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Coupling Therapeutic Justice with Professional Mediation for Settlement of Disputes in Sri Lanka.

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Abstract

The concept of Therapeutic Justice examines how the legal processes and the behaviour of justice sector actors have a psychological impact on the people. The adversarial judicial system invariably calls for exercise of authority, vigorous advocacy for the vindication of rights and proceeds to jjudgment without understanding the disputants' perceptions or emotions. This paper argues for conceptualising Therapeutic Justice into mediation as the latter recognizes the human element in conflict and the two schools of thought share similar attributes such as party autonomy and procedural fairness. The Study reviews the evidence from Eleven (11) civil cases litigated in Sri Lanka with its focus on anti-therapeutic impact on the disputants during the pre-litigation, litigation and post litigation stages of each case during the years 2021 to 2023 resulting from partaking in adversarial processes. The findings highlight the need to experiment and adopt private or professional mediation within the legal framework for Alternative Dispute Resolution (ADR) through the lens of therapeutic justice as part of judicial reforms in Sri Lanka and of the corresponding need to set up an independent and vibrant professional *culture of mediation.*

Keywords: Justice reforms, Mediation ethics therapeutic justice, Out-of-court settlement, Professional mediation.

Introduction

It is known that emotions play a central role in conflict management, conflict resolution and reconciliation[1] as humans in conflict do go through certain neurological and psychological processes[2] with cognitive biases and prejudices that shape human judgement and decision making[3]. It could be further observed that two most common strategies used for people in conflict, with intense emotions like anger, anxiety, stress are cognitive reframing and collaborative problem solving, which are encompassed within the Alternative Dispute Resolution (ADR) landscape including mediation and conciliation[4]. The present discourse on judicial reforms in Sri Lanka is associated with the stress on the policy makers and other justice sectors actors including judges, lawyers and police in finding best methods to ease the burden of case backlog by digitizing its administrative processes, thus enhancing the efficiency of service providers. However, the time is ripe to review its age-old adversarial justice system and open its doors to more effective, professional and non-adjudicative means of resolving disputes such as mediation and conciliation[5]. The statistics of the Ministry of Justice of Sri Lanka reveal that by the end of the year 2023, around 1,122,113 lawsuits were pending before its courts[6]. Out of the case backlog, the bulk of cases (being 1,065,265) remain in the primary courts of District and Magistrates courts. The caseload indeed speaks volumes of losses to the national economy and incurred state expenditure on these cases but more so reflects on undocumented and much ignored psycho-social impact on litigants. In this context, this paper strives to place the value of psychological well-being as one of the primary considerations in the current discourse of justice sector reforms in Sri Lanka, by examining the close connection between therapeutic jurisprudence and professional mediation with the aim of harnessing their benefits to promote the psychological well-being of people. The concept of Therapeutic Justice adopts an inter-disciplinary approach to create a positive impact on the psychological and emotional well-being of people through the legal processes. Hence, the objective of this research is to push for justice reforms towards establishing a legal framework for professional mediation not merely as a solution for prolonged delays in

[1] Eran Halperin, Michal Reifen Tagar. 'Emotions in conflicts: understanding emotional processes sheds light on the nature and potential resolution of intractable conflicts' (2017) ScienceDirect, Volume 17, 94-98 https://www.sciencedirect.com/science/article/abs/pii/S2352250X16302111

[2] Catherine Raeff. 'Exploring the Complexities of Human Action' (2020) (Oxford University Press) *https://doi.org/10.1093/oso/9780190050436.001.0001* & Chung-Chuan Lo & Xiao-Jing Wang (2016) 'Conflict Resolution as Near-Threshold Decision-Making: A Spiking Neural Circuit Model with Two-Stage Competition for Antisaccadic Task' - https://doi.org/10.1371/journal.pcbi.1005081

[3] Korteling, J.E. & Toet, A. 'Cognitive biases', Reference Module in Neuroscience and Biobehavioral Psychology. (2020). Amsterdam-Edinburgh: Elsevier ScienceDirect. https://doi.org/10.1016/B978-0-12-809324-5.24105-9

[4] Mitchell, R, 'Seven Conflict Resolution Strategies Backed by Neuroscience (When Emotions Explode)' (2025). https://www.emotionstherapycalgary.ca/blog-therapy-calgary-emotions-clinic/conflict-resolution-strategies

[5] Moving beyond the already established community mediation boards and Debt Conciliation Boards

[6] Annual Performance Report of the Ministry of Justice of Sri Lanka, 2023

courts but more so in alleviating the unspoken psychological trauma that litigants undergo. Mental well-being would invariably lead to social harmony and sustained economic growth for Sri Lanka.

