

# The International Trends in the Effective Mechanism for the Settlement of Post-Divorce Child Custody Disputes

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## ABSTRACT

Alternative means for settling disputes are a negotiation and dialogue with the parties to compromise in order to reach an appropriate and satisfactory solution for the parties of the dispute. Interest in alternative means at the local and international level follows growing problems among members of the community, and its side by the accumulation and overstock of case files in judicial bodies around the world, especially in custody matters that have been accumulated by the personal status courts due to the high divorce rates. There is no doubt that these means will play a vital role in finding quick solutions to settle disputes related to custody, which are one of the most important combinations of society, and that these means represent common goals between the parties of dispute, and great gains for the child for the sake of the safety of his life and the goodness of his upbringing.

**Keywords:** Settling disputes - the custody - divorce - elimination

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## INTRODUCTION

The world, today, knows a social phenomenon represented in alternative means for settling disputes, which have evolved alongside the formal mechanisms to resolve them, which is a group of mechanisms that can be adopted to resolve disputes with the participation and consent of its parties, but they are not completely substitute for the judiciary, they are only a substitute for some judicial procedures, and eventually take place under the judicial supervision.

The alternative means of settling disputes is not a new mechanism, but it is very old since ancient times, and it was present and effective at that time. But the new is its necessity at a time when everyone needs it at various levels and fields. This necessity has been appeared by the dilemma which the judiciary is facing for a long time in various judicial systems across the world, manifested in the accumulation of huge numbers of cases, due to the delay in issuing judgments, the slow settlement of disputes, multiple appeals across various levels of litigation, in addition to the complexity and inefficiency of reporting procedures. Also, the dilemma of distension and accumulation of issues is not exclusive for the developing countries, but also the developed countries suffer from it with various degrees, and difference in quality and subject of issues.

Resorting to the alternative means becomes more important when it relates to family disputes because of the nature of the relationship between the components of the family. Especially after the divorce, and it becomes more important if the custody is related, and the matter may exceed to reach some crimes that may arise between the origins, branches and relatives. All of this motivates us to search and talk about alternative means of settling disputes after divorce and specifically about child custody.

### **The first topic: The essence of alternative means of settling the custody disputes.**

It has two requirements:

#### **The first requirement: The definition of the alternative means**

Some scholars define these means as (a group of procedures that form a substitute for courts in settling

disputes, and it mostly requires a third party who is neutral and honest.)<sup>1</sup>

Professor Garrosson defined it as (an unspecified group of procedures to settle disputes in which it often carried out by the intervention of a third person in order to reach a non-judicial solution for these disputes.)<sup>2</sup>

Professors Marriott and Brown defined the alternative means as (a group of procedures aimed to settle disputes by non-judicial and non-arbitral ways whereas there is no need to the intervention of a neutral third party seeks to help the parties to facilitate reaching to settle the dispute.)<sup>3</sup>

The trade center for the alternative means for settling disputes defined it as (The procedures that aimed to encourage the disputing parties for the purpose of solving their disputes by themselves and that by a neutral third person to facilitate their work.)<sup>4</sup>

Definitions are convergent, however, the definers differed on the issue of the need for the intervention of a third party, in which professor Garrosson sees that the intervention of a third party in most cases while professors Marriott and Brown see the opposite.

The word (Alternative) has been used with the meaning of the freedom of choosing the non-judicial means, and these means are additional and friendly, which by resorting to it, gives a wider field for the disputing parties to reach an agreement in any level of the disputing levels.<sup>5</sup>

#### **The second requirement: The alternative means for**

<sup>1</sup> Lo, A Mistelis: *A.D.R in England and wales*, clive Mschmitt off senior lecturer in international commercial law, school of international Arbitration center for commercial law studies. Queen Mary, University of London.P.3

<sup>2</sup> See, *Ibid*.

<sup>3</sup> <ADR> «May he defined as arrange of procedures which serves as (s) alternatives to the adjudication. Procedures of litigation and Arbitration for the Resolution of disputers generally But Not necessarily involving the intercession and assist of a neutral third party who helps to facilitate such Resolution.

<sup>4</sup> J.mackie - Karl. *A handbook of Dispute Resolution ADR in Action Alternative Dispute Resolution in Australia*. Davied Newton Sweet & Maxwell - London And New York first published 1991 p. 231.

«Alternative Dispute Resolution (ADR) means dispute Resolution by processes (a) which en courage resultants to reach their own solution and (b) in which the primary role of the third party natural is to facilitate the disputants to do so.

<sup>5</sup> Enas Hijazi, the alternative means for settling disputes-Comparative survey, Economical and legal studies Magazine - Faculty of Law, Al-Menoufia University in Egypt, 2011 A.D., 382p.

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### settling disputes under the Islamic law.

The researcher considers the necessity of addressing the Islamic law side of these alternative means even if briefly and not disruptive because this survey focuses on resolving custody disputes in Saudi Arabia where the rule in the Kingdom of Saudi Arabia is derived from Islamic law and its original and subsidiary sources. It is also one of the most prominent means that approved by the Islamic law for settling disputes which arise among the Islamic society. These alternative means for settling disputes represented by these following methods:

- 1 Arbitration
- 2 Conciliation
- 3 Peace and Reconciliation
- 4 Mediation

### Arbitration

Arbitration is that if two rivals rule a man and accept him to judge between them.<sup>6</sup>

The reason behind Arbitration is that sometimes the two rivals do not refer to the judiciary to separate between them but rather they resort to a person who does not assume a position of judge or imam in order to judge between them either because they are away from the judge's place, or to minimize the litigation procedures, or for any other purpose, and this is the adjudicator or the arbitrator.

Arbitration was known at the period of Jahiliyyah before the Islam, and the rank of an adjudicator or arbitrator may be lower than that of a judge for several things:

- The rule of the arbitrator is limited to those who accept his judgement according to a group of scholars.
- The Judge decides on matters that the arbitrator does not have the right to decide on, such as retribution and boundaries for a group of scholars as well. So, the Arbitrator's rule is not absolute in every case such as the Judge according to some scholars.
- The generality of the judge's jurisdiction, in which his judgement exceeds to non-litigants as in manslaughter and other similar cases, unlike the arbitrator.

