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Embedding Legitimacy: The Evolving Nature of Mediation and Why Regulation is Essential

28 July 2025

I. INTRODUCTION

Alternative Dispute Resolution (ADR) has increasingly been recognized as a practical and effective means of resolving disputes outside formal judicial proceedings.[1] Among its various mechanisms, mediation distinguishes itself as a voluntary, confidential, and collaborative process in which a neutral third party facilitates communication and negotiation between disputing parties.[2] Mediation empowers parties to craft mutually acceptable solutions while preserving relationships and avoiding the procedural rigidity of litigation.[3] Its cost-effectiveness, procedural flexibility, and emphasis on autonomy and privacy make it particularly valuable in commercial and ongoing relational contexts.

Empirical data supports its effectiveness, with settlement rates reaching approximately 70% in jurisdictions such as the Netherlands, Finland, and the UK, and exceeding 80% in Switzerland.[4] In response to its growing adoption, many countries have introduced regulatory measures to establish ethical standards, ensure mediator competence, and protect participants.[5]

Nevertheless, the long-term legitimacy and sustainability of mediation depend on the implementation of coherent and balanced regulatory frameworks. Inconsistent standards, lack of enforceability, and risks of bad-faith participation can undermine public confidence, especially as Online Dispute Resolution (ODR) continues to expand.

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[1] Naser Sherman and Bashar Talal Momani, 'Alternative Dispute Resolution: Mediation as a Model' (2025) 13 F1000Research 778.

[2] Rahul Sagar and Utsav Chandrappa, 'The Role of Mediation and Alternative Dispute Resolution in Modern Legal Practice' [2023] Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4616500>; The UNCITRAL Model Law of Year 2002 has also defined mediation as "any process, whether referred to as conciliation or mediation, or by another term of similar meaning, in which the two parties request another person or persons (conciliator or conciliators) to assist them in their endeavors to reach an amicable settlement of their dispute arising out of a contractual or other legal relationship."

[3] Ilijana Todorovic and Bobby Harges, 'Alternative Dispute Resolution in the World of Commercial Disputes' (2022) 5 Journal of Strategic Contracting and Negotiation; Numfor Thaddeus Tanifum and Sundjo Fabien, 'The Importance of Mediation as an Alternative Dispute Resolution Method' (1 January 2024) 12 <https://www.researchgate.net/publication/389390725_Paper_Title_The_Importance_of_Mediation_as_an_Alternative_Dispute_Resolution_Method>.

[4] Maria Zhomartkyzy, 'Comparative Study of Mediation Practices in European Countries' (2023) 5 EUREKA: Social and Humanities 94.

[5] Madelene de Jong, 'Mediation Legislation around the World?A Variety of Options for South Africa' (2019) 52 The Comparative and International Law Journal of Southern Africa 279 <https://www.jstor.org/stable/27328021>.

II. LEGAL FOUNDATIONS FOR MEDIATION: COMPARATIVE INSIGHTS

A. Global Lessons in Regulating Mediation

The regulatory scope of mediation covers laws that mandate or encourage its use, procedural rules, mediator qualifications, ethical standards, and party protections. Globally, mediation is governed through diverse models shaped by each country's legal traditions, policy objectives, and socio-economic context.

Ghana uses a dual model combining formal legislation with soft law to guide mediator standards, while the US takes a decentralized, sector-specific approach driven by court rules and private agreements, allowing broad party autonomy.[6] In Asia, Singapore and Hong Kong follow hybrid models that balance statutory frameworks with industry-led accreditation.[7] Singapore's Mediation Act ensures confidentiality and enforceability, supported by SIMI and court-linked digital platforms.[8] Malaysia offers a similarly comprehensive framework through its Mediation Act and KLRCA Rules, reflecting its mixed legal system.[9]

Austria represents a state-centric model, enforcing strict mediator registration, ethics, and co-mediation in family cases, with court-recognized settlements.[10] Australia applies a sector-based model, mandating mediation in civil and family matters through legislation, complemented by the widely adopted voluntary NMAS framework to uphold mediator competence and protect vulnerable users.[11] Countries like France, Italy, and the UK have formal mediation laws, often supported by soft law instruments such as the European Code of Conduct, while others, like Norway and Germany, promote mediation through mandatory or voluntary schemes focused on mutual understanding.[12]

At the regional level, the EU Mediation Directive builds on these national efforts, with a foundational objective to promote mediation as a cost-effective and collaborative method for resolving civil and

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[6] Nadja Alexander, 'Comparative Mediation Law Mapping Mediation Law with the Mediation Matrix | CPLJ' (2024) Part XV Chapter 4 Comparative Procedural Law and Justice <https://www.cplj.org/publications/15-4-comparative-mediation-law-mapping-mediation-law-with-the-mediation-matrix>.

