giving the due share of alimony to Judy.

So, it is argued that a mediator can in many ways minimize the power imbalance between parties. They can use visual materials to make parties understand about some technical issue or seek help from professionals[30] such as accountants, psychologists, and physicians etc. to strengthen the argument of a less empowered party who is rather hesitant to place their arguments. Since relative power of two individuals can change depending on circumstances, there is no reason to think that the power imbalance that exists at the beginning of mediation persists all over the process of mediation. A mediator can use various available techniques to change the situation in favor

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30 Ibid, p. 232.

of a disadvantaged party and try to ensure an equitable solution for all.

**Limitation of power balancing in mediation:**

Despite all efforts by mediators, it may not be possible for a neutral mediator to balance all the power imbalances that exists between the parties. Although a mediator can try to give relevant information to a party and induce a party to make his/her claim, a mediator can not make any opinion in favor of any party or insist any party to settle for a specific term.[31] So, although a mediator can foresee an inequitable solution, he has nothing to do but to wait for the parties themselves to make the proposal and just help him to do so by using various strategies as mentioned above or otherwise. So, although it is sometimes argued by the scholars that existence of power imbalance between male and female can be addressed by the mediators during mediation session[32] to attain a reasonably fair solution and so, mediation can be held even when some power imbalance exists between the male and female participants, these arguments face strong challenge when power imbalance exists by such a significant degree that effective mediation becomes impossible. This type of insoluble power imbalance might arise in the mediation of family disputes involving family violence.

**Mediation of family disputes involving family violence and the issue of power imbalance in mediation:**

Family violence may takes different forms, such as, physical assault to cause physical injury, mental torture through forced social isolation or through threat to make physical assault, economic deprivation by providing poor maintenance or not giving access to use matrimonial property etc.[33] In Australia, the *Family Law Act 1975* defines family violence[34] as, "conduct; whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for,

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31 See above, note 20, at p. 83.

32 See above, note 4, at p. 228. See also, Davis, A. M., and Salem, R. A., "Dealing with power imbalances in the mediation of interpersonal disputes" (1984) 6 *Mediation Quarterly*, at p. 18.

33 Astor, H., "Violence and family mediation: Policy" (1994) 8(1) *Australian Journal of Family Law*, at p. 4.

34 Section 60D of the Family Law Act 1975 (Cth).

or be apprehensive about, his or her personal well being or safety". While examining violence on recently separated people, Grania Sheehan and Bruce Smith defined violence as, occurrence, attempt or threat to cause physical or sexual violence those are considered as offences under the criminal law. Their study shows that violence might not always cause a severe physical injury. For example, 65% women reported family violence when the above mentioned definition of violence was used. But, family violence was reported by only 14% of the respondent women, when it was defined as actions those cause injury requiring medical treatment[35]. So, instead of family violence, this type of action by the perpetrators can be termed as domestic assault. But, one more problem appears when we see that many of the victims are assaulted or harassed by their ex-partner even after separation or divorce. So, an even better term can be *'spouse assault'*, although this spouse can be an ex-spouse as well. However, for our discussion here, we should rather stick on the term *'family violence'*- a term which is mostly used in Australian literatures to discuss about this issue.

Scholars dealing with family violence, pose stout opposition to mediate family disputes involving family violence because of the strong power imbalance between the perpetrator (usually husbands) and its target (usually wives). In case of persistent family violence, this power imbalance may be so high that effective mediation becomes impossible.[36] Family violence impairs the target of violence's capacity to mediate, for most of the cases[37] the objective of a perpetrator, in case of family violence, is to achieve control over the target by physical assault or threat to do so etc. So, when a perpetrator becomes successful to establish such control over his target, it is hardly possible for such target to come out of such control and make a

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35 Sheehan, G., and Smith, B., "Spousal violence and post-separation financial outcomes" (2000) 14 *Australian Journal of Family Law*, at p. 109; cited in Astor H., *Dispute Resolution in Australia*, 2nd ed., 2000, p. 351.

36 Astor, H., "Swimming against the tide: keeping violent men out of mediation"' in Stubbs Julie (ed.), above note 11, p. 150.