The first part of this paper examines the unity of two schools of thoughts; being 'Therapeutic Justice' and 'Mediation' by way of a literature review and argue for integrating inherent values of *Therapeutic Justice* into professional mediation and its ethics. The latter part of this Paper contains evidence-based justification of the need to test and adopt professional mediation, by examining the anti-therapeutic effects on the disputants in the current adversarial judicial set-up.

Materials and Methods

A combination of research methodologies has been used in the present study mainly including a discussion of the existing literature and qualitative methodologies to achieve the objectives. The concept of Therapeutic Justice and therapeutic attributes of mediation have been explored in a literature review, while the case study methodology was blended in with an observational study to review the eleven case studies. Use of the case study method was ideal to gain a deeper and a multi-faceted understanding of the issues as experienced by the participant litigants given their real-life context. The main data collection tools used for the case studies were interviews and observations of the researcher that formed a part of an effective strategy. The researcher's empathic neutrality, mindfulness-based insights formed an important part of the research enquiry and became critical to understanding the phenomenon under study.
The Eleven (11) unique case studies before civil courts in Colombo were purposively selected as the researcher worked closely with at least one disputant of each case (either as a plaintiff or defendant as indicated in Table 1 below) and observed the participants' behaviour and interactions with the opposing party throughout the years 2021 to 2023. One of the parties to each case was chosen due to reasons of practicality and to safeguard the confidentiality of such party's disclosures during the pendency of litigation. The semi-structured interviews of the participants were based on three (03) key attributes, namely.

i. The mental state of the participant in interacting with the opposing party in all three phases of a case,
ii. The participants' satisfaction of the outcome of the case especially regarding an actual/potential ''out of court settlement''
iii. The use and awareness of private or professional mediation amongst the participants and their lawyers.

In the context of clinical methods of mental status examination, it has been observed that a successful clinician would develop a style for mental status examination of the client through unstructured observations made during the routine history and physical attributes including the general appearance, the behaviour, alertness, speech, activity, affects, perception and attitude[7]. Thus, the semi-structured interview guides were devised based on an apt conceptual framework targeted at eliciting the mental state of the participants with a combination of close-ended and open-ended questions to

[7] David C. Martin, Boston 'Clinical Methods: The History, Physical and Laboratory Examination'. (1990) 3rd edition: Butterworths- https://www.ncbi.nlm.nih.gov/books/NBK320/

enable observations in the contexts of both 'in court' and 'out of court' and at each phase of the litigation on a qualitative basis. Data was collated into interview transcripts, texts and documents as well as observational notes for analysis and comparison purposes. Thematic analysis was done manually to attain a coherent understanding of the phenomenon under review as it afforded a systematic way of categorising complex qualitative data into different broader themes for increasing accuracy in understanding and interpreting participants' experiences and observations about the participants, the events, and situations. Moreover, through its theoretical freedom, thematic analysis provided a highly flexible approach that is adaptable to a variety of contexts present in the case studies, providing a substantial and complex account of data. The analytical method thus rendered support in demonstrating the anti-therapeutic elements present in the pervading adversarial culture including the legal processes, the court set-up, the interactions with the justice actors, which were all marked by absence of recognition of therapeutic justice or collaborative problem solving in the process.

Discussion on the Literature

Indeed, the question has been raised if the law can be used for emotional healing rather than as a tool of social control, to which the answer has been in the affirmative as the law's emotional impact on people should be an important dimension in evaluating its desirability[8]. There is indeed an intersection between mediation as an ADR method and the theory of Therapeutic Justice (**'TJ'**) due to the similarities in their underlying principles, values and processes. Hence, one needs to gain a firm grasp of the two concepts in order to explore their integration into judicial reforms.

Mediation

Litigation rests largely on the efficacy of the legal profession, the need to unravel the law, to establish legal rights and remedies and the need to argue its logical consistency[9]. ADR practices on the contrary have a longer history as it can be dated back to older civilizations in China, India, Greek, Egypt where amicable settlement of disputes was the norm[10]. In Sri Lanka too before the British rule was established, 'Gamsabhavas' or 'Village Councils' operated throughout the country, that consisted of an assembly of respected citizens drawn from the village/community who met at an 'Ambalama' (resting place), under a shady tree or a central place on the occurrence of a dispute involving debts, petty thefts, to settle the matter upon an informal inquiry. It has been observed that although the so-called 'Gamsabhavas' survived the British Rule, its constitution and purpose were altered with the introduction of a fully-fledged adversarial system[11].