The rank of arbitrator may be the same as that of the official judge.<sup>7</sup>

Arbitration is legitimate in the holy Qur'an, Sunnah, consensus and reasonable, and also in Muslim scholars. The evidence of arbitration's legitimacy from the Holy Qur'an is the verse: "... (Al-Nisaa: 35), Samarkandy said: (This verse is a evidence for proofing arbitration)<sup>8</sup> Al-Qurtubi said: If one is permitted to send a person, it would be more permissible if the couple ruled a person, then it is a

prior permissible if they accepted that, but rather God addressed to send two arbitrators without the couple. If the couple sends two arbitrators and they judged, their judgment is executed, because arbitration is permissible for us.<sup>9</sup> And Al-Baydawi said: It was indicated that the arbitration is legitimate.<sup>10</sup> Ibn Ashour said: This verse

represented an origin for the legitimacy of arbitration in all rights, and the issue of arbitration is mentioned in jurisprudence.<sup>11</sup> Which means that all issues of arbitration are mentioned in the Islamic jurisprudence, whereas jurists and their doctrines have addressed it in a simplified and detailed manner.

In Sunna: On the authority of Hani' that when he came to the prophet, peace be upon him, with his people, he heard them calling him Abu Al-Hakam, So the prophet, peace be upon him, called him, and said: "God is the arbiter, and the judgement is for him, so why are you nicknamed the arbiter?" He said: If my people disputed in something, they came to me, So I judged between them and both parties accepted my judgement ... until the end of the hadith)<sup>12</sup>. If the arbitration is not legitimate, the prophet would not approve it, because the prophet does not approve a non-legitimate thing<sup>13</sup>. And there are so many Hadith about the legitimacy of arbitration.

As for the consensus, it has been proven that arbitration occur for a group of companions and none of them denied it.

While for reasonable, as long as the two people who are accepted the arbitration have authorization over themselves, the arbitration is legitimate<sup>14</sup>. Abu Hayyan reported consensus about the legitimacy of arbitration, as he said: ahl al-hal wal a'qd (people of power and influence) agreed: that the two arbitrators may be arbitrated<sup>15</sup>.

For Islamic Jurists of the Islamic Jurisprudence, Hanafi<sup>16</sup>, Maliki<sup>17</sup> and Hanbali<sup>18</sup> schools believe in the legitimate of arbitration. While Shafi'i scholars differed in their opinions, but the legitimacy of arbitration was their strongest view, and this is what is understood from their books.<sup>19</sup>

So, arbitration is permissible and take place in the financial affairs either the Islamic or the traditional. The arbitrator shall not judge the limits set by Allah, nor judging to separate between spouses and shall not judge in retaliation, slandering, divorce, emancipation, descent or loyalty. As that arbitration does not address these matters. These issues have been excluded from the arbitration rule because these issues require confirmation or denying from both parties, so the arbitrator cannot confirm or deny them. In which descent is related to the right of a child to deny his father's lineage, the arbitrator may deny, and arbitrator has no right to deny or confirm and has no jurisdiction to judge in this. And likewise, descent and loyalty shall be committed by non-arbitrators. As well as divorce and emancipation have the right of Allah and the arbitrator has no authority in confirming or denying it.<sup>20</sup> Therefore,

Anwar Al-Tanzeel and Asrar Al-Ta'weel. (Beirut)

<sup>6</sup> Mohammed Al-Taher Ben Mohammed Al-Taher Ben Ashour Al-Tunisi, Al-Tahreer w Al-Tanweer << Tahreer Al-Ma'na Al-Sadeed w Tanweer Al-Aqel Al-Jadeed men Tafseer Al-Kitab Al-Majeed >>. (Tunisia: The Tunisian House for Publishing, 1984 A.H) volume 5 Page 47.

<sup>7</sup> Abu Dawood Suliman Ben Al-Asha't Al-Sujestani, Al-Sunan with Ahkam Al-Albani. (Saïda- Beirut: Al-Asriyalibrary) Hadith no. (4955) Corrected by Al-Albani.

<sup>8</sup> Ibn Farhon, Insight the rulers in the origins of the issues and provisions approaches, page 53.

<sup>9</sup> Same reference.

<sup>10</sup> Abu Hayyan Ben Yusuf Ben Ali Ben Yusuf Ben Hayyan Atheer Al-Din Al-Andalusi, Al-Bahr Al-Moheet fe AL-Tafseer. (Beirut: Dar Al-Fekr, 1420 A.H) volume 3 Page 630.

<sup>11</sup> Ala'a Al-Din, Abu Bakr Ben Masoud Ben Ahmed AL-Kassani Al-Hanafi, Badae' Al-Snae' in Tarteeb Al-Sharae. (Beirut, Dar Al-Kutub Ilmyia, 1406 A.H- 1986 A.D) Volume 7 page 3.

<sup>12</sup> Al-Qurubi, Al-Jame' lahkam Al-Quran- Tafseer Al-Qurtubi. Volume 5 page 178.

<sup>13</sup> Mwafak Al-Din Abdallah Ben Ahmed Ben Mohammed Ben Qudama AL-Jamali AL-Maqdsi AL-Hanbali, Al-Kafi Fe Feqh Al-Emam Ahmed. (Beirut: Dar Al-Kutub Ilmyia, 1414 A.H- 1994 A.D) Volume 4 page 224.

<sup>14</sup> Shams Al-Din Mohammed Ben Abi Al-Abbas Ahmed Ben Hamza Shehab Al-Din Al-Ramli, Nihaya Al-Mohtaj Ela Sharh Al-Menhaj. (Beirut: Dar Al-Fekr, 1404 A.H - 1984 A.D) Volume 6 page 224.

<sup>15</sup> Ibn Farhon, Insight the judges in the origins of issues and provisions approaches.