37 According to Michael Johnson, violence caused by male to gain control over their partners can be termed as *'Patriarchal Terrorism'* and is different from the *'Common Couple Violence'*, which is relatively infrequent and of a non-escalating nature. Johnson, M., "Patriarchal terrorism and common couple violence: Two forms of violence against women", (1995) 57 *Journal of Marriage and of the Family*, at p. 283; cited in Astor, H., *Dispute Resolution in Australia*, 2nd ed., 2000, p. 350.

successful negotiation with the perpetrator, based on her perceived rights and expectations over such perpetrator, during mediation.[38] The problem escalates when persistent assault on targets permanently degrades their demands and expectations up to a level that will not antagonize the perpetrator to initiate another assault. When the victims habitually modifies their behavior, she is also unlikely to make any challenge to the proposal made by the perpetrator during the mediation session,[39] for she has already given up to raise her demands and degraded her demand up to a level that is offered by the perpetrator.

Another argument used for not using mediation to resolve family disputes involving family violence is that mediation requires a minimum level of consensuality, respect and trust between the parties to make them able to reach a *mutually* beneficial agreement. But, in case of couples involving family violence, the presence of such kind of relationship is unusual. A batterer husband always tries to establish and continue his control over the target and so, always tries to be in a more advantageous position, denying the rights of his target. So, if a couple who has history of severe family violence comes to mediation, there may be two possible consequences. Either there will be a highly inequitable settlement, favoring the perpetrator,[40] or the mediation will be unsuccessful if in any case, the assaulted woman, who is used to act as subservient to the perpetrator, denies to do so. Another significant criticism against the use of mediation in family disputes involving family violence is its gradual attempt to decriminalize the violent actions those occur inside the home.[41] As will be discussed little later, in Australian society family violence is widely treated as private matter. For this reason, activists who are working against such violence had to make a long rigorous effort to take such violence in political agenda and, to make policy makers to promulgate laws against such violent actions. So, increased decriminalization of family violence by settling family disputes involving family violence through

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38 Astor, above note 37 at p. 351.

39 Kaganas, F., and Piper, C., "Domestic violence and divorce mediation", (1994) 16 *Journal of Social Welfare and Family Law*, at p. 272.

40 See above, note 35, p. 151.

41 See above, note 32, p. 24.

mediation can pave a way to lose the hard battle of criminalizing family violence already won.[42]

**Family violence in Australia- a need for concern:**

In Australia, there is a great concern about family dispute mediation in presence of family violence, for research data shows the existence of family violence by a considerable degree in Australian society.[43] So, if the increasing trend of referring family dispute to mediation persists, there is a wide possibility that family disputes involving family violence will also be dealt with mediation and so, assaulted women having great power imbalance will not get justice due to the ineffective mediation they attend. Statistical data for a period from 1968 to 1986 shows that 43% of homicides in New South Wales (NSW) were committed within the family[44]. *Women Safety Survey-* the largest empirical study in Australia to reveal violence against women- identified that in a period of 12 months prior to this survey, 247,700 women in Australia experienced violence, amongst which 180,400 women or around 73% experienced violence from their current or ex-spouses.[45] Family violence is even a greater concern during the period of mediation, for women go to family mediation during the time of their separation and separation is a time when family violence tends to escalate.[46] In Australia, nearly half of the women who were killed by their spouses were either separated or in the process of their separation, at the time of their killing.[47] Through family violence a perpetrator usually tries to establish and continue his control over the target. But, making separation to get divorce is a sign from the part of the target to break up and come out of such control. So, perpetrators become more desperate and even more violent during the days of separation to reestablish or perpetuate their control.[48] Another important motive for a perpetrator behind the escalation of violence

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42 Astor, above note 37, p. 353.

43 Astor, H., "The weigh of silence: talking about violence in family mediation", in *Public and private: feminist legal debates*, Thornotn Margaret (ed.), 1995, Melbourne, at p. 178.

44 See above note 35, p. 156.

45 See above note 41, p. 350.

46 See above note 35, at p. 151.

47 Wallace, A., *Homicide: the Social Reality* (1986); cited in above note 24, p. 157.

48 See above not 38, p. 267.

during the days of separation may be, to make pressure on his target to suppress past violence. Since the family law in Australia does not require a prior mediation effort before filing a case for 'disputes involving family violence',[49] suppression of past violence is important to put the dispute in a mediation table, get relieve of criminal offences those might arise if the case were filed and, to attain a most favored solution by making negotiation with the frightened target, who has experienced violence recently.