[8] Paquin, Gary, & Harvey, Linda. 'Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection'. (2002) Florida Coastal Law Journal, 3(2), 167-188, pg 169

[9] Marasinghe, M. L. 'The use of conciliation for dispute settlement the Sri Lanka experience'. (1980). International and Comparative Law Quarterly, 29(2–3), 389–414, Pg 402 https://doi.org/10.1093/iclqaj/29.2-3.389

[10] Dawa, A 'Origin of ADR across the Globe' Viamediationcenter.org, https://viamediationcentre.org/readnews/MjY3/Origin-of-ADR-across-the-globe

[11] Marasinghe, M. L. 'The use of conciliation for dispute settlement the Sri Lanka experience' (1980) International and Comparative Law Quarterly, 29(2–3), 389–414. https://doi.org/10.1093/iclqaj/29.2-3.389

The movement to look out for Alternatives to Dispute Resolution (**'ADR'**) outside courtrooms began in the 1960s[12]. ADR emerged due to the inherent defects in the adversarial legal system that encouraged combative strategies and due to the numerous advantages of being faster, more responsive and less expensive processes that better serve clients, and the belief that the justice system would benefit by reducing its caseload[13]. Mediation as part of the ADR movement has its roots back in the end of 1970s and is a method premised on profoundly different dispute resolution principles than litigation[14], where a neutral third party named a 'mediator' facilitates the disputants to resolve their differences by negotiating entering into a voluntary settlement.

At a time when professional mediation is vibrantly practiced if not at least promoted worldwide through international organisations[15] and international[16] conventions especially in the settlement of international commercial disputes, countries in the region, notably Singapore[17] and India[18] have set precedent for similar assimilations into judicial reforms in Sri Lanka with a focus on professional mediation for civil and commercial disputes. The Mediation Act of Singapore defines "mediation" *as a process comprising one or more sessions in which one or more mediators assist the parties to a dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:*

a. *identify the issues in dispute.*
b. *explore and generate options.*
c. *communicate with one another.*
d. *voluntarily reach an agreement*[19]

The Mediation Act of India defines that mediation *'includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute'*[20].

[12] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 243

[13] Schneider, Andrea Kupfer. 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1087

[14] Shapira, Omer. Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 244

[15] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) & UNCITRAL Mediation Rules (2021)

[16] United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" (2018)

[17] Mediation Act, Singapore (No.1 of 2017), 'Currently, mediation is not only used for private disputes but forms an integral part of the Singapore legal system. It is widely used as a mechanism of dispute resolution in courts, government departments, businesses and other specific industries' – Seng Onn Loong 'Mediation', http://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation

[18] The Mediation Act of India 2023

[19] Section 3 (1), Mediation Act, Singapore (No.1 of 2017)

[20] Section 3 h) of the Mediation Act of India 2023

The concept of 'mediation' is 'best described as a voluntary and confidential process in which the parties seek to find a practical solution to their dispute' through a neutral third party, *the mediator*, who assists the parties in dispute to find a practical solution[21]. Mediation can be used for many purposes including settlement of disputes, management of conflicts, negotiation of contracts, policy-making and conflict prevention[22]. Moreover the techniques of mediation that a mediator would adopt would depend on the parties as it is practiced in a variety of professional and cultural contexts[23]. Conceptually a range of mediation styles reflects the increasingly 'complex and sophisticated array of practices' that inter-relate and share the name of *'mediation'*. Mediation models include traditional problem-solving mediation, narrative mediation, evaluative mediation, facilitative mediation, transformative mediation, expert advisory mediation, wise counsel mediation, and tradition-based mediation[24]. Hence, a mediator's orientation namely the way mediator conduct the process such as the manner of information gathering, setting the agenda, facilitating parties in choosing viable options would indeed have an impact on mediation dynamics[25].

The existing literature of mature legal systems with mediation such as Singapore not only reveals that mediation provides extraordinary opportunities for the disputants, their lawyers and the justice sector to transform conflict into collaboration and peace-making but also it is an opportunity *'that should not be squandered to merely recast mediation in adversarial terms'*[26].

