

**A COMPARATIVE ANALYSIS OF THE  
PRACTICE OF FAMILY MEDIATION  
WITH PARTICULAR REFERENCE TO  
AFRICAN CUSTOMARY MEDIATION**

by

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## **DECLARATION**

I hereby declare that this dissertation for a Degree of Master of Laws at the University of Durban-Westville, Durban, hereby submitted by me, is my own work and has not been previously submitted to this University or any other University.



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**P B MKHIZE**

SEPTEMBER 1997

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## SUMMARY

Family mediation is a process that was and is still practised by African indigenous societies. However, mediation in relation to family and divorce matters, is viewed either positively or negatively by most South African writers mainly from a Western perspective.

The recommendations made in this work focus, amongst other things, on what ought to be done by policy makers and exponents of mediation in order to make the benefits of mediation realised by South Africans particularly disadvantaged communities.

The role of illiterate and semi-literate South African citizens is pointed out as being critical more in managing family disputes from disfunctioning the family and leading to marriage break-down than merely mediating the parting of ways and ancillary issues of marriage.

The practice of family mediation and procedures followed by Africans when introducing the son-in-law to the daughter-in-law's family and the protracted marriage negotiations between *Umkhongi* (emissary) and the in-laws are all indicative of the entrenched or mandatory approach to family mediation.

The benefits of the peaceful ending of marriage relationship through third party interveners are highlighted in President Mandela's desire to terminate his marriage as 'painless as possible' particularly for the sake of children.

It is pointed out in this work that the Bushmen of the Kalahari Desert still adhere strictly to their tribal mediation procedures both in relation to family disputes and disputes in general. The tribe relies highly on *korakoradue* who is its senior citizen and respected elder, as resolver of community disputes.

The South African Justice Department brought hope when it worked toward introducing divorce mediation legislation. However, the vision was misdirected as the enacted family mediation legislation turned out to be constraining in its operation contrary to the recommendations by the Hoexter Commission. The majority of destitute South Africans who should be benefiting from this legislation end up not knowing about the existence of the Act and/or not making use of it because of the costs involved as only the Supreme Court can adjudicate upon matters covered by the Act.

The lack of research which focuses on local mediation styles makes it difficult to justify, for example, either Mrs. Mandela's claim when she said Mr. Mandela had not answered to the 'African Cultural and Traditional *Inkundla*' or Mr. Mandela's defence that he respects customs but is not a 'tribalist' as he 'fought as an African Nationalist with no commitment to any tribal custom'.

## KEY TERMS

divorce mediation, family mediation, mediation, mediator, lay-mediator, dispute resolution, mediation in certain Divorce Matters Act, African customary mediation, family, traditional family, *ukuphuthuma*, conflict management, protracted marriage negotiations, Mandela's.

## METHOD OF CITATION

The method of citation employed is that of the **South African Law Journal**.

The name of the author of a book is followed by the underlined title of a book, year of publication and page number in sequence.

Thus: S. Triangle The Perished Kingdom (1990) 46.

The name of the author of an article is followed by an article in quotation marks, year of publication, volume number, underlined name of Journal and page number in sequence.

Thus: T. Hola 'We are not saved' (1990) 5 Kilimanjalo Law Journal 10.

Cross references are used thus:

op cit n9 at 14;

ibid (Meaning 'in the same place').

All the works that have been cited are referred to in footnotes and complete bibliographical references appear at the end under Bibliography.

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## CHAPTER 1

### RECOMMENDATIONS

#### 1.1 INTRODUCTION

The search for alternative dispute resolution methods has burgeoned in South Africa to what one may call a 'South African Movement'. In the divorce context, those interested in assisting couples to bring to an end their marriages with dignity have formed themselves into an association known as The South African Association of Mediators. In the legal context, and for many reasons, lawyers in the Johannesburg area have organised themselves into an 'elite' group of lawyers referred to as Alternative Dispute Resolution of South Africa. Those practising as advocates in the Johannesburg area have recently decided, amidst dissatisfaction from other members, to establish an arbitration centre in an affluent Northern Suburb of Sandton in order not to expose the management of big white companies to potential dangers and inconveniences associated with courts located in the city centre of Johannesburg. At the grassroots level an association known as Lay-Mediators Association has been formed at the instance of my organisation with a view to empowering illiterate and semi-literate members of the community to contribute toward conflict mitigation in their neighbourhoods. The Government has introduced mediation - related legislation, like The Mediation in Certain Divorce Matters Act,<sup>1</sup> and the Short Process Courts and Mediation in Certain Civil Cases Act.<sup>2</sup>

Various reasons are advanced (also by South African experts in conflict resolution) for preferring alternative dispute resolution processes like mediation to adversarial methods. In family disputes, the proponents of mediation assert that debilitating expenses, frustrating delays, and its failure to address the

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<sup>1</sup> Act 24 of 1987.

<sup>2</sup> Act 103 of 1991.

emotional needs of the parties whilst a mediation process offers the opposite.<sup>3</sup> Despite the potential for mediation one would, however, have to pause and ask whether mediation could be said to be the process that could ameliorate the needs of the underprivileged and illiterate masses in South Africa who have, within the context of this theses, been denied easy access to the legal justice system.

In reviewing a collection of articles on the field of family or divorce mediation written by South African writers, one observes that such articles tend, among other things, to focus only on the advantages and disadvantages of mediation as researched by western countries. Very little is said as to whether mediation could be effectively applied to benefit all South Africans, particularly the underprivileged Black masses.

Family mediation in South Africa will take time to produce the benefits professed by its exponents mainly because the concept is in its infancy.<sup>4</sup> Even in the United States of America, where family mediation has been practised for the past 20 years, it will, according to Professor Haynes 'take another 10 years for people to think of mediation as a first choice'.<sup>5</sup>

What could be the reasons for family mediation not attaining the scope of implementation in South Africa? I am not going to discuss the causes that could hinder the successful implementation of family mediation. I am, however, going to make and discuss, in this chapter, recommendations for a successful implementation of mediation.

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<sup>3</sup> S T Knuppel 'Promise and Problems In Divorce Mediation' (1991) Journal of Dispute Resolution 127 at 129; J G Mowatt 'Some Thoughts on Mediation' (1988) 105 SALJ 727; D Scott-Macnab 'The Legal Profession's Declining Image: Is there a better way' (1987) De Rebus 27.

<sup>4</sup> D Scott-Macnab 'Mediation in the Family Context' (1988) 105 SALJ 705 at 707, 'mediation is so new that we are still bandying about with terminology and have as yet not got to grips with either the concept or its practical implications'.

<sup>5</sup> Wall Street Journal, March 27, 1990 B at 1 Col. 4.

## **1.2 RECOMMENDATIONS**

A central focus of the recommendations involves education and a holistic training approach as possible tools to realising the mediation benefits for all South Africans. Holistic training refers to training of all groupings in our communities be they professional, semi-literate or illiterate. Semi-literate and illiterate groupings of our communities are the ones to whom training should have a special focus as these are more prone to violence than others and their approach to a conflict situation could be modified since training has an effect of changing attitudes and behaviours. Recommendations offer short and long term suggestions and also the institutionalisation of mediation in courts and communities, respectively.

### **1.2.1 Short term**

#### **1.2.1.1 Substantive endeavour**

The infancy of mediation in South Africa presents to us a duty to be involved in substantive mediation endeavours. By this I mean that we should be engaged in an awareness campaign whereby the public is informed about the availability of mechanisms for resolving disputes other than traditional dispute resolution structures and professionals; we should be engaged in explaining key concepts like negotiation and mediation and pointing out the benefits derived from them as well as disadvantages associated with them. We should also be engaged in highlighting how these processes differ from the adversarial process of resolving conflicts.

Training of the public should be part of this endeavour and should also be inclusive, that is, training should be offered to professionals like lawyers, social workers, teachers, and others. People at grassroots level, in particular, should be exposed to basic mediation concepts. Mediation is a discipline and a specialised field that can be confusing to an ordinary person as it does confuse the South African policy makers. Hence, we need to spend much time

educating ourselves about it and not rush to an implementation process and legislation since justice hurried is justice miscarried. Hahlo did warn against a series of divorce law reforms when he said:

'People who believe that the Divorce Amendment Bill will do anything to get the divorce rate down are likely to be disappointed. All it will achieve is to make divorce more complicated, longer drawn-out, clogging the courts, and more expensive, both for the state and the parties'.<sup>6</sup>

The continuing teaching of only legal courses to law students, particularly those at Black Law Schools, conditions them to think only from a legalistic point of view and to think as positivists, thus being deprived of other values of looking at people's life. I have commented on this aspect as follows:

'Legal education in general methodically constrains students not to immerse themselves in their client's lives, but rather to attend to only that which is 'legally' relevant to a situation, to ignore what other people may be doing in response to the problem, and effectively persuades students to think of themselves as the pre-eminent problem solvers.

I suggest that for us not to be ashamed by our much talked-about new South Africa, we will have to start now educating and re-educating ourselves about ways to resolve conflicts without hatred, bloodshed and misery. Processes like negotiation and mediation are not of recent origin, they were used long ago by our traditional societies, and they were successfully used'.<sup>7</sup>

The confusion created in positioning the Family Advocate<sup>8</sup> not as a neutral third party who takes no sides when assisting in investigating the best interests of minor children, strengthens the 'conservative' lawyer's mind that the adversarial legal system is entrenched in South Africa. This attitude ought to be discouraged through education by the exponents for empowerment whose duty

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<sup>6</sup> H R Hahlo 'A Bad Bill' (1984) SALJ 707.

<sup>7</sup> P Mkhize 'Schools Must Teach Conciliation' The Star January 26, 1991 at 18.

<sup>8</sup> Section 4 (3) op cit n1 at 2.

is to, among other things, encourage the independence of citizens to constructively take control of what concerns them, and to advocate that social control dictates that the citizens should be exposed to processes and be focused on outcomes that reduce social conflicts, and that social justice encourages access to justice on an equal basis to rich or poor and to the educated and illiterate.

The questions we have to ask ourselves as 'liberated and democratised' South Africans are: How should everyone irrespective of his or her standing in society going to have equal access to benefits of the reformed divorce laws? How are we going to have stability in our trouble torn communities if the residents of such communities perceive the administration of justice to be not sensitive to their situations? And how are we going to discredit the operation of people's courts if we still consider our legal system as operating 'OK' despite Judge Huddart's view that judgement after trial resolves the issues, but rarely does it resolve the conflict?<sup>9</sup> Budlender's comments seem to cover the feelings expressed in the above questions when he says:

'If it is true that the problems of poor people are principally group problems, then it is also true that it is through group action rather than individual action that they are likely to be resolved.

The strengthening of these groups surely lies at the heart of any attempt to resolve conflicting interests and promote social justice. Strong groups are clearly better able to promote cohesion, to articulate demands, and negotiate effectively ... . While the expert may succeed in solving the client's immediate problem, the simultaneous result may be to reinforce the client's position of powerlessness and dependence.

This serves to exacerbate the long-term problem. The alternative route is to attempt to use skills to empower people and groups. Much more time and effort need to be expended in exploring ways in which lawyers, and other professional people, can promote the just resolution of

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<sup>9</sup> C M Huddart 'Should Information Received in Mediation be Admissible in Court' (1991) Family and Conciliation Courts Review 85 at 89.

conflict by enabling the poor and powerless to act cohesively and effectively on their own behalf'.<sup>10</sup>

Education awareness in the field of family mediation is not only the first essential step but a critical one. It may not be a bad guess that almost all non-legal people in Soweto, for example, have never heard of a thing known as Short Process Courts and Mediation in Certain Civil Cases Act. I may not stand accused if I assume that few members of the justice system from clerks of courts to judges, may not know much about the above mentioned Act. If they do, they have not said anything about it. I mean they have not advised claimants about the existence of the Act and the benefits derived from the provisos of it and they have not acted as Justice Sandra Day O'Connor of the United States Supreme Court did when she said:

'The courts of this country should not be the places where the resolution of disputes begins. They should be places where dispute ends after alternative methods of resolving disputes have been considered and tried. The courts of our various jurisdictions have been called the 'courts of last resort'.<sup>11</sup>

Mowatt's<sup>12</sup> efforts in explaining and analysing the abovementioned Act are helpful and laudable. But, with all the due respect, they are academic only as they do not reach out to the needy. I say this from my experience having conducted a number of lay-mediation training sessions in Soweto and other townships where adult members of the community, like women, church ministers, civic leaders and police have been participants. I have conducted a number of professional mediation training sessions in Provinces like Gauteng, KwaZulu-Natal and Western Cape where law students, lawyers, justice college teachers, teachers, and social workers have been participants. In all these sessions I mention or refer to mediation-related statutes and would ask

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<sup>10</sup> G Budlender 'Lawyers, Conflict and Social Justice' Law and Justice in South Africa (1988) (ed.) John Hund 17 at 22.

<sup>11</sup> Cited in R Wolff and M Ostermeyer 'Dispute Resolution: Citizens Access to Justice' (1988) 51 Texas Bar Journal 51.

<sup>12</sup> J G Mowatt 'The High Price of Cheap Adjudication' (1992) 109 SALJ 83.



participants to comment about the usefulness of those acts. To my surprise, the responses I received were commonly: 'What are you talking about?' 'Would you make available copies of those acts to us?' 'How are we going to obtain copies of those acts?' 'Why are we not told about those laws (referring to statutes)?' These questions have been asked as recently as October 4, 1994, in Uitenhage, Port Elizabeth, when I was training teachers there in professional mediation.

South African mediation scholars and Non-Governmental Organisations in particular, should be actively involved in educational efforts in order to put into effect in South Africa Judge Huddart's hope that mediation 'as the process might also be educational: that it might assist the parents in resolving future conflicts which are inevitable when both are trying to raise children after they have separated, divorced, most probably remarried'.<sup>13</sup>

The overcrowding in our courts, both lower and superior, does bring about frustrations when cases are postponed for such a remarkable length of time or indefinitely. The cause of such overcrowding is largely due to the fact that minor disputes are rushed to courts or referred to lawyers. Lawyers for example, accept instructions to prosecute clients' claims without advising their respective clients on other best alternative methods that may be explored to have their claims discussed and solved. Lawyers, as they are also interested in the riches of the market, protract one way or another, the finalisation of the dispute due sometimes to the form and procedure laid down by the rules of court.

The potential danger inherent in the overcrowding of our courts and the omission by lawyers, clerks of court, and judicial officers to inform clients and or claimants, inadvertently or purposely, about the best alternative to the dispute, often leads to a minor dispute escalating into serious consequences.

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<sup>13</sup> Huddart op cit n9 at 90.

Death which may ensue from delayed resolution of dispute could not be compensated by any amount of damages to be awarded.

Willrich has succinctly summarised this proposition as follows:

'As advocates we must resolve our basic mistrust of the process. We know that mediation is a growing field of practice and little can be done to dismantle it. We recognise the need for stabilisation, uniformity, regulation, and training. Although mediation is most difficult with persons who are immature, poorly educated, and often unable to keep their personal feelings separate, there is data that in some circumstances mediation is an appropriate alternative. As legal services advocates we should be on the forefront of change. Can we accept mediation as an alternative mechanism for dispute resolution? In a time when monies cannot even support legal services\* programs in place and court dockets are extremely crowded, it is especially important that we provide our clients with alternative methods of resolving disputes. The theory of empowering the client community includes offering our clients a choice. It means being able to recognise the shortcomings of the system and the lack of sophistication of our clients. It means using all available mechanisms to prevent domestic violence. It means obtaining the necessary training on the subject of mediation to fill our gap of knowledge ... . It means a willingness to let go of some of the power that we feel when we negotiate on behalf of a client who can achieve the same results. It means serving more of the client community'.<sup>14</sup>

### **1.2.1.2 Court-annexed mediation**

Conceding as I do, that for lay and even sophisticated people courts are sites of stress and intimidation, court-annexed mediation, that is, voluntary divorce mediation is, in my view, an initial option worth introducing in South Africa. I know quite well, as a Black person and especially as a person born and bred in rural areas, that family problems are issues, disclosure of which is highly

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<sup>14</sup> P L Wilrich 'Resolving the Legal Problems of the Poor: A focus on Mediation in Domestic Relations Cases' (1968) 22 Clearinghouse Review 1373 at 1378.

guarded against. Referring one's (couple's) marital problems to a private mediator in practice or not attached to court, is something not easily to be done. The culture of settling disputes through litigation has also caused individuals to trust nobody other than a lawyer and courts.

Myers, Gallas, Houson and Keilitz comment on mandatory mediation as follows:

'disputants do not resoundingly volunteer to settle disputes through mediation ... . Even when participation is mandatory, up to one-fifth of those required to attend at least one session still find ways to avoid participation. Much of this resistance can be explained by lack of familiarity with mediation and a preference to stay with the known quantity represented by litigation'.<sup>15</sup>

The Provincial Supreme Courts would have to direct how a court-annexed programme should be applied rather than having it imposed on a country-wide scale. The Supreme Courts would, I submit, be in a position to know the type of court-annexed programmes to be adopted having taken into account the level of education, the living habits or customs of the people under their jurisdiction, the needs of the local people, the expertise available to cater for such needs, potential conflict between legal principles and traditional or tribal law and accessibility of court-annexed programmes by people living under their jurisdictions.

As to the personnel to be utilised for the operation of a court-annexed programme, I would suggest that such programmes could be carried out in court by either independent private mediators and/or by court employed mediators. Court employed mediators would have to be cautiously utilised as their involvement might be looked at with suspicion.

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<sup>15</sup> S Myers, G Gallas, R Houson & S Keilitz 'Divorce Mediation in the States: Institutionalisation, Use and Assessment' (1988) 12 State Court Journal by National Centre for States Courts 17 at 23.

### 1.2.1.3 Settlement Week

Settlement week refers to some days that may be set aside by court registrars or Chief Magistrates so as to enable professionals, like mediators, counsellors, arbitrators, and psychologists to avail their services to disputants for an informal and or peaceful settlement of disputes or to attempt at assisting disputants to reconcile their differences.

For a 'settlement week' to be implemented much publicity about it will have to be made. This could be done through radio and using all languages especially African languages. Television broadcast and print media also to be used at such a large scale. When the public is informed about 'settlement week', they would have to be told about what the 'settlement week' is all about and what its benefits are. There must be no conditions attached to the 'settlement week' proceedings, like stating what will happen if parties fail to resolve their disputes. Conditions would make parties think or feel that they are forced to resolve their problems purely because the courts direct the process of negotiations.

'Settlement week' will have to be conducted at neutral venues so as to make the settlement week sessions attractively informal. It shouldn't be, for example, like the multi-door programme attached to the Superior Court of Columbia, in Washington, where parties are referred to court-attached mediators for informal discussions having first appeared before the Commissioner where they first receive a 'lecture' about the benefits of the court-annexed programme.