<sup>6</sup> Ibrahim Ben Ali Ben Mohammed, Ibn Farhon, Borhan Al-Din Al-Ya'mori, Insight the rulers in the origins of the issues and provisions approaches. (Cairo: Al-Azhar Colleges Library, 1<sup>st</sup> edition, 1406 A.H- 1986 A.D). 1<sup>st</sup> part p62.

<sup>7</sup> Mohammed Ra 'fat Othman, The Judicial system in the Islamic jurisprudence. (Cairo: Dar Al Bayan, 2<sup>nd</sup> edition, 1415 A.H, 1994 A.D) volume 1 Page 51

<sup>8</sup> Nasr Ben Mohammed Ben Ahmed Ben Ibrahim Al-Samarkandy, Bahr Al-Ulum. Volume 1 page 301.

<sup>9</sup> Mohammed Ben Ahmed Ben Abi Bakr Ben Farah Al-Ansari Al-Khazraji Shams Al-Din Al-Qurtubi, Al-Jame' lahkam Al-Qur'an- Tafseer Al-Qurtubi. (Cairo: Egyptian Books House, 2<sup>nd</sup> edition, 1384 A.H- 1964 A.D) volume 5 page 178.

<sup>10</sup> Naser Al-Din Abu Saeed Abdullah Ben Omar Ben Mohammed Al-Shirazi Al-Baydawi,

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it is not permissible to arbitrate in the rights of Allah, such as adultery and robbery limits. Also, the arbitration on the correct say in retaliation is not permissible as well as on the chosen to say in slandering<sup>21</sup>.

### Conciliation

Conciliation is one of the legitimate means for settling disputes in the Islamic law (Sharia), as conciliation always accompanies with reconciliation, so it is legitimate, for the Almighty saying: "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things." (an-nisa 35), As conciliation is about approximating the different views in order to reach a solution or an agreement in a kind way, in which the conciliator offers the solutions that both parties accept. Conciliators are chosen by the will of both parties.

### Peace and Reconciliation

In general, reconciliation is legitimate, it has been approved in Qur'an, Sunna, consensus and reasonable, and it is accompanied with arbitration. The legitimacy of reconciliation has confirmed by the legitimacy of arbitration. The Quran mentioned it in the verse of discord, Allah says: "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things." (An-nisa 35) and "If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just). The Believers are but a single Brotherhood: So make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive Mercy." (Al-Hujraat 9-10). And in sunna: The prophet -peace be upon him- has reconciled Suhail bin Amr<sup>22</sup>. And in Omar's message to Abu Mousa: Reconciliation is legitimate between Muslims except that peace which forbidden a permissible or permit a forbidden<sup>23</sup>.

As for consensus: The consensus of nation's scholars was held on the legitimacy of reconciliation<sup>24</sup>.

As for the reasonable, in leaving reconciliation, there is a dispute, because if the right owner requests all his right, then the defendant denies it and the plaintiff establishes the evidence, this is a cause for conflict, especially if this happened at the time of insolvency, and that is a reason to arouse sedition between the plaintiff and the defendant, and the hostility between them increases, and this is what is required for the great corruption. It is understood that there is good and benefit in reconciliation<sup>25</sup>. And because reconciliation is a reason to push rivalry and cut off the dispute and quarrels, and when

the dispute spread, it led to corruption, so the reconciliation was a push for the cause of corruption, and an extinction for the sedition and stubbornness, and a cause of reform and peace, which is familiarity and approval, so it was well legally delegated to him, and it is positive and acceptable, because it is opposition<sup>26</sup>.

The reconciliation is legitimate in every capital and every right has been considered of all rights and destructing funds, felonies, loan and debts<sup>27</sup>.

### Mediation

Mediation is considered as one of the effective ways in Islamic law to resolve disputes between the disputing parties, and it is based on an attempt to bring the views closer together between the disputing parties, in order to reach a settlement to resolve disputes, as it is satisfactory to all parties where each of the disputing parties contributes in reaching a settlement.

It is a process of preparing for alternative solutions to resolve disputes that arise among members of the society and has become urgent to meet the demands of the life and its complexity within this society. Mediation contributes to reach amicable settlement of some disputes, relying on consensus and compromise, without being firm or forced, not mistaken or right, and without leaving an impact on the souls of the litigants in a manner that takes into account the required speed and the mutual interests of the litigants.

Therefore, mediation is a non-binding third-party negotiation process aimed at helping the disputing parties to resolve the existing dispute<sup>28</sup>.

The origin of mediation in the Islamic law is the legitimacy or desirable, and if it was to ensure the falsehood or to defuse the truth, it is forbidden. The origin of the mediation is the legitimacy, but it is one of the charitable things that the Islam ordered and desired for it<sup>29</sup>. The prophet Mohammed -Peace be upon him- said: "Intercede, be rewarded, and Allah decides by the tongue of his prophet, peace be upon him." Mustafa Al-Bega Said in his commenting on the hadiths of Sahih Bukhari (Intercede) begged to meet the need of requesting or asking. (Be rewarded) you have the same reward of meeting a need<sup>30</sup>. Also, the prophet Mohammed -Peace be upon him- said: "whoever is concerned for the needs of his brother, Allah is concerned for his needs" Mustafa Al-Bega Said: (concerned for the needs of his brother) "Seeks to meet it". Commenting on the hadiths of Sahih Musallam, Mohamed Fouad Abdel Baki said: "Anyone who has helped him and was kind with him through it."<sup>31</sup> All these Islamic texts indicate that Muslims can be mediated to solve their problems and disputes? And the mediation, in conclusion, is conducive to the reconciliation of the two opponents<sup>32</sup>. The same terms and procedures for reconciliation and conciliation are conducted on mediation in which they were issued by

Volume 1 page 62.

<sup>21</sup> Ali Haider Khawaja Ameen Afandi, Pearls of rulers in explaining the provisions magazine. (Beirut: Dar Al-Jeel, 1<sup>st</sup> edition, 1411 A.H - 1991 A.D.) volume 4 page 695.