As mentioned earlier, mediators can try to minimize the power imbalance between the parties during family mediation. But, in case of family mediation involving family violence, mediators face some practical problems those restrict their effort in this regard. Since during the mediation session a mediator acts like a neutral person without having an authority to make any direct influence to the outcome of the session, he might not be able to minimize such power imbalance up to the level sufficient enough to make a fairly equitable solution,[50] even if he can perceive the severe power imbalance that exists between the perpetrator and his target. Moreover, in many cases, targets remain silent about the family violence they experienced in the past or even deny it, and so violence is significantly underreported.[51] This habit of concealment can even continue when they go for mediation.[52] When this kind of concealment occurs, mediators may not perceive the violence and so appropriate measures are not taken in this regard. As a result, there is a possibility that target women have to make a more compromised solution. For example, women might make more sacrifice on maintenance and property decisions when the perpetrator husband claims that he has to give access to see his child, even if the mother would like to get the custody. Although this type of proposal might seem very much reasonable to a mediator who is not aware of any past violence, the target can perceive that possibility of a future contact with the perpetrator also increases her risk for future violence. So, to avoid any possibility of future violence, she might agree to sacrifice much of her claims on maintenance, property share etc. Because of these reasons,

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49 Rule 1.05(2) of the Family Law Rules 2004.

50 See above, note 41, p. 352.

51 See above, note 42, at p. 184.

52 See above, note 35, p. 160.

there remains a strong protest, from a group of scholars and practitioners dealing with these issues in Australia, against the use of mediation to resolve family disputes involving family violence.

**Screening out family disputes involving family violence from mediation and some challenges for effective screening:**

But to deter disputes involving family violence from mediation, a mediator should be able to screen out the disputes involving family violence and refer them to court trial if the severity of violence exceeds a level that makes effective mediation impossible. Problem may arise here about how to choose the criteria for determining the severity of violence experienced. Sometimes severity is determined by the involvement of fire arms or gross physical injury etc.[53] or by the time when last violence occurred. But the problem with using such *'severity criteria'* is that response of two women may be different towards similar type of violence involving fire arms or causing the same level of physical injury etc. One may be frightened enough to sacrifice all her rights to get rid of such violence, while the other may be courageous enough to negotiate with, or protest against the perpetrator. Another enigma arises in using such severity criteria as a screen out devise when past physical violence has some dynamic effect on the control established by the perpetrator over his target[54]. When a perpetrator becomes successful to establish control over his target's will through consecutive violence, it may not be necessary for him to make any further violence to continue such control, rather a simple threat to make violence, or any specific sign of anger may be enough to make the target women do, what she knows will soothe the perpetrator. So, severity of physical injury or time when violence last occurred can not be a good criterion to screen out family violence cases from mediation. To assess the effects of violence on target, what we need to assess is the extent to which the existence of any recent or past violence is able to control the behavior of that target. That is, to what extent family violence has impaired the target's ability to make free choices based on her necessity and rights, an ability that she would require to use during mediation.[55]

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53 See above note 32, p. 17.

54 See above note 41, p. 350.

55 See above note 32, p. 15.

As mentioned earlier, another predicament that might arise, and widely experienced during the initial screening out of family violence cases, is the silence of assaulted women regarding the history of violence they have experienced in the past. But why battered women remain silent about the history of family violence they have experienced? There is no single response to this question, for the reasons can be multiple. One reason that can be readily identified is their fear to experience further violence, if information about past violence is revealed. In many cases after separation, perpetrators physically assault their targets or threat to do so in the car park, popularly known as *'car park violence'*. In such instances, perpetrators may make their targets to write scripts in favor of mediation and give instructions to the targets about their future conduct.[56] Women sometimes prefer mediation because they become desperate to end the violent relationship and take mediation as an easy and quick process to do so, avoiding the lengthy trial process in the formal courts. They might even think that breaking the control of the perpetrator with an amicable process like mediation, without going to formal courts that might create a criminal charge against the perpetrator, will placate the perpetrator and not antagonize him much to take any further violent action.[57] If this is the case, it seems wise for the target women to keep silent about her past experience of violence because, revealing violence may cause her dispute to be screened out from mediation. Another corollary reason for abused women's silence about past violence during mediation is their financial condition. Women may be poor enough to afford to go to the court and so takes mediation as a cost effective way to get rid of the control of her husband.[58] Moreover, legal aid programs are increasingly attaching the condition of a prior use of mediation before going to formal trial. So, financially incapable women may remain silent about violence, for identification of violence may screen out their cases from mediation and also reduce their possibility to get any legal aid.[59] Sometimes women keep silent with an assurance from their perpetrator that there will not be any further violence, if the target keeps silent about any past occurrences. This type of assurance is actually a threat in a

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56 See above, note 35, pp. 159-60.

57 Ibid, p. 160.

58 See above, note 32, p. 14.

59 See above, note 35, p. 156.

polished form, to cause further violence if the request of the perpetrator is not obeyed by his target. Another notable reason for which assaulted women may keep silent about violence is the social attitude towards family violence. Because Australian society treat family violence as a private matter to be dealt with by the couples themselves inside their house, women sometimes get ashamed to discuss about this with others.[60] They also get ashamed to be treated as a *'battered women'*.