Divorce matters would have to be part of a 'settlement week'. Since divorce matters other than dissolution of Black customary unions, fall outside the jurisdiction of the magistrate's court, the solution may be partly a short term and long term one. As a short term solution, it would mean that only the Supreme Court may set aside some days for a 'settlement week'. As a long term solution, efforts would have to be made to empower all magistrates' courts with

jurisdiction to adjudicate upon divorce and other divorce matters so as to be able to implement a 'settlement week' programmes enunciated above. This would therefore need a reconsideration of the powers of a court of civil jurisdiction as contemplated by Magistrates' Courts Amendment Bill in the event the Bill becomes law.<sup>16</sup>

Black Divorce Courts may also implement a 'settlement week' proposal due to the fact that they still exist and are actively used by Blacks. They are the structures which should without much delay, be given powers to implement the proposed recommendations. This should be considered as a matter of urgency because Blacks are the most deprived section of our society who cannot afford to pay high fees for lawyers and advocates and are the most faced with social problems, waning of moral values and poverty which contribute highly toward break-down of families.

It is imperative that ordinary magistrate's courts become actively involved in campaigns that would educate people in their respective areas about any family mediation-related laws so as to make a 'settlement week' a successful endeavour also in rural areas. Circuit Family Courts are not going to be solutions in as far as our South African situation is concerned. I agree with Professor Schafer when he says:

'... family court would have to share some co-ordinate jurisdiction in respect of certain family law matters of an ancillary nature with the magistrates' courts in outlying areas'.<sup>17</sup>

I do not agree, however, with Schaffer's view that only ancillary matters of divorce should be part of the co-ordinated work of the Family Court and Magistrates' Courts. My view is that divorce and ancillary matters are so inter linked that separation of them as regards adjudication, may create so much

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<sup>16</sup> Section 46 A (a) of the Magistrates' Courts Amendment Bill, 1993. See also par. 5 of the Memorandum on The Objects of the Magistrates' Courts Amendment Bill, 1993 at 56.

<sup>17</sup> D Schafer 'Family Courts Reconsideration invited' (1983) *Acta Juridica* 191 at 199.

hardship for rural people if done by two separate courts. Magistrates' Courts should be given divorce jurisdiction as existing Black Divorce Courts are not easily accessible to most Blacks in rural areas at the moment.

In Australia the 'settlement week' was initiated by the Dispute Resolution Committee of the New South Wales Law Society with the support of the New South Wales's Attorney Generals Department, the Bar, and the Supreme Court.<sup>18</sup> This shows, to a certain extent, how important the bottom-up decision making approach could be.

## 1.2.2 Long-term Solution

### 1.2.2.1 Voluntary Mediation

For voluntary mediation to work, a certain amount of research will have to be done. The issue of qualification, training, certification, and controlling body of mediators will have to be covered by such research. The qualification aspect will be difficult to resolve. Serious problems would exist if qualification as a family mediator would depend on one being in possession of a degree. I am of the opinion that possession of a degree is important but not critical for one to be a family mediator. Lack of qualified Black mediators would inhibit the exposure of Black couples to the process of mediation and other alternative dispute resolution processes.

If ADR has, at its best, to do with, among other things, the contribution to the pursuit of **individual autonomy** (that is, empowering of all communities to take control of their own lives) and **social control** (that is, diverting cases from courts and have them informally handled), then all communities, Black and White, Coloured and Indians, would have to participate directly in the justice system that is affecting their own respective lives. This is very important in a country like ours where diversity of cultures exists, where language barrier

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<sup>18</sup> Review by L Maloney (1993) Australian Journal of Family Law 177.

prevents a White mediator, for example, from understanding what the real issues are between Black parties and from understanding the non-verbal cues presented by Black clients.

The solution I may offer for extending the ADR processes to deprived communities, would be the one to do with the development of those schemes which stress community participation. These schemes may involve community mediators comprising of ordinary local residents and those which emphasise mediation skills and prefer qualified or trained, more or less professional mediators. These mediation schemes if developed, may provide and encourage, respectively extensive service and voluntarism on the part of helpers in their own communities and in their own designed way. There would be nothing peculiar with such contemplated schemes in a divided and pluralistic country like ours. Davis has his views about how mediation should be applied as he says:

'... each professional tends to give mediation its own slant, lawyers converting it into a modified accelerated adversarial process, social workers making it approximate more to therapy or counselling'.<sup>19</sup>

At the beginning of December 1993, I facilitated a workshop in mediation and conflict resolution attended by ANC's local government officials. Some participants asked me about qualifications required for one to be a mediator. Being influenced by IMMSA, ADRASA, and SAAM's standards I responded by saying 'you must be a psychologist, a social worker or a lawyer and you must undergo a training prescribed by these bodies'.

The response from the participants was overwhelmingly negative. Some shouted 'do these people who make these regulations ever set their feet in our communities and assess how we think of them?' 'How do the objectives they

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<sup>19</sup> Cited in T F Marshall Alternative to Criminal Courts (1985) 166.

set for us fit well with our community life and how much do we know of their organisations?’

Comments like these show a high attitude against policies and functions which are imposed on the people from outside their communities. This also suggests that a participatory form of justice system is needed. These comments also militate against ADRASA's (Alternative Dispute Resolution Association of South Africa) executive director's remarks, when she commented on ADRASA's need to expand its services. She said:

‘ADRASA must provide a service that is accessible to the broadest possible section of the community’.<sup>20</sup>

ADRASA's executive director appears to mean providing services on behalf of the people rather than empowering the people themselves to deliver services on their own. ADRASA's executive director may not be faulted about what she says as ADRASA was founded solely by lawyers and only White lawyers, for that matter, who might not have felt how it is to be entirely dependent even on matters requiring immediate healing.

Empowerment of non-professionals, reasonably educated township residents, in possession of say a standard 9 or 10 certificate, may be a saving device against lack of manpower both in urban and rural areas. Scott-Macnab has said:

‘We certainly do not have the facilities or manpower here in South Africa to run two competitive systems; ... careful utilisation of manpower resources, which include the manpower of private associations and university law and social-work facilities, must be used in conjunction with public servants and court-appointed officers in order to develop a holistic and comprehensive South African approach to mediation in family context’.<sup>21</sup>

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<sup>20</sup> B Van Rooyen 'The Mediators' Fair Lady (1993) December 1, 188 at 190.

<sup>21</sup> D Scott-Macnab 'Mediation in the Family Context (1988) 105 SALJ 709 at 725.



I am **ad idem** with Scott-Macnab in as far as his comments on lack of manpower and mobilisation of resources available in South Africa so as to carry-on the emerging concept of alternative dispute resolution. I, with due respect, differ from Scot-Macnab in as far as from where the manpower resources may be obtained and his extent of 'holistic and comprehensive approach to mediation'.

When we talk about family mediation we envisage not only giving services to families in urban areas, whether Black or White, sophisticated or educated. But we talk about offering skills and knowledge to families or couples who are in dire need of such services. Communities to benefit more from such services are those not able to cope with high legal fees, those faced with the high rate of unemployment and those experiencing numerous social problems. Mostly, these families or couples are in Black communities. Other groups do experience or do face problems mentioned above, but may, in my view, relatively manage to engage, for example, services of attorneys and advocates in terms of meeting professional fees.

Difficulties or barriers could exist if professionals from law and social-work faculties and private associations are depended upon; firstly, private associations won't go cheap; secondly, professionals from the above mentioned faculties won't always be freely available and they won't be offering their services free of charge; thirdly, if these professionals are available, from which racial group will they be coming in order to assess whether there would be language barriers or not; fourthly, ordinary people, or semi-literate people, do not open up or become comfortable when communicating with status people. They withdraw or yield to what may perhaps be suggested by a 'Professor' or 'Doctor' or 'Lawyer' or 'Therapist'.

Public servants and court-appointed officers may not be readily accepted as healers of human conflicts purely because they are, in my view, perceived as agents for and pay allegiance to the state. The aspect of potential bias is so

paramount that public servants may not be comfortably utilised. The other point is that political tension occasioned by a transitional phase has it that government employees come largely from one ruling party. This would politically tend to make some people uneasy to ventilate their chest to people they do not trust.

The other reservation I have about Scott-Macnab's view is that his 'holistic and comprehensive' approach, lacks in that it does not refer to lay-people as forming part of it or imply that lay-people are to be part of it. Thus, it is not inclusive or participatory in its approach. Our education for development to be sensitive, ought not only to be conventional in form for this would make it to be monopolised by a few educated experts who would then pass it over to the ignorant or illiterate masses. To be relevant, education for development, ought also to be grassroots focused.

The grassroots people have their own fountain of knowledge unavailable to experts or professionals. To broaden their horizon, they would need certain forms of training and broader education in order to be able to identify or articulate their needs. The task, therefore, of professionals or experts is not solely to empower the grassroots, but to empower the grassroots in order to enable them to empower themselves. Educators and professionals should therefore strive towards bringing out the potential of the people to full realisation.

Educators' ultimate goal at this period of transition, should be to initiate or develop people-oriented programs so that people would be accountable to their own communities. This holistic approach may stop dependency of one class of people on another and encourage interdependence and partnership. From this approach, availability of manpower would not be a headache. To be specific, I recommend that endeavours should be made, as I earlier indicated, that community residents in possession of a standard 9 to 10 certificate be targeted for training. Intensive training for lay-mediators should be conducted where

participants would be exposed to basic and constructive conflict management, conflict resolution and mediation skills.

The training process to be tailored in such a way that it focuses highly on practical experiences with as little theory as possible and participants' own personal conflict situations to be investigated and used as role plays. Methods often followed and techniques applied to solve conflict by these participants to be aired-out so as to see how they may still be used, adapted and or discarded.

The importance of the lay-mediators' role may be assessed in terms of two conflict situations: one was related by a student participant of the University of Zululand during a professional mediation training on October 3 1994; the second was related by a Soweto woman participant during a lay-mediators' training at the Baragwanath Hospital.



- (i) P has a conflict with Z, A and C.  
Z accused for having facilitated the affair between A and C (financial gain).
- (ii) B has a conflict with her mother (Z), sister (A), and ex-boyfriend (C).
- (iii) P and A's minor children remain with P (father but children are illegitimate as P and A were not married).

This conflict depicts a complex township life dictated by social conditions. The complexity of the conflict is occasioned by the fact that a marriage has already been solemnised. There is no legal precedent justifying it declared null and void **ab initio**. Lobola has been received by destitute Z. A's illegitimate children with P remain with P. Notwithstanding that Z may claim them at any time in terms of Zulu law and custom. A's sister, B, may feel the everlasting pain because of being betrayed by her own mother, Z, and through being 'robbed' of her long standing boyfriend by her sister, A. She has anger also against her ex-boyfriend, C.

The question we have to ask ourselves is: who would have earlier intervened and stopped this conflict from getting complicated between a lay-mediator (township resident) and an expert or professional (non-township resident)? I would be inclined to say that a lay-trained person in conflict management and mediation would have handled it timeously and better. Grassroots people know almost everything concerning other grassroots people, more than professional people (Black or White), as the latter group tends to be disinterested in what is considered to be 'low class affairs'. A lay-mediator would have assisted in facilitating the resolution of the tension at its earliest stage but for the lack of grassroots' focused programmes on conflict management, conflict resolution and mediation.

### **The second conflict situation is a marital case**

H (husband) and W (wife) got married. During the course of their marriage H advised his family of which W is part, that 'we are going to live on sour milk in this family of mine because sour milk is a good food'. It was related that W, in the course of her marriage, could not endure this kind of meal anymore, as a result she became frustrated and wanted for divorce. It was not clear whether the parties had parted ways at the time the story was related.

This story could look simple and unfounded. But similar stories are a real life event and often lead to suppressive and tolerated marriages and eventual divorce. Black couples in particular do not go public about such conflict situations because of family 'secrecy codes'. But they do confide in their trusted ones. However, ventilation of frustrations to close friends may not help much because such friends may be limited in so far as communication and conflict management skills are concerned. Ventilation of frustration to even friends results in destructive gossip. Thus a need for grassroots training in basic conflict management exists. Nkuhlu, Chairman and Chief Executive of IDT, said, referring to IDT's commitment to community funding:

'Partnership forged directly with communities have had a significant impact on delivery. We have benefited from the contribution of those we set out to assist'.<sup>22</sup>

Nkuhlu commented as he did above in order to substantiate the IDT's policy which he is proud of as it takes 'into account lessons learned from grassroots ...'.<sup>23</sup> The emphasis here is to train those people who are interested in assisting others solve their problems. They should be trained to be lay-mediators in order not to be obliged to comply with Professional Associations' requirements which commonly require diplomas or degrees as a condition for one to be a professional mediator.

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<sup>22</sup> Professor W Nkuhlu 'Learning from the grassroots' Evening Post October 31, 1994 at 5.

<sup>23</sup> *ibid.*

I do not understand why one should be degraded or professional before one can be a facilitator. It is important to realise that not all family problems lead to divorce where court proceedings and judicial involvement become a critical focus. Most family problems range from simple not seeing issues in the same way, failure to maintain children, sleep-outs without the knowledge of the other spouse, purchases of household assets, domination of one spouse by the other, unbecoming shouting at the other spouse, disrespect towards the other spouse and other relatively minor misunderstandings. These types of problems may easily be handled by a trained lay-mediator thus preventing them from becoming serious or leading to a divorce.

To whom would lay-mediators or lay trained people be answerable? This question raises ethical issues which are meant to protect members of the community from being abused or misled by someone purporting to be concerned with peace in the community or family or neighbourhood.

The organisation, Community Conflict Management and Resolution (CCMR), of which I am a founder and director, is involved in the training of adult people (non-professional) as lay-mediators. Adult people in the Gauteng Region, from Police, women's groups and other constituencies, have formed an Association of Lay-Mediators. This association is going to function under a certain code of conduct developed by the executive committee that members of the public have elected.

The Minister of Education for the Gauteng Region, Ms Mary Metcalfe, described the training offered by CCMR as follows:

'your programme is an innovative example of the kind of training we have never had in the past'.<sup>24</sup>

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<sup>24</sup> M Metcalfe's letter dated August 10, 1994.

### 1.2.2.2 Community Mediation Centres

The waning of informal intervention in, and control of, family dispute, as a result of the introduction of a foreign law by colonists, has had serious impact on Black families. It brought about an increasing fragmentation of neighbourhood ties, privatisation of nuclear families, and disempowerment of communities to take control of their own lives. On the other hand, courts cannot be expected to offer positive or healing services to couples who come before them because by the time they appear, a long history of bitterness and violence makes reconciliation or amicable settlement very difficult to achieve.

Community mediation may be an answer to this declining societal image. Community mediation's basic goal is to empower disputing members of our communities with skills to deliver for themselves justice with dispatch, efficiently, at less pain and at less costs. Dispute resolution methods applied by traditional tribal communities may not have scope for application by modern societies as social conditions, on which informal, community controlled conciliation procedures were predicated, are lacking in our modern society.

However, one could concede that the concept of community mediation endorses the foundation upon which community-controlled conciliation procedures were founded. In other words, community mediation centres are not an idea to be constructed on a completely barren terrain.

Community mediation centres should be revived so as to make them supplement adjudication. They should exist as centres designed for prompt resolution of disputes, for resolving family disputes, neighbourhood disputes and minor criminal cases which might be inappropriate for adjudication by courts. Chief Justice Burger explains the motivation for community based mediation centres persuasively as follows:

'The notion that ordinary people want black-robed judges, well dressed lawyers, and fine panelled court-rooms as the



setting to resolve disputes is not correct. People with problems, like people with pain, want relief and they want it as quickly and inexpensively as possible'.<sup>25</sup>

Unlike the courts, community mediation centres should be seen as working against subjecting the delicacy of inter-dependent and ongoing relationships to a considerable degree of overkill. They should be seen to be providing an avenue to strengthening and decentralising social control functions and providing community residents with an enhanced sense of their ability to handle legal and political problems on their own.

Community Mediation Centres ought not to be seen merely as alternative to legal or judicial institutions, but also as a constituent part of community life. The importance of community mediation centres, from the grassroots perspectives, is not acting as notorious community courts but in providing the potential for restoring to the neighbourhood the responsibility of taking a major role in constructive conflict management and problem solving. Through these centres, the civics, that is community residents, would be encouraged not to shift responsibility to social agencies but to themselves, as is the case with most democratic societies.

### 1.3 CONCLUSION

The recommendations discussed above should be looked at in no other way than to highlight the importance of family mediation in South Africa. The mushrooming of mediation - related associations referred to in the introduction above, proves that a great deal of interest is generated toward making mediation an ideal alternative dispute resolution process not only at macro level (professional) but also at micro level (grassroots).

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<sup>25</sup> Quoted in J S Auerbach Justice Without Law (1983) at 124.

Family mediation will continue to evolve because of the promises it offers to families, couples, children and even to workers associated with the well-being of the family. The benefits of family mediation are impliedly recognised by Mandela as he said during his divorce proceedings:

'I did not want to wash my dirty linen in public, but he came back (referring to the go-between person between him and Mrs Mandela - my own clarification) and told me that she had been very harsh towards him and very negative ... she was my wife whom I had in the past shared some of the happiest moments of our lives and I wanted to make it as painless as possible for the children'.<sup>26</sup>

Family mediation will, however, take time to be a success in South Africa. Education and training of South Africans, particularly the grassroots and or non-professionals, could contribute effectively toward mobilising for the use of mediation.

The major challenge facing the exponents of family mediation in South Africa has to do with researching indigenous methods for dispute resolution. The result of this research would enrich both the theory and practice of family mediation and could clarify whether customary mediation values clash with any Western values.<sup>27</sup> It would also encourage researchers to pay more attention to local archives than Western ones. The outcome of local research would go a long way toward influencing policy makers to consider reforming family laws. Local research and recommendations relating to promoting indigenous dispute resolution methods have to be emphasised as they stand a chance of being sympathised with due to the fact that the majority of policy makers in Parliament comes from Black community and it is highly likely that this majority will continue even after 1999.

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<sup>26</sup> President N Mandela The Star (1996) 19 March at 1-2.

<sup>27</sup> President N Mandela in The Star *ibid* at 1 'I know of no instance where customary law would deal with the dissolution of a civil marriage ... . 'He said this when he referred to attempts made by Mrs Mandela at getting Chief Kaizer Matanzima to mediate their marital dispute.

The heated debate which centres around the rights of a natural father towards his illegitimate child and which tends to be drawing the attention of the Government makes vital the role of family mediation and it also justifies the urgency that should be put on local research and indigenous methods for dispute resolution.

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## CHAPTER 2

### PROBLEM OF THE STUDY

#### 2.1 INTRODUCTION

Divorce and the high rate of divorce is a widespread international phenomenon and concern.<sup>28</sup> Its consequences do not only bring about the juridical event of the end of a marriage relationship but also affect a number of people: like spouses and the clan, in the case of traditional or customary union, the courts, the community, and the state. Divorce is a contagious disease, that is why the spouses, in the case of a customary union (as will be seen in Chapter 4) are not the only parties getting married but also their respective families become involved in the marriage. Khoza, a Black old lady, recognised as an expert in traditional law, in Soweto, said recently that the paying of lobola to the wife's parents and the involvement of extended family's relatives, and the protracted negotiations that accompany the lobola issue, shows beyond doubt that couples are not the only parties in the union.<sup>29</sup> The families' involvement serves as checks and balances so as to prevent hardships or evils that may befall both families should the union be dissolved. The serious consequences of divorce are as a result, among other factors, of an adversarial approach to it and the lack of knowledge or other means that may be used to handle the ending of marriage or other ancillary aspects of a divorce action like maintenance, forfeiture of patrimonial benefits and costs. The adversarial approach as a process used to end marriage caused, for example, the scholarly judge of the United States Supreme Court, Mr Justice Learned Hand, to say:

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<sup>28</sup> L J Weitzman The Divorce Revolution (1985); L R Singer Settling Disputes (1990).