<sup>22</sup> Abu Abdullah Ahmed Bin Mohammed Bin Hanbal Bin Helal Bin Asad Al-Shibani, Al-Masnad. (Beirut: Al-Resala institution, 1<sup>st</sup> edition, 1421 A.H - 2001 A.D.) hadith no. (656) and Al-Bukhari Mohammed Bin Ismail Al-Ja'fi, Sahih Bukhari. (Beirut: Tawq Al-Naja, 1<sup>st</sup> edition, 1422 A.H.) Hadith no. (2711), and Muslim; Muslim Bin Al-Hajjaj Abu Hassan Al-Qushairi Al-Nisabari, Sahih Muslim, (Beirut: House for the Revival of Arab Heritage) Hadith no. (28).

<sup>23</sup> Ali bin Muhammad bin Ahmed, Abu al-Qasim al-Rahbi known as Ibn al-Sammani, Rawdhat al-Qudah and the way to salvation (Beirut: Al-Risala Foundation, and Amman: Dar Al-Furqan, 2nd floor, 1404 AH - 1984 CE), Volume 2, p. 760.

<sup>24</sup> Ali Haider Effendi, pearls of rulers in explaining the magazine's provisions. Volume 4 Page 5.

<sup>25</sup> The same reference.

<sup>26</sup> Abu Al-Hassan, Aladdin, Ali bin Khalil Al-Tabrushi Al-Hanafi, Moein Al-Hakam in what is circulating between the two opponents of the rulings. (Beirut: Dar Al-Fekr) Page. 122.

<sup>27</sup> The same reference.

<sup>28</sup> Star Algeria, Memorandum of Alternative Methods for Resolving Disputes, Conciliation, Judicial Mediation and Arbitration <<http://www.staralgeria.net>> Recovery date 17-7-2017.

<sup>29</sup> Fatwa Centre, Summary of the fatwa, <<http://fatwa.islamweb.net/fatwa/index>> Recovery date 18-7-2017.

<sup>30</sup> Bukhari, Sahih Al-Bukhari, with the explanation and commentary of Mustafa Al-Bega on the hadiths of Sahih Al-Bukhari. Hadith No. (1432) and Muslim, Sahih Muslim, Hadith No. (145).

<sup>31</sup> Bukhari, Sahih Al-Bukhari, with the explanation and comment of Mustafa Al-Bega on the hadiths of Sahih Al-Bukhari. Hadith No. (2442). And Muslim, Sahih Muslim, with the explanation and commentary of Muhammad Fouad Abdel-Baki on the hadiths of Sahih Muslim, Hadith No. (58).

<sup>32</sup> Ministry of Endowments and Islamic Affairs, Kuwaiti Jurisprudence Encyclopaedia. (Kuwait: Ministry of Endowments and Islamic Affairs, (1404-1427 A.H) Volume 38 Page 142.

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one source and it is not very different from reconciliation and conciliation, particularly the similarities between conciliation and mediation, so most of the provisions and procedures of conciliation apply in the mediation process.

### **The third requirement: Definition and legitimacy of Custody.**

There are many definitions of custody among scholars and jurists.

The Hanafi definition of custody is that it is (raising a child for those who have the right of custody).<sup>33</sup>

Al-Maliki defined him as: (Keeping the child in his house and supplying his food, his clothes, his bed and cleaning his body).<sup>34</sup>

The definition of shafi'ia is that it is: (the preservation of those who do not distinguish and do not take responsibility for himself and raise him with what is good for him, and to keep him from what harms him).<sup>35</sup>

With regard to the hanbalis, they defined the custody as: (Keeping a child, crazy and insane person who is the mind-scarised from any detriment of them and raise them by doing their best, such as washing the child's head, washing his hands, washing his clothes, covering him, tying him in the cradle, moving him to sleep and so on).<sup>36</sup>

In view of these definitions, they revolve around preservation, conservation and raising the infant for his benefit.

The **Saudi judiciary** has revealed the concept of custody:

The custody claim is allowed against the boy and the lunatic.

Custody is held against those who hold the child, even if it is not the parents.

The claim from one of the parents is not allowed to have the custody of a rational adult child, but the claim is conducted against the child directly.<sup>37</sup>

It should be noted that custody is legal, and it is obligatory, so Ibn Qudama said: (The care and custody of the child is obligatory, because he perishes by leaving him, so that he must be kept from the destruction, as he must be spent on him and saved from the dead).<sup>38</sup>

### **The second topic: Types and advantages of the means to resolve disputes in custody.**

#### **The first requirement: Types of the alternative means for settling disputes in custody.**

The types of the alternative means for resolving disputes in custody are one of the most important requirements of the era due to the society need because of the advantages they can achieve if it was applied and it branches into several means that we limit them to:

#### **Mediation in Custody**

The mediation of custody is an optional mean for resolving disputes with the assistance of a third person - the mediator - relying on dialogue and mutual consultation to convince the spouses of proposed solutions, and to reach a solution from their own for the

dispute that exists in whichever case is entitled to custody of the child after examining their requests and claims.<sup>39</sup>

#### **Reconciliation in Custody:**

The reconciliation in custody can be indicated as: a contract in which the two parties settle consensually an existing dispute or expected a potential dispute<sup>40</sup>. Or: It is a contract that reconciles two disputing parties.

#### **Organizing mediation and reconciliation in the custody of children after divorce:**

The first step of reconciliation offices in Saudi Arabia, for example, was when the Guidance and Reform Office was established at the Court of Guarantee and marriage in Riyadh in Muharram 1420 A.H, and when it became clear that the attempts to reconcile were successful from the experience carried out by the personal jurisprudence from some of the staff members and commissioned by the President of the Court. These encouraging results have led the Ministry of Justice in Saudi Arabia to seek to expand the work of the principle of reconciliation and mediation and organize it in order to achieve its desired objectives, and therefore the organization of the Centre for Reconciliation was approved and approved by the decision of the Council of Ministers No. 103 and date 8/4/1434 A.H, we hope to draft a mediation and conciliation system that includes governmental offices with systematic procedures in the hope that they will develop into magistrates' courts, it is mandatory so that the Personal Status Court does not hear any case covered by the mediation system until after a referral from the magistrate, or the conciliation mediator, and it is even more important if mediation and reconciliation in custody issues, knowing that custody is a right of the child, so his side must prevail<sup>41</sup>.

