FAMILY MEDIATION IN ITALY: BILLS AND IDEAL MODEL
(ESPECIALLY FOR THE “DE FACTO” COUPLE)

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Introduction
In systems of the western legal tradition there has recently been considerable interest in resolving family disputes outside the formal court system. Options such as alternative dispute resolution are being employed by the courts, administrative tribunals and ministries and agencies of different governments to provide people with viable dispute resolution processes.

Definition
Mediation is a process where a neutral third party with no decision-making power (i.e. the mediator) helps people negotiate a settlement to their dispute. Mediators help the parties examine their potential options and, if possible, come to decisions that might satisfy the interests of all concerned. The participants are helped to come to their own voluntary and conscious decisions, with neither reciprocal threats nor pressure, and without any leverage on the part of the mediator. When the solution proposed by the parties has legal repercussions, they are sent to seek separate and independent legal advice, before consenting formally to any legally-binding agreement.

In Italy mediation in judicial procedure regarding separation and divorce isn’t statutorily instituted, even though various, successive governments over the last few years have elaborated bills on this subject. At present, the norms governing divorce do not say anything about recourse to family mediation. Yet this instrument for resolving problems relating to the dissolution of family relationships seems to represent a valid alternative to recourse to lawyers.

One instrument in resolving family disputes is art. 145 Italian cod. civ., where it is stated that: “In the event of disagreement, each of the spouses can informally request the intervention of the judge, who, after hearing both sides of the argument, and, wherever opportune, the opinion of any children living with their parents, and who have reached the age of 16 years, will try to reach an agreed solution. Whenever this is not possible, and the disagreement entails establishing residence or other essential facts, the judge, whenever expressly requested jointly by the spouses, will adopt, with a ruling that is not refutable, the solution that he deems in the best interests of family life and unity.”

For convenience and precision of analysis it would be better to keep the hypotheses, in paragraph 1 and 2, separate.

With regard to paragraph 1, there is a clear inconsistency, and so, in order to prevent obstructionism, with one spouse hampering attempts to reach an agreed solution to the conflict, the parties are guaranteed the possibility of appealing individually to a judge, without the need for a

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2 Q.v. the bill presented to the Senate, (no.3290), which states that the introduction into the civil code of art.155 ter (Unità specializzate per la famiglia), which included mediation among the instruments of assistance to spouses in drawing up their “educational project” (as stated in paragraph 1, art. 155 bis, i.e. a “project” to regulate the education and maintenance of children after divorce.)
joint recourse, so that the latter, having heard both parties, might explore every possibility of a settlement on the basis of agreement between the parties themselves. Let us suppose that it is only one of the spouses that has taken the opportunity of appealing to a judge, in a single-judge court, in order to arrive at the settlement of an agreement that might consent the peaceful continuation of married life. In this hypothesis, given that the judge needs to hear both parties (and any children living with their parents, and aged 16 years or over), it is not easy to understand how the spouse that has manifested his or her disagreement with the procedure in progress, might be obliged to participate in the indispensable meeting, previous to the “mediated” solution to the conflict. On this subject, it has been noticed that individual legitimisation to recourse ex art.145 par. 1 cod. civ., through an expression “of a prudential choice made by the legislator to avoid a situation where the (possibly thwarted) spouse might not unilaterally exercise his or her decisional powers regarding family disputes”, on most occasions brings about a failure in the actual attempt, seeing that it is not in any way possible (nor desirable) to oblige the dissenting spouse to participate in the reconciliatory encounter. These observations seem to be substantially borne out by the failure of the remedy in the Italian system: Italian courts are without doubt the least suitable place for restoring family harmony. Let us consider the hypothesis of two spouses, in disagreement over a few points regarding their relationship; they decide to overcome their differences by appealing to article 145 co.1 c.c., directly, to the wisdom and serenity of a judge, so that the latter might help them reach a settlement without recourse to a lawyer. Even supposing that they manage to find a materially competent judge (president of the Court), they will have to present important and delicate facts to a person with no competence other than his own experience and cultural, social and emotional background, in an environment (the courtroom) that is certainly unsuitable for cushioning the antagonism that has led the parties to their conflict.

As regards the manner in which the judge’s activity is carried out, to cite article 145 co.1 c.c., there does not seem to be any difference to the work of the mediator; the latter also has the task of helping the parties to resume their interrupted dialogue, thus representing an external support for the couple. The fundamental difference between the two structures lies in their different ultimate objectives: whereas article 145 aims teleologically to help the troubled couple to overcome their moment of difficulty, whilst maintaining a sound relationship, mediation, on the other hand, aims principally to facilitate the resolving of the quarrels arising from the process of dissolution of a relationship. In fact, the family mediator has to intervene when the spouses have decided to terminate their marriage.

