ADR'S IN MATRIMONIAL DISPUTES

*Kamaljit Kaur**

I. INTRODUCTION

The discontentment of people over the inordinate delay in dispensation of justice today makes it not only important but imperative to evolve new juristic principles for dispute resolution. The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, and procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

Alternative Dispute Resolution (ADR)[1] comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multiparty negotiation, through mediation, consensus building, to arbitration and adjudication. Conflict is endemic to human society, among individuals and groups, and it is important to manage it.

Dealing with conflicts – "conflict management," or "conflict resolution" as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.[2]

The field of "conflict resolution" has matured as a multidisciplinary field involving psychology, sociology, social studies, law, business, anthropology, gender studies, political sciences and international relations. The discipline is complex because it deals with conflicts at different stages of their existence, and also because it is a mix of theory and practice, and of art and science.[3] The "science" is the systematic analysis of problem solving, and the "art" is the skills, personal abilities, and wisdom.

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* Faculty Member, Army Institute of Law, Mohali.

[1] A procedure for settling a dispute by means other than litigation, such as arbitration or mediation, BLACK'S LAW DICTIONARY (8th Ed. 2004) 86.

[2] Barrett, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION (Jossey-Bass San Francisco (2004) 7.

[3] Howard Raiffa ,THE ART AND SCIENCE OF NEGOTIATION (1982).

Alternative Dispute Resolution (ADR, sometimes also called "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed to resolving disputes in a non-confrontational way. ADR has been accepted and is now regarded as respectable within the legal profession. The large number of lawyers having undertaken mediation and other ADR training is recognition of the changes that the profession has been grappling with.[4] Russian federation provides for courts called "arbitrazhnye study" for dispute resolutions in family cases.[5] It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjustification at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies "mediation," a process by which a third party aids the disputants to reach a mutually agreed solution.

II. Negotiation, Mediation, Collaborative Law, Arbitration and Conciliation in General

ADR is generally classified into 5 types: Negotiation, Mediation, Collaborative law, Arbitration and Conciliation.

A. Negotiation

Goldberg, Sander, and Rogers define negotiation as "communication for the purpose of persuasion."[6] In negotiations there are three approaches to resolving the dispute, each with a different orientation and focus – interest-based, rights-based, and power-based-and they can result in different outcomes.[7]

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[4] J Pollard, *Collaborative law Gaining Momentum*, (45) 5 Law Society Journal 68-72 (Australian 2007).

[5] Bulletin, *General Overview of the Judicial System of the Russian federation* (BBH Legal, September 2006).

[6] Goldberg, Sander and Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes (New York, 1992).

[7] Ury, W. Brett, J. and Goldberg, S. Getting Dispute Resolved (Harvard University Press, PON, 1993). Fisher, in Getting to yes (1991), define negotiation as : "a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."

B. Mediation

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. Mediation is a process close in its premises to negotiation: "mediation is an assisted and facilitated negotiation carried out by a third party" [8]

In family law this is a process of negotiation between a couple, assisted by professionals who may be lawyers; it runs alongside the advice given by lawyers but offers a different way for couples to resolve themselves the issues they face. It is not to be confused with counseling. In orthodox mediation, the mediators can say if a proposed outcome is unlikely to be upheld by a court.

C. Arbitration

Arbitration can be defined as a method by which parties to a dispute get the same settled through the intervention of a third person. Parties can also settle their disputes through a permanent arbitral Institution like, Indian Council of Arbitration, Chamber of Commerce's, etc. This is a form of independent adjudication but outside the court system and with the opportunity to agree timetables, choice of arbitrator, procedures, location of hearings etc. It can be for all issues in a case or just a narrow point in dispute.

D. Collaborative Law

Collaborative Law, commonly known as collaborative practice because the service may involve other professional, is a dispute resolution method in which the clients and their lawyers agree by way of a limited retainer agreement to negotiate settlement without resort to the courts. Collaborative Law is very prevalent in other countries.[9] Collaborative lawyering is an emerging method of dispute resolution for separating or divorcing couples, where the parties and their lawyers agree to resolve the issues without litigation. The essence of the process is that the best interest of the spouses and their families is served by trying to resolve

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[8] *Supra* n. 6.

[9] Tesler, P, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (American Bar Association, 2001).

these disputes in a non confrontational way. This is achieved by way of informal discussion with each party, ensuring their direct influence on the outcome. The ultimate aim is to avoid the use of court in family law cases.