At a time when the Sri Lankan experience of professional mediation[27] (as opposed to community mediation) remains relatively new[28] and the potential beneficiaries and lawyers trained in adversarial processes

[21] Seng Onn Loong 'Mediation' http://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation

[22] Seng Onn Loong 'Mediation', http://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation

[23] Nadja Alexander 'The Mediation Meta model: Understanding Practice', (2008) Conflict Resolution Quarterly, Volume 26, Issue 1, Pages 97-123

[24] Nadja Alexander 'The Mediation Meta model: Understanding Practice'(2008) Conflict Resolution Quarterly, Volume 26, Issue 1, Pages 97-123

[25] Nadja Alexander 'The Mediation Meta model: Understanding Practice' (2008) by Nadja Alexander, Conflict Resolution Quarterly, September 2008, Volume 26, Issue 1, Pages 97-123

[26] Rubinson, Robert. Client counseling, mediation, and alternative narratives of dispute resolution. (2004). Clinical Law Review, 10(2), 833-874, Pg 833,834

[27] The Mediation Board Commission was established under the Mediation Board Act No.72 of 1988 (as amended) that supervises and control the mediators for the gazetted mediation board areas. So called 'community mediation' is not characterised by confidentiality which is one of the cornerstone principles of professional mediation nor can the lawyers represent their clients before community mediation. There is a prevalent reluctance especially in the business community to resolve disputes before these Boards due to lack of professionalism – the selection criteria being for mediators to represent the geographic area based on their residence and to represent an ethnic balance reflecting the population in each distinct area.

[28] Sri Lanka ratified the 'Singapore Convention' by enacting domestic legislation for enforcement of international mediated settlement agreements (The Recognition and Enforcement of International Settlement Agreements resulting from Mediation Act, No. 5 of 2024). There is a proposed law for domestic mediations; 'Mediation (Civil and Commercial Disputes) Bill of Sri Lanka'

may be reluctant or suspicious of the new processes or fear the unknow based on a belief that the mediation would not work[29], and the policy makers seem to make only cautious moves towards such unknow territory, it is very important to stimulate dialogue in the academia, amongst the professionals and the community to set the right tone by incorporating invaluable concepts such as 'Therapeutic justice' that explores the psychological ramifications of legal processes[30]. Integrating TJ into mediation would help achieve wider benefits in the society by avoiding *juridification* of the non-adjudicative dispute resolution processes such as mediation[31].

Therapeutic Justice

The term 'Therapeutic Justice' is quite new to the legal fraternity in Sri Lanka, unlike 'Restorative Justice' with the latter's focus on the criminal justice system as it seeks 'criminal justice practitioners and legal professionals to involve people in identifying the needs, repairing harm and building strong relationships, rather than imposing a proportionate amount of harm on perpetrators'[32]. Therapeutic jurisprudence on the other hand 'recognizes that legal rules, procedures, and actors have pro-therapeutic or anti-therapeutic effects, and looks for methods to prioritize and realize the former'[33] . It has been said that both TJ and Restorative justice propose a relational, participatory justice system *'that departs from modern standards by providing citizens with opportunities for empowerment and to have their needs met..'*[34] As it has been observed that *'therapeutic approach knows no bounds'*[35] , it is apt to examine its potential to shape and influence the mediation landscape in Sri Lanka and specifically in the field of resolution of civil disputes to begin with.

TJ is a younger movement compared to ADR and has been introduced in the late 1980s by Professors David Wexler[36] who recognized that shortfalls of the traditional legal approaches in addressing the complex psychological and social issues underlying many legal disputes[37]. TJ proposes for law reforms to minimise the law's negative effects on well-being related goals' such as achieving participatory justice as it highlights the

[29] Schneider, Andrea Kupfer 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1100

[30] Schneider, Andrea Kupfer 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1087

[31] Penny B, 'The "Juridification" of Alternative Dispute Resolution', Anglo-American Law Review Pg 4

[32] Ian D. Marder & David B. Wexler 'Mainstreaming Restorative Justice and Therapeutic Jurisprudence through Higher Education' (2021). 50 U. BALT. L. REV. 399-Pg400

[33] Ian D. Marder & David B. Wexler 'Mainstreaming Restorative Justice and Therapeutic Jurisprudence through Higher Education' (2021). 50 U. BALT. L. REV. 399-Pg400