[7] *Ibid.*

[8] 'Mediation Act 2017 - Singapore Statutes Online' (*sso.agc.gov.sg*) <https://sso.agc.gov.sg/Act/MA2017>.

[9] Umar Hasan, Suhermi Suhermi and Sasmiar Sasmiar, 'Regulation of Commercial Dispute Settlement Mediation in the Perspective of Legal Assurance and Justice' (2022) 7 Journal of Governance.

[10] Madelene de Jong, 'Mediation Legislation around the World?A Variety of Options for South Africa' (2019) 52 The Comparative and International Law Journal of Southern Africa 279 <https://www.jstor.org/stable/27328021>.

[11] Yan Feng Low, 'Legal Transplantation in Mediation: A Comparative Analysis of Australian and Singaporean Mediation Laws' (2020) 9 University of New South Wales Law Journal Student Series <https://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2020/9.html> accessed 16 July 2025.

[12] Maria Zhomartkyzy, 'Comparative Study of Mediation Practices in European Countries' (2023) 5 EUREKA: Social and Humanities 94.

commercial disputes. It sets minimum procedural safeguards, ensures confidentiality and enforceability, and encourages high-quality services—extending its standards to both cross-border and, voluntarily, domestic mediations.[13] Before the Directive, many member states lacked formal mediation laws, resulting in low awareness and limited trust. The directive addressed this by encouraging accreditation schemes, codes of conduct, and mandatory training to ensure mediator competence and impartiality. It also introduced confidentiality protections and enforceability measures, enhancing legal certainty and reinforcing mediation's credibility.[14]

That said, regulatory approaches vary across jurisdictions, and some are still in the process of refining and strengthening their mediation frameworks. For instance, India and Indonesia face similar challenges in adapting their mediation frameworks to contemporary demands. In India, while the flexibility of mediation is widely recognized, underregulation has raised concerns about unethical conduct and diminished public trust.[15] Likewise, Indonesia's mediation framework remains limited, treating mediation as part of arbitration with minimal guidance on procedures, qualifications, or enforcement.[16] While initiatives by bodies like the Indonesian Dispute Council exist, they remain insufficient without legislative support.[17]

Legal theories have long shaped the core purpose of law—for example, Rawls' theory of justice and Radbruch's view that law must promote justice, utility, and legal certainty.[18] Thus, whether through

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[13] Jan Tymowski, 'The Mediation Directive European Implementation Assessment' (Ex-Post Impact Assessment 2016) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf>.

[14] With incorporating such mechanisms into one that is compulsory in court provides a clear end to this implementation. This balanced relationship is a form of promotion on mediation usage where courts may suggest or require mediation while maintaining the parties' access to justice. For instance, Italy's model of mandatory mediation (although further amended) reduced court backlog, showing how regulation can enhance judicial efficiency as well as improve case resolution rates.

[15] While some argue that market forces are sufficient or that regulation may stifle innovation, this overlooks the need to protect vulnerable users. In reality, minimalist, enabling regulation provides a structured environment where creativity and flexibility can thrive within clear professional boundaries. See Radhakrishnan H., 'Mediation: International Legal Framework and Application: Self-Regulatory Approach V/S Formal Regulation - the Global Scenario V/S Indian Scenario' (*legalserviceindia.com*) <https://www.legalserviceindia.com/legal/article-11657-mediation-international-legal-framework-and-application-self-regulatory-approach-v-s-formal-regulation-the-global-scenario-v-s-indian-scenario.html>.

[16] Law No. 30 Year 1999 on Arbitration and Alternative Dispute Resolution; Beny Saputra, 'Strengthening ADR System in Indonesia: Learning from ADR Practices in Hungary' (2024) 6 Indonesian Comparative Law Review.

[17] Umar Hasan, Suhermi Suhermi and Sasmiar Sasmiar, 'Regulation of Commercial Dispute Settlement Mediation in the Perspective of Legal Assurance and Justice' (2022) 7 Journal of Governance.

[18] Leif Wenar, 'John Rawls' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/entries/rawls/>; Sabela Gayo, 'Mandatory Mediation under Indonesia Legal System' (2024) 11 International Journal of Research and Review 340.

hard law, soft law, or hybrid approaches, the shared goal remains clear: to make mediation accessible, effective, and trustworthy, while preserving party autonomy, fairness, and procedural integrity.