<sup>29</sup> C Khoza 'Customary Law' a topic discussed by her during a workshop titled 'Family Violence and the Law a Perspective' convened by the Department of Health and Welfare (September 22, 1994) UNISA.

'I must say that as a litigant I should dread the lawsuit beyond almost anything else short of sickness and death'.<sup>30</sup>

In the same vein, Coogler acknowledged, in the preface of his book, the disadvantages of an adversarially terminated marriage. He said:

'I am indebted to my former wife and the two attorneys who represented us in our divorce for making me aware of the critical need for a more rational, more civilised way of arranging a parting of the ways.

Her life, my life, and our children's lives were unnecessarily embittered by that experience. In my frustration and anger, I kept thinking of something Mahatma Gandhi (sic) wrote over half a century ago.

'I have learned through bitter experience that one supreme lesson to conserve my anger, and heat conserved is transmitted into energy, even so our anger can be transmitted into power which can move the world.

'This system of structured mediation is, therefore, my anger transmuted into what I hope is a power to move toward a more humane world for those who find themselves following in my footsteps'.<sup>31</sup>

The guilt principle adhered to by our courts, in terms of the old divorce law, also demonstrates why Mr Justice Hand and Coogler are not in favour of resorting to litigation in order to settle disputes, particularly marital disputes. The case of Van Der Vyvel vs. Netherlands Insurance Co. of S.A. Ltd.<sup>32</sup> typically shows the ills of the guilt principle. In this case the wife hired a detective to spy on her husband who was suspected by her to be involved in a love affair.

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<sup>30</sup> K Fletcher & S C Gerald Before you Sue, How to get Justice without going to court (1978) 228.

<sup>31</sup> O J Coogler Structured Mediation in Divorce Settlement (1978) V .

<sup>32</sup> 1967 (2) SA 476 (T).

Mr Van Der Vyvel was hired in order to investigate whether her husband was in love and or might have committed adultery with the woman suspected. The investigation was conducted by both the wife and Mr Van Der Vyvel so as either to have Mr Van Der Vyvel corroborate her allegation of adultery or to prove the existence of a love affair between her husband and the suspected woman. The hiring of the detective was therefore essential for the wife, although this case was not necessarily about marital dispute, in order to prove guilt on the part of her husband on the balance of probabilities so as to succeed in whatever claim she could have had against her husband.

To fulfil his mission, Mr Van Der Vyvel tried to drag the woman out of the car driven by the wife's husband. As the husband drove on Mr Van Der Vyvel decided to jump on the bonnet of the car in order to obscure the view of the driver thus forcing him to stop. The driver of the car continued to drive with Mr Van Der Vyvel on the bonnet. Mr Van Der Vyvel was eventually hurled on to the ground and he sustained serious injuries.

The case above shows that the guilt principle did not only affect the lives of the spouses but also the society as a whole. The Black community is the one hit hard by application of the guilt principle. Most Africans are illiterate and are not even aware that the old divorce law has been amended. Most of them still believe that one spouse may lose the benefits arising out of their marriage if he/she may be proved to be the cause of the breakdown of the marriage. I am still consulted by a few Africans who varyingly ask: 'Would I be still required by law to pay maintenance for my wife should we divorce as a result of me having deserted her?' 'Am I going to get the custody of all our children if I divorce my husband as a result of my husband having slept with O?' 'What will happen to the order of court which says I must pay maintenance for my children if I decide to be out of employment or have the children killed by someone as I feel that I am not to blame for the end of our marriage?' Questions like these were constantly asked when I was working as a clerk of court from 1978 to 1981 and are still generally asked now.

The consequences of adversarially terminated marriages, as evidenced by Coogler's bitter experience, and the 'increasing dissatisfaction with the inability of the old divorce law to cope with modern circumstances'<sup>33</sup> caused the South African Department of Justice to ask the South African Law Commission to investigate the short-comings of the old divorce law and the possible solution to reform.<sup>34</sup>

## 2.2 COMMON LAW GROUNDS OF DIVORCE

Until 1 July 1979 the common law grounds for divorce were adultery and malicious desertion.<sup>35</sup> The statutory grounds for divorce introduced by the Divorce Laws Amendment Act<sup>36</sup> were insanity and habitual criminality. As in the United States of America during the late 1960's and early 1970's,<sup>37</sup> the South African courts could grant divorce to spouses only when it could be proved that a marital partner had been guilty of the kind of marital misconduct in terms of the abovementioned common law and statutory grounds for divorce.<sup>38</sup> In addition to establishing the guilt of the defending spouse, the spouse seeking divorce had to be innocent of any connivance regarding the offending spouse's misconduct. To have the divorce granted in one's favour one had to comply with the 'clean hands principle'.<sup>39</sup>

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<sup>33</sup> H J Erasmus, C J van der Merwe & A H van Wyk Lee and Honore Family, Things and Succession (1983) 114.

<sup>34</sup> Report on the Law of Divorce & Matters Incidental Thereto 1978 (RP57- 1978).

<sup>35</sup> R W Lee An Introduction to Roman-Dutch Law (1953); Webber v Webber 1915 AD 239.

<sup>36</sup> Act 32 of 1935.

<sup>37</sup> Lee op cit n35; T W Bennet Application of Customary Law in South Africa (1985).

<sup>38</sup> H R Hahlo & E Kahn South Africa the Development of Laws & Constitution (1965).

<sup>39</sup> ibid; P J J Olivier The South African Law of Persons and Family Law translated by Carmen Nathan (1976); Doyle v Doyle 1981 (3) SA 1094 (D) at 1097.

## 2.3 SOUTH AFRICAN LAW COMMISSION

The South African Law Commission was appointed by the legislature to investigate the limitation of the old divorce law. The Commission having investigated the limitations of the Old Divorce Act, pointed out among other things, that:

‘the law can do little to stem the flood of divorces, since the problem is not so much divorce but rather the breakdown of marriages. A modern divorce law should rather endeavour to dissolve a disintegrated marriage in a manner which causes the least dislocation to the spouses and to the minor children.

A divorce law based on the guilt principle cannot attain this goal. The guilt principle leads to unnecessary conflict and bitterness between the parties, discourages efforts at reconciliation ..., is based on a usually false assumption of guilt on only one side, and often results in the fabrication of evidence’.<sup>40</sup>

Consequent to the Law Commission’s rejection of fault as a ground for divorce, Parliament passed the Divorce Act.<sup>41</sup> The Act became law on 1 July 1979. The importance of this Act is that it made it possible for either spouse in marriage to seek for divorce without having to prove guilt on the part of the other spouse.

The old grounds for divorce were replaced with irretrievable break-down of the marriage. The common ground for divorce often averred by a party seeking divorce after 1979 Divorce Act is ‘irretrievable’ break-down of the marriage. This is stated to mean that the parties’ normal marriage relationship has broken down and that there are no chances of it being restored.

This could be brought about, for example by the fact that: the parties have been living apart for a period of more than a year; one party has committed adultery; one party has no love or affection for the other and that the other

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<sup>40</sup> cited in Erasmus *et al* op cit n33 par 114.

<sup>41</sup> Act 70 of 1979.



party has been assaulting the other.<sup>42</sup> Any of these grounds could contribute to the marriage to being regarded as having irretrievably broken down.

Separation for a period of more than one year is a statutory ground of divorce which is considered to allow easy divorce because parties could wink at or agree to this separation in order to get divorced on the basis of statutory period of absence from each other. President Mandela and Mrs Mandela got separated by agreement but President Mandela is said to be seeking divorce on the basis of this separation among other grounds.<sup>43</sup>

## 2.4 CONCLUSION

The 1979 Divorce Act still subjects parties to the consequences of the adversarial legal system. This is so because an order for the forfeiture of the patrimonial benefits of the marriage<sup>44</sup> and an order for maintenance of the other spouse<sup>45</sup> respectively, could be made against the other spouse if found 'substantially' to blame for the break-down of their marriage.<sup>46</sup>

Again, the section of the South African community which is still hard hit by the consequences of the adversarial legal system even under the no-fault divorce, as the 1979 Divorce Act is known, is the Black community. Mostly Black couples or blacks in general, are ignorant about the existence of the no-fault divorce. To them the marriage, if to be terminated, entails: 'fighting to the end', proving that 'you are to blame and I am innocent', entails 'fixing him/her up', involves displaying that 'I am able to hire a lawyer in order to get everything and her/him losing everything', involves 'getting custody of 'my children' since she/he is to blame' and so on. The attitudes referred to above would continue

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<sup>42</sup> Section 4 (2) (a).

<sup>43</sup> The Star March 20, 1996 at 18; L Unterhalter, a lawyer said 'It is an amazingly easy process'.

<sup>44</sup> Section 9 (3) of Divorce Act 70 of 1979.

<sup>45</sup> Section 7 (7) *ibid*.

<sup>46</sup> Singh v Singh 1983 (1) SA 781 (C) at 786; Kruger v Kruger 1980 (3) SA (O) 283.

to be adopted not only by Black couples but by everyone whose marriage has broken down and irrespective of whatever divorce reform is brought about. This is highlighted by Bohannan when he says:

‘In the emotional divorce, people are likely to feel hurt and angry. In the legal divorce, people feel bewildered - they have lost control, and events sweep them along. In the economic divorce, the reassignment of property and the division of property and the division of money ... may make them feel cheated. In the parental divorce they worry about what is going to happen to the children. They feel guilty for what they have done. With the community divorce, they may get angry with their friends and perhaps suffer despair because there seems to be no fidelity in friendship. In the psychic divorce, in which they have to become autonomous again, they are probably afraid and are certainly lonely’.<sup>47</sup>

The 1979 Divorce Act could, I submit, be referred to as ‘South African Divorce Law Revolution Act’. It brought about, to a greater extent, a radical reform of our family law system as it moves from a guilt principle to a no-fault divorce.

I would point out, however, that the Divorce Act has not lived up to its expectations in terms of The South African Law Commission’s understanding of a ‘modern divorce law’ which is to ‘endeavour to dissolve a disintegrated marriage in a manner which caused the least dislocation to the spouses and to the minor children’.<sup>48</sup> The mere fact that our courts still look for ‘substantial’ or ‘gross’ misconduct when they investigate whether or not forfeiture of benefits or a maintenance order should be made against the other spouse, militates against post-divorce harmony between the spouses and against the continuation of good parent-child relationship.

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<sup>47</sup> J D Payne & E Overend ‘Divorce Mediation: An Overview of Process and Strategies’ National Themes in Family Law (1988) (ed.) M E Hughes & E D Pask 3 at 14.

<sup>48</sup> Report op cit n32

## CHAPTER 3

### DIVORCE MEDIATION : LITERATURE REVIEW

#### 3.1 WHAT IS MEDIATION?

Mediation is one of the alternative dispute resolution processes. It is an alternative to litigation and not alternative of dispute resolution as the South African Department of Justice tends to say.<sup>49</sup> Mowatt highlights this tendency on the part of the South African Justice Department when he says 'but there is confusion as to what exactly it is'.<sup>50</sup> Mediation may be defined as:

'a private voluntary process in which disputants work together to reach a consensual settlement of issues in dispute with the assistance and facilitation of a neutral resource person or persons at the very least, the process consists of systematically isolating points of agreement and disagreement, developing options, and considering accommodations. It is a goal-directed problem solving helping intervention in which the parties' sense of fairness becomes a predominant basis for decisions'.<sup>51</sup>

It should, however, be stated that there is no definite way to mediate a dispute. Mediation is a situational process, that is, mediation techniques differ with the parties, the dispute, and the person who facilitates the happening of an understanding between disputants. For example, labour mediation tends to reflect the competitive and positional nature of traditional collective bargaining negotiation and the mediator usually spends considerable time working in caucus with the

<sup>49</sup> D Scott-Macnab 'Terminology and Alternative Dispute Resolution' Family Mediation in South Africa (1992) (ed.) W Hoffmann 20 at 21 'The words alternative dispute resolution imply that the processes ... are alternatives to ordinary litigation'.

<sup>50</sup> Mowatt op cit n1 at 738; Scott-Macnab ibid at 23.

<sup>51</sup> J Folberg 'A Mediation Overview: History and Dimensions of Practices' Divorce Mediation: Readings (1985) (ed.) L L Riskin 62. See also J M Haynes The Fundamentals of Family Mediation (1996).

parties. Child custody mediation tends to be a co-operative process where the mediator spends so much time working with the parties together. I would, however, qualify the above by conceding that experts in the field of mediation are agreed that, in substance, the mediation proceedings are the same in terms of, for instance, mediation ethics like neutrality, impartiality, confidentiality, setting a comfortable tone and ground rules as pointed out in footnotes 65 and 66.

### 3.2 WHAT IS DIVORCE MEDIATION?

I prefer to give Neuman's explanatory definition of the concept of divorce mediation because it is more than a definition. He explains the process as follows:

'Divorce Mediation is being heralded as a civilised way to reach a divorce settlement. It can be used to reach one or more agreements, or to establish the complete divorce settlement. The method involves using a professional, neutral mediator. 'Neutral does not mean that the mediator has no feelings or opinions; rather it means that the mediator does not actively take the side of either spouse. The divorcing couple is supported using a structured step-by-step approach. It is essential, however, that both the spouses agree to mediation. It can't work if only one spouse wants it'.<sup>52</sup>

From the above statement it becomes apparent that the term 'divorce' may mean an event which entails a massive disruption and re-organisation for individuals and families. That is why Davis<sup>53</sup> says divorce may also be a time of conflict and of negotiation. In the same vein, Singer says:

'Divorce is an event that demands decisions about the custody and support of children (and sometimes each other) and division of property and debts. If the parties do not make these decisions themselves, a judge will do it for them. It is becoming almost a cliché that courts are poorly suited to

<sup>52</sup> D Neumann Divorce Mediation: How to cut the costs and stress of divorce (1989) 4-5.

<sup>53</sup> S Davis Partisans and mediators (1988) 1.

settling these problems'.<sup>54</sup>

Mnookin and Kornhauser identify four distributional questions that must be decided upon in divorce cases: marital property, spousal support, child support, child custody and access or visitation.<sup>55</sup> They advance an argument that divorce is now largely a matter of private concern, thus, divorcing spouses themselves should settle these questions with less state interference. There is no way of enhancing one's self-respect or image in the adversarial system of contested divorce cases. What is disputed is in the hands of lawyers who battle to convince the adjudicator that 'mine is innocent - his to blame'. The parties' participation is acknowledged but ignored, irrespective of the interests of a minor child, if such is an issue. Andrup comments on the court procedure as follows:

'The formalised conventionalised technique of the proceedings in itself prevents the judge from obtaining a reliable impression of the parties in their every day life. The judge does not speak naturally with them or hear them talk together still less with the child. The parties only make more or less instructed declarations, under conditions which seem quite distorted to them.

They do not express themselves freely. What is to be explained is said on their behalf by their lawyers, whose statements can be so far removed from the client's own comprehension and concepts'.<sup>56</sup>

Mnookin and Kornhauser in their most referred to work say:

'Moreover, because parents, not the state officials, are primarily responsible for the day-to-day child rearing decisions both before and after divorce, parents, not judges, should have primary authority to agree on custodial arrangements'.<sup>57</sup>

<sup>54</sup> L R Singer Settling Disputes (1990) 35.

<sup>55</sup> Folberg op cit n51 at 65.

<sup>56</sup> H H Andrup 'Divorce proceedings: End the means' Resolution of Family Conflict (1984) 172.

<sup>57</sup> R Mnookin & L Kornhauser 'Bargaining in the shadow of the law: The case of divorce' (1979) 88 Yale Law Journal 950.

The abovementioned trend of thoughts seems to be in accordance with Weitzman's view. She comments as follows:

'Children benefit from such arrangements because the continued post-divorce involvement of both parents is a practical and psychological necessity.

If the children perceive that their mother and father share in the decision making and planning of the activities involving them, their sense of abandonment lessens and the need to 'choose' between one or the other parent diminishes thus decreasing the harmful impact of divorce'.<sup>58</sup>

It is for the abovementioned analysis that mediation for custodial arrangements has been found to be beneficial. It is no surprise that in California, for example, and as early as 1981, the law made mediation mandatory whenever custody is contested as will be seen later in this chapter. Mediation is believed to be a better process to be utilised for a parting of ways if the parties feel that their marriage cannot be save any more. The adversarial legal system is opposed for the reason that it tends to increase the trauma of divorce, escalate conflict, and to obstruct communication between the parties in domestic disputes.<sup>59</sup> Mediation on the other hand, reduces conflict in the sense that parties are provided with an appropriate time and place in which to express feelings and anger, loss, disappointment and guilt. In addition, unlike the insulation which parties undergo when their attorneys are relied on to do their bargaining, face-to-face confrontation and direct negotiation in the creation of an agreement is experienced during mediation.

It is through this direct participation that each party becomes aware of the needs and interests of the other and becomes more flexible in accommodating the needs and interests of the other. Active participation leads the parties to believe that mediation is fair. Above everything else, the process of creating their own agreement in contrast to honouring an imposed order, fosters a commitment to its successful

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<sup>58</sup> Weitzmann op cit n21 at 253.

<sup>59</sup> S C Kuhn 'Mandatory Mediation: California Civil Code Section 4607' (1984) 33 Emery Law Journal.

implementation.<sup>60</sup> To prevent post-divorce hostilities divorce is treated through mediation, as a family problem not as a legal problem. The post-divorce hostilities occasioned by the adversarialy handled divorce are well demonstrated by Coogler's experience when he laments that 'her life my life, and our children's lives were unnecessarily embittered by that experience'.<sup>61</sup>

### 3.3 HOW IS DIVORCE MEDIATION STRUCTURED?

Mediation has been found to have numerous virtues. These virtues are associated with the procedural aspects of mediation. As pointed out earlier, Coogler came up with the adhered to procedure of negotiating a divorce settlement. In his book, **Structured Mediation in Divorce Settlement**, Coogler criticised the legal struggle which he regarded as damaging the relationships between the spouses themselves and between them (as parents) and their children. He then created the procedure which he referred to as 'structured mediation in divorce settlement'.<sup>62</sup> He realised a need to redefine the transformation of a family by giving decision-making control to the family or spouses so as to safeguard their relationship and the relationship toward their children, if any, after divorce.

The structured mediation model is distinguished from other mediation approaches by the following virtues and stages: it provides a more open and complete sharing of information; a more positive negotiating climate; a more flexible and creative agreement; it results in an enhanced ability to clarify the priorities of each side and in the ventilating of emotions which might otherwise be an obstacle to solving problems constructively or managing them from escalating.

Shonholtz of the San Francisco Community Board Programme identifies structured mediation stages as: defining the conflict; understanding each other; sharing

<sup>60</sup> W A Donahue Communication, Material Dispute and Divorce Mediation (1991).

<sup>61</sup> See op cit n24.

<sup>62</sup> Neumann op cit n52.

responsibility for the conflict and resolution and reaching the agreement.<sup>63</sup> Larry Ray of the American Bar Association uses a six stage model: introduction; an initial statement of intentions; problem determination problem identification; generation and evaluation of alternatives; the selection of an alternative; and agreement.<sup>64</sup> I, personally, use a six stage model: pre-meditation, contracting or introduction; development of issues; development of options; reaching agreement; and concluding. However, experts in the field of mediation are **ad idem** that, in substance, the procedural aspect through which parties are taken through is more or less the same although there may be some variations in the stages.