#### **First: It is suggested that there should be an organization and a center of reconciliation in the custody of children after divorce:**

#### **The following is a list of the highlights of this organization as stipulated in its regular articles:**

Article 1: Definition of reconciliation (mediation) and arbitrator (mediator).

Reconciliation: A consensual means of resolving disputes, handled by reconciliation offices, totally or in part.

Arbitrator: Who undertakes reconciliation procedures between spouses in accordance with the provisions of this organization.

Article 2: Establishing the Reconciliation Center in the Ministry of Justice.

A centre called the (Reconciliation Centre) to be established in the Ministry of Justice and its work shall be carried out in accordance with the provisions of this organization.

Article 3: The core function of the Centre.

Reconciling and settling the dispute between the two parties while considering the interest of the child and resolving disputes about it.

Article 4: Establishing reconciliation offices and the conditions of arbitrators.

Reconciliation offices are established in court offices or the writings of justice and each office consists of one or more arbitrators who are chosen by the ministry's employees or

<sup>33</sup> Ibn Abdeen, Al-Dar al-Mukhtar and Ibn Abdeen's entourage (Al-Makhtar's reply to al-Dar al-Mukhtar), (Beirut: Dar al-Fikr, 1<sup>st</sup> edition, 1412 A.H - 1992 A.D) Volume 3 page 555.

<sup>34</sup> Al-Kharshi, Khalil's brief explanation of Al-Kharshi, (Beirut: Dar al-Fikr) volume 3 page 207.

<sup>35</sup> Al-Nawawi, Mohieddin, Kindergarten students and the mayor of the Muftis, (Beirut, Damascus, Amman: Islamic Library, T2, 1412 A.H - 1991 A.D) Volume 9. page 98. Al-Sharh, Shamseddine, singer who needs to know the meanings of the syllabus, (Beirut: The House of Scientific Books, 1<sup>st</sup> edition, 1415 A.H - 1994 A.D) Volume 5 Page 191.

<sup>36</sup> Al-Bahwati, Mansour Bin Younis, The Mask Scout on the Board of Persuasion, (Beirut: The House of Scientific Books, D.T., D.T.) Volume 5: page 495. Al-Assemi, Abdul Rahman bin Mohammed, Footnote of Al-Rawd al- Square, (D.N., D.T., 1397 A.H), Volume 7: Page 148.

<sup>37</sup> looks: The judicial proceedings in marital problems. Research published in the journal Justice. The number 45 Muharram. Page. 14

<sup>38</sup> Ibn Qudama, Al-Mughni, (Cairo: Cairo Library, D.T., 1388 A.H - 1968 A.D) Volume 9: page 298.

<sup>39</sup> Cairo Regional Centre for International Commercial Arbitration, How to Resolve International Trade Disputes- Arbitration and Alternative Dispute Resolution Methods, (DN, D.T., D.T.) page 45.

<sup>40</sup> Ahmed Al-Barrak, Reconciliation in Discounts, (D.N., D.T., 1426 A.H) page 17

<sup>41</sup> Masfar bin Hassan al-Qahtani, mediation ended with reconciliation and its role in dispute resolution in Saudi Arabia, (D.N., D.T., D.T.), page. 207.

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state employees, with the consent of their agencies, or others who meet the conditions set by the Minister by decision from his.

Article 7: Keeping reconciliation procedures confidential. It is not permissible for who works in reconciliation offices, even after the end of his work, to disclose a secret that he or she has been entrusted with or knew through his work in those offices, unless there is a legitimate or statutory requirement.

Article 8: The right to end the dispute is guaranteed for the disputing parties outside the reconciliation offices.

The provisions of this organization do not prejudice the right of the parties to end their disputes outside the framework of reconciliation offices.

Article 9: Rules and procedures for working in reconciliation offices.

The Minister of Justice issues the rules of work in reconciliation offices and his procedures and decisions to implement this organization.

Secondly, the rules and procedures for the work of the reconciliation offices in accordance with article 9 of the Organization of the Reconciliation Centre, which entitles the Minister of Justice to issue the rules of work in the reconciliation offices and his procedures and decisions necessary to implement this organization, these rules have been issued and published<sup>42</sup>.

### The regular procedures for mediation ended by reconciliation in the custody of children after divorce:

#### First: General provisions for reconciliation

1 Reconciliation and conciliation offices conduct in the custody of the child in accordance with Islamic law, and the regulations issued by the guardian which do not conflict with Qur'an and sunnah.

2 The Minister shall determine by his decision the objective progression of the issues relating to mediation, which ends with the reconciliation in custody of the children after the divorce.

3 The provisions of these rules apply to unresolved reconciliation requests to the court, of which the parties apply for reconciliation from the court, even if they are pending before the competent court.

4 The arbitrator is required to:

- 1- To be a Saudi national.
- 2- Be recognized for integrity and experience, and to be well-behaved.
- 3- To pass the interview.
4. Arbitrators shall not engage in work that falls within the limits of their functions in their requests for reconciliation, their spouses, relatives or in-laws, until the fourth degree, otherwise this procedure is invalid.
5. It is forbidden for those who make reconciliation:

- To disclose to one party what the other party has shared with him except with his consent.
- To reveal a secret that he has been entrusted with or knew through reconciliation proceedings, unless the person authorized or agreed to otherwise.
- To act as an arbitrator, agent or lawyer after working as an arbitrator in any dispute in which he has made reconciliation, or any dispute associated with or arising from it.
- The place of residence in the application of the provisions of these rules means what is referred to in the

system of legal arguments and its executive regulations issued in 1435 A.H.