**'Effective intake session'- a remedy to the screening problem:**

To break the silence of victim women about family violence and, therefore, to make an *'effective screening'* out of disputes involving family violence, we need a very effective *intake session*. During these intake sessions, an expert having knowledge about the dynamics of violence tries to elicit the information regarding the existence of any prior family violence and its nature, if such violence existed.[61] But, mediation schemes run by many mediation organizations do not follow any rigorous *intake procedure*, for these processes are time consuming and expensive, requiring much specialist helps. So, to minimize the use of specialist time and consequent higher cost of intake sessions, we might consider splitting the intake process into two parts. In the first phase, a well trained specialist on family violence may make a *shuttle intake session* to determine with some considerable degree of accuracy about the possibility of the existence of any prior history of family violence. In the second phase, we can use an interviewer to make intensive face to face interview about different aspects of the dispute. This interviewer should be trained and should be one who has clear knowledge about the mediation process and the dynamics of family violence women usually face in Australian society. But such interviewers should not be a specialist in this field, for trained women from refuges or women from other organizations who used to be the target of family violence and also experienced mediation can be a good interviewer.[62] Even if a family dispute involving family violence is referred to formal trial, an *extensive intake session* should be made before such referral has been made. Making an extensive intake session before making any court

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60 See above, note 32, p. 15.

61 Ibid, p. 13.

62 Ibid, pp. 19-20.

referral is necessary, because during mediation women have more chance to share their story in an uninterrupted manner and without being considered for its relevancy tested against some formal rules and procedures of the court.[63] Contrary opinion might argue that there is a possibility for a perpetrator or the target to make fake story and that the capacity of story telling in a more convincing way might differ from person to person.[64] But if we would like to make effective screening, mediators or other experts operating intake sessions should have the capability to reveal the true story behind. Moreover, vulnerable women who choose to go for mediation even with a considerable sacrifice of their right, are not supposed to exaggerate the existence of any family violence that will ultimately screen out their cases from mediation. However, for enhanced safety of possibly vulnerable target, intake session of perpetrator and his target should be held separately, while one does not know about the time and place of the intake session for the other.[65]

Even with the use of intake procedures to screen out family disputes involving family violence from mediation, due to their extreme difficulty in reliable identification, one can not expect to ensure a complete success in this regard.[66] So, in 1991 the National Committee on Violence against Women developed a *Guideline for the Mediation of Cases Involving Violence against Women.* They also recommended for mediators' training regarding the mediation of disputes involving violence.[67] Besides, mediators can use various techniques to help battered women when they come for mediation. One such technique is the use of *Shuttle Mediation.* In shuttle mediation, the parties are kept separate and a mediator makes shuttle negotiations between the parties involved. This type of shuttle mediation is most helpful to the parties who are expecting further assault, if the perpetrator knows the whereabouts of his target. Although shuttle mediation can remove the instant threat from the mind of a target that she will be detected by her perpetrator and have to face further assault, it might not be enough to remove completely the dynamic effect of control created by

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63 See above, note 42, p. 190.

64 Ibid, p. 191.

65 See above, note 32, p. 13.

66 See above, note 35, p. 161.

67 Ibid, p. 161.

the perpetrator by his earlier assaults.[68] Other measures to make assaulted women more competent for mediation may be use of *protection order* as part of mediation,[69] organizing some information sessions to make the target more aware about her legal, and economic rights against the perpetrator, and to use counseling sessions to make the target more confident in negotiation. While Community Justice Centres (CJCs)[70] and similar other organizations can organize regular *information sessions* to discuss about general rights about women. However, attendance in such mediation sessions can be referred to any party intending to participate in mediation but, do not have sufficient knowledge about his rights and opportunities required to make such mediation more successful.[71] Mediators can also use *private caucus*[72] to provide necessary legal, economic, and financial information to the assaulted women, when the information of such assault is revealed after the initiation of mediation. Alternatively, in case of a post-revelation of family violence a mediator can stop to proceed with mediation and refer the dispute to formal trial.[73]

**Recommendations giving 'access to justice' the ultimate priority:**

Since family disputes involving family violence causes extreme power imbalance that can not be minimized effectively by a family mediator, for the sake of effective mediation we should screen out family violence cases from mediation and refer those cases to formal trial. Although formal trial has some limitations in providing access to

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68 See above, note 32, p. 6.