The International Academy of Collaborative Professionals (IACP) is an international body promoting the practice of collaborative law internationally. It has 2,458 members drawn from 9 countries and sets out training standards for those involved in collaborative law.[10] Whilst the highest concentration of collaborative lawyers is in family law, the collaborative process is also used in other areas of law. For example, in Massachusetts it is used in resolving commercial disputes. Similarly, Texas is considering extending the practice of collaborative law into other areas of civil law.[11]

Although collaborative law is an emerging ADR process, it has a capacity to provide another method to assist the resolution of family disputes in certain circumstances. Given that it is a relatively new process, the need to ensure that those engaged in the process are trained in the collaborative process. This involves learning not only the collaborative model, but also the new skills needed to work with clients and the lawyer representing the other spouse to try and get the best result for both spouses and the family. At present the basic issues stemming from collaborative lawyering is the ethical and professional problems which may arise and whether the parties best interests are fully served by the solicitors.[12]

E. Conciliation

Conciliation is a process in which a third party brings together all sides of the conflict for discussion among themselves. Conciliators do not usually take an active role in resolving the dispute, but may help with agenda setting, record keeping, and other administrative concerns. A conciliator may act as a go between when parties do not meet directly, and act as a moderator when joint meetings are held. Japanese law makes extensive use of conciliation in civil disputes. The most common forms are civil conciliation and domestic conciliation. Civil conciliation is

[10] See www.collaborativepractice.com.

[11] Pirrie, *Collaborative divorce*, 156 NEW LAW JOURNAL 898 at 899 (2006).

[12] Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST J DIS RESOL 505 (2002).

a form of dispute resolution for small lawsuits, and provides a simpler and cheaper alternative to litigation. Domestic conciliation is most commonly used to handle contentious divorces, but may apply to other domestic disputes such as the annulment of a marriage or acknowledgment of paternity.

III. A Brief History Of ADR

The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is flourishing throughout the world because it has been proven itself, in multiple ways, to be a better way to resolve disputes.

The US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help "communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin".[13]

Internationally, the ADR movement has also taken off in both developed and developing countries. In the developing world, a number of countries are engaging in the ADR experiment, including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine, and Uruguay. These countries are experiencing similar growth while continuing to develop new and creative ADR processes and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field. In the United Kingdom, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged"[14]. In response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovation in ADR models,

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[13] Moore, C., The Mediation Process: Practical Strategies for Resolving Conflicts (San Francisco, Jossey Bass, 1996).

[14] A.F. Acland, Managing Conflict Through Mediation (London, Hutchinson Business, 1995).

expansion of government-mandated, court-based ADR in state and federal systems and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR. In 1976, the San Francisco Community Boards program was established to further such goals. In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation.[15]

In Sri Lanka, the courts are ineffective in resolving many local and small disputes because of high costs and long delays. The Mediation Boards there have evolved as a substitute for the courts, but enjoy the support of the judicial system. Bolivia, Haiti, Ecuador, and El Salvador are developing systems involving government support for independent, local, informal dispute resolution panels to serve parts of the population for whom the courts are ineffective.[16]

Many studies of developing country ADR systems offer evidence that the systems have been effective in processing cases quickly, at least relative to traditional court systems. The mediation Boards in Sri Lanka resolve 61% of cases within 30 days and 94% within 90 days. Studies of programs in China, India, Costa Rica, and Puerto Rico similarly indicate that ADR systems have been successful in handling large numbers of cases quickly and efficiently.[17] In India, the lok adalats were generally credited with resolving large number of cases efficiently and cheaply in the mid-1980s before the system was taken over by the government judiciary.

IV. ADR IN INDIA SPECIFICALLY WITH REGARD TO FAMILY LAW

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people

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[15] *Supra* n. 6 and Elizabeth Plapinger and Donna Stienstra, ADR AND SETTLEMENTS IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center and CPR Institute for Dispute Resolution 1996).

[16] William, Davis, and Madeleine Crohn, , *Lessons Learned: Experiences with Alternative Dispute Resolution*, Prepared for Judicial Roundtable II. Wlliamsburg, VA: National Center for State Courts, May 1996.

[17] Harry Blair, and Gary Hansen, *Weighing in on the Scales for Justice: Strategies Approaches for Donor-Supported Rule of Law Programs*, USAID PROGRAM AND OPERATIONS ASSESSMENT REPORT NO. 7, 1994.

and such mediation was called in olden days "Panchayath". The Indian Contract Act, 1872 and the Specific Relief Act, 1878 recognised the settlement of disputes by arbitration. Even Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes.

The arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940 which has now been replaced by the Arbitration and Conciliation Act, 1996. The scope of interference of the award passed by an arbitration was dealt with by the Apex Court in *Food Corporation of India* v. *Joginderlal Mohindarpal*[18] as:

> Arbitration as a mode for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play in action. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only by doing justice between parties but by creating a sense that justice appears to have been done.

[18] (1989) 2 SCC 347.

Reference to the village panchayat without court intervention, was one of the natural ways for Hindus to resolve disputes. Hindu civilization expressly encouraged dispute resolution by tribunals chosen by the parties.

A study of the Muslim law during the Muslim rule and judicial administrators under Arabs, Sultans, Mughals, Vijyanagar Empire and Marathas give useful information about the dispute resolution practices prevalent during that epoch.[19]

In present scenario, family disputes are becoming very common. Individualization, modernization, western culture and decline of joint family systems are the main causes behind family disputes. The sensitiveness involved in the family matters makes the family disputes different from others. Family disputes are difficult to settle as they are linked with emotions arising out of a relationship. It is hard to handle situation, so they enter into litigation losing their time, money and peace. In reality most of the family disputes can be solved amicably by adopting ADR.

Section 5 of the Family Courts Act, 1984 provides provision for the Government to require the association of Social Welfare Organization to help the Family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counselors to effect settlement in the family matters. Section 9 of the Act impose an obligation on the Court to make effort for settlement before taking evidence in the case. In fact the practice in Family Court shows that most of the cases are filed on sudden impulse between the members of the family, spouses and they are being settled in the conciliation itself. To this extent the alternate dispute resolution has not much recognition in the matter of settlement of family disputes. Similar provision has been made in Order XXXII A of Code of Civil Procedure which deals with family matters. Order 32A of CPC lays down the provision relating to "suits relating to matter concerning the family". It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.[20]

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[19] R.D. Rajan, A PREMIER ON ALTERNATIVE DISPUTE RESOLUTION (2005) 515.

[20] The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession etc.,

ADR programs cannot be a substitute for a formal judicial system. ADR programs are instruments for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in legal and social norms. However, ADR programs can complement and support judicial reforms.

When courts are systematically biased against women, ADR may be able to improve women's access to justice, especially when discrimination against women inherent in local norms or traditional dispute resolution mechanisms can be overcome in the new ADR mechanism.

By amendment of the Code of Civil Procedure in the year 2002, Section 89 has been included in the Code, which give importance to mediation, conciliation and arbitration.[21] This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok Adalat or other methods enumerated in that section itself.[22]

Order 23 Rule 3 of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 provides that if the court is satisfied that a suit has been adjusted wholly or partly by lawful agreement or compromise, the court shall pass a decree in accordance to that. Order 27 Rule 5B confers a duty on court in suit against the government or a public officer to assist in arriving at a settlement.

The other legislation, which has given more emphasis on the alternate dispute resolution, is the Legal Service Authorities Act, 1987.[23] Though settlements were effected by conducting Lok Nyayalayas prior to this Act, the same has not been given any statutory recognition. Now under the new Act, a settlement arrived at in the Lok Adalat has been given the

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[21] *K.A.Abdul Jalees* v. *T.A. Sahida*, (2003) 4 SCC 166.

[22] Section 89, coupled with Order X Rules IA, IB, IC of the CPC and allied laws, affords the judiciary the opportunity to offer the parties an array of avenues to resolve their issues in a timely and amicable manner and, in the process, reduce its backlog.

[23] As per sub-section (2) of Section 89, when a dispute is referred to arbitration and conciliations, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute to Lok Adalats for settlement by an institution or person, the Legal Services Authorities Act 1987 alone shall apply.

force of a decree which can be executed through court as if it is a decree passed by a competent court. Power has been given to the Lok Adalat constituted under the Act, to decide the dispute referred to them, to effect settlement by mediation and if settlement is arrived at between parties to draw a decree on the basis of compromise and the same will be signed by the members of the Adalat which consist of a judicial officer working or retired, a lawyer and a person of social welfare association preferably women and a copy of the same will be given to the parties free of costs. This has really reduced delay in getting copy of the decree by the parties. Lok Adalats have acquired wide acceptance among the public as the results are quick, less expensive and no appeal will lie against the award passed in a Lok Adalat.[24]

Realizing that in some countries trial within a reasonable time is a part of the human right legislation and in our country, it is a constitutional obligation in terms of Article 14 and 21 of the Constitution, the Delhi High Court mediation and conciliation centre SAMADHAN was established in May 2006. In 1995 the International Centre for Alternative Dispute Resolution (ICADR) was inaugurated by Shri P.V. Narasimha Rao the then Prime Minister.[25]

Section 23(2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

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[24] Section 19(1) of the Legal Services Authorities Act 1987 defines that every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. As amended vide Act No. 37 of 2002.