6. The record delivers the form of notification prepared to those who have been charged at his place of residence or work, if any, otherwise he will hand it over to his family, relatives, in-laws, or those who are employed in his service, and if there are multiple persons who have been brought to them, there must be multiple reports of their number.

The Office may request a prisoner or detainee for reconciliation hearings at the competent reconciliation office in the prisoner's state.

The Director of the Reconciliation Office may inform the parties involved in the dispute of any means of reporting which he deems appropriate to attend the reconciliation hearing.

7. In all cases stipulated in the previous article, if the person to be notified, or who ever signed the receipt refrained, the record clerk must prove it in writing, and the reconciliation office must refer the transaction to the competent court, unless the other party requests another date, but the date should not be repeated more than three times.

### Second: the authority concerned with reconciliation and its competence

1. Reconciliation offices are competent to consider applications filed against Saudi and non-Saudi selected persons who have public or selected residence in the Kingdom, with regard to custody of the child after divorce.

2. The reconciliation application is referred to the competent court in the following cases:

- If reconciliation between the two parties of the case cannot be reconciled.
- If the requested person does not attend, cannot be informed or apologize sought for acceptance of

reconciliation, or the notification paper is not received unless the other party requests another date, but the date is not repeated more than three times.

- If the plaintiff does not know the address of the requested attendee.

3. If the address of reporting within the Kingdom is outside the jurisdiction of the Reconciliation Office, the case shall be referred to the competent reconciliation office, if there is no reconciliation office in the country to be present, if the reconciliation request is requested by the competent court to hear the matter.

4. The plaintiff must apply for reconciliation to the office within his jurisdiction of the place of residence required to attend.

5. Reconciliation offices do not have the right to take precautionary measures, nor do they have the right to be banned from travelling, with the right of the applicant to apply to the competent court to request precautionary measures, travel bans and urgent requests.

### Third: The reconciliation request and restricting

1. The request for reconciliation in the custody of the children is submitted by the applicant for reconciliation with a newspaper that is deposited with the Office, and must be edited and the registration in the reconciliation

<sup>42</sup> Look: Ministerial Resolution No. 53792 dated 27/7/1435 A.H and published the decision in the newspaper Al-Riyadh no. (16667) and date 10/4/1435 A.H page 6.

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office is a restriction in the relevant court.

2. The reformer may hold several reconciliation hearings in the nursery, but the number of hearings should not exceed three, if the treatment must be exceeded to the competent court, unless the parties of the reconciliation request that they be kept and the hearings continue.

### **Fourth: The attendance of the parties to reconciliation**

1. On the day designated for the reconciliation hearing, the parties of the reconciliation will attend themselves or on their behalf, and if the deputy is an agent, he must be of the right to reconciliation and the right to confess and waive.

2. An all-time agent decides in the presence of the client is the decision of the client himself, unless he denies it during the reconciliation session itself, and if the client does not attend, it is not valid for the agent to reconcile unless he is a special delegate in the agency.

### **Fifth: Session procedures**

1. The arbitrator writes down the facts of reconciliation in the record, and states the date and hour of the opening of each session, the number and date of the registration, the name of the reformer, the names of the applicants of the reconciliation, or their agents, and then the arbitrator signs it and those whose names are mentioned in it, and if the reformer is not a member of the Ministry, he mentions the mandate decision and the date issued by the authority.

2. The facts to be reconciled during reconciliation must be related to the custody of the child, which may be accepted legally and in order.

3. The arbitrator at the reconciliation session may discuss with the parties collectively or individually, taking into account the legal provisions relating to the seclusion of foreign women or so, and may consult with them on the subject of the dispute or ask any of them to provide additional information, and to take what he deems appropriate to bring the views closer in order to help to complete reconciliation in the custody of the child.

4. Reconciliation sessions are confidential, unless the parties wish to be public, treated equally, and each has the full and equal opportunity to present its opinion on the subject of reconciliation, namely, custody of the child.

### **Sixth: Informing and interpreting reconciliation**

1. The Reconciliation Office shall issue a containing notification of the summary of the request for reconciliation and the answer and what has been done to the reconciliation in the custody of the child, signed by the arbitrator and stamped with the seal of the reconciliation office, and shall be referred to the competent court or judge assigned for ratification.

2. The judge in charge of certifying must return the reconciliation concerning the custody of the child if it is contrary to Islamic law or regulations, indicating the reason for the response in the record and the treatment referred to the competent court.

3. Reconciliation notification, under which implementation must be followed by the executive formula and handed over only to the party that has an interest in its implementation, and copies of the notification may be given to anyone who has an interest in custody of the child.

4. If there is ambiguity or confusion in the reconciliation notification, the parties to the reconciliation may ask the reconciliation office, from which the notification issued the information, and the judge who approved the

reconciliation must explain the ambiguity concerning the custody of the child.

5. The issued media follows the original version of the notification, signs it from the notification, is considered to be a supplement to the original reconciliation and applies to the reconciliation notification in the custody of the child.

### **Seventh: Objection**

All notifications issued by the reconciliation offices concerning the custody of the child are acquired by the child after they have been approved by the court, or the judge in charge of ratification, and are not subject to appeal, and are applied in the objection what mentioned in the methods of challenging the implementation bonds.

### **Eighth: Final provisions for reconciliation**

1. The provisions of the regulations of sharia law, criminal procedures and implementation are applied while there is no provision in these rules, and in accordance with the nature of reconciliation in the custody of the child and its procedures.

2. All discounts arising from the notification of reconciliation in the custody of the child are within the jurisdiction of the Personal Status Court.

3. In the decision of establishing the reconciliation offices in the custody of the child, the Minister determines the administrative body to which the offices belong.