[34] Ian D. Marder & David B. Wexler 'Mainstreaming Restorative Justice and Therapeutic Jurisprudence through Higher Education' (2021). 50 U. BALT. L. REV. 399-Pg400

[35] David B. Wexler 'Therapeutic Justice' (1972) Minnesota Law Review, 57(2), 289-338, Pg 293

[36] David B. Wexler 'Therapeutic Justice' (1972) Minnesota Law Review, 57(2), 289-338, Pg 293

[37] 'Therapeutic Jurisprudence: Revolutionizing Legal Practice and Constitutional Law' (2024) Neurolanch, https://neurolaunch.com/therapeutic-jurisprudence/

'importance of management of emotions as well as a professional's interpersonal skills and emotional intelligence in dispute resolution[38]. In fact, TJ being an interdisciplinary field that draws insights from psychology, criminology, social work, and public health[39], seeks to humanise the legal processes leading to more emotionally satisfying results using ADR[40]. TJ as vague as it is, does not limit its application as it was first applied in mental health, then expanded to diverse areas including family law, tort, contract law and criminal law as it serves as a tool for legal reforms and social change[41].

Integrating Therapeutic Justice into Mediation

The two concepts of TJ and mediation share striking resemblances in terms of their attributes, values and processes as the legal systems seek to bring about positive therapeutic impact on individual well-being[42]. It has been contended that TJ incorporates several mediation's key attributes such as resolving underlying issues; empowering' litigants to actively participate in rehabilitating relationships; reducing litigants' return to court and involvement in the justice system; achieving outcomes benefitting all parties through collaboration[43].

Principles of procedural justice, trust and self-determination underpin TJ[44] while similar principles of party autonomy and procedural fairness dominate the mediation processes equipped with the neutrality of the mediator, thus refining the confidentiality and the integrity of the processes[45]. Hence, mediation promotes party autonomy, party empowerment through active participation and by enhancing a perception of the process as fair, thus avoiding frustration and disempowerment associated with litigation[46]. Moreover, the education experience may also become therapeutic as the parties consider the interests of their opposing party as it makes rehabilitation of the relationship a possibility. Especially in the case of family disputes, the therapeutic potential is unmistakable as the

[38] Marder, Ian D., and David B. Wexler "Mainstreaming Restorative Justice and Therapeutic Jurisprudence through Higher Education" (2021) University of Baltimore Law Review, vol. 50, no. 3, Summer 2021, pp. 399-424, Pg 403

[39] 'Therapeutic Jurisprudence: Revolutionizing Legal Practice and Constitutional Law' (2024) Neurolanch, https://neurolaunch.com/therapeutic-jurisprudence/

[40] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 243

[41] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 245

[42] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 243

[43] Douglas A. Van Epps 'Multi-Door Courthouse - Therapeutic Justice Adds to Prescriptions for Problems, (2000) 6 Disp. Resol. Mag. 9

[44] Jill A Howieson 'A framework for the evidence-based practice of therapeutic jurisprudence: A legal therapeutic alliance', (2023) International Journal of Law and Psychiatry, Volume 89, 101906, https://www.sciencedirect.com/science/article/pii/S0160252723000493

[45] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 253

[46] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 248

approach goes beyond a mere agreement, striving to improve the relationship between the divorcing parties especially in cases involving children[47]. One needs to closely examine how to incorporate TJ in the practice of varied forms of mediation.

It is true that diverse mediation forms of mediation have been developed and it has been argued that the closest to TJ would be 'narrative mediation' and 'transformative mediation'[48] with its focus on the psychological and moral growth of the parties[49]. Traditional 'problem solving mediation' was one of the widely used and the purpose of which has been defined as 'facilitation of voluntary and un-coerced negotiation between the parties with the aim of obtaining an agreement that resolves the conflict in whole or in part'[50]. 'In facilitated negotiation the intent of the mediator is to stay with the issues in dispute and hammer out an agreement through encouraging compromise.' The critique of this approach is that too narrow a focus can lead to more rapid but weaker agreements as getting the whole story out in itself may serve a significant therapeutic function in mediation[51].

The therapeutic significance in narrative mediation lies when parties are allowed space to freely illustrate their subjective experiences related to the conflict, some of which may go to the root of the conflict. Hence, the ability to tell their stories has been highlighted as an important part of measuring the therapeutic impact of the process because *'in a dispute each party may have a firm sense of entitlement to act as he or she demands what they want based on a narrative from which they are operating*[52] *'*

Transformative mediation favours systemic therapeutic interventions to address behavioural and emotional difficulties experienced by the parties by facilitating the participants to create new dialogue and identify option-generating and problem-solving techniques that are emphasized in the facilitative model of mediation[53].