69 Gagnon, A. G., "Ending mandatory divorce mediation for battered women", 1992 (15) *Harvard Women's Law Journal*, p. 274.

70 Community Justice Centres (CJCs) are government funded centres to deal with arise within the community. These centres provide mediation free of cost. Mediation sessions at CJCs are conducted by two impartial trained mediators who help people to understand each other's view and to reach a mutually acceptable solution to their problem. Disputes suitable for mediation in CJCs are (i) disputes between neighbors (ii) family disputes (iii) business disputes, (iv) civil and small claim matters, (v) workplace disputes, (vi) disputes arises in incorporated associations, and (vii) disputes arise between and among communities etc. See more detain in Mediation at Community Justice Centers, Fact Sheet.

71 Ibid, p. 278.

72 'Private caucus may provide the opportunity for the mediator to discuss the provision of support for a weaker party, such as legal or financial advice.' Supra note 24, p. 153.

73 See above, note 48, p. 278.

justice to women because of its exorbitant cost and delay, nonetheless we can not refer all disputes to mediation if mediation can not ensure a better justice than formal trial. So, what we need is to improve our formal justice system and not to refer those cases to mediation which are not suitable for mediation.[74] While screening out family disputes involving family violence from mediation, we have to ensure that exclusion of family disputes involving family violence from mediation should not exclude the women facing family violence from getting their access to justice. To resolve this dilemma, we have various alternatives in our hand. One option suggested by scholars is to give an option to make an *informed choice* by the target women between mediation and formal trial. But before doing so, we have to make sure that the assaulted women have courage and confidence enough to make successful negotiation during mediation, that she has sufficient knowledge about the mediation process, has sufficient knowledge about her legal and economic rights against the perpetrator, and an understanding about the other methods of resolution available at her hand.[75] All these things can be done in the *extensive intake session* that takes place prior to mediation. Moreover, *information sessions* and *private caucus* as mentioned earlier can be helpful for a target to make such informed choice for mediation. But as we can not screen out all disputes involving family violence because of procedural complicacy as mentioned earlier, we must have to provide training to the mediators about how to deal better with disputes involving family violence. These trainings involve not only the identification of issues of violence and how to address them, but also about how to change the attitude of individual mediators regarding family violence.[76] Training for attitudinal change is required as mediators are part of society who might also use common social values that consider family violence as a private matter and so not to be discussed much. Another solution used by the CJCs to deal with family disputes involving family violence is to make effort to keep the issue of family violence separate from other issues of dispute and, make resolution of those other issues, such as maintenance, custody etc. through mediation. But since negotiation on any family issue requires minimum power balance that might be impaired

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74 See above, note 32, p. 20.

75 *Ibid.*

76 See above, note 42, p. 181.

through family violence, this type of arbitrary separation is not supported by the scholars[77].

While referring disputes to formal courts, we have to make sure that economically disadvantaged women have access to legal aid programs. But given the financial constraint, it might not be possible to provide adequate support to all financially handicap women seeking legal aid to run their cases in the formal courts. Moreover, indiscriminate referral of all family disputes involving family violence may again create the problem of exorbitant cost and congestion problem to the formal courts. So, without making an indiscriminate referral to all family disputes involving family violence to formal trial, we can transfer only those cases to formal trial which involve *severe* family violence. On the other hand, family disputes with a history of minor family violence for which a mediator is able to handle the power imbalance effectively can be dealt through mediation. If we have to implement such type of *partial exclusion policy*, the *protection order* taken by abused women should be strictly implemented and should be a part of her effort to do mediation.

**Conclusion:**

So, indiscriminate referral of all family disputes involving family violence to formal trial or mediating other issues of a family dispute keeping the issue of family violence aside (as is done by CJCs) can be short run temporary solutions to the problem. Several things we may do to improve the access to justice for battered women. One is to conduct effective intake sessions to screen out family violence cases with a considerable degree of accuracy and refer them to formal trial, if the battered women are not judged suitable to attend mediation. We may even form a separate body to run such effective screening. While these can be some medium-term solutions to enhance access to justice for women, the ultimate long term goal should be the economic and social empowerment of women[78] that will resolve the problem of family violence and assist women to acquire more equitable justice either through mediation or by following a course of trial in formal courts.

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77 See above, note 32, at p. 17.

78 "... [E]conomic domination perpetuates violence in the family. Women's economically unrewarded work in the home results from women's economic dependence on men." Stallone, D. R., "Decriminalization of violence in the home: Mediation in wife battering cases", (1984) 2(2) *Law and Inequality*, p. 502.