Analysing paragraph 2 of the above-mentioned article 145 c.c., the difference between the figure of the family mediator is even clearer. In fact the norm in question specifies the possibility (in the event of the solution mentioned in paragraph 1 not achieving the desired effect) of joint recourse to the judge so that he may adopt (with a discretionary and binding ruling) the solution deemed most appropriate for the unity and harmony of the life of the family. With regard to this hypothesis the norm again embraces clearly illogical and inconsistent elements: the preoccupation of the legislator to safeguard the family from a judgement by a person extraneous to the family, (limiting to second-best the possibility of handing over to a third person the solving of the problem within the family), has determined the decision to allow the request for intervention on the part of the judge depend on the joint wishes of the parties. There is a clear paradox here: a joint recourse is absolutely essential when it is geared towards arriving at an understanding (via the external help of a judge) arising from the wishes of both parties; wishes that can, of course, only be expressed when it has been

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agreed to appeal to an outsider and to reveal one’s ideas to him. In the light of all this, there is therefore an obvious inconsistency in paragraph 1 regarding an individual’s recourse to a judge.

In general, analysing mediation, the first problem to emerge concerns the choice between either mediation imposed on the spouses by higher authorities, and therefore binding and obligatory, or a voluntary mediation, where it is the parties who freely choose to submit to an activity carried out by a third person aiming to resolve the conflict. It is opportune to point out that both the models offered have advantages and disadvantages.

Above all, with regard to “imposed and binding mediation”, it should be pointed out that the character of obligatoriness derives from either a precept of law or a discretionary ruling by the judge presiding over the separation or divorce process; furthermore, one should distinguish between mediation being carried out in close collaboration with the judge and (although it might be obligatory) mediation that does not affect the trial procedure in any way. Furthermore, de iure condendo, it should be remembered that the current “exclusively judicial” model in force in Italy, means high legal assistance costs, but also the problem of protracted court trials, often exacerbated by the particular complexity of the dispute to be settled (as well as the frequently aggressive behaviour of the spouses), and of the endless adjournments.

In order to obtain the desired aims, however, family mediation should function in an optimal fashion; it should be an efficient, high-level service. Minimum standards should be guaranteed, as well as rules of behaviour that are valid for all family mediators in Italy. More specifically, if such an alternative instrument for resolving disputes were to be introduced, there would have to be certain valid rules for selection, training and behaviour of all mediators, as well as the institution of a single, national register, in which mediators would be obliged to enrol in order to practise their profession; there should also be obligatory training and refresher courses that deal specifically with the mediators’ juridical training and knowledge.

The role of the mediator should be kept separate from that of any other subject who might participate in the divorce procedure, and especially that of the lawyer\(^7\), who is the representative and defender *par excellence* of the interests of only one party, his client.

As already suggested, in Italy legislation has dealt with the issue, but with no definite outcome. In much the same way as the subsequent ones, the 1998 draft 3290 has never been passed; it aimed to introduce new norms on the subject of separation and child custody, and not only by modifying article 155 and ss. of the c.c., but also by introducing new articles in the civil procedure code and modifying law 1970 n. 898 reformed. One of the proposals that Bill 3290 makes is to insert article 155 ter (Unità Specializzate per la famiglia “Specialised Family Units”) in the civil code; as already stated, this article proposes setting up specific units with the function of assisting spouses in the preparation and drawing up of an “educational plan” as stipulated under article 155 bis. In substance the “plan” would be an agreement reached by the spouses on questions regarding their children’s custody, education and maintenance. This agreement would be reached thanks in part to these specialised units, some of which would be called to carry out actual family mediation operations, which however, appear to be understood as instruments to be used only in issues regarding children; this seems to be confirmed by the report accompanying the bill, in which, after referring to the fundamental features of family mediation (such as voluntariness, secrecy, separation from the judicial environment), it is stressed how economic questions would remain in the hands of lawyers and would be discussed elsewhere\(^8\).

As regards the possibility of keeping the sphere concerning offspring separate from the patrimonial and economic issues, although the rationale is clear, the aim can not be shared in this case. In particular, it is clear that, by following this path, one would wish to avoid the risk of “bartering”\(^7\)

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\(^7\) Through this, it is not excluded for mediation to be carried out by a lawyer; he should not, however, have the role of defence of one of the parties in the actual trial itself.

\(^8\) Cfr. Report to d.d.l. 3290, 6-7.
contact and time spent with the children with an economic benefit; this situation can nowadays be observed in consensual separation and divorce proceedings, ratified by a judge. In other words it does not seem to be possible to share the idea that patrimonial issues should be entrusted exclusively to lawyers, especially as in many countries where mediators have existed for years, such as Great Britain, the latter also deal with this aspect of separation, and not only with regard to the children, often discussing the various aspects in separate sessions.