4. The provisions of these rules shall be applied as of its issuance<sup>43</sup>.

### **The second requirement: the nature and advantages of the alternative means for settling disputes in custody.**

Mediation is achieved as an alternative and friendly means for resolving disputes in post-divorce custody with justice considering the interest of the child as an essential element and it is a quick way with a lower cost, and simplified procedures with the spouses' active participation with the mediator to reach a friendly settlement for the dispute after removing the causes of the dispute, moreover, restoring the spirit of cooperation and connected relationships between spouses, and repairing the damage with an amicable solution stemming from the will of the spouses with the assistance of the mediator in the form of a non-binding recommendation for the spouses which does not characterize as an order.

Mediation is a means of creating mutual understanding between spouses in an atmosphere away from hatred and loathing, and spreading a spirit of tolerance, compassion and friendliness between the spouses. This leads to social reharmony and coexistence, which is an effective and rapid means for resolving disputes, especially in the issue of custody of children, which contributes in solving the problem of slow litigation.

Mediation in the custody of children after divorce as an alternative method for settling disputes has a set of benefits and advantages:

#### **First: Rapidity**

The mediator is often an expert in the issue of the dispute between spouses and he has the right to do so and has sufficient time to examine the subject of the dispute, which helps him to settle the dispute in the shortest possible time and with simple procedures, at appropriate times for both disputing parties and without restricting

<sup>43</sup> Published on the website of the Ministry of Justice, these rules are in place in the Saudi system in the offices of the judiciary and the justice and reconciliation. <moj.gov.sa recovery date July 17, 2017.

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to the official working hours to hold the mediation sessions, also that the mediator is working hard to resolve the dispute during the mediation period.

The rapidity in settling disputes by mediation is encouraging in all disputes, particularly post-divorce child custody disputes, which are affected by the instability of children, so trusting the mediator and seeking a solution to the dispute with mediation is better than wasting time before the judiciary to reach the full right<sup>44</sup>.

### **Second: Low costs:**

Mediation expenses are low compared to arbitration, litigation, lawyers' fees, experts and witnesses. This advantage makes the mediator convince one of the parties of the dispute as a spouse, for example, and what the mediator sees for the interest of the child by making mutual concessions and modifying their legal positions to reach a solution for the dispute as soon as possible to prevent the psychological effects on children, as well as the parties to the dispute<sup>45</sup>.

### **Third: Taking advantage of time and getting quick solutions:**

Mediation is based on the mediator's skills, methods used to resolve the dispute, and his scientific and practical ability to assess the family reality of the spouses, and both parties trust in him, in addition to his ability to find successful ways to negotiate in a friendly atmosphere. The mediator is often an expert in the subject of the dispute, the mediation is on a single level, and mediation also saves time, effort and expenses due to the appropriate timing and location of the mediation sessions for the spouses, and the short time required for the mediation process<sup>46</sup>.

### **Fourth: Confidentiality:**

Maintaining the secrets of the parties of the dispute and the family atmosphere of the spouses in the post-divorce mediation process is a particularly important duty in the field of family relations and disputes, otherwise the parties of the dispute would not have resorted to mediation.

The confidentiality of mediation leads to peaceful coexistence after divorce at the level of the spouses in general, and in the children especially in the future and keeping the relationships connected, and the maintenance of family secrets to the extent that some spouses prefer to waive their right to reveal their secrets, which are keen to keep problems and dispute secret<sup>47</sup>.

The confidentiality of mediation requires the confidentiality of the procedures, the hearings are attended only by the parties of dispute for example, the spouses, witnesses, experts and those authorized to attend secret sessions not attended by the public, nor the media. Moreover, confidentiality encourages the parties of dispute to be free to speak, to make statements and documents and to make concessions at the negotiating stage freely, without having an argument before the judiciary or any other party, such as arbitration, if mediation efforts fail. Confidentiality would also help the mediator bring the spouses' views closer together in order to reach a satisfactory settlement.

All mediation procedures and their implications are confidential and may not be disclosed or invoked, and the mediator may not consider cases as a holding, or act as a

lawyer, expert or witness<sup>48</sup>.

Article no. (25) of the rules of work in the reconciliation offices and their procedures<sup>49</sup> in Saudi Arabia stipulates that "reconciliation sessions are confidential, unless the parties request them to be made public, both parties of reconciliation should treat equally and give each of them a full and equal opportunity to present their claim or defence."

### **Fifth: An alternative friendly means and a reduction of the burden of the judiciary:**

Mediation and reconciliation are a voluntary system based on the consent of both disputing parties, such as the spouses, and the comfort and reassurance of the child in what is stable in his incubator, provided that there is agreement in determining the mediator<sup>50</sup>. It is chosen to settle the dispute in whichever is entitled to custody of the child, to define solutions clearly and to be consenting for both spouses in general and to the child in particular, and to be a means of peaceful coexistence and related relationships between the parties of the dispute as an alternative

to the judiciary, which is described as the elimination of broken relationships<sup>51</sup>.

Mediation is an alternative means for settling disputes in friendly ways, time-economy, expenses, fees and fees, which is a convenient justice for the parties of the dispute by mutually agreed reform, in which it is not predominant or defeated, both of which are winning opponents.

The researcher believes that mediation and reconciliation have common benefits for both parties of the dispute in general and the child in particular. In which the final settlement of mediation is based on a satisfactory solution for all of them, which has been reached of their own free will and is based on their common interests, benefits and social relationship while maintaining a friendly relationship between them, that's where an important goal is achieved which is reducing the burden on the courts and the judiciary in general.

### **Sixth: A non-binding and optional means:**

Mediation is an alternative means for resolving settling that are not binding on the disputing parties, where the parties of the dispute retain all their legal rights if the mediation process fails, and they did not agree on a solution that could be reached, or either of them rejected the mediator's recommendation, so that each party of the dispute would remain free to resort to the judiciary as a public facility for justice in the state<sup>52</sup>.

Also, parties of dispute shall not be forced to resort to mediation as an alternative means for resolving disputes in which the mediation agreement by the will of the disputing parties is the basis of the mediation process.