Taylor highlights these variations as he says:

‘The mediator must often change the dimension of his or her role within any given time of the mediation process. Progress from session to session may include minor variations from the universal process because of the unique circumstances of the case.

Participants may not be ready emotionally to move from one stage to the other. They may need to return to earlier stages or may reverse the stages because of pre-existing conditions, the requirements of the particular jurisdictions in which they reside or the policies and procedures of the agency or individual serving the parties’.<sup>65</sup>

Payne and Overend argue that despite agreement on the essential characteristic of mediation:

‘...mediators and their processes come in many different shapes and sizes. A large number of mediators come from the ranks of social workers and family therapists, with an ample sprinkling of psychologists and lawyers, as well as a few psychiatrists. The search for a single or even a

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<sup>63</sup> R Shonholtz ‘The work and structure of a neighbourhood Justice System’, Unpublished Paper (1983).

<sup>64</sup> L Ray ‘Six stages of mediation’ Unpublished Paper (1982).

<sup>65</sup> A Taylor ‘A general theory on Divorce Mediation’ in Divorce Mediation: How to cut the costs and stress of divorce op cit n42 at 63.



preferred model of mediation is therefore illusive'.<sup>66</sup>

Despite various approaches used by various mediators, the procedural aspect of the mediation process can be defined by a description of predictable stages that include a series of techniques. Such techniques are employed in order to accomplish the tasks focused in that particular stage. Each stage in mediation has its goals as well as methodology and skills. In each and every stage there may be a necessity for a mediator to change his or her dimensional role due to, perhaps, the unique circumstances of the matter for mediation. The participants may not be ready emotionally to move from one stage to the other.

### **3.4 MEDIATION STAGES**

#### **3.4.1 Pre-Mediation Stage**

The pre-mediation stage is a stage preceding the coming together of the parties at a negotiating table organised or facilitated by the mediator. During this stage the third party neutral is often contacted by one of the parties asking him or her to 'help' or 'assist' 'us' solve 'our marriage problem' or 'we want a divorce.' Some mediators when contacted in this way, often ask parties what is it that they intend doing with the marriage in order to assess whether he or she is empowered to assist in that dispute.

Once the mediator has been contacted he/she may get the personal particulars of the other spouse so that the other spouse could be contacted in order to confirm the appointment of the mediator. Some mediators contact the other party themselves whilst some ask the party who first contacted the mediator to tell the other party to contact the mediator so as to confirm the appointment.

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<sup>66</sup> J D Payne & Overend 'Divorce mediation: Process and strategies: An Overview' (1990) 28 Family Conciliation Courts Review 27 - 28.

The rationale behind this approach is to ascertain from the beginning that the services of the mediator are required by both parties. This may be important as it may prevent a situation where one party would question the appointment of the mediator during the first session thus causing a delay which might even enlarge the hostility that often exists between divorcing parties. If both parties confirm the appointment the mediator would then make the appointment to see the parties together.

### **3.4.2 Contracting Stage**

In this stage the mediator has five principal functions: that of eliciting basic information; explaining the process; determining the suitability of mediation to the parties; laying down and explaining the ground rules; preparing and have signed an agreement to mediate; and setting the tone and structure for the next stage. In as far as the first function, the mediator will have to get basic information from each of the parties regarding their problem.

This information is about their misunderstanding or problem or disputed issues. It is important to check on this aspect initially so as to make sure that the parties have got more or less a common problem in as far as what divides them or the subject of the dispute from the beginning. There may be a problem if basic information about the parties' dispute is not elicited initially. Payne and Overend state that to define issues earlier would allow new issues 'not to be sprung on a party at a later stage'.<sup>67</sup>

Once basic information has been elicited the mediator will have to ascertain the parties' understanding of the process of mediation and also to explain it further (even if they say they know what it is) to them. Once the preliminary information has been determined, and there is a general understanding of the mediation process, a determination will have to be made by the mediator as to the parties' suitability for mediation.

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<sup>67</sup> *ibid.*

A mediator may determine this by assessing, for example, whether each of them actively engages in the discussions that take place; whether there are signs which indicate that any of the parties is utilising the process through being coerced by the other; whether there are inequalities in ability to deal with the subject matter of the dispute; and whether the parties can deal fairly with one another. As part of this process, the mediator can help the parties clarify their motivation for seeking mediation. Their motivations are critical not only to an assessment of their suitability to mediation, but also to laying the ground work for a successful mediation.

The determination of the parties understanding of the process should continue throughout all the sessions as it may not sometimes be easy to check on this thoroughly just at the beginning of the first session. If the parties are found to be mediation candidates the mediator can then explain the working guidelines or ground-rules to the parties.<sup>68</sup>

The guidelines are norms which should be respected by the parties so as to have a constructive atmosphere conducive for negotiation. Some of these guidelines can be the following: agree to solve the problem, no physical violence to take place during the sessions, no finding of fault or blaming of each other, no abusive language to be used; respect of each other; no interruption whilst one is talking; confidentiality; not to call a mediator as a witness should the negotiations breakdown or when one of the parties does not respect the agreement to be reached; and agreement on the mediator's fees.

The parties may be required to sign an agreement so as to indicate commitment to comply with the guidelines. Agreement to the guidelines, whether written or oral, is necessary where one is dealing with powerful spouses or hostile disputants. Such parties often behave unproductively or angrily. If they so behave the mediator may discipline them or control such behaviour by referring them to the agreement they

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<sup>68</sup> *ibid.*

committed themselves to.

In addition to the above principles the mediator's major task is that of setting a tone conducive to making discussions informal, directive, receptive, and to establishing contact between the mediator and the parties, and between the parties themselves.

### **3.4.3 Developing the issues**

The goal of the mediator and parties at this stage is to set out all information necessary to identify particular issues needing solution, and the dimensions of those issues. This means identifying all relevant facts, including economic, emotional and other factors involved in each party's view of the various concerns and issues.

It also means clarifying both factual agreements and disputes which exist so that there is some understanding about what still needs to be resolved through the mediation process. Inquiry into agreements already reached not only clarifies which issues are in dispute but can also provide key information as to how the parties work together, and what they use as the basis for agreement.

The mediator can profitably focus on both what the parties describe as the content of the issues and how the parties talk about these issues. In this way, the mediator can begin to notice patterns between the parties that impede progress such as one party blaming the other or accommodating unnecessarily the other party's needs.

The information the mediator obtains about how the parties are dealing with each other is an indication of what factual and or legal content need to be addressed, as well as what might happen on an emotional level between the parties that would make a fair resolution possible. In this respect, the mediator can begin to hold the parties to agreements made in the contracting stage about the ways in which they will approach the issues as well as clarify and renegotiate those agreements.

As the mediator helps the parties develop the issues, it is important to allow them room to explain the significance to them of any particular issue. It is helpful to consider two different levels of concerns operating within the mediation setting:

- (1) concrete issues
- (2) needs and interest.

Concrete issues represent the most concrete level, which often translates into who gets what, who owes whom, and how much. Needs and interests may look behind the concrete to the lives of the individuals and may assist the mediator to know why the disputants are in dispute.

#### **3.4.4 Resolving Conflict**

Once the parties have ascertained the necessary information, the mediator can help them to develop options. In doing so, it is important that the full range of possibilities be explored. The mediator may need to counteract the tendency of either party to seize upon his or her proposal as the only solution. The mediator may do this by helping the parties defer judgement on any option until a later stage. By so helping, the parties can be freed to further invent solutions which may clarify options earlier offered.

Fixed positions may be defused by looking to the underlying interests or needs of the parties by or through applying principles for a fair resolution of conflict which require that each party must honour his or her own needs and interests, whilst at the same time, understanding the needs and interests of the other.

Menkel-Meadow suggests that in assessing the fairness and practicality of the solutions ultimately reached by the parties, the following criteria of evaluation may be considered:

1. Does the solution reflect the parties' total set of 'real' needs, goals and objectives, in both the short and the long term?
2. Does the solution promote the relationship the parties desire?
3. Have the parties explored all the possible solutions that might either make each better off or one party better off with no adverse consequence to the other party?
4. Is the solution achievable, or has it only raised more problems that need to be solved? Are the parties committed to the solution so that it can be enforced without regret?
5. Has the solution been achieved in a manner congruent with the parties' desire to participate in and affect the mediation process?<sup>69</sup>

### 3.4.5 Reaching Agreement

At this stage, specific choices are made by the parties regarding the concrete resolution of particular issues. It is important that any agreement reached on any particular issue be viewed as tentative so as to make it flexible for the parties to test any particular solution over time. The tendency of the parties toward premature closure needs to be counteracted by the mediator even when it appears that a particular agreement is in sight.

The mediator's main task at this stage is to give feedback to the parties as to whether any particular agreement is realistic and to do this in a way that does not assert the mediator's particular view. The mediator should ask questions that need to determine whether the parties have fully understood the implications of any particular issues.

This is also the time for a mediator to include the legal context without having it control the parties' own sense of fairness as the basis for choices. The mediator's

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<sup>69</sup> C Menkel-Meadow 'Toward Another View of Legal Negotiations: Structure of Problem Solving' (1984) 31 UCLA Law Review 754 at 760-761.

job is to work creatively with the parties to fashion possible solutions that honour each party's needs and interests and their respective relationship, as well as the circumstances of their lives. To do so, both the mediator and the parties may have to look beyond the norms of legal rules or customs provided that such solutions are practical and realistic.

### **3.4.6 Concluding**

Once a concrete agreement has been reached, the mediator enters into the task of drafting the memorandum of understanding. It is preferable to use the words 'memorandum of understanding' to 'agreement'. This is safer because mediators are mostly people not trained in law and often have no knowledge of drafting an agreement that would comply with the requirements required to be met legally. The drafting of a final agreement should be the responsibility of the parties' consultants or representatives.

It is important to use words, when drafting this memorandum, which are both understandable to the parties and reflect as accurately as possible, their intentions as to what the agreement is, and how it will take effect. It is always useful to be clear about any areas which can only be resolved in the future, and to articulate a process for resolving these issues.

The parties may profitably have their agreement reviewed by their financial advisers, lawyers, and others to determine whether any input made represents the parties' view of both the fairness and the practicalities of the agreement reached. Particularly critical at this juncture is for the parties to use the experts as consultants rather than representatives, as the latter tend to take over what the parties should be doing, or to inject their views of how the parties should be looking at their lives. The parties need to determine both how they wish to use the expert and what weight to give to the latter's views. Flexibility on the part of the mediator, and a willingness to

continue to explore with the parties can be helpful to them in determining whether or not the agreement needs to be modified or altered in any way.

Finally, once the agreement has been fully reviewed (and modified, if necessary), then the agreement is signed by the parties and a decision is made as to whether or not the agreement should be submitted to court. The parties can take responsibility for preparation and/or filing of the final agreement with the court, if they wish. This can represent both a re-affirmation of their responsibility and control over the process, and a real recognition of the degree to which they have been empowered. This kind of affirmation of the significance of the mediation process can also be achieved in other ways, like, for example, instructing their own chosen lawyer(s) to prepare and present a final agreement legally executed, with the presiding officer or Registrar or with the clerk of court.

### **3.5 ETHICAL ISSUES FOR DIVORCE MEDIATION**

The process of mediation, like all other related processes, should be practised by qualified individuals and in a professional manner. To fulfil the essential task some standards should be laid down as a guide for those practising it and for those who utilise it. The standards of practice for family mediation are generally the same in almost all countries or may be slightly adapted. The following standards of practice are varyingly observed by the American Bar Association and by the South African Association of Mediators (SAAM) having been adapted from the Family Mediators of the Academy of Family Mediators.



- (a) ***'The mediator has a duty to define and describe the process of mediation and its costs before reaching an agreement to mediate'.<sup>70</sup>***
- (i) Before the actual mediation session begins or during the introductory stages of a mediation session, the mediator should give an overview of the process and assess the appropriateness of mediation for the participants. This entails explaining the process in such a way that the participants understand the differences between mediation and other processes, such as, particularly, litigation, arbitration and counselling.
- (ii) To facilitate effectively, the mediator shall have to stress the importance of disclosure of all information, relevant to the parties' dispute so that the parties would reach a fair and mutually beneficial outcome.
- (iii) The mediator shall have to advise the parties that they are entitled to have lawyers as consultants so as to review, on their behalf, progress after each and every session, and that lawyers are not allowed to be present during a mediation session.
- (iv) The mediator shall have to discuss his/her fees right at the beginning so as to make the parties decide upon payment in terms of who pays, how, and when.
- (v) The mediator shall have to let the parties know that caucusing shall take place if and when the mediator deems this necessary and shall have to tell the parties the ramifications of such a step.

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<sup>70</sup> 'Standards of Practice for Family Mediators' (1984) xvii Family Law Quarterly 455-459; South African Association of Mediators' Ethical Code for Mediators (1989).

- (b) ***'The mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both parties'.***

During the introductory stage the parties should commit themselves in writing that they would not require the mediator to disclose to any third party any statement made in the course of mediation. However, this commitment would have to be further qualified by saying that the mediator may be required by the court of law to disclose some information relating to the mediation proceedings. This is important particularly in South Africa as there is no statute law protecting the mediator from giving or disclosing such information.

Hence, the mediator may be forced to give evidence thus disclosing what transpired during the mediation session. Some states' courts in America may require a mediator to make a recommendation to the court if the parties do not reach agreement through mediation concerning child custody issues. In California, the mediator can make such recommendations to the court and be subjected to cross-examination by any of the parties save where the parties waive their rights to cross-examine the mediator or other rights essential to due process.<sup>71</sup> In South Africa, the family advocate (styled as a mediator) may institute an enquiry where she investigates and cross-examines witnesses (parents) and may furnish to the court a report that she prepared following her enquiry.<sup>72</sup> British Columbia, in Canada, is the only known country where the family court counsellor is protected from being subpoenaed to give evidence in court after having mediated a marital dispute in terms of the brochure published by the Ministry of the Attorney General entitled,

<sup>71</sup> J A Lemmon Family Mediation Practice (1985) 260-69.

<sup>72</sup> Mediation in Certain Divorce Matters Act, Act 24 of 1987, sections 4(1), 4(3) and 6(1).

'Confidentiality and the Family Court Counsellor'.<sup>73</sup>

(c) ***'The mediator has a duty to be impartial'.***

- (i) This standard practice entails that a lawyer-mediator shall not act on behalf of either party during or after the mediation process in any legal matter. Should the mediator have represented any of the parties before hand, such mediator shall not accept an invitation to act as a mediator where the party represented earlier by him is a party in the mediation.

The principle enunciated here also applies to a therapist-mediator in the sense that the mediator shall not later act as a mediator where one of the parties had been counselled by him or her previously.

- (ii) The mediator shall have to disclose to the participants any biases relating to the issues to be mediated both in the orientation or introductory session and also before the issues are discussed in detail.
- (iii) As impartiality is not the same as neutrality, the mediator must be impartial as between the parties in mediation but should still be concerned with fairness. Hence, the mediator has got an ultimate duty to avoid any unreasonable outcome or decision. This is more important where it comes to protecting the best interest of a child.
- (iv) The mediator shall not hold separate meetings with one party without the consent or knowledge of the other party where he discusses issues subject to

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<sup>73</sup> C M Judge Huddart 'Should Information received in Mediation be Admissible in Court' (1991) Family and Conciliation Courts Review 85 at 92 'I am persuaded that the expected evidence of the counsellor was privilege and therefore inadmissible ... she was assigned the task of assisting these parties toward a pre-trial settlement of this issue ... she was assigned the task because ... confidentiality was deemed essential to satisfactory conciliation. She emphasised the confidential nature of the discussion with the parties to ensure that they be frank and open with her. I am satisfied that the court should not intrude into those discussions for the purpose of determining whether specific words or conduct constitute 'objective facts'.

mediation.

- (d) ***'The mediator has a duty to suspend or terminate mediation wherever continuation of the process would harm or prejudice one or more participants'***
- (i) If the mediator has reason to believe that any of the parties lacks the ability to engage in mediation, the mediator has a duty to terminate the process. The mediator should not, however, decide to terminate the process promptly before investigating the apparent lack of ability or willingness to engage appropriately. The mediator may go into caucus with any of the parties and enquire about what he observes happening in the mediation sessions. If he discovers, for instance, that such unwillingness to engage is as a result of cultural restraints not to, for example, exchange words with her husband for fear of being seen as being disrespectful (in terms of black custom), the mediator would have to assure such party that she need not fear as she is entitled to air her views and be heard by her husband. In this way the mediator would be empowering her and creating a balance of power between the parties which is his major role to do.
- (ii) Should the mediator decide to terminate the process he would have to suggest to the parties other professional services that might be available to them than leaving the parties to decide for themselves.

### **3.6 THE PLACE OF LAW IN MEDIATION**

In mediation, bringing in relevant law to a particular case requires the mediator to walk a thin line between, on the one hand, viewing law as determining the outcome or, on the other hand, considering it irrelevant. Both of these possibilities pose real dangers. Where law controls, it can usurp the parties' sense of fairness, where it is

ignored, the parties can miss any value that it might have in aiding them to reach a fair agreement.

Given the appropriate attitude on the part of the parties and mediator, law can play a role in the process where it is neither used as a club or is it disregarded. Rather, law is considered a relevant factor. The mediator's own view of the importance of law, the parties' predisposition's, as well as their understanding of applicable law through outside lawyers (or others) all have critical bearing on reaching for that balance. So the mediator can help the parties consider law not primarily as a set of necessary applied rules, but as providing a relevant reference point in terms of a practical alternative and as an expression of societal norms.

There seems to be divergent views ranging from allowing attorneys to be available throughout the mediation session or outside the mediation sessions.<sup>74</sup> This is a complex aspect of divorce mediation.<sup>75</sup>

The answer may not be easily available. Some academics would even say that it is up to an individual mediator to decide whether he would require the involvement of a lawyer or not. Some authors, like Mnookin and Kornhauser, are ambivalent. This is obvious in the discussion of 'the role of lawyers' where they seem to acknowledge positively the significant role to be played by an attorney, but one becomes uncertain of the respective authors' attitude on this subject when they discuss the involvement of lawyers under the subheading 'evaluating the lawyer's role'.<sup>76</sup>

Roberts and Neumann also found themselves confronted with the tension which seems to face Mnookin and Kornhauser. Roberts submits that lawyers are well equipped to be involved by virtue of the fact that they are usually engaged in the handling of most of life's crises. But he concedes that under these circumstances

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<sup>74</sup> Folberg op cit n51 at 181 - 187; Mnookin & Kornhauser op cit n57 at 985 - 986.

<sup>75</sup> M Schaffer 'Divorce Mediation: A Feminist Perspective' (1988) 46 Toronto Faculty of Law Review 163 - 187.

<sup>76</sup> Mnookin & Kornhauser op cit n57.

some disputants would want to use their lawyers as companions transforming the process if they are allowed to do so.<sup>77</sup> In the United States, the question of lawyers' involvement has been made more difficult by the American Bar Association which has made it one of the rules of practice of family mediators that mediators should advise parties to seek independent legal representation at any stage of the mediation process. But I heard personally during a mediation training session, in California, when some mediators said they hide any mention of legal representation to their clients. It may be true that in practice any mediator does as he feels.