[25] The Prime Minister observed: "While reforms in the judicial sector should be undertaken with necessary speed, it does not appear that courts and tribunals will be in a position to hear the entire burden of the justice system. it is incumbent on government to provide at reasonable cost as many modes of settlements of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention."

In *Salem Bar Association* v. *Union of India*[26] the Supreme Court has requested to prepare model rules for ADR and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rules are framed as "Alternative Dispute Resolution and Mediation Rules, 2003".

The new law, which came into effect in July 2002, was seen to be adopted with differing enthusiasm across the nation. Some State High Courts had already put in place a panel of trained mediators, who were being referred cases for mediation on a regular basis, and had also adopted the earlier version of the aforesaid Model Rules (recommended in an earlier order of the Supreme Court in the same case) with or without modifications. Whereas other States high Courts had either only held "Awareness Campaigns" with little or no follow up action or were in the process of providing mediation training and creating a panel of trained mediators. These ADR developments in the respective States depended largely on the inclination of their respective High Court's Chief Justice towards ADR. This not only led to uneven introduction of ADR services in the different States but also led to the implementation of the ADR system gaining and losing momentum with the change of guard in each High Court, which on an average one can expect to happen every other year. Now, after the second Order of the Supreme Court in the *Salem Bar's case*, it is to be presumed that all High Courts shall be implementing the ADR system by adopting the aforesaid Model Rules in such form as they choose. They will be providing mediator's training to the legal fraternity and such others as they choose, and setting up Panels of trained mediators and providing the list to the judges, lawyers and parties for consideration whilst appointing mediators. On successful completion of the mediation process, they will take the mediated agreements on record and dispose of the cases on the basis thereof.

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003 lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

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[26] (2005) 6 SCC 344.

(i) It will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;

(ii) Where there is no relation between the parties which requires to be preserved it will be in the interest of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec. 89.

(iii) Where there is a relationships between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of sec. 89.

The rule also says that disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) Where parties are interested in a final settlement which may lead to a compromise, it will be in the interest of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section 89.

According to Rule 8, the provisions of these Rules may be applied to proceedings before the courts, including Family courts constituted under the Family Courts Act 1984, while dealing with matrimonial, and child custody disputes.

The National legal Services Authority (NALSA), a statutory body constituted under the Act, is responsible for providing free legal assistance to poor. There is a need to make the masses legal literate and for this NALSA is doing a yeomen service.[27]

In terms of Section 7(hb) of the Notaries Act, 1952 one of the functions of a notary is to act as an arbitrator, conciliator, if so required.

V. Family Mediation (Global Scenario)

Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the dispute.[28] Proponents of family mediation argue that the traditional adversarial

[27] R.C. Lahoti, "Envisioning Justice in 21st Century" keynote address delivered at conference of chief ministers of state and chief justices of high courts. Vigyan Bhavan, New Delhi on September 18, 2004: (2004) 7 SCC (J) 13.

[28] Irving and Benjamin, Therapeutic Family Mediation: Helping Families Resolve Conflict (Sage Publications, 2002).

litigation system is unable to adapt to the needs unique to family breakdown. Where human relationships are strained, the adversarial approach may actually increase rather than reduce conflict.[29]

In Australia, the Family Law Act 1975 as amended by the Family Law Reform Act 1995 put a greater emphasis on the child's best interest in the process of dispute resolution. An Australian study found that only 4% of mediators had ever consulted school age children. Following this, a four month pilot project was launched into child consultation. The result of this study reported that over 80% of parents whose children were consulted as part of the mediation process felt that they had benefited a great deal from it.[30]

According to the American Model Standards for Family and Divorce Mediation – except in extraordinary circumstances, the children should not participate in the process without the consent of both parents and the children's court appointed representative. The use of the phrase "extraordinary circumstances" in the Model Standards sets a deliberately high barrier, and does not force a parent to involve a child if that parent is opposed to it and a child's participation is a matter for parents to decide after proper consultation and discussion".[31]

In England and Wales in *Al-Khatin* v. *Masry*[32], Thrope LJ stated that mediation should be considered at each level of court proceedings, even at Court of Appeal Level, because - ... there was no family case, however conflicted, that was not potentially open to successful mediation, even if mediation had not been attempted or had failed during the trial process. There are approximately 150,000 divorces per year in England and Wales and approximately 50,000 applications concerning children. Furthermore, 3 in every 5 marriages are estimated to end in divorce, 1 in 4 children under 16 will experience their parents' divorce and over 150,000

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[29] Alberta Law Reform Institute, RESEARCH PAPER ON COURT-CONNECTED FAMILY MEDIATION PROGRAMS IN CANADA (No. 20 1994) at 1.