The researcher believes that the optional nature, which is essential in the mediation process which ends with a recommendation that includes optional solutions that are not binding on both parties and cannot be carried out without the consent of the parties of the dispute together. They can also at any time withdraw from mediation and resort to any other means of resolving a dispute, such as arbitration or judicial jurisdiction.

### **Seventh: A means of participation in finding solutions for the dispute:**

The mediation process is carried out with the

<sup>44</sup> Cairo Regional Centre for International Commercial Arbitration, Arbitration and Alternative Dispute Resolution Methods, page. 47.

<sup>45</sup> Khalifa Abdel Latif, Peaceful Means of Resolving Collective Labour Disputes (Ph.D. Research in Law, Cairo University, 1987), page. 150.

<sup>46</sup> The same reference, page 151.

<sup>47</sup> Abdelhamid Al-Swarbi, Arbitration and Reconciliation in the Light of Jurisprudence and Justice, (D.N, D.T, D.T.) page. 21.

<sup>48</sup> The same reference, page 22.

<sup>49</sup> Look: Article 9 of the Organization of the Reconciliation Center and based on the decision of the Minister of Justice of Saudi Arabia No. 53792 dated 27/7/1435 A.H

<sup>50</sup> Such as Jordanian, Algerian, Egyptian and Moroccan law.

<sup>51</sup> Khairi Abdel Fattah Al Sayed, Mediation as an alternative means of resolving civil and commercial disputes, (D.N, D.T., D.T.), page. 28.

<sup>52</sup> Mohammed Nasreddine Jouada, Civil Suit Department, (D.N., D.T., D.T.), page. 22.

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participation of the disputing parties and the mediator to settle the dispute, where the mediator is tasked with facilitating dialogue between the parties of the dispute and helping them by bringing their views closer and facilitating communication between them, and then to propose possible solutions that serve the interests of both parties of the dispute and reconciling points of view. In addition, providing a forum for dialogue may contribute to a satisfactory solution for both parties of the dispute after creating an atmosphere of trust and confidence in a dialogue for the benefit without leaving bad effects on both sides. So, the success of mediation depends on the genuine participation of the parties of the dispute in the search with the mediator for fair and acceptable solutions by both parties to be both winners<sup>53</sup>.

In other words, the mediator is putting forward proposals for the settlement of the dispute for its parties to choose from what they see as the closest to achieve a satisfactory settlement for them, away from the idea of antagonism. This enables the parties and spouses to maintain good relations, and each is free to accept or reject all or some suggestions of the mediator's recommendation.

The conviction of the disputing parties of the integrity of the mediator often leads them to take into account his proposals when choosing the solution that he sees it as the most acceptable, which increases the credibility of the mediator's work, because the recommendation of mediation is not binding to the parties to the dispute except with their consent, which ensures that they are implemented without difficulties.

Mediation also provides the parties of the dispute with the opportunity to express their interests and provide their best interests in the custody of the child, where the child finds his psychological and financial stability. Adding to that, the solution of the dispute lies in preserving their common interests and maintaining their relationship friendly in the future; Because it came from both sides of the dispute and with the assistance of the mediator, leading to the rapidity of the optional implementation<sup>54</sup>.

**The third topic:** Examples of alternative means of resolving disputes as an alternative system to court procedures in settling the custody dispute after divorce in Saudi Arabia, with some resolutions issued by the Saudi judiciary in this regard.

### (Peace Convention)

**Based on the transaction received by us from the Virtue of the President of the Courts of Qassim District**

**No. .... Dated on**

**.... regarding a claim ..... with his spouse ....**

Regarding the custody of the daughter, we inform you that after studying the treatment by the reconciliation committee, the two parties have been scheduled and have been sitting with them for several sessions together and alone, and after hearing their statements, we advised them and tried to reconcile them and overcome the obstacles facing the spouses in order to continue their married life, trying to bring their views closer and to draw them to reconcile and stay away from the dispute and its causes and try to convince the wife to go back to her husband's house on condition that each of them reserves their legitimate rights, especially since they have a daughter who needs the care

and care of the spouses but to no avail.

And then they peacefully agreed that the husband divorce his wife for indemnity amounted to 50,000 Saudi Riyal only and the wife concedes the previous maintenance that she claims over her husband. Since they have a daughter, they also agreed that the daughter would remain in her mother's custody unless she marries, if she got married, the custody is transferred to the mother of the wife, and the husband must pay 300 riyals a month as allowance to the daughter which deposited into the wife's father's account. The two parties confirmed their conviction in this reconciliation and considered it to be an end to the issue, and therefore this was signed.

The Husband

.....

The witnesses

.....

.....

### Head of the Magistrate's Centre in The Court of Buraida Mohammed bin Saleh Al-Sawei

Through this research, the researcher was able to reach out to the following results and recommendations:

#### First: Results

1. The existence of a purely optional character by the parties of the dispute in the use of alternative means for settling disputes, whether in custody or elsewhere.
2. The decision that issued by the process of resolving custody disputes shall not be binding until it has been approved by the competent court.
3. There are no appeal proceedings against the decision of the custody dispute resolution process, except after an appeal of an error in the interpretation of the texts, or acceptable defects.
4. The possibility of using these alternative means to resolve custody disputes without third-party intervention.

#### Second, recommendations:

1. The researcher recommends giving extra attention to the use of alternative means to resolve custody disputes, such as having a special system to regulate this process, and also the existence of bodies, centers and offices intensively for the custody disputes processes for the interest of the child and the preservation of his rights.
2. The researcher recommends that societies to consider the resort to the alternative means for resolving custody disputes and limit the success of the process to reaching solutions, such as making concessions and accepting judgment and decision, for the benefit of children.
3. Expanding the use of alternative means in resolving custody disputes reduces the burden on the judiciary and the personal status courts.

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<sup>53</sup> One of Sharaf al-Din, settlement of international construction contract disputes in arab countries, (DN, D.T., D.T.), page. 63.

<sup>54</sup> Mohammed Nasreddine Joua, Civil Suit Department, page. 22



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