Thus, it is proposed that integration of TJ into mediation would advance therapeutic goals by enabling identification of emotional concerns, in addition to legal and financial concerns and in choosing processes that are most

[47] Shapira, Omer. 'Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics'. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 249

[48] Paquin, Gary, & Harvey, Linda. (2002). 'Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection'. Florida Coastal Law Journal 3(2), 167-188, Pg168

[49] 'Paquin, Gary, & Harvey, Linda. 'Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection'. (2002). Florida Coastal Law Journal 3(2), 167-188, Pg 168

[50] Shapira, Omer. Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), 243-272, Pg 244

[51] Paquin, Gary, & Harvey, Linda. Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection. (2002). Florida Coastal Law Journal, 3(2), 167-188, Pg 170

[52] Paquin, Gary, & Harvey, Linda. Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection. (2002). Florida Coastal Law Journal, 3(2), 167-188. Pg 174

[53] Nadja Marie Alexander 'The Mediation Metamodel: Understanding Practice Article in Conflict Resolution' (2008) Conflict Resolution Quarterly, Conflict Resolution Quarterly, DOI: 10.1002/crq.225 · Source: OAI

likely to have positive therapeutic effects[54]. In the eventuality of a deadlock situation, an evaluative model is usually adopted, which involves the mediator expressing views about the potential outcome of the conciliation and by expressing the implication as to how the mediator perceives the dispute ought to be resolved, based on which a settlement may be reached[55]. The process invariably involves negotiation that includes making offers and counteroffers, concessions accompanied by justifications, persuasive arguments based on facts, weighing risks, justified by standards for determining issues such as fairness, market prices, equity, equality[56]. In the event of deadlock situations, a "brainstorming" session with the parties in a joint session may also result in finding a solution to the impasse'[57]. An evaluative mediation style has been critiqued on the premise 'adversarial bargaining may harm the relationship between the clients to the detriment of any future relationship[58].

Despite the differences in the mediation style that may be adopted by a mediator depending on the parties and the nature of dispute, it must be emphasised that under the concept of TJ, the success of mediation cannot be equated to a mere signing of a settlement agreement procured by pressure tactics. If the mediator becomes evaluative, this will strike on the neutrality of the process as the mediator becomes an interested party in the outcome of the mediation. Hence, even though reaching a settlement is a legitimate aim, it cannot be allowed to take precedence over the dominant element of mediation. Thus, all forms and tools of mediation must be used only recognising the therapeutic value in mediation with the focal point of having the desired therapeutic impact on the parties.

Mediation as a concept is not premised on the basis that there exists only one version of the truth to the exclusion of all others or that one needs to disapprove the truth of an adversary's story. Therefore, it can be argued that whatever one or more of the mediation styles adopted by a mediator in the mediation process, the therapeutic goal of mediation as part of ADR ought to remain a primary consideration rooted in mediation ethics and culture. Hence, it is vital to consider how to incorporate therapeutic gaols into mediation ethics and culture. The basic ethics of mediation would help achieve therapeutic goals, including the skills of a mediator such as competency, fairness & impartiality coupled with any disclosure of conflict of interest by the mediator all of which ensure the confidentiality of the process, building trust in the parties to open space for effective communication of their interests and emotions. In essence the competency of a mediator encompasses effective communication and multiple intelligences, notably, inter-personal skills and emotional intelligence to perceive the emotions of the disputants' including the non-verbal signals such as body language and facial expressions. Active listening which

[54] Schneider, Andrea Kupfer. 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1087

[55] Michael McHugh AC QC, 'Mediation and Negotiation in Legal Disputes ' (2021) 31 ADRJ 104, pg.105

[56] Michael McHugh AC QC, 'Mediation and Negotiation in Legal Disputes '(2021) 31 ADRJ 104 pg.110

[57] Michael McHugh AC QC, 'Mediation and Negotiation in Legal Disputes ' (2021) 31 ADRJ 104- pg.113

[58] Schneider, Andrea Kupfer. The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102., Pg1093

is an indispensable skill in psychological counselling is a basic skill of a mediator coupled with linguistic, analytical and creative problem-solving skills in exploring the underlying multiple interests that the opposing parties may have. For instance, when one expresses angry emotions, the mediator's ability to explore the cognition behind such emotions and explore the cause of such anger using strategies such as neutral language, empathetic responding, reflective questioning and purposive reframing of the negative thinking to positive, thus tacitly facilitating self-discovery through release of emotions and nudging towards clearing misunderstandings comprise important milestone in the process with therapeutic attributes.