B. The Case for Ethical Oversight in Mediation

A widely cited case that underscores the critical need for regulatory safeguards in mediation is the Karpin case,[19] often regarded as a staple example in discussions on mediator misconduct. Although Karpin was admitted to the Vermont Bar and had served as Deputy State's Attorney in Orleans County, he was later exposed for extensive fraudulent conduct under the guise of offering free consultations and affordable rates. His actions included bribing individuals to lie in legal proceedings, forging client signatures, and falsely representing himself as a divorce attorney. He also engaged in highly inappropriate and unethical conduct during consultations, including sexually inappropriate behavior toward clients who rejected his advances.

Other incidents have also exposed individuals falsely acting as mediators, often with bias or without legal authorization, demonstrating that in the absence of proper regulation, mediation becomes susceptible to abuse, deception, and exploitation.[20] Without adequate oversight, it risks devolving into a hollow procedural formality, used not to resolve disputes but to delay litigation and avoid accountability—ultimately undermining its credibility and effectiveness.

Furthermore, it is to be noted that dispute resolution clauses, such as "mediation first, arbitration next," are now common in contracts.[21] However, without enforceable standards or regulatory safeguards, these clauses can be misused as stalling tactics rather than genuine attempts to settle conflict.[22] If left unregulated, such practices only erode trust in mediation. Clear rules and guiding principles are essential to ensure mediation is not only accessible but also meaningful, accountable, and outcome oriented.

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[19] Art Hinshaw, 'Regulating Mediators' (2016) 21 Harvard Negotiation Law Review <https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/HNR201_crop-1.pdf> accessed 14 July 2025.

[20] *Ibid.*

[21] Often referred to as a hybrid method of dispute resolution. See Jie (Jeanne) Huang, 'Multi-Tier Dispute Resolution (MDR) - Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study' (2023) 10 Asian Journal of Law and Society 339.

[22] Harges and Todorovic asserted that "Thus, it is not unusual that when a dispute arises, a party will file a lawsuit disregarding or overlooking the ADR provision embedded in the contract. If that happens, the adverse party's invocation of the ADR provision is all that is needed to freeze the litigation." See Ilijana Todorovic and Bobby Harges, 'Alternative Dispute Resolution in the World of Commercial Disputes' (2022) 5 Journal of Strategic Contracting and Negotiation.

III. REGULATION AS AN ENABLER FOR THE FUTURE OF MEDIATION

A. The Evolving Nature of Mediation

The future of mediation, shaped by emerging trends, depends on supportive regulations to help it flourish. One of the most significant developments in mediation stems from the rise of ODR, which represents a new frontier in resolving disputes. As a transformative alternative to traditional court systems, ODR offers greater efficiency, lower costs, and broader access to justice. However, many ODR models sideline mediation altogether or automate it entirely, removing the role of human third-party neutrals, altering the essence of the mediation process.

Automated systems often lack transparency, autonomy, and due process, reducing user participation to passive compliance. Instead of fostering mutual understanding, ODR increasingly focuses on quick settlements and enforcement—seen in systems like those used by municipal courts for traffic fines. Such platforms risk misclassifying complex cases, ignoring emotional stakes, and replacing human empathy with rigid algorithms.[23]

Mediation via ODR is both necessary and feasible, particularly in light of the growing number of disputes arising from digital transactions. Since the mid-1990s, traditional court systems have struggled with the jurisdictional and logistical challenges posed by online disputes, prompting the need for more adaptable alternatives. As internet use expanded, so did the volume and complexity of digital conflicts. Early online conflicts, such as the LambdaMOO case and student-led copyright issues, highlighted the lack of legal infrastructure for cyberspace.[24]

Today, ODR is no longer limited to resolving disputes that originate online. It has evolved into a set of responsive, context-sensitive tools capable of addressing conflicts across both digital and physical realms. In the early 2000s,[25] ODR startups like SquareTrade and Smartsettle emerged but declined

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[23] Spaulding warns this shift undermines mediation's democratic and dialogic nature, heightens power imbalances, and prioritizes efficiency over fairness. See Norman W Spaulding, *Online Dispute Resolution and the End of Adversarial Justice?* (David Freeman Engstrom ed, Cambridge University Press 2023) 251.

[24] Mohamed S Abdel, Ethan Katsh and Daniel Rainey, Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution (1st edn., Eleven International Publishing 2012).