[30] McIntosh, *Child–Inclusive Divorce Mediation: Report on a Qualitative Research Study*, 18 MEDIATION QUARTERLY 2 (2000); and LEGAL AID AND MEDIATION FOR PEOPLE INVOLVED IN FAMILY BREAKDOWN (National Audit Office, Legal Services Commission, March 2007) 26.

[31] Schoffer, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAMILY COURT REVIEW 326 (2005).

[32] 2004 EWCA Civ 1353.

children are affected by divorce every year.[33] With 15,000 publicly funded mediations plus approximately 5,000 private mediations, this indicates a mediation population of around 20,000. Thus it would appear that there are 10% of the divorcing and separating population who use mediation.[34] For many years, there was little official support and funding for family mediation in England and Wales. However, stemming from the recommendations of the Law Commission's 1990 Report[35], family mediation was allotted a central role in the reform of divorce introduced by the Family Law Act 1996.

In a study conducted in 2001, it was noted that 38 states in the United States had legislation that regulate family mediation.[36] Most agreements reached through mediation were not binding until approved by the court. If no agreement was reached, generally, it was found that the cases go to trial but now these are mandatory. It was also pointed out that such mandatory mediation statutes send a clear public policy message that where possible, the first level of intervention for family law disputes should be in non-adversarial processes, before proceeding to more conflict-escalating adversarial interventions.[37]

Australia has a long tradition of promoting ADR for family disputes. The Federal government issued a - Justice statement in May 1995 in which it committed itself to make dispute resolution services more widely available. Funding was allocated to 24 family mediation services throughout Australia over a four-year programme. Funding was also allocated to expand community based family mediation services. A National Alternative Dispute Resolution Advisory Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the

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[33] Divorcing or Separating? National Family Mediation, 2006.

[34] Sayers, FAMILY MEDIATION IN ENGLAND AND WALES, Presentation to the Committee on Legal Affairs Presidency of the Council of the European Union – Mediation: Pushing the Boundaries, October 2007. INFORMATION MEETING AND ASSOCIATED PROVISIONS WITHIN THE FAMILY LAW ACT 1996: SUMMARY OF THE FINAL EVALUATION REPORT (Lord Chancellor's Department, London, 2001).

[35] LAW COMMISSION OF ENGLAND AND WALES REPORT ON FAMILY LAW: THE GROUND FOR DIVORCE (Law Com. No. 192, 1990).

[36] Tondo, et al, *Mediation Trends, A Survey of the States,* 39 FAM CT REV 431 (2001).

[37] Kelly, The United States experience, keynote address at the Proceedings of the International Forum on Family Relationship in Transition Legislative, Practical and Policy Responses, December 2005.

expansion of alternative dispute resolution.[38] Section 10f of the Family Law Act 1975 as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006, defines a family dispute resolution as a process (other than a judicial process). It also provides for Family Consultants and Family Relationship Centres.[39]

In Canada, mediation has been connected with the formal legal process for 30 years. The first court-connected family mediation service in Canada was launched in 1972 with the establishment of the Edmonton Family Court Conciliation Project. Since then, mediation services offering various programmes have been introduced in all 10 Canadian provinces.[40]

In several Canadian jurisdictions, the role of mediation in assisting to resolve family law matters is recognised in legislation, Federally, the Divorce Act 1985 provision that every lawyer who acts in a divorce case has the duty to inform the spouse of mediation facilities that might be able to assist the spouse in negotiating the matters that may be the subject of a support order or a custody order.[41] In Ontario,[42] Newfoundland,[43] and the Yukon[44] legislation expressly authorizes the court to appoint a mediator to deal with any matter that the court specifies.