The latter may be worthy of credence in the light of the fact that Neumann has said that she 'neither requires nor forbids such contact' (client-lawyer contact), but qualifies herself by saying she would suggest that 'each party consult with a lawyer at some point during the mediation'.<sup>78</sup> The discretionary powers of mediators that is empirically shown leaves one in no doubt that lawyers' involvement is a question still to be addressed by researchers. It is essential that this be resolved since there is a tension between alternative dispute resolution exponents and the legal profession.

The above tension is well highlighted by Lerman in his article 'Mediation of Wife-Abuse Cases: The adverse Impact of Informal Dispute Resolution on Women'.<sup>79</sup> Lerman gives an account of a lawyer who had referred his client (wife) to a complaint centre which had mediation services. The referral was about a wife who had been abused by her husband. This is how the referral lawyer pressed to be involved:

'I met Mrs Carson at the complaint centre the morning of the hearing; after about an hour's wait, her name was called. The two mediators, a Black man and a White woman, were in a small room with a table and four chairs. I asked permission to remain, but the mediators refused, asserting that my presence would make it difficult to reach an

<sup>77</sup> S Roberts 'Mediation in Family Disputes' (1983) Modern Law Review 46; Neumann op cit n52 at 144-145 says 'it is unusual to have lawyers in private mediation ... though this 'occurs in court imposed mediation' but its risky to do so as the mediator ends up 'mediating between lawyers instead of between the clients'.

<sup>78</sup> Neumann op cit n52 at 136.

<sup>79</sup> L G Lerman 'Mediation of Wife Abuse Cases: The adverse Impact of Informal Dispute Resolution on Women' (1984) Harvard Women's Law Journal 59.

agreement. The mediators were trained volunteers, not lawyers; they may have seen the presence of an attorney as a threat to their authority and ability to control the hearing. I then offered to sit quietly in the back of room to be available if Mrs Carson has questions or wanted advice from an advocate. Again, the mediators refused. I declined their suggestion that I remain outside in the hall during the mediation and talk to Mrs Carson at the conclusion of the hearing. Mrs Carson decided to participate in the hearing nonetheless'.

Considering the above remarks, it becomes apparent that lawyers hold their own view about the mediators, the mediation process and about how the mediation ought to be conducted.

### **3.7 ROLE OF AN ATTORNEY**

The exponents of attorney's involvement in mediation, state that attorneys may play a significant role in cases where child custody is involved. The following are considered major roles of attorneys:

#### **3.7.1 Initiator of the Mediation Process**

The opinion is that attorneys may play an essential role in connecting the family with the mediation process. As attorneys are often in touch with their clients during the first stages of the conflict, they may thus be instrumental in connecting the family with mediation, in selecting mediation and the mediator who will help the family most and in preparing the family for effective use of the mediation process.

### 3.7.2 Inventor of Options for Mutual Gain

By representing the interests of his client, it is hoped that the attorney can be in the best place to invent options for mutual gains.<sup>80</sup>

### 3.7.3 Educator of Client

The memorandum of agreement prepared by a mediator, should be reviewed by each attorney. The attorney, it is said, would be able to find out from his client whether the client understood the clauses of all proposed agreements. The attorney would explain his limit to his client in as far as his involvement in the reviewing process is concerned as this would also limit the client's expectations from the attorney.<sup>81</sup> In this way the attorney's role is that of a consultant not a representative for the client. Samuels and Shawn<sup>82</sup> refer to the attorney's role in this capacity as an 'educator, drafter of the agreement, investigator and drafter, and reviewer of the drafted agreement'.

### 3.7.4 Guarantor of Due Process

Another important role of an attorney is that he should investigate his client's satisfaction with the proposed agreement. The attorney may specifically ask his client whether he felt the outcome of mediation process was fair or unfair to either or both parties. If he finds out that the outcome wasn't fair, the attorney may contact the other party's attorney to discuss a possible remedy or solution before he contacts the mediator who maintained the process.

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<sup>80</sup> H Mclsaac 'The Role of Attorneys in Resolving Custody Disputes' (1988) Conciliation Courts Review 11.

<sup>81</sup> Neumann op cit n42.

<sup>82</sup> M D Samuels & J A Shawn 'The Role of the Lawyer Outside the Mediation Process' (1983) Mediation Quarterly 13 at 17.



### 3.8 MENTAL HEALTH PROFESSIONALS

Mental health professionals like psychologists and social workers, may become involved in divorce mediation as attorneys do. But there is a distinction between mediators and mental health practitioners. Mental health professionals may become involved in the mediation process as private mediators do. However, for mediators, the essential focus of mediation is upon enabling the parties to arrive at joint decisions upon specific issues which cause them to be divided.

Mediators have nothing to do with advisory activities, with providing 'support' in the immediate crisis of breakdown, with the long-term examination of relationships or with wider problems of coping with changed circumstances. Hence the mental health practitioners perform what mediators do not. In addition to the above, the mental health professional may consult with one of the parties in the absence of the other, especially with the spouse who seems reluctant to get divorced. In such a case the reluctant spouse would be comforted by the mental health professional to accept a divorce, and would be advised why the other spouse wants to divorce.<sup>83</sup>

Mental health practitioners often participate in divorce mediation involving minor children. The primary purpose of counselling in mediation is to reduce hostility between the parties which often cause the interests of the children not to be best served. To secure the welfare and well-being of the children, the mental health practitioner can assist, support, and encourage parents to work together to provide a safe and nurturing environment of their children so as to enable the children to experience close and continuous contact with both parents after divorce.

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<sup>83</sup> L J Silberman 'Professional Responsibility - Problems of Divorce Mediation' Mediation: The New Force in Family Law (1984) 206.

### 3.9 FORMS OF MEDIATION

#### 3.9.1 Private Mediation

Private mediation is one form of dispute resolution often used when disputants have failed to solve their dispute through negotiation. Roberts refers to a negotiation process as 'simple bilateral negotiation'.<sup>84</sup> In this process the parties simply talk about the dispute without the intervention of a third person and mutually come to a solution. The parties in this case, retain the control over the process, the content and the outcome. Roberts further comments as follows on negotiation as a process:

'The essential feature is that control over any solution is retained by the disputants themselves rather than being surrendered entirely or in part 'to some outsider'.<sup>85</sup>

Private mediation is used therefore when negotiation does not help the disputants to end their dispute. This takes place when both of the disputants decide to seek the assistance of a third-person to assist solving the conflict.

Private mediation has replaced the traditional model of negotiation through lawyers. In private mediation the parties become actively involved in reaching the decision mutually acceptable to them. The mediator, according to Mowatt has to

'facilitate bilateral negotiations. He must assume the task of unobtrusive neutral assistance, while the disputants retain, to a greater or lesser extent, control over process of negotiation and the resultant agreement or settlement'.<sup>86</sup>

When I was at Stanford University in the United States of America in January 1990, Gary Friedman, a lecturer and director of the Centre for the Development of

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<sup>84</sup> S Roberts 'Mediation in Family Dispute' (1983) 41 Modern Law Review 537; J G Mowatt 'Divorce Mediation - The Mediation in Certain Divorce Matters Act 1987' (1988) Tydskrif vir die Suid Afrikaanse Reg 47 - 51.

<sup>85</sup> *ibid.*

<sup>86</sup> Mowatt op cit n3 at 730.

Mediation and Law in San Francisco, said in the United States of America private mediation has been so widely advertised that the disputants or parties are rarely referred by the courts to mediators. The parties, on their own, he said, often look for mediators and they look for the best mediator available instead of making use of any mediator. The results of such awareness is that the parties acquire mediators of high quality.

In Canada, within the area of divorce, mediation emerged in 1969 through what was known as Federal Ministry Health and Welfare Canada. The Federal Ministry established the 'Divorce Counselling and Family Affairs Unit'. The objective for the latter was to see the funding promotion of court-based conciliation services in the whole of Canada.<sup>87</sup> The first conciliation court was established in 1975. The concept of mediation in divorce was offered by the Law Section of the Law Reforms Commission in 1975. It was after the findings of this commission that private professionals developed an interest in family mediation.

In Britain, divorce mediation was introduced as a result of the Divorce Reform Act of 1969. The objectives of the act were to bring about the 'maximum of fairness, the reduction of bitterness, distress, and humiliation'.<sup>88</sup> The manner in which the objectives were to be carried out has to date been a point of confusion. Walker comments as follows on the machinery of the Act:

'The process by which this should be achieved has remained uncertain and equivocal with an uneasy co-existence of 'private soliciting and traditional litigation: although the Act was seen as a radical piece of legislation'.<sup>89</sup>

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<sup>87</sup> H H Irvin & M Benjamin 'Family Mediation in Canada :Its History and Accrued Status' The Role of Mediation in Divorce Proceedings: A Comparative Perspective (1987) 17.

<sup>88</sup> J Walker 'Divorce Mediation - An Overview from Great Britain' *ibid* at 31.

<sup>89</sup> *ibid*.

The Finer Report of 1974, although it did not make any difference to the Divorce Reform Act of 1969, recommended a process of reconciliation which was defined as:

‘a process engendering common sense, reasonableness and agreement in dealing with the consequences of estrangement ... having substantial success in civilising the consequence of the breakdown’.<sup>90</sup>

The definition of ‘conciliation’ was also interpreted by the Report of the Committee of One-Parent Families in 1974 as :

‘Assisting the parties to deal with the consequences of the established breakdown of their marriage ... by reaching agreements or giving consents or reducing the area of conflict on education of the children and every other matter arising from the breakdown which calls for a decision on future matters’.<sup>91</sup>

### 3.9.2 Court-annexed mediation

A definition of court-annexed mediation is not going to be given, but it will be explained as follows: First the concept ‘court-annexed’ mediation is also referred to as ‘court-annexed’ mediation or ‘court-based’, or ‘public mediation’.<sup>92</sup> Second, ‘court-annexed’ mediation may be divided into two sections; namely, mandatory mediation and voluntary mediation.<sup>93</sup> Mandatory mediation takes place when the government enacts legislation requiring a divorcing couple to make use of mediation before any marital dispute, particularly child custody and visitation, is entertained by the court. On the other hand voluntary mediation occurs when a divorcing couple is purely

<sup>90</sup> D Scott-Macnab op cit n2 at 712; J Walker, P McCarthy, R Simpson & J Corlyon ‘Family Conciliation in England and Wales - The Way Forward’ (1990) Family and Conciliation Courts Review 1-2.

<sup>91</sup> Report of the Committee on One-Parent Families (1974) 176.

<sup>92</sup> A Orgus, P McCarthy & S Wray ‘Court-Annexed Programs in England and Wales’ op cit n 87 at 63; J Blades Family Mediation Co-operative Divorce Settlement (1985) 98-110; F E Scanlon ‘Dispute Resolution: The Negotiation Process and Mediators’ (1989) 74 Women Journal 21.

<sup>93</sup> Neumann op cit n42 at 87.

ordered by a presiding judge to exhaust its remedies toward resolving a dispute through mediation services or is left with a choice to initiate mediation itself.

Blades defines public divorce mediation as a:

'Court connected and typically a service of the family or conciliation court. Though only some jurisdictions offer divorce mediation services, those that do generally charge nothing or only a nominal fee. Often it is only one of many services these courts provide. Other services include marriage and family counselling, where the possibility of reconciliation exists; divorce counselling, to assist families with post-divorce adjustment; mediation of family conflicts parent/teenager or husband/wife); preparing evaluations for judges when families are unable to resolve custody or visitation issues; seminars for families in the process of divorce; premarital consent evaluations for couples under the age of eighteen; and restraining orders and counselling as regards domestic violence'.<sup>94</sup>

In Britain the terms 'conciliation' and 'mediation' are used interchangeably not only by lay people but also by lawyers.<sup>95</sup> Orgus *et al* point out that there is no consensus on the definition of the terms 'conciliation' and 'mediation'. As a result, as pointed out above, these terms are used as synonymous. The justification, they argue, of using these terms interchangeably, is based on a triad process involving administrative, therapeutic and paternalistic goals. They explain this triad process as follows:

The administrative goal is to produce a settlement to the dispute as cheaply and quickly as possible. A variation of this, while still concerned with the costs of achieving outcomes, views the latter over a long-time scale: settlement must not only be secured but must also be 'satisfactory' since 'unsatisfactory' settlements generate further disputes and thus add to the costs.

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<sup>94</sup> Blades *op cit* n92.

<sup>95</sup> J Walker 'Family Conciliation in England and Wales - The way forward?' (1990) Family and Conciliation Courts Review 1 at 2.

The therapeutic goal presents another perspective. The process of reaching the outcome is seen as being as important as the outcome itself, particularly it enables the parties to explore their own feelings about the issues, to communicate more easily between themselves, and thus also to reduce bitterness and tension.

At the extreme, mediation which pursues this goal merges into counselling. The paternalistic goal is concerned to achieve socially appropriate outcomes ... in the present context, since mediation programs invariably deal with child issues, these are outcomes which are in the best interests of the children'.<sup>96</sup>

There is no mandatory mediation in Britain. An informal invitation by the judiciary sets up schemes toward resolution of disputes. Probation officers are the people who become involved in mediation and conciliation services on referral by the courts. Sometimes specialists who are not attached to the courts are asked to carry out such services as probation officers conduct these services without being formally qualified to do so.

In Britain, there is what is called automatic discretionary selection system. Automatic selection takes place when a court staff member sends a formal notice to the parties advising them to appear before a member of the judiciary or to consult with the probation officer for the purpose of starting conciliatory attempts. Before a notice is sent, a court official would consider from papers filed whether such a couple should first be assisted to reconcile. If he so deems fit he would refer the couple either to the member of the judiciary or probation officer for reconciliation efforts.<sup>97</sup> Discretionary selection system on the other hand, is operated by registrars or probation officers who would make an assessment from the papers filed with the court as to whether such a case is well suited for mediation or conciliation.<sup>98</sup> The stages at which selections are made for conciliation and mediation differ from one court jurisdiction to the other. In some jurisdictions, cases are selected after papers

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<sup>96</sup> Orgus *et al* op cit n92 at 64 - 65.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

have been filed, which would indicate that an application involves dispute over custody, access or support, or after an opponent has filed opposing documents claiming some right (custody or visitation) over the child. Some cases are referred for mediation during a court hearing when parties have indicated an intention or willingness to mediate the disputed issue.

Orgus *et al* say that the judge attends the mediation process at the termination of the appointment in the event of mediation being successful. The attendance by the judge is directed at formalising any agreement which might have been reached by the parties. This would entail making a formal court order which would include the terms as agreed upon by the parties. If there was an agreement reached, the mediators would report to the court the results of the mediation by virtue of the fact that they are court officials or court appointees when mediating any issue referred to them by the court or court staff. Some efforts are being made whereby mediators would not have to make reports or recommendations to the court so that confidentiality would be kept concerning what was said during the mediation process.

In the United States of America a revolutionary concept of the legal profession and behavioural scientists working together for the welfare of families was brought to life with the 1939 establishment of the Family Conciliation Court of Los Angeles.<sup>99</sup> In 1955 a form of conciliation counselling somewhat similar to divorce mediation, was introduced in the Los Angeles programme. The term mediation started to be used in 1974. The use of court-connected divorce mediation during the 1970's in states like Arizona, California, Connecticut, Massachusetts, Michigan, Minnesota, Wisconsin, and Virginia, led to state-wide legislation in a number of states. Court-based mediation services became firmly established during 1976. In Los Angeles, the establishment of court-annexed mediation was motivated by the following objectives:

- '(a) To provide a non-adversarial means of settling conflict within the Superior Court, maximising participation of the parties

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<sup>99</sup> L C Hale & J A Knecht 'Enriching Divorced Families Through Grass Root Development of Community - Wide Court Referred Mediation Services' (1986) Conciliation Courts Review 24.

involved and giving them maximum responsibility for their own individual and collective lives.

- (b) To help families reconcile and divert from the divorce process.
- (c) To help families going through the divorce process handle the crisis of dissolution effectively and settle their difference amicably.
- (d) To make recommendations regarding underage couples applying for marriage.
- (e) To review public and private policy and programs to make recommendations for the strengthening of family life, both inside and outside the court system'.<sup>100</sup>

### 3.9.3 Mandatory Mediation

California was the first state in the United States of America which enacted mandatory court-mediation in disputed custody and visitation matters. It became mandatory following the Surety Bill, Senate Bill 961, which came about as a result of the recommendation made by the Family Law Advisory Committee appointed to study California's 1969 no-fault divorce law. Blades says that the bill was first proposed in 1978, but was not approved until 1980. She gives the following passage of the bill:

'Senate Bill 961 was held up in committees for almost three years with Governor Brown threatening to veto the Bill. However, the Bill received considerable community and judicial support. The most persuasive argument was made to the governor's office by a person who had personally participated in the court mediation process during his own divorce.

He explained that he and his wife had spent \$38,000 in their custody action for attorney's fees and trial costs without mediation. He pointed out that he and his wife has achieved a custody agreement through conciliation court in nine to ten

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<sup>100</sup> Ibid.



hours at no costs to themselves and only a minimum cost to the county...'.<sup>101</sup>

The Surety Bill left most of the aspects of mediation implementation to the various county courts. Blades says the discretionary power given to various county courts was as a result of the fact that mediation had varyingly been used in California counties long before the Surety Bill became law. Gardener points out that although mediation is mandatory, parties may make private arrangements to mediate their dispute. However, in California, it is provided as a public service.

In the Los Angeles Superior Court, mediation usually takes four or five hours, unlike in McClean County in Illinois, where clients must participate in a minimum of three hours.<sup>102</sup> If the parties successfully mediate, the agreement they sign is sent to the court and the copies are made available to their attorneys who would have ten days to respond. If no objection is received within the said period, the agreement is incorporated into the divorce decree as an order of court. The mediator would then make herself/himself available for future consultation to work out subsequent problems with the parties. If the agreement is not reached, then no report is sent to the court. The parties would proceed on the adversarial track or in any other way.

### 3.10 CONCLUSION

The exponents of mediation are in agreement as to what mediation is, within the context of family or divorce mediation, and there is also a common acceptance by them that divorce mediation, unlike adversarial divorce, yields beneficial consequences to those directly and indirectly affected by the family or marriage breakdown (spouses and children in particular). There is also a mutual understanding as to the structure the divorce process ought to follow although various mediation models are used. The mediation ethics to be followed or complied with by mediators appear

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<sup>101</sup> Blades op cit n92 at 103.

<sup>102</sup> Hale et al op cit n98 at 111.

also to be universally applied. Problem areas which deserve further research have to do with the role of attorneys and the confidentiality of the inputs during the mediation process. Schafer highlights the complexity of the attorney's role during the mediation process as follows:

‘At one extreme, lawyers are entitled to be present during the mediation sessions and to give legal advice (own emphasis) as the session progresses, while letting the clients and the mediator conduct the negotiations’.<sup>103</sup>

Burman and Rudolph, although they favour lawyer's representation during mediation, appear not to be persuasive in their argument.<sup>104</sup> The proposition in the above comments that lawyers may attend and ‘give legal advice’ could make mediation a process to be utilised by affluent people as poor people would be deterred from using mediation because of the prohibitive expenses of engaging a lawyer. If this line of argument (leaving lawyers to give legal advice) could be followed, mediation would be like the South African Small Claims Court process which was, in essence, developed to encourage quick, informal and inexpensive resolution of disputes involving small sums of money. Instead, the Small Claims Court is being dominated, as I observed when I was working as a clerk of court in Pietermaritzburg between 1976 and 1981, by businessmen who use it as an inexpensive method to enforce their claims against poor and illiterate people who have no understanding of, for example, the contract entered into between ‘them and the businessmen’ that pertains to ‘goods sold and delivered to the defendants at the latters’ special instance and request’.