Moreover, the benefit of being heard and meeting face to face, affording each party the opportunity to tell the story and to be heard in a setting that is safe and with respectful empathy is indeed helpful for parties to move past the dispute and to productively work toward a mutually satisfactory solution[59]. A basic technique used in mediation is 'externalisation' of the problem, where the parties place the problem in the context of their full relationship, in an attempt to correct the bias towards internalisation of the problem or play the blame game. As such the mediators are equipped with basic skills such as active listening, reframing from the negative to the positive while externalisation language is used to separate the people from the problem[60]. The purpose is to open up emotional space for the parties to take a different view of the conflict and to consider different options and an outcome that is both materially and emotionally satisfying[61].

In terms of mediation culture and ethics in the justice system, it is true that the lawyers have a supportive role to play, while TJ provides lawyers and disputants with a framework to help choose among a variety of ADR options[62].

The role of the lawyer in mediation differ in their role as negotiators out of court. It is well known that lawyers indeed enjoy a high level of control over their clients participating in mediation, firstly in advising the parties whether to go for mediation or not; as their opinion carries much weight to a litigant in a court case, secondly in the selection of a mediator and thirdly by active or dominant participation in mediation that may affect the mediation process. Though not mandatory, when a dispute is mediated, lawyers are likely to participate in mediation with their focus on the legal rights instead of the needs and interests of the parties, which may become incompatible with the aims of mediation as

[59] Schneider, Andrea Kupfer. 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1094

[60] 'Paquin, Gary, & Harvey, Linda. Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection. (2002). Florida Coastal Law Journal, 3(2), 167-188, Pg 178

[61] Paquin, Gary, & Harvey, Linda. Therapeutic jurisprudence, transformative mediation and narrative mediation: natural connection. (2002). Florida Coastal Law Journal, 3(2), 167-188, Pg 179

[62] For instance, arbitration is considered non-therapeutic as it is similar to litigation as it operates on the assumption that the parties are adversaries, with positioning being part of the adversary system. Hence, even where arbitration has been selected by the parties, in appropriate cases, the parties may be referred to mediation preceding arbitration or leading to an arbitral award; Schneider, Andrea Kupfer. (1999). 'The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution'. Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1085

the parties ought to be in the centre of the process. Hence, *'TJ assigns a more modest role in mediation to the parties' lawyers*[63].

Mediation process can also be abused for fishing evidence or to test a witness or to cost other side time and money[64]. Therefore, mediators ought to exercise discretion in a way that promotes the psychological well-being of the parties. Thus, TJ could influence the ethics of mediation on all parties of a mediation process including lawyers to avoid familiar adversarial approach and commit to a standard of fairness and good faith higher than direct negotiation[65].

Conducting mediation through the lens of therapeutic justice is vital. However, it cannot be conceded that therapeutic consideration is superior to all other considerations such as justice, constitutional values. Nevertheless, it is proposed that therapeutic effects should be identified as a vital consideration for policy makers and decision makers in the justice sector as well as the legal professionals. Hence, there is a need to raise awareness of the existence of therapeutic interest in enhancing party satisfaction out of the mediation process and its outcome. Thus, it is of utmost importance to have these insights built-into ethics of mediation, in mediator training and mediator evaluation to form the basis of justice reforms[66].

Discussion of the Case Studies

A summary of the Eleven (11) case studies is set out in **Table 1**. Eight (08) cases were divorce proceedings which directly involved family relations. One (01) case that was a testamentary matter also involved family relations. Two (02) cases involved business relationships. Hence all the case studies involved broken human relationships resulting from a legal dispute. Within an adversarial setup, eight (08) out of the Eleven (11) cases attempted at and did reach 'out of court settlements' resulting from the collaboration of the disputants' lawyers that led to early dispensation of justice especially in cases where such settlement was reached during the pre-litigation stage. Even in cases that reached an 'out of court settlement' during the litigation phase, the parties reported the settlement to court and obtained a final decree in less than eight (08) months. Three (03) cases showcased failure of attempts at collaborating or on an 'out of court settlement' either due to the reluctance of the disputants or their lawyers. However, there is a notable difference between such an 'out of court settlement' and a settlement resulting from professional mediation. In the former mechanism, as only lawyers of the parties enter into negotiations 'out of court' without the presence of parties, the parties are deprived of a golden opportunity to vent their emotions and transform the conflict into one of enforceable negotiated settlements but more so in healing the broken relationships.