Equally, in Italy, mediators (if they are qualified, or specialised, or even lawyers, perhaps) could carry out their activity by helping the spouses to resolve many, if not all, disputes regarding their separation, even if it is desirable to keep every patrimonial issue separate from those regarding the children, and where there is recourse to the assistance of a lawyer (a person distinct from the mediator on the case) before formally broaching any agreement.\(^9\)

The most recent bill no. 2344, (elaborated during the XIV legislature), following the example of the previous one, modifies the text of art. 155 cod. civ., which states that “the judge will see to it that the parents are opportunely informed of the possibilities due to them through family mediation, as laid down by:- 155 ter, to overcome parental squabbles, in the greater interests of the children”. Moreover, in cases where the spouses are unable to reach an agreement on issues regarding their children, the intervention of a judge is provided for by the regulation of the above-mentioned art. 316 cod. civ.. In particular “wherever the judge has recognised the opportunity, the objective being the best understanding of reciprocal rights and duties regarding the child, he will invite the parents to turn to a family mediation centre, (q.v. 155 quinquies), in order to verify whether this remedy for resolving the problem might be attempted.(…)”.\(^10\)

The new art. 155 ter proposes modifying the presidential phase of the separation proceedings, dissolution or cessation of the civil effects of the marriage, stating that “the president of the court is flanked by an officially nominated consultant, chosen in turn from the register of consultants and experts in relational dynamics and development psychology, who will assist the judge during the hearing (..)”. The norm also states that the consultant’s fee should be a lump-sum paid by the parties involved.

Art. 155 ter proposes instituting “Mediation Centres”\(^11\), establishing that “In any phase of the proceedings of separation, dissolution, annulment or cessation of the civil effects of marriage, (…), the judge can suspend the relative proceedings, on the joint request of the parties and contextual indication of the name of the centre and the acceptance of mediability, for a period of eight months, with the sole aim of consenting to an experiment in family mediation, in absolute autonomy from the judicial context, has the goal of permitting the parties to arrive at a direct agreement, aimed at the formulation of an interactive programme between them and at a better handling of relationships with the children. The family mediator, armed with specific educational requisites, carries out his work, ensuring secrecy for the contents of the encounters, respecting the willingness to participate of both parties, and guaranteeing the neutrality of the mediation context from the judicial and counselling contexts. Whenever one or both of the parties do not turn up at the chosen centre, after the interruption of the trial (obtained according to the first paragraph of the norm) the contextual cessation of mediation is declared, with consequent rights for the party that is interested to propose the immediate resumption of the trial. At the end of mediation the parties sign a report of the agreement, which is presented by the more diligent party to the judge for the relative ratification. Financial aspects can be included in the document, even if they have been agreed outside the family mediation sessions”.


\(^10\) Q.v. text of art.155 bis how it would have been modified by art. 2 of the draft n. 2344 – XIV Legislature.

\(^11\) Q.v. again art. 2 of the draft no.2334 – XIV legislature.
The norm in question ends by decreeing that only subjects in possession of specific qualifications obtained at recognised structures (on the basis of criteria fixed by the institutional law of the Register of Family Mediators) can carry out the functions of a family mediator.

On the one hand, the bill in question certainly seems to offer less grounds for the criticism aroused with regard to the previous bill no.3290. and on the other hand, responds better to what should be the essential characteristics and plus-values of family mediation (according to analysis so far carried out and, above all, according to directives arriving from the European Community and from the systems where the institution of family mediation has existed for many years).

It is therefore essential to define the guiding principles and the limitations of mediation in order to establish and define the “structure” of family mediation, also in the light of directives provided by the Council of Europe 12:

1) Voluntary participation
2) Mediator’s neutrality and impartiality.
3) Mediator’s conflict of interests
4) Empowerment of the parties to ensure sensible results
5) Personal security and protection from risks.
6) Privacy
7) Legal privilege attributed to mediation.
8) Attention towards the future rather than the past.
9) Centrality of common interests and marginalization of individual rights.
10) Attention to the needs of all those interested, and particularly, the children.
11) Mediator’s competence.

With these characteristics, family mediation could efficiently represent - in Italy, differently from other western legal tradition systems - the legal tool for irregular or de facto couples (cohabiting couples, same sex couple, adulterous couples, immigrant couple with different religious and ethnic backgrounds), who cannot go to court, but can resolve their conflicts according to a new “privatistic approach”, through a private agreement.

The Court trends in many western legal tradition systems, especially in common law, is to promote primary dispute resolution (ie, non judicial resolution) in family law with no distinction between “legitimate family” and “de facto family”.

The recent policy is oriented in the direction of removing many of the primary dispute resolution functions from the Courts and placing them in the hands of organizations. Those Governments want to keep primary dispute resolution as far away from the Court as possible, they would like to see the Court confined to judicial adjudication of cases that really cannot be settled by other means. And it’s easy to understand the reason why: court procedure is too bureaucratic and this increases costs for the parties and inefficiency in the handling of their affairs.

With regard to the Italian system, we don’t yet have a statute that regulates this subject, even though mediation might be very helpful in a country, such as Italy, where the judiciary is extremely slow in coming to a decision and the State is also extremely reluctant to innovate and regulate cohabitation matters and in general to intervene in family affairs.

As we have already said, mediation could became an effective instrument to prevent disputes not only for the “legitimate family” – already well protected by the civil code – but mainly for de facto unions, allowing the validity of para-matrimonial agreements or conventions and promoting the intervention of a neutral arbitrator who would help the parties to identify the issues in disputes, or to prevent disputes, and discover how to resolve them on a “contractual” and private basis. For these situations, in fact, in Italy there is a lack of statutory provision, despite the fact that the themes involved are of great interest not only to lawyers and scholars, but also to the general public.