Judicial mediation conferences are available in New Zealand for parties under the Family Proceedings Act 1980 where a party has applied for a separation or maintenance order, or for a custody or access order. Mediation conferences may also be convened under section 170 of the Children, Young Persons, and their Families Act 1989. In response to the New Zealand's Law Reform Commission Report on Dispute Resolution in the Family Court recommendation that non-judge-led mediation be

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[38] www.nadrac.gov.au.

[39] Nicholls, *The New Family Dispute Resolution System: Reform Under the Family Law Amendment (Shared Parental Responsibility) Act 2006,* 3 (1) BOND UNIVERSITY STUDENT LAW REVIEW 6 (2007).

[40] Alberta Law Reform Institute Research Paper on Court-Connected Family Mediation Programs in Canada, ALBERTA LAW REFORM INSTITUTE RESEARCH PAPER NO. 20, 1994 at 4.

[41] R.S.C. 1985, 2nd Supp., c.3, s. 9(2).

[42] Children's Law Reform Act, R.S.O. 1990, C.C. 12, S.31; Family Law Act, R.S.O. 1990, C.F.S. S.3.

[43] Children's Law Act, R.S. Nfld. 1990, C.C-13, S. 37, 41; Family Law Act, R.S. Nfld. 1990, c.F-2, s.4.

[44] Children's Act, R.S.Y. 1986, c. 22, s.42.

introduced into the Family Court as part of a new conciliation service, the Government established a family mediation pilot. Family mediation was piloted in North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.[45]

VI. Conclusion

Litigation is a fight unto death, with severe economic, psychological and spiritual harm done to the parties: ADR compliments compromise embedded in moral and spiritual principles.[46]

It is recommended that there should be a Family Court Information Centre as in other countries and where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the proposed Family Court Information Centre, if they had not already done so, to receive information as appropriate concerning the various family support services available, including welfare service and to receive information and advice concerning the availability and purpose of mediation.

This should not be compulsory, but the court would be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the proposed Information Centre to receive the relevant information and advice. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue. Where the appropriate certificate of attendance or waiver has not been obtained, the Court would have the right, at its discretion, to adjourn the case until the parties had attended the proposed Information Centre. When one or both of the parties still refused to attend, the court would proceed with the hearing, but written information would be sent to the parties.

It also recommended that each proposed regional family courts should have an information office providing information on all options available for the resolution of family law disputes, mediation facilities, an office of the Legal Aid Board, and family support and child assessment services.

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[45] Barwick and Gray, Family Mediation – Evaluation of the Pilot: Report for the Ministry of Justice (Ministry of Justice, 2007).

[46] Joseph Allegretti, *A Christian Perspective on ADR*,28 Fordham urb LJ 997 and 1001 (2001).

We should give recognition to Parenting After Separation (PAS), a carefully devised schedule which lays out how to share time with the children, how to manage responsibilities, and how to make decisions about the children. School arrangements, child care, holidays, and pocket money can all be part of a parenting plan. It is a plan that is individual to each family and takes into account everyone's needs and interests.[47] Australia[48] and New Zealand recognize it.

In British Colombia it is a free three-hour information session for separating parents sponsored by the Ministry of the Attorney General.[49] The purpose of the sessions is to help parents make informed choices about separation and conflict, taking into account the best interest of their children. Information is presented in lectures, videos, handouts and interaction with participants in three key area: the impact of separation on children and adults, and how parents can best help their children through this difficult time; the full range of dispute resolution options available in the justice system, including mediation and the court process; how the child support guidelines work; and how to find out more about them. Both the person making an application to court and the other parent must attend a PAS session before their first court appearance.

Research on parent education programmes in the United States, and parental response to these programmes, suggests that well-designed divorce education programs should be mandatory and early in the divorce process for all parents disputing custody or access issues as they bring children's needs and voices sharply into focus for parents in a completely non adversarial manner, and at relatively low cost.[50] When parents separate, children often experience distress, and their adjustment post-separation may be adversely affected when the relationship with one of their parents is severed, so there is a need for PAS.

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[47] What is a Parenting Plan? Family Mediation Service.

[48] Section 63B of the Family Law Act 1975, as amended by the Family Law Reform Act 1995.

[49] See http://www.ag.gov.bc.ca/family-justice/help/pas/index.htm. see also Kruk, *Promoting Co-operative Parenting After Separation: A Therapeutic/interventionist Model of Family Mediation,* 15 JOURNAL OF FAMILY THERAPY 235 (1993).

[50] Kelly, *Psychological and Legal Interventions for Parents and Children Custody and Access Disputes: Current Research and Practice,* 10 VA J SOC POL'Y & L 129 at 133-136 (2002).