Confidentiality in mediation is an aspect so difficult to handle because its finality requires not only information and discussions between mediators and mediators' associations, but also depends on what the judicial legal establishments think and say on this important and sensitive issue. It is necessary for mediators to have the

<sup>103</sup> Schaffer op cit n64 at 187-188.

<sup>104</sup> S Burman & D Rudolph ‘Repression By Mediation: Mediation and Divorce in South Africa’ (1990) 107 SALJ 251 at 276.

confidence of the parties if they (mediators) intend to assist them to resolve their dispute amicably and informally. This may be accomplished only if mediators explain to the parties at the beginning of the session that 'everything said during the course of the mediation process' will not be reported to anybody else without the consent of the parties.

Much as it is important for a mediator to gain the confidence of the parties by stressing confidentiality of the mediation proceedings, the mediator would need to qualify that no law of parliament, like in South Africa and many other countries, exists protecting mediators from giving evidence in court when subpoenaed to do so following the informal agreement reached out of court in case where one of the parties decides to seek a court adjudication on the dispute. Some countries like Canada<sup>105</sup> protect mediators from giving evidence in court only if the mediator is subpoenaed after the summons had been issued and his or her facilitation was required to settle the dispute.

An act of parliament is critical to enable mediators to firmly advise their clients that they would not give evidence in court about what transpired during mediation. The state's policy, on this issue, declared through its legislation, should not be seen to be designed to protect mediators, but ought to be seen to resolve disputes without resorts to courts. It is only through informal resolution of disputes that (social) justice could be attained. Informal resolution of disputes depends on trusted third parties. If the third-party neutral is not trusted in terms of what he/she says (non-disclosure of information), then the parties would also not be persuaded to trust each other. However, the mediator cannot tell with confidence that everything said in the course of the mediation would remain confidential.

For mediators not to lose face in terms of what they promise their clients, they would need to be protected by the states from being called to give evidence.

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<sup>105</sup> Huddart op cit n9.

The question of whether divorce mediation should be voluntary or mandatory is really a vexed one. In South Africa, the final decision in as far as this issue, would have, as I suggested when discussing court-annexed mediation in Chapter I, to be left at the Local Supreme Court's discretion and or at the local Magistrate's Court discretion (on the same basis as the local Supreme Court) once the latter is vested with the jurisdiction to entertain all divorce cases. I would add, however, that we should not be at pains arguing for or against voluntary or mandatory mediation because at the end, the outcome of mediation, irrespective of whether mediation is voluntary or mandatory, would be marked by the attribute of consensus.

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## CHAPTER 4

### AFRICAN CUSTOMARY MEDIATION

#### 4.1. INTRODUCTION

A large amount of research on indigenous law has brought about a series of highly competent monographs such as those on law among the Barotse, the Nuer and African speaking people in Southern Africa.<sup>106</sup> These and other related studies have focused primarily on formal processes for the settlement of disputes, such as those which take place in a courtroom or those which are in some other way, set apart from simpler measures of social control. However, many traditional or indigenous societies had informal quasi-legal, dispute-settlement procedures, and some have been utilised to supplement formal or semi-formal ones. Most of these informal procedures have not been scientifically analysed.

Mediation as an alternative form of dispute resolution, is not entirely new. Mediation is used as an adaptation of something that has existed in other cultures.<sup>107</sup> In Africa the custom of assembling a 'moot' or neighbourhood meeting has long provided an informal mechanism for resolving a variety of interpersonal disputes. With the exception (to a certain extent) of spouses involved in a marital dispute, any disputant or neighbour could call a moot, where a respected 'notable' man would serve as a go-between to help the involved parties to resolve their conflict co-operatively. The mediator's role varied from one community to another, but all would appear to seek settlement without acting as a judge or an arbitrator. In other parts of the world, like

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<sup>106</sup> M Gluckman The Judicial Process among the Barotse of Northern Rhodesia (1954); P P Howell A Handbook of Nuer Law (1954); D W Augsburger Conflict Mediation Across Cultures (1992); Race to Power: The Struggle for Southern Africa (1994) by Africa Research Group. See also Sanders footnote 111.

<sup>107</sup> P Mkhize 'Mediation: An Old Family Practice Dressed up as New' Family mediation in South Africa op cit n38.

America, informal ways of dispute settlement were practised. Auerbach supports this view as follows:

'Surely, history supports our enduring legal tradition, stretching back beyond our seventeenth century origins to the murky success of Anglo-Saxon common law. It does; but if we can remove our contemporary cultural blinders we can also locate, during three and a half centuries of our colonial and national experience, many groups of Americans who persistently searched for justice beyond law, without lawyers or courts. Indeed, they found it there: within their communities of faith, ideology, or even profit. Protected by their own choice from the reach of formal law, they lived by values that legal institutions could not satisfy'.<sup>108</sup>

For centuries the church has played an important part in resolving conflicts among its members. The local parish priest would frequently be called upon to serve as a mediator, particularly in family disputes, and could facilitate ways in which the disputants would learn to live with each other or recognise their relationship.

Mediation was a process mostly used by traditional or indigenous societies. By traditional societies I mean those tribes in Southern Africa which practised African or indigenous ways for resolving disputes in their daily lives. Indigenous methods of dispute resolution refers to:

'An established system of immemorial rules which had evolved from a way of life and natural wants of the people, the general concept of which was a matter of common knowledge coupled with precedents applying to special cases which were retained in the memories of chiefs and the councillors, their sons and their grandsons until forgotten or until they become part of

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<sup>108</sup> J S Auerbach Justice Without Law (1983) 3; see also P Mkhize 'Mediation: A Tool for Facilitating Integration in a Changing South Africa' Multi-cultural Conflict Management in Changing Societies (1994) (ed.) L Nieuwmeijer & R du Toit 251; see also Matthew 18: 15-17 where Christians as "communities of faith" referred to by Auerbach above are guided to follow some steps (negotiation, mediation and arbitration) when a conflict situation arises.

the immemorial rules. It is a system of law of ancient origin'.<sup>109</sup>

In the same vein, Makec defines the customary law of the Dinka people of Sudan as follows:

'The origin of their laws appears to have been experience, so applied to suit their tribal life; and this experience and customs based thereon, is of such antiquity that it is almost hopeless from lack of any written records to trace back to their origin'.<sup>110</sup>

The introduction by colonists of Western values for resolving conflicts, like Roman-Dutch-Law, steamed off traditional values which had been recognised and held so dear by our ancestors.<sup>111</sup> Although some tribes still adhere to customary ways for resolving conflicts, such customs cannot be readily upheld since the law of the land requires customs to be proved before they could be applied. Bennett says:

'Customary law is not part of the Court's ordinary repertoire of rules. It is treated as if it were foreign law or custom'.<sup>112</sup>

In **Ex parte Minister of Native Affairs**, in re **Yako vs. Beyi**,<sup>113</sup> the Supreme Court held that the approach to be adopted to customary law is that 'Native custom must be proved in the same manner as any other custom. It is submitted that the requirement of proof of customary law undermines the independence of customs as has been observed by those subject to it as it makes customs subservient to 'court's ordinary' rules.<sup>114</sup>

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<sup>109</sup> P Mkhize 'Conflict Resolution: An African Style' (1990) Family and Conciliation Courts Review 71.

<sup>110</sup> K W Makec The Customary Law of the Dinka People of Sudan (1988) 31.

<sup>111</sup> A J G M Sanders "How Customary is African Customary Law? (1987) Comperative and International Law Journal of Southern Africa 405-410. Augsburger op cit n106.

<sup>112</sup> T W Bennet Application of customary law in South Africa (1985) 27; see, however, section 211(3) of The Constitution of Republic of South Africa, Act 108 of 1996.

<sup>113</sup> 1948 (1) SA 388 (A) at 394-5.

<sup>114</sup> Bennet op cit n112.

## 4.2 DISPUTE RESOLUTION: THE BUSHMEN STYLE

It is encouraging, despite the weakening by foreign law of the African customary dispute resolution style, that some indigenous tribes in Africa still adhere to their so-called 'primitive' dispute resolution mechanism. The Bushmen of the Kalahari Desert according to the research conducted by Ury during April and May 1989,<sup>115</sup> firmly observe and use their old style of dispute resolution with success, Ury's research reveals that the Bushmen tribe does not get involved in wars, except wars fought in olden days purely because people 'did not speak well to each other'.<sup>116</sup>

The Bushmen believe that, through good communication and negotiation skills, problems and misunderstandings could be managed or prevented from escalating into serious consequences.

The Bushmen's method for investigating disputes was open, safe, and guarded. If somebody had been wronged, he would call three witnesses to assist him investigate his complaint. If the wrongdoer is found, he would be warned not to repeat his bad actions. If he repeats the wrong complained about, four witnesses would be called who would 'loudly' demonstrate their anger toward the wrongdoer and warn him not to repeat it again. It is said that it rarely or never happened that a wrongdoer would violate the Bushmen's norms by offending others more than twice particularly after he had been harshly warned against his bad behaviour.

The 'most serious dispute' according to the Bushmen, would happen 'when one man runs away with another's wife'.<sup>117</sup> The procedure to be followed is that an aggrieved husband should 'go and get her', and then 'go and live far away so

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<sup>115</sup> W L Ury (1990) Dispute Resolution Notes from the Kalahari.

<sup>116</sup> *ibid* 232.

<sup>117</sup> *ibid* 231.



that he can't get her again'.<sup>118</sup> The same procedure is repeated should she be taken away by another man. If she refuses to come back the husband is entitled to take his children, if any, and live far away from her. It is amazing, however, that the seriousness of this dispute does not lead to the enticed wife's husband plotting, for example, to mishandle or murder the man who takes away his wife.

The procedure that is followed by the Bushmen tribe when a wife has either left the common home or enticed by another man is the same as **ukuphuthuma** (follow-up) custom practised by the Zulu's as will be explained later in this chapter. The services of a mediator features highly in the Bushmen's dispute resolution mechanism. The best known mediator amongst the Busmen is **Korakoradue**. He stands out as a dispute resolver in the Bushmen community and is the most used dispute resolver.

The Bushmen dispute resolution style resolution style is not certain cure for all types of disputes as is the case with modern dispute resolution processes. The Bushmen mediator, if he fails to assist in having the problem solved through mediation, would convene **xotla**. The **xotla** is a sort of deadlock-breaking mechanism where some people are requested to meet in the centre of a circle and each one would question the disputants about the dispute 'until they have talked each other lame'.<sup>119</sup> The deadlock-braking process could take a number of days until everyone involved in the questioning of the disputants has had a chance to ask them about their dispute. Another technique used by the Bushmen to break a deadlock is centred around the trance dance. People are called for a dance that is going to cause their gods to fill with spirit those dancing until they fall into a trance. When they come out of the trance they would be so filled with the spirit that they easily persuade disputants to solve their problem. This is also a powerful technique to manage a dispute from escalating as disputants are calmed down through fearing that failure to obey

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<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

their gods' spirits may be visited with punishment. We entertain this power even in our own biblical teachings which require that we take seriously professes made by people speaking in tongues. The Bushmen's fear of having unresolved conflicts is not regulated by personal conscience. The personal conscience is the fear of God who 'is in the sky, on the veld, and underground. You don't want to make the gods angry and they are everywhere. They know if you've been good or bad'.<sup>120</sup> The Bushmen's dispute resolution 'education' is not static. It is really a process that improves with time. This is evidenced by the fact that in olden days one of the disputants would have to leave and stay away from the other if the dispute could not be solved by any means. But this avoidance method of dispute resolution is no longer resorted to as it is said 'under no conditions will a person be allowed to go away until the dispute is resolved'.<sup>121</sup> The Bushmen believe that, through genuine negotiation which entails frank and open discussion and ventilation of hurt feeling, anger is calmed down and reconciliation is created thus stopping disputants from negatively moving away from each other.

Friends among Bushmen play an important role in dispute resolution. It is said that a friend or friends are often approached to intervene in a dispute situation by pleading with disputants to stop an oppressive behaviour or to agree to the resolution of a problem. This form of intervention is in accordance with the general view held by some conflict resolution experts that people like, aunts, grandmothers and close relatives, who might have an interest in the subject matter of the dispute ought not to be ignored or left out of the discussion or negotiations as they may later sabotage all outcomes that were reached without their participation. This normally happens in negotiations about marital matters where custody of minor children is in dispute.

Caucusing as a technique for dispute resolution is observed when friends are approached to intervene. Friends are approached separately. This shows that

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<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

Bushmen are highly skilled as negotiators and as mediators, and that they take great cognisance of elements of confidentiality and neutrality which should be observed in order to be trusted as a facilitator. The process of peaceful resolution of disputes is instilled in the Bushmen's culture at tender ages. This is evidenced, for example, when children quarrel over a blanket.

It is said that a child who possesses or owns a blanket is requested to share it with the other child. The sharing is not suggested on a baseless persuasion by an adult person, but is founded on the belief that the one who owns something acquires it on the kindness of God. This is also the belief many Christians hold that God gives in abundance to those who are generous to others. Ury puts it in modern negotiating terms, when he says sharing of a blanket is an:

'example of reframing a zero-sum situation (in which one girl loses) into a positive-sum situation (in which both girls win). Sharing the blanket is not just a compromise: The girl with the blanket now receives pleasure from the other girl sharing it'.<sup>122</sup>

The following statements by Bushmen are indicative of peace education culture amongst the Bushmen:

'If a person hunts better, it must be because of his father. The skill is inherited. The same is true of the skill of dispute resolution'.<sup>123</sup>

'The greatest lesson my father taught me was to tell the people: never cause a dispute so that it won't have to be resolved. Live in harmony'.<sup>124</sup>

### 4.3 DIVORCE MEDIATION

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<sup>122</sup> *ibid* 236.

<sup>123</sup> *ibid*.

<sup>124</sup> *ibid*.

The term 'Divorce' was not known or used in traditional societies. This is apparently due to the fact that marriage or customary union would never come to an end formally as Christian marriages do. The same practice is still evidenced in the way the Bushmen end their marriages. They do not divorce. Purana, the Bushmen elder, says if his daughter wants to be out of the marriage and asks for his comments, he responds as follows: 'I tell her to come home and live with me'.<sup>125</sup> A traditional African marriage or customary union was not only a union between the individuals principally concerned (spouses) but was also between the family groups to which they belong. This family relationship was of critical importance during spousal tension or misunderstanding. This relationship again, underscored the role played by the clan, and hence, by the extended family. According to the African tradition, the clan was made up of relatives who identified themselves from a common ancestry. In addition, all children of one's parents and grandparents were accordingly referred to as members of the clan. Therefore, the extended family was not at all understood as extended to the extent that it was not essential when it came to matters concerning the traditional family. By traditional family I mean also the clan as described above.

The concept 'nucleus family' did not exist in the traditional African society, particularly in the Zulu society. It did not, according to Lewanika, exist 'in many of the cultures'.<sup>126</sup> The family was a strong and valued unit. Hence, the stranger would not easily drive a wedge amongst members of the clan.

The colonisation of Africa, however, interfered with the web that knitted the family together but some elements that made the family an intact unit continued to exist after colonisation, although they were disrupted to a greater extent during the operation of the colonial governments. The values that held the family together tended to be obliterated by the systems and patterns brought about or introduced by the colonial era.

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<sup>125</sup> *ibid.*

<sup>126</sup> I M Lewanika 'Policies regarding the family in Africa South of the Sahara' Changing Families in Changing Societies (1993) 86 at 89.

In the same vein, the relationship that existed between the husband's and the wife's families, in as far as co-operation regarding the protection of, and guidance to their married children's family, was like the relationship among clan members. The unity of the family was something of high priority from the point of view of the family as a group or clan, and of the family as it relates to the husband and wife (nucleus family). The tension between husband and wife would rarely escalate to serious consequences as the clan and families of both spouses had conflict management and third party intervention procedures which had to be complied with since failure of which would subject any member of the clan to the wrath of the ancestral spirits. The ancestral spirits' wrath could take any form like, the snake biting any member of the clan, the thunder striking any hut, person or any property, sudden illness to any member of the clan or even prolonged misfortune like not getting children or adequate stock.

The traditional family was more concerned with conflict management than mediation. The dispute between members of the clan had to be attended to promptly and not let out to be the subject of gossips. Gossips within the clan, were not allowed because they would tend to divide the clan and were a disgrace once they reach out to members not belonging to the clan. If gossips were allowed to circulate the ancestors could inflict any punishment to any member of the clan as explained above. The ancestors would sometime show their anger through a dream to adult members of the clan if the misunderstanding within the clan was not discussed and resolved.

Negotiation as a process of dispute resolution, was therefore of paramount importance. If those involved in a dispute were not willing to talk about it, a senior member would facilitate negotiation, going between the disputants persuading them to get together and talk about the dispute. Disputants would be encouraged, before negotiations begin to be open about their feelings (**khululekani**), to talk with their voices down (**hlisa imimoya**), to listen to each

other, not attack personalities but attack the problem and to talk in order to solve the problem so as to have peace in the family or clan.

Negotiations were structured not only for the purposes of addressing marital problems but were also structured in relation to opening up relations through affinity.

Structured negotiations, in relation to beginning families' relationship through affinity, would be a long process divided into conventional stages and conducted by a third party facilitator who would be from the man's (husband's) family. The following stages are characteristic of negotiations in almost all African cultures: **Ukucela** (introducing the son-in-law to daughter-in-law's parents), **opening official lobolo (dowry) talks**, visiting son-in-law's family to view **lobolo beasts**, **marriage date discussion** and **union (wedding) day**.

**Ukucela** was an initial introduction of a relationship between those wishing to getting married. Ukucela would take place immediately after the son had informed his parents that he wished to get married to a particular woman. The senior father (uncle) of the boy would be mandated by the clan led by his father, to go and introduce the love relationship between the 'children' son and would be daughter-in-law. This would be done without notice to the 'daughter-in-law's' parents. The relationship was commonly introduced by the husband's senior uncle by approaching the in-laws' main family entrance and shouting as follows: 'The family of A (surname) asks for a relationship with you (mentioning their surname)'. He would then keep quiet until somebody is sent to call him into the main hut. He would then be questioned as to which of the girls in the family, if many, is he trying to identify with his request. After identifying the girl, the girl would be called in to confirm the alleged relationship.

Sometimes the man would be rebuked by not being called in or told simply to leave as nobody is prepared to listen to his story. If he is being listened to or called in, he would leave after the girl had confirmed or not confirmed (rarely

happened) the relationship. This stage was not a formal stage to open to lobola negotiations, but was about 'testing out' or 'feeling out' the attitudes of the girl's parents and the response of the girl herself. In modern terms this stage could be compared to pre-negotiation stage where the facilitator prepares parties to come to a negotiation table.