[25] eBay partnered with SquareTrade to offer a two-stage dispute resolution system: free automated negotiation followed by low-cost online mediation, partially subsidized by eBay. This improved fairness, reduced negative feedback, and built user trust. The partnership ended after eBay's 2008 feedback system changes, though SquareTrade still provides warranty and trustmark services. See Faye Fangfei Wang, 'Online Dispute Resolution (ODR)', Max Planck Encyclopedias of International Law [MPIL] (Max Planck Institute Luxembourg for Procedural Law 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3028.013.3028/law-mpeipro-e3028>.

after the dot-com crash.[26] Institutional adoption continued, with ICANN using ODR for domain disputes. Since 2011, ODR has grown through public sector integration, international efforts (e.g., UNCITRAL, Benoam), and tech innovations like Modria and Juripax. As online interactions evolved from Web 1.0 to Web 2.0, disputes became more complex, positioning ODR as essential not only for resolution but also for managing risk, building trust, and supporting user retention in a digital age.

B. Contemporary Challenges and the Role of Regulation

With the proliferation of modern technological platforms, new issues arise, specifically concerning data privacy and the security of confidential data. While ODR is often deemed suitable for typical cases, this assumption overlooks the emotional and subjective complexity present in many disputes.[27] As a result, the procedural fairness that defines mediation is often compromised by impersonal digital interfaces. Mediation is fundamentally about giving parties a voice—something AI still struggles to deliver, lacking the nuance, empathy, and judgment essential to human interaction.[28] Without human-centered design and proper safeguards, ODR risks reducing mediation to a process of automated compliance, prioritizing efficiency over ethical and social considerations. In doing so, fully automated systems can undermine mediation's core strengths: meaningful dialogue, active participation, and the role of human judgment.

In practice, ODR systems function more as compliance or enforcement tools than genuine mediative processes. Being automated by nature, they often fail to account for power imbalances, especially in cases involving unrepresented individuals, leading to one-sided outcomes.[29] This dynamic is further complicated by the monocultural tendencies of AI systems, which are shaped by the dominant norms and general practices embedded in their algorithms.[30] Rather than offering neutral solutions, these systems often reproduce existing patterns, favoring what is common or statistically likely over what is

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[26] The dot-com bubble was a stock market surge driven by speculation in internet-based companies. Fueled by investor hype and flawed metrics, such as website traffic over profitability, many startups lacked sustainable business models. This ultimately led to a market crash in the early 2000s, triggering a major downturn in the tech sector. See Mohamed S Abdel, Ethan Katsh and Daniel Rainey, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (1st edn., Eleven International Publishing 2012).

[27] Committee on Legal Affairs and Human Rights and Mr Jordi XUCLÀ, 'Access to Justice and the Internet: Potential and Challenges ' (2015) <https://pace.coe.int/en/files/22245/html>.

[28] As a fourth party, ODR platforms may unintentionally reinforce power asymmetries, especially when consumers face large data controllers without legal support.

[29] This dynamic raises broader concerns about the emergence of a two-tiered justice system, where affluent users retain access to traditional adjudication, while lower-income parties are funneled into automated, pseudo-mediation mechanisms that lack meaningful human engagement.

[30] Chris Draper and Nicky Gillibrand, 'The Potential for Jurisdictional Challenges to AI or LLM Training Datasets' <https://ceur-ws.org/Vol-3435/paper2.pdf>.

just or contextually appropriate. Predictive biases inevitably arise,[31] as the algorithms reflect the assumptions, values, and blind spots of their human designers, further undermining the fairness and inclusivity that mediation is meant to uphold. When algorithms are used to shape societal decisions, they risk fostering a monoculture which promotes uniform behaviors and preferences while suppressing diversity in thought and context.[32]

Moreover, as cross-border agreements become more common, the need for convenient and adaptable dispute resolution mechanisms has grown—especially when parties are based in different jurisdictions. In response, legal reforms have emerged to redefine what constitutes a valid "written form" in procedural contexts.[33] Recognizing emails, letters, and telegrams as legally acceptable written communications not only facilitates remote dispute resolution but also strengthens the enforceability of electronic agreements.

Despite its growing potential, data protection remains a critical concern in the development of ODR.[34] Effective ODR in data protection requires collaboration between technical providers, national Data Protection Authorities, and an overarching regulatory body to ensure due process.[35] A strong example of regional cooperation is the EU ODR framework, which offers a centralized platform for resolving consumer disputes across member states.[36] It sets minimum standards for mediator qualifications, protects user data and rights, and ensures fair, independent, and efficient outcomes. Similarly, Japan's national ODR support councils oversee implementation, guide platform development, and uphold

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[31] James Lau, 'Artificial Intelligence, Machine Learning, Technology and the Legal Profession-Perspective of an Asian Chief Legal Officer' (2020) 12 International In-House Counsel Journal.

[32] Jon Kleinberg and Manish Raghavan, 'Algorithmic Monoculture and Social Welfare' (2021) 118 Proceedings of the National Academy of Sciences of the United States of America.

[33] Munkh-Erdene Batdulam, 'Developing the Legal Regulation of Online Dispute Resolution' (2023) 5 241 <https://rbadr.emnuvens.com.br/rbadr/article/view/210/153> accessed 11 July 2025.

[34] When cross-border disputes arise, particularly if companies choose to opt out of ODR mechanisms, the risk of data misuse increases. Without robust legal frameworks in place, this lack of oversight can pose serious challenges to accountability and user protection. See Damian Clifford and Yung Shin Van Der Sype, 'Online Dispute Resolution: Settling Data Protection Disputes in a Digital World of Customers' (2016) 32 Computer Law & Security Review 272.

[35] Lodder, quoted by Clifford and Van Der Sype, proposes the institution providing the technological infrastructure as a "fifth party". For instance, the European Data Protection Board, which could oversee and manage ODR tools at an EU level.

[36] Committee on Legal Affairs and Human Rights and Mr Jordi XUCLÀ, 'Access to Justice and the Internet: Potential and Challenges ' (2015) <https://pace.coe.int/en/files/22245/html>; Faye Fangfei Wang, 'Online Dispute Resolution (ODR)', Max Planck Encyclopedias of International Law [MPIL] (Max Planck Institute Luxembourg for Procedural Law 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3028.013.3028/law-mpeipro-e3028>.

ethical and procedural standards, demonstrating how targeted regulation and institutional support can strengthen the quality and credibility of digital mediation.[37]

While many ODR platforms now incorporate tools such as decision trees, facilitation software, and collaborative brainstorming features, these technologies are still evolving and not without limitations.[38] This is why regulation plays a vital role in addressing concerns over algorithmic bias and the impersonal nature of automated systems.[39] By mandating human oversight where appropriate, enforcing strong data protection standards, and requiring accreditation for digital mediators and platforms, regulation builds legitimacy, accountability, and user trust.

IV. CONCLUSION

Mediation remains a vital tool for resolving conflict, offering a flexible, collaborative, and empowering alternative to adversarial systems. As it evolves, particularly with the growth of ODR, its future depends on thoughtful, balanced regulation. The goal is not rigid control, but to protect the process, uphold justice, and empower users through dialogue. Legal frameworks must provide structure without stifling adaptability, especially as digital platforms begin to shape decision-making in dispute resolution.

To preserve mediation's core values—autonomy, empathy, fairness, and participation—regulation must be comprehensive yet flexible. A soft-touch approach with minimal but meaningful harmonization can prevent misuse, respect diverse legal contexts, and maintain key ethical and professional standards. Ultimately, regulation defines mediation as a credible and distinct practice. It builds public trust, reinforces party autonomy, and ensures mediation remains an accessible, effective, and respected method of dispute resolution in both traditional and digital contexts, especially in cross-border mediation.

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[37] Munkh-Erdene Batdulam, 'Developing the Legal Regulation of Online Dispute Resolution' (2023) 5 241 <https://rbadr.emnuvens.com.br/rbadr/article/view/210/153> accessed 11 July 2025.

[38] Mohamed S Abdel, Ethan Katsh and Daniel Rainey, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (1st edn., Eleven International Publishing 2012); Committee on Legal Affairs and Human Rights and Mr Jordi XUCLÀ, 'Access to Justice and the Internet: Potential and Challenges ' (2015) <https://pace.coe.int/en/files/22245/html>.

[39] For instance, the proposed AI Regulation bans specific AI practices, including systems that significantly manipulate human behavior in ways that could result in physical or psychological harm, or cause adverse or discriminatory treatment toward individuals or entire groups. See Faye Fangfei Wang, 'Online Dispute Resolution (ODR)', *Max Planck Encyclopedias of International Law [MPIL]* (Max Planck Institute Luxembourg for Procedural Law 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3028.013.3028/law-mpeipro-e3028>.