The second stage, **opening official lobolo** talks, would be done again by the senior son's uncle. He would be mandated by the clan as described above, to go to the in-laws' and offer how they propose paying lobolo. This would be done after making a formal notice to the in-laws: The in-laws would, this time, be in the company of other senior members of the clan. But the offer by the son's uncle could be refused in parts or as a whole and replaced by counter-offers. The in-laws' response could be reported back to the son's family or clan at some later time or months. The third stage, would be about the **viewing of the lobolo beasts** at the son-in-law's family. This was a great ceremony to be attended by the daughter-in-law's father and his selected senior clan males and relatives. This stage used to have no problems except that the daughter-in-law's delegation could request that one or two beasts be replaced by some beasts of different size or sex.

The following stage involved sending the son's senior father to open up negotiations regarding the **date of the union**. The daughter-in-law's parents (including her mother, at this stage) could inform the son-in-law's father or umkhongi (styled a mediator) that he would have to come back as the date would still have to be discussed with the clan members. After the date had been discussed by the clan, the son-in-law's parents would be told accordingly or they would find out themselves as to what was the date agreed upon for the marriage by the daughter-in-law's clan members. The husband's parents would inform their clan members respectively.

The last and final stage of negotiation, would be the **handing over of the daughter-in-law** to the son-in-law's family by the daughter-in-law's family at a

ceremony to be officiated by the senior Induna (Headman) under which the son's family is situated. Explicit public pronouncement by the daughter-in-law that she loves her husband was enough to finalise the union thus handing her over to the ancestors of her husband's clan.

This long process of negotiation, which would sometimes involve heated exchanges of words and frustrations (not beyond expectations) between the two families representatives, shows beyond doubt that constructive negotiations and third party facilitation's were an essential approach to addressing any issues requiring a durable outcome.

#### **4.4 MEDIATION INSTANCES**

If the spouses were still living together, the husband's mother often acted as a mediator between the daughter-in-law and her son. She would only act in this capacity if the problem was a minor one like, shouting at or harassment of the wife by the husband or not chopping wood or cutting trees down by the husband so that they would be easily converted into fire wood by the wife.

The mother-in-law was more easily approachable than the father-in-law, hence the daughter-in-law easily interacted with her mother-in-law than her father-in-law. The same applied to sons towards parents. If the son felt that he wanted to get married, he would easily discuss such an idea with his mother. The mother would then introduce the son's wishes to her husband. This communication structure made it possible for the mother or mother-in-law to know about the tension or misunderstanding between the 'children' at an early stage and intervene at that stage.

The possibility of the mother-in-law being seen to be not neutral by the daughter-in-law could not exist because the daughter-in-law was often the one approaching the mother-in-law by way of seeking intervention. In this way, the



mother-in-law would tend to be on the side of the daughter-in-law by politely discussing more the feelings of the daughter-in-law when discussing the matter with her son. The matter was often discussed with spouses separately because it is not customary (for almost all the African tribes, particularly the Zulu's) for the woman to be the chairperson during meetings, where any matter involving two or more persons was discussed. The chairperson's role was always that of a senior person in the family or ward.

The father of the husband would act as a mediator if the dispute or misunderstanding was of a serious nature, like for instance, the beating of the wife, witch-craft accusation and sleeping with another man. The senior male person was the only person to investigate these allegations by calling the parties together. He would be the competent person to chair and lead the enquiry as he would be expected, first of all, to ask the ancestors to make the meeting a success after introducing them to the matter to be discussed, and asking them for forgiveness for the wrongs that might have been committed by the 'children'.

In a traditional Zulu family a female person had no authority to call on the ancestors' intervention for any reason. If there was no male person of the level of the father or senior-brother-in-law or senior grown-up son, the duty to discuss serious marital or family matters could be delegated to another senior male person within the extended family. The person chairing the meeting would enquire into the misunderstanding without taking sides or seem to be favouring one party, especially the husband. It was common for the chairperson to end the enquiry by encouraging the parties to live peacefully as any continuous squabble in the family could cause ancestors to be annoyed, thus causing some mishap to befall any member of the family.

The misunderstanding between spouses or persistent assault of the wife by the husband could sometimes lead to the wife going back to her maiden home. In the event of this happening, the traditional Zulu mediation procedure called **ukuphuthuma**, which could be likened to modern society's mandatory

procedure had to be observed. **Ukuphuthuma** (literally interpreted) means quick-follow-up. That is, the husband had to follow his wife as soon as the wife had left the matrimonial home. Usually the wife would go directly to her maiden home. It was unheard of for a wife to desert for any place other than to her maiden home. Hence, her husband would not hesitate as to where to follow her up. If the husband delayed to **phuthuma** her, the legal guardian (father or senior brother of the wife) would call for an enquiry at his home where the husband together with his father or another senior male member of the family would attend. The people required to attend would be the husband and his estranged wife in the company of legal guardians on both sides.

I was told by an old man, when I trained the lay-mediators at the Hoek Inn, Western Cape (September 1994), that the wife's parents in the Cape, were the one who would conduct reconciliation in the event the wife returned to her parents after a quarrel with her husband. The husband would attend the reconciliation efforts alone. His parents would be involved if the initial reconciliation efforts failed. The wife's legal guardian would open an enquiry by saying for example, 'my son (referring to the son-in-law), I suddenly saw my daughter coming here and I became worried when days go by without seeing you following her or her going back. Hence, I wanted you to come so that your father and myself may assist if there are difficulties **'bantwana bethu'** ('our children') you might have encountered'. Whatever reason might be given by the son-in-law both legal guardians would advise 'the children', as they were normally referred to, to reconcile their differences as the living apart would enrage the ancestors as explained above. The wife would hardly say anything as it was customarily a sign of disrespect to either challenge or exchange words with one's husband in the presence of other people, particularly her father-in-law.

The style of conflict resolution adopted by her might be described as constructive avoidance since she appears determined to have the dispute resolved even though she could not express her feelings. The mere fact that

she would attend an enquiry would show her willingness to have the dispute mediated.

The rationale behind **ukuphuthuma** was that the sooner the problem is attended to the higher the possibility would exist to have it resolved before if it becomes enlarged or escalated. The mere fact that the legal guardians were parties to the enquiry used not to affect their neutrality and impartiality and that is why they referred to the disputants as 'children'. Co-mediation was highlighted by both legal guardians chairing the enquiry.

The abovementioned traditional procedures are still observed by courts in rural areas but without giving much rigidity to it. In Natal if the parties were married by customary union the courts do not readily grant an order for divorce if attempts at reconciliation are not proved to have been done by the husband or by the wife's legal guardian. In order to comply with this requirement some attorneys make certain that they include in their pleadings a paragraph to the effect that attempts at reconciliation were made but proved unsuccessful.

In Malawi mediation in the form of reconciliation as is often used, is conducted by what is called **ankhoswe** (marriage guardians). The **ankhoswe** play a prominent role in all customary family law matters throughout the Central region and Southern region. The role of the **ankhoswe** is also recognised by the National Traditional Appeal Court which attributes much importance to them as:

'...validators of customary law marriages. If anything, the court attributes even greater importance to their role as mediators in matrimonial disputes; they encourage married couples to refer their disputes to the ankhoswe before having recourse to a court of law. Indeed, the National Traditional Appeal Court has effectively penalised spouses who have failed to follow this procedure'.<sup>127</sup>

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<sup>127</sup> B P Wanda 'Customary Family Law in Malawi: Adherence to Tradition and Adaptability to Change' (1988) *Journal of Legal Pluralism & Unofficial Law* 126.

In Kwa-Ndebele a dispute between members of the same agnostic group is not taken directly to the court but is first brought before the elders. If such matter is brought before the courts the disputants are invariably asked as to whether they attempted to solve it at home. It must, however, be remembered that the concept of mediation was not so loose that it could be enforced on disputants to comply with it even where it would be impractical to utilise. There were instances where reconciliation could not succeed. I commented as follows in this regard:

'In the event the husband did not wish to take his wife back because (perhaps) of some serious allegations against her, the husband would not abandon her because of those reasons. At the same time he would not stay with her at his home, but would build a separate hut for her not far from his home. The wife and children would stay there while he stayed at the separate home alone or with another wife if there is one. The reasons behind building a separate home, but close to his, were the following:

- (a) To make it easy for the children to be with both parents at any time they like. They could sleep at any home at any time as if there had been nothing disturbed.
- (b) It was easy for the husband to visit the children at the home of his estranged wife. Casual visits were regarded as important because it was through them that it was possible for the husband sometimes to sleep over while not losing sight of his other home, something he could not do if the estranged wife had her separate home far way from his home. The most important thing to emerge out of such visits was the redevelopment of love between the parties. The parties would become reconciled through constant visits made by the husband'.<sup>128</sup>

#### 4.5 CAUCUSING

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<sup>128</sup> Mkhize op cit n10 at 72. Section 50(1) of KwaZulu Act on the Code of Zulu Law 16 of 1985. Sections 50(1) and (2) of Natal Code of Zulu Law No. 151 of 1987.

I recently interviewed a 94 year old lady from Nongoma, Zululand, on how exactly marital misunderstanding was discussed in olden days. She said that the matter used to be discussed by the husband's senior guardian and the wife's senior or legal guardian in the presence of the spouses. She stated that if the husband was to blame for the breakdown of the marriage relationship, he would not be blamed in the presence of the wife because that might encourage the wife to 'feel good and boastful' and confront her husband about his misbehaviour contrary to custom. However, the wife would also not be blamed in the presence of the husband.

She said the substance of the discussion would often be to find out about the cause of the misunderstanding and then a word of advice would be given by spouses' senior guardians in the presence of both parties and in a reconciliatory manner. She further stated that in order to discourage repetition of destructive behaviour the guardians of the spouses would deal privately with that behaviour. In other words, they would advise that spouse in the absence of the other that he or she acted in an unbecoming manner. It became clear to me that elders were in fact people with deepest skills and mediators of unquestionable integrity. In mediation, the mediator's important role is to act neutrally when assisting the parties to communicate about their problem. The difficult task for mediators is to be seen to act neutrally. The latter requirement entails, for example, not to blame the other party in the presence of the other, not to question his/her behaviour (like why not compromise, why become positional) in the presence of the other party, such questions should be raised in caucus. It is quiet apparent that elders often went into caucus when they wanted to discipline one spouse or to point out disruptive behaviour on the part of that spouse.

#### **4.6 TRADITIONAL THERAPY**

Conflict resolution methods used by traditional societies were not only conciliatory in nature but also therapeutic. They were geared toward re-educating disputants through a type of social learning brought about in a specially structured interpersonal setting. Without claiming any psychological expertise, it is submitted that therapy may involve the following elements: support, permissiveness and manipulation of rewards.<sup>129</sup>

In therapy the patient may not continue with counselling if he feels that the therapist is not being supportive. This support was realised to be important by the elders in the event of them facilitating a resolution of any conflict situation. In the case of a marital dispute being attended to after the wife had returned back to her maiden home, the dispute would be discussed with both parties being supported by their respective senior guardians as pointed out when discussing Ukuphuthuma custom.

The parties, particularly the wife, would feel safe to express their feelings because of the group support on their side, as shown by the Bushmen trance dance aimed at asking gods to remove the bitterness in the parties' heart. The very presence of one's relative would demonstrate group concern and empathy. This kind of support would indicate to the parties that they are not alone during times of trouble and that others, like senior family members, are there to guide them and have whatever problem solved. This support system would encourage parties not to withhold anything that might have an effect of endangering or undermining the decision to be taken.

#### **4.6.1 Permissiveness**

Permissiveness in the therapeutic setting (and in the moot) results in catharsis, in a high degree of stimulation of feelings and an equally high tendency to verbalise these feelings. This type of ventilation of feelings is important for it

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<sup>129</sup> Mkhize op cit n10 at 91-92.

ensures that nothing is withheld that might have an effect of endangering or undermining the decision to be taken.

An atmosphere conducive to healthier ventilation of feelings would prevail where disputants are assisted to resolve their differences by people familiar to them, like one's own senior legal guardian. Permissiveness was also rooted in the lack of publicity of family problems. I commented on the issue of confidentiality as follows:

'Adherence to domestic practices and the high standard of secrecy in family matters made it a rare event to refer a family dispute to a person who was not a member of the same family or clan. It was regarded as a disgrace to expose family squabbles to people unrelated to the family. The family was often a close unit especially when family relations were an issue. The unity of the family was always of paramount importance and it had to be protected at all costs'.<sup>130</sup>

#### 4.6.2 Manipulation of rewards

Not all marital problems were resolved without resistance or embitterment. Some of the problems would be so serious that the elders would be obliged to **hlawulisa** (fine) the party who committed the wrong. Blaming of any party by elders could only be done as mentioned earlier in the absence of the other. But witch-craft or adultery by the wife could be discussed in the presence of the other party.

Such allegations would subject the blamed party to being fined in order to cleanse or purify the insulted **ikhaya** (the family). The fine was a form of apology to the ancestors of both families so as not to attack the families or any

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<sup>130</sup> *ibid* 90.

other member of either families with illnesses. The fine used to be a goat. The fine was not negative in the sense of it being regarded as a form of punishment. The reward (goat) to be paid by the wrong-doer's parents (as it was customarily done) to the aggrieved party's parents to cleanse the family, was positive in the sense that it would be slaughtered and eaten by members of both families. In this way, the wrong-doer would not feel punished or having lost something as he or she also benefits in the reward he or she paid.

The New Zealand family group conference model,<sup>131</sup> although it was set-up to address disputes caused by young Aboriginal people, is aimed at indigenising the justice system and is akin to dispute settlement methods discussed above. It is aimed at producing a negotiated settlement rather than an imposed solution. The negotiated settlement is reached after the parties have been given an opportunity to 'elicit emotions of shame and responsibility' among themselves.

The New Zealand family group conference model is more important in that, the wrong-doer is not blamed to such an extent that he or she feels being not a **bona fide** member of the community. The process of 're-integrative shame' conducted in order to put the wrong right in expression of 'remorse, in apology, in reparation, in forgiveness, ...' plays a critical role towards keeping the New Zealand aboriginal community coherent. It eliminates the tendency of labelling the wrong-doer a 'criminal', that is, somebody to be isolated from the community.

#### 4.7 CONCLUSION

On the basis of existing oral history and literature on traditional means of conflict management and resolution, one can draw parallels between mediation as a discourse and a discipline in modern society and some traditional African

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<sup>131</sup> Q Beresford & P Omaji Rites of Passage (1996) 171 - 172.



practices which were based on the same principles and serve a similar function.

The long process of introducing the son-in-law to the daughter-in-law's parents leading to handing of the daughter-in-law over to the son-in-law's family, could be likened to the 'renegotiating stages of dispute resolution' which Horowitz and Boardman say are of great importance toward 'slowly developing skills and relationships between representative participants in the Israel-Palestinian conflict'.<sup>132</sup> Kressel *et al* are said to have succeeded in finding out that 'taking time to explore underlying needs and attitudes, through the use of a problem-solving, mediator style, yields more stable divorce agreements than simple focusing on settlements'.<sup>133</sup> Although Kressel *et al* refer to a divorce scenario, their analogy which emphasises patience and mutual understanding in negotiating a settlement, through using a third party, has a bearing in the way traditional African marriage or union was brought about. The relevance of their analysis re-inforces the idea behind a long process through which a customary union was brought about. To make sure that there would be no misunderstanding between the in-laws after the solemnisation of the union, which could lead to the union becoming strained, the customary union negotiations which centred around lobolo issues, had to be taken very slowly.

That is why the first level of introducing the son-in-law to the parents of the daughter-in-law was referred to as 'feeling out' or 'testing out' the parents' attitudes and to involve everybody (the clan) who might sabotage the agreement if he had not been engaged from the beginning. Nowadays marriages could be concluded within one month from the time people fell in love. Courtship could take few hours, lobolo negotiations may be discussed and agreed upon over dinner time and the possible date of the wedding could be decided during the same time. The consequences that often result from such hurried arrangements, inadvertent or design, may be to match a couple

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<sup>132</sup> S V Horowitz & S K Boardman 'Managing Conflict: Policy and Research Implications' (1994) 50 *Journal of Social Issues* 197 at 200.

<sup>133</sup> *ibid.*

with different interests and world view, and where one has got a shallow understanding of marriage obligations and so on. The break-down of the marriage relationship and a divorce could be avoided if pre-marriage relationship is thought through. In other words, a couple ought to get married when ready and mature to do so.

The traditional African family ensured against rushing an inmate into an unplanned and immature relationship. The best interests of all potential inmates were, indeed, protected. The kraalhead was a protector of his inmates, he was a mediator or facilitator between his inmates and the ancestors, as he was the only one to ask the ancestors to protect his subjects, he was the one to negotiate sometimes, through his agents, with the in-laws or the better of his son or daughter. Mitchell says that one of the basic functions of an intermediary is to make sure that the process of negotiation:

‘begins with both parties as far as possible, at a similar level of readiness to engage in dialogue rather than one wanting to talk and the other highly unwilling’.<sup>134</sup>

A traditional family, through its kraalhead, was very conscious of the principle alluded to by Mitchell above. Crucial family meetings would be held after a number of caucus sessions had taken place. Bilateral meetings with senior members of the clan had to take place before the matter could be discussed with junior members of the clan.

As much as settlement of family disputes used to be a desired outcome by all mature clan members and or families of both husband and wife, but the focus was much on the procedure through which the outcome would come. The involvement of senior clan members during lobolo negotiations and during the wedding or union day, and the getting together of two families to discuss tension between their ‘children’ (as married couple used to be referred to), are all indicative of the African culture to consult sufficiently in order to generate

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<sup>134</sup> C R Mitchell The Structure of International Conflict (1981) 307.

different views. Put differently, the traditional family was more concerned with the promotion of interpersonal harmony and group solidarity (collective wisdom) as opposed to individual autonomy.

Privacy within the family or clan was minimal because the family or clan had to be in touch with every member of the family in order to ensure that tension between inmates or married people was tackled at a very early stage. This family 'policy' was consistent with censoring continuing gossips or rumours within the family (as explained above when discussing ancestral spirits' hate of unresolved disputes) as such tendencies could not fall under a family framework that was designed to manage conflicts from escalating and leaking to community members unrelated to the family clan.

Harmony as one of the attributes of a coherent family, could only be guaranteed if senior family members or family heads took interest in each and every family inmate by often checking with their immediate juniors or senior sons about the inmates' 'health' not 'behaviour'. In this way even marital misunderstanding could be identified and settled at an early stage.

Finally, dispute or conflict in the traditional African family was not characterised as such but was referred to literally as 'noise'. This had an effect of minimising the seriousness of the misunderstanding so that parties could feel that what divided them did not need them to be hostile toward each other. Classifying conflict as 'noise' had an effect also of influencing parties to communicate constructively to each other. The third party could also be mandated by senior family member(s) 'to go and calm down that 'noise' between 'my children'. The latter could refer even to a married couple.

## CHAPTER 5

### DEVELOPMENT OF FAMILY MEDIATION IN SOUTH AFRICA

#### 5.1 INTRODUCTION

Apart from the indigenous societies' practices of family mediation discussed in chapter 3, there is little awareness and practices of family mediation in South Africa. Scott-Macnab has remarked as follows on the emerging concept of family mediation:

'The idea of mediation in family issues is a new concept in South Africa, so new that there is very little local writing on the subject'.<sup>135</sup>

In the same vein, Mowatt referring to the Mediation in Certain Divorce Matters Act,<sup>136</sup> says the Act:

'is of interest because it heralds the dawning of the new era of mediation in divorce in our law'.<sup>137</sup>

Mediation as a process, has been used in South Africa since about 1984 in the labour field by the Independent Mediation Services of South Africa. It has been used by way of rendering direct mediation services between employers and employees or unions. The Centre for Intergroup Studies located in Cape Town, has been involved in the field of political and community disputes and giving training courses to various constituencies.

The South African Association of Mediation (SAAM) established in 1988, is the first established organisation which directly focuses on family mediation.

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<sup>135</sup> Scott-Macnab op cit n2 at 209.

<sup>136</sup> Act 24 of 1987.

<sup>137</sup> Mowatt op cit n83 at 47.

SAAM's theme 'Family Mediation in South Africa: Present Practices and Future Vision' is said to be aiming to:

- \* further increase the knowledge the public and professionals have of family mediation.
- \* acknowledge and publicise existing family mediation services in South Africa.
- \* promote extension of family mediation practice in this country.
- \* acknowledge and promote family mediation as an interdisciplinary process'.<sup>138</sup>

## 5.2 BACKGROUND TO FAMILY MEDIATION IN SOUTH AFRICA

The rejection of the old grounds for divorce by the Law Commission on the basis that they were not in themselves necessarily the causes for marital breakdown, but merely symptoms of the spouses conflicting attitudes, personalities or other mutual difficulties, led to the promulgation of the Divorce Act of 1979. The Divorce Act of 1979 came about precisely, in my view, as a result of the Law Commission's objective, which was:

'...to lay down realistic rules for the dissolution of marriages. By realistic rules it meant rules which are in keeping with present-day needs which take due account of the interests of all those involved and of society, and which do not lose sight of society's conception of what is reasonable and just'.<sup>139</sup>

Barnard<sup>140</sup> says that a divorce law which bases the termination of marriage on the fault principle would not serve the objective suggested above by the Law Commission. An acceptable divorce law, according to Barnard, might be determined in terms of its objectives or aims, and such objectives or aims

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<sup>138</sup> W Hoffman Family Mediation in South Africa op cit n49 at (iii).

<sup>139</sup> Report of the Law of Divorce and Matters Incidental thereto (1978) RP 57/1978.

<sup>140</sup> A H Barnard The New Divorce Law (1979).

should be those which favour 'the perpetuation of happy and stable marriages'. He argues that such a divorce law would 'meet the needs and reflect the views of the society as a whole'.<sup>141</sup>

What Barnard is suggesting as an acceptable divorce law, is echoed and taken further by Olivier, Barnard and Cronje. They argue that:

'... society has an interest in maintaining marriage as a social phenomenon, but it has an interest in the dissolution of marriages that have irretrievably broken-down'.<sup>142</sup>

In essence, the respective authors are **ad idem** that the guilt principle should not be the criteria in determining whether to maintain or dissolve the marriage. They are of the view that it is in the public interest for the marriage to subsist and to be dissolved if it is found to be not repairable. They accept irretrievability as a ground for divorce instead of the guilt principle.

The Law Commission said that a marriage would have irretrievably broken down if the parties' marriage relationship:

'...has degenerated to the point where their marriage no longer exists as a marriage in the true sense of the word and where there is no reasonable prospect of a normal marriage relationship between them being resumed'.<sup>143</sup>

The Law Commission had hoped that the findings of its investigation would lead to the radical reform for divorce law. Its hope had been based on the findings that the guilt principle leads to unnecessary conflict and bitterness between the parties and dashes efforts at reconciliation. The Archbishop of

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<sup>141</sup> *ibid* at 3.

<sup>142</sup> P J J Olivier, A H Barnard & D S P Cronje The South African Law of Persons and Family Law (1980) 279.

<sup>143</sup> Report op cit n128 par 8.1.

Canterbury's Group also views an adversarial divorce as the Law Commission does. He says divorce is:

'...not a reward for marital virtue on the one side and a penalty for marital delinquency on the other, not a victory for one spouse and a reverse for the other, but a defeat for both'.<sup>144</sup>

The no-fault divorce, as the 1979 Divorce Act is referred to, instead of bringing about the reforms hoped for is said to be encouraging easy divorce and more hardship than the old divorce based on fault principle. Mowatt puts it as follows:

'...it is disturbing to note that the Hoexter Commission found that 'in the vast majority of undefended divorce actions neither is the question of whether the marriage had irretrievably broken down properly considered nor is the investigation into the suitability of provisions for minor or dependent children thoroughly undertaken in the light of sufficient and reliable evidence'.<sup>145</sup>

Grib,<sup>146</sup> referring to the Californian and other state's breakdown type of no-fault divorce statutes, says 'these no-fault laws may be designated as an 'add-on' kind of no-fault law or a 'mixed' fault/no-fault divorce law'. The 'substantial misconduct' or 'gross misconduct' often referred to or required by our courts may fall within the so-called 'add-on' kind of no-fault law or 'mixed' fault/no-fault divorce law referred to by Grib.

The invariable application of a guilt principle by our Supreme Courts after the enactment of the 1979 Divorce Act,<sup>147</sup> may easily make no-fault divorce fall within what Grib calls 'no-grounds' divorce.

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<sup>144</sup> J Sinclair 'Notes and comments' (1981) SALJ 89 at 90.

<sup>145</sup> Mowatt op cit n83 at 47.

<sup>146</sup> P J Grib Divorce Laws and Morality (1985) 172-3.

<sup>147</sup> See op cit n46.

### 5.3 THE HOEXTER COMMISSION

It is on the basis of the abovementioned inadvertent application of the no-fault divorce principle and the consequences of the continuing adversarial handling of divorce, amongst other factors, that the Hoexter Commission of Enquiry (RP 78/1983) into the Structure and Functioning of the Courts was instituted.

The report of the Hoexter Commission, although accepting that irretrievable break-down and the rejection of fault principle do reduce the hostility between divorcing parties, pointed out that most divorces are still characterised by the bitterness especially when division of property, maintenance and the custody of minor children are in issue.

The Commission, in its report, recommended the establishment of a Family Court which would deal with divorce-related issues. It specifically proposed a conciliation scheme to be incorporated within the Family Court so as to make it possible that the welfare of minor children is protected during divorce. The Commission's report also recommended the abolition of special courts for Africans but this did not include African divorce courts. In recommending that the Family Court be comprised of social components, known as the Family Court Counselling Service, the Commission envisaged this court to comprise:

- (a) **the reception process** at the Family Court's reception centre, where family problems will be sifted and classified; where both legal advice and social counselling will be available; and where the spouses in marriages that can still be saved will be referred to marriage counsellors with a view to conciliation;
- (b) **the conciliation process**, which, in cases of irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic for them as well as for their minor children; and to resolve by agreement disputed points (such as custody of



and access to minor children and the division of matrimonial assets);

- (c) **the supporting service to the court** where the court is to adjudicate upon a family matter the counselling service will see to it that any further social welfare investigation or action that may be required by the court will be undertaken either by the counselling service's staff or by the staff of some approved social agency'.<sup>148</sup>

By having the counselling component, the Family Court appears to have, according to Scott-Macnab, 'its hints of mediation and conciliation ...' and which would end up opening 'a race between the runners of private and public mediation'.<sup>149</sup>

#### 5.4 MEDIATION LEGISLATION

The Hoexter Commission's recommendations, having been debated by the parliamentarians, resulted in the introduction of Family Court Bill, 62 of 1985. However, legislation establishing a Family Court was not enacted, instead, legislation enacting a bill called The Mediation in Certain Divorce Matters Act,<sup>150</sup> was passed. The Act, instead of being welcomed as a vision in the right direction, received tough criticisms. It has been described as 'positively narrow and unimaginative and fails to meet the objective of its short title',<sup>151</sup> merely flatters to deceive',<sup>152</sup> 'a 'band-aid legislation'<sup>153</sup> and creating 'confusion as to what exactly it means'.<sup>154</sup>

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<sup>148</sup> Burman & Rudolph op cit n103 at 270.

<sup>149</sup> Scott-Macnab op cit n4 at 725.

<sup>150</sup> See op cit n13.

<sup>151</sup> J G Mowatt 'The Mediation in Certain Divorce Matters Act: News but Nothing New' (1987) *De Rebus* 611 at 612.

<sup>152</sup> *ibid.*

<sup>153</sup> Scott-Macnab op cit n4 at 719.

<sup>154</sup> Mowatt op cit n3 at 738.

I describe the Act as a 'vision blurred'. I say this because had some of the Hoexter Commission's recommendations been seriously considered and appreciated, the Mediation in Certain Divorce Matters Act would not have been a hollow shell or as Hahlo put it 'a bad-after-thought on a good statute'.<sup>155</sup> One important recommendation by the Hoexter Commission envisaged the establishment of the Family Court Counselling Service, which was to attempt 'helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic'.<sup>156</sup> This recommendation was, however, completely ignored by the legislature for Mediation in Certain Divorce Matters Act simply establishes the office of the Family Advocate whose function is:

...to institute an enquiry to enable him to furnish the court with a report and recommendations on any matter concerning the welfare of each minor child or dependent child or regarding such other matter as referred to him by the court'.<sup>157</sup>

While the introduction of the Mediation in Certain Divorce Matters Act was reformative, equitable, laudable and welcomed by a fair-minded reformist but the Act, through its provisions 'flatters to deceive'. It talks about a 'neutral third party' who is a Family Advocate. In effect the Family Advocate is a styled mediator. The styled mediator may, in terms of the Act,<sup>158</sup> cross-examine witnesses at the trial of the divorcing parties in order to elucidate some aspects relating to the welfare of the minor children, if any.

Mowatt correctly points out that if the 'neutral third party' referred to in Section 2 of the Act, refers to the Family Advocate, as a mediator, then:

'He in no way resembles a mediator. Consequently we are no nearer a new approach to divorce mediation than we were before the introduction of the Act'.<sup>159</sup>

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<sup>155</sup> H R Hahlo 'A Bad Bill' (1984) 101 SALJ 706.

<sup>156</sup> See op cit n137.

<sup>157</sup> Section 4 (1) of Act 24 of 1987.

<sup>158</sup> Section 4 (3) *ibid*.

<sup>159</sup> Mowatt op cit n84.

## 5.5 AS I SEE IT

The Mediation in Certain Divorce Matters Act, is **ex facie** a good piece of legislation. But what the Act says, through its provisions, almost makes all the efforts that brought about its existence an exercise in futility. The aim behind the enactment of the Divorce Act of 1979, was to replace the guilt principle with irretrievable break-down of the marriage. But it was indicated by the Report of the Hoexter Commission, that divorce still tends to be characterised by bitterness and hostility where the ancillary aspects of marriage like custody of minor children, maintenance, visitation and division of assets are in issue. To remedy a defect in the Divorce Act, the Hoexter Commission recommended, amongst other things, that the family court be established so that, through it, a shift away from the adversarial approach would be promoted in the event of the marriage being terminated. In substance, the Hoexter Commission proposed for a new divorce law that would encourage the parting of ways by spouses to be less traumatic to themselves and also to their children, if any. The Mediation in Certain Divorce Matters Act was meant to serve that purpose. But few people know what the Act in essence means.

Hoffmann and Wentzel say the Act may be about 'the promotion of the inherent value of court-connected mediation services',<sup>160</sup> whilst the first Chief Family Advocate, Bosman, says:

'mediation by the family advocate and as understood by the family advocate is mostly, at least to some extent (my own emphasis) not voluntarily submitted to by the parties'.<sup>161</sup>

On the other hand, Levy, in his opening sentence and with a view to arguing against mediation asserts:

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<sup>160</sup> W Hofman and Anne-Marie Wentzel 'Family Mediation in South Africa: Development and Promotion', in Family Mediation in South Africa op cit n49 at 11.

<sup>161</sup> F Bosman 'The Family Advocate And Mediation' in Family Mediation in South Africa op cit n49 at 58.

'Those who believe that mediation is a substitute for litigation and that it can avoid litigation, might reconsider their views if they studied the cases of *Diner v Dublin ... and Dublin v Diner*'.<sup>162</sup>

He continues to say:

'Such behaviour weakens the arguments in favour of mediation as a complete substitute for litigation'.<sup>163</sup>

It should be pointed out that mediation is not a substitute for litigation but one of the preferable alternative dispute resolution processes, if not better, to be tried and utilised before one tries to litigate. Put differently, mediation like any other alternative dispute resolution process may supplement litigation in some other cases. This view is painfully expressed by Justice Sandra Day O'Connor as follows:

'The courts of this country should not be the places where the resolution of disputes begins. They should be places where disputes ends after alternative methods of resolving disputes have been considered and tried. The courts of our various jurisdictions have been called the 'courts of last resort'.<sup>164</sup>

Burman and Rudolph, although highly critical of the process of mediation in South Africa, in particular, but do point out that mediation efforts should not only be made after the filing of summons. They think that mediation should also be utilised at an earliest stage of the marital dispute in order to reconcile the parties.<sup>165</sup>

What they are basically saying is that we should not in South Africa think of mediation only as an end tool (to be used to assist spouses to end their marriage amicably), but think of it also as a means to achieve many aims (like

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<sup>162</sup> M H Levy 'Mediation - not always the answer' (1988) *De Rebus* 873.

<sup>163</sup> *ibid* at 874.

<sup>164</sup> Wolff *et al* *op cit* n11.

<sup>165</sup> *Op cit* n103 at 255.

assisting spouses to settle their marital differences so as to discontinue their divorce plans). This is what they mean when they criticise a single approach to mediation. They put it:

‘some schemes try to achieve incompatible aims with only one set of arrangements’.<sup>166</sup>

The increasing application in other settings of mediation in South Africa, like in family disputes and community disputes, is something to be encouraged. However, the confusion that have been highlighted above which has to do with how mediation should be applied in South Africa, would have been fairly avoided had we approached the subject of mediation in terms of the recommendations suggested in Chapter I.

Scott-Macnab sums up how the state misdirected itself in this regard:

‘It is palpably wrong for the state to have started to legislate at this stage, as it has done with the Mediation in Certain Divorce Matters Act 1987. The State should have waited and observed how the divorce mediation wind was going to blow before matching legislation which has already been criticised as positively narrow and unimaginative and ‘fails to meet the objective of its short title’. The State must accept that divorce mediation in South Africa is at present a delicate plant with the potential of prodigious growth’.<sup>167</sup>

The exponents of mediation failed and are still failing or have done very little to introduce the process of mediation and its usefulness from the perspective of South Africans. What we have read about thus far, is mediation from the Western-value perspective. We are not innocent. We have lived beyond being South Africans. How are we going to exonerate ourselves from being blamed in the event of a ‘lengthy’ divorce case between our President and his wife in the light of the following reported plea by Mrs Mandela to Mr Mandela’s summons:

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<sup>166</sup> *ibid.*

<sup>167</sup> Scott-Macnab *op cit* n2 at 713-14.

'The plaintiff has yet to and did not answer to the African Cultural and Traditional INKUNDLA (own emphasis) which encourages reconciliation, forgiveness and family cohesion proposed by the **parties' extended family**.

In the circumstances, there are reasonable prospects that with proper and adequate counselling, including **cultural and traditional tutelage**, the parties have reasonable prospects to reconcile'.<sup>168</sup>

## 5.6 CONCLUSION

The development of the concept of mediation in South Africa, as it applies to family issues, has one serious limitation. The limitation has to do with its exclusive application. The introduction of the office of the Family Advocate by the Mediation in Certain Divorce Matters Act, shows this limitation in that Black families are excluded from the benefits intended to be derived from Family Advocate's services. The importance of any new Family Law legislation, ought to be judged in terms of the benefits to be acquired out of it and by the majority of the beneficiaries. Black families are in the majority in this country and experience numerous social problems which lead to a high rate of divorce and are economically deprived.

The exclusion of Blacks from utilising the benefits of the Family Advocate is based on the fact that the Family Advocate's office is attached only to the Supreme Court. An argument that Black couples could have their divorce entertained by the Supreme Court may not hold. The high rate of unemployment in the Black community and meagre wages paid to Blacks in general, makes it difficult for a Black couple to institute a divorce action in the Supreme Court so as to benefit from the Family Advocate's services.

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<sup>168</sup> M Nkome 'Why Winnie's saying NO' Sowetan October 17, 1995 at 1.

Lack of means to engage a lawyer renders a party uninformed about the legal machinery, like how the Family Advocate works. In 1991, for example, I was telephonically contacted by a man after I had spoken on TV2 on the usefulness of mediation in family issues. He asked me to explain to him 'what the Family Advocate is'. I enquired what his problem was. He said his wife had instituted a divorce action against him in the Supreme Court and there was a dispute over child custody. He said they had been referred to the Family Advocate. This man contacted me from Durban and I was in Johannesburg. I tried to explain but realised that he was far from understanding. This one example, amongst many, shows the shortcomings of the development of mediation in South Africa. However, the concerns raised above could be addressed if the institutionalisation of mediation and training of mediators could be considered in terms of the recommendations suggested in Chapter I.

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## CHAPTER 6

### SYNTHESIS OF PERSPECTIVES

I have been concerned throughout this thesis, with showing how the successful implementation of mediation in South Africa ought to be brought about. This I did initially by highlighting the excitement shown by individual groups of South Africans who have mobilised themselves with a view to facilitate the reception of the concept of mediation in their own country, in their own communities, and in their own chosen professional fields. I also offered suggestions which, if considered seriously, could, in my view, effectively market the process of mediation, successfully benefit those mostly affected by the adversarial process of dispute resolution, (and) holistically bring about the empowerment of most South Africans in relation to capacity building or manpower development.

Whilst my primary aim was to emphasise that Africans or Blacks, if you prefer, need not be undermined as potential mediators or service deliverers, irrespective of their level of education, as alternative dispute resolution processes are not of Western origin. I also attempted to show:

- (i) The development of our divorce laws from the guilt principle to a no-fault divorce.
- (ii) That our courts invariably continue to apply the guilt principle and that South Africans, particularly Blacks, still employ the adversarial methods to bring about the end of their marriage or when handling marital disputes due, to a certain extent, to the lack of knowledge in relation to the divorce law reforms.
- (iii) That a lesson may be learned from dispute resolution methods used by indigenous traditional societies.



- (iv) That there tends to be similarities between Western and African Indigenous Societies' value entrenchment of dispute resolution methods as evidenced by, for example, the Western Societies' legislated mandatory mediation procedures, and the African Indigenous Societies' customary mediation procedures of Ukuphuthuma Custom (practised by the Zulu's), reconciliation custom (practised by the Zulu's), reconciliation custom (practised by Malawians' Ankoswe) and the 'go and get her' custom (practised by the Bushmen of the Kalahari desert).
- (v) That there is an appreciation on the part of policy makers that a need exists for the use of mediation in family matters, and I, however, pointed out that such need ought to be addressed mainly through education than legislation.
- (vi) Lastly, that the exponents of mediation in South Africa should conduct local needs analysis in relation to the relevance and implementation of mediation so as not to be 'in serious danger in the future, of falling into the same pit as the proponents and practitioners of mediation have fallen in the United Kingdom'.<sup>169</sup>

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<sup>169</sup> Scott-Macnab op cit n153 at 710.

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