[63] Omer Shapira 'Joining Forces in Search for Answers; The Use of Therapeutic Jurisprudent in the Realm of Mediation Ethics', Pg 264&265

[64] Schneider, Andrea Kupfer. The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1101

[65] Schneider, Andrea Kupfer. The intersection of therapeutic jurisprudence, preventive law, and alternative dispute resolution. (1999). Psychology, Public Policy, and Law, 5(4), 1084-1102, Pg1085

[66] Shapira, Omer. Joining forces in search for answers: the use of therapeutic jurisprudence in the realm of mediation ethics. (2008). Pepperdine Dispute Resolution Law Journal, 8(2), Pg 269, 270

Hence, the unparallel value of professional mediation leading the parties towards a sustainable solution and mental well-being appears prominent.

The emotional agonies that the participants were undergoing which were revealed under confidentiality depict the dire need for emotional healing in their interactions with the opposing party and the ideal platform would have been in the presence of a professional mediator. *Excerpts from participant communications have been reproduced below;*

'If you want to know what happened and how narcissistic she is you might need to listen to this (audio clip). She is manipulative to the core…I recorded this because I need to keep myself whenever I feel heartbroken. I wanted to get the truth out because ……'

'I hate coming to court, I have been doing so for the last three and half years ever since she filed the maintenance case. Every single time I get severe gastritis because of the tension leading up to it and the stress of the day'.

'Even though there is a settlement the problem to him is as I think is in whose favour the divorce will be given. If the counsel decides it's on my side he might contest…'

'He does not understand. He only thinks of how he feels not at all of another person, when he inflicts emotional trauma it takes ages to recover…'

The above excerpts point to the bottled emotions that have not found room for expression anywhere, especially in an adversarial sitting, where the control of the process and outcome is in the hands of justice sector actors, be they lawyers, judges or court staff and the participants are forced to play a submissive role especially in a court house, while their lawyers would take the lead in presenting facts, legal arguments, counter arguments followed by a judgement.

Table 1.

Case summary.

No.	Case Type	Court	Partici-pant	T	Outcome	Phase
1	Divorce	DC Nugegoda	Plaintiff (male)	6	''Out of court settlement''	Pre-litigation stage
2	Divorce	DC Kaduwela	Plaintiff (female	4	''Out of court settlement''	Pre-litigation stage
3	Divorce	DC Homag-ama	Plaintiff (female)	7	''Out of court settlement''	Pre-litigation stage
4	Divorce	DC Colombo	Defendant (female)	5	''Out of court settlement''	Pre-litigation stage
5	Divorce	DC Moratuwa	Plaintiff (female)	7	''Out of court settlement''	Pre-litigation stage

Table 1. ***(continue)***

5	Money Recovery	Colombo Commercial High court	Plaintiff (corporate)	2	At pre-trial stage the case was dismissed	No settlement
6	Divorce	DC Nugegoda	Defendant (female)	108	''Out of court settlement''	Litigation stage
7	Divorce	DC Nugegoda	Plaintiff (male)	24	''Out of court settlement''	Litigation stage
8	Testamentary	DC Colombo	Plaintiff (female)	24	On-going	No settlement
9	Divorce	DC Moratuwa	Plaintiff (female)	8	*Ex-parte* order	Unofficial 'Out of court settlement''
11	Arbitration	Institutional arbitration	Respondent (corporate)	>36	ongoing	No settlement & court like procedure

T = Time taken to continue (in months)

The majority of Eight (08) cases that achieved 'out of court settlements' depict the important role played by lawyers representing their clients in bringing about a mutually agreed settlement during the pre-litigation and litigation stages. However, the research continued to observe the participants and their mental state in interacting with the ex-spouse/ ex-partner for about three months period during post litigation as these relationships continued beyond the legal case. The thematic assessment of the study with special focus on the post-litigation phase is summed up under three (03) emergent themes as follows.

1. Despite the successful practice of 'out of court settlements', the mental state of the participant in interacting with the opposing party in all the three phases of a case remained as one of stress and insecurity.
2. Participants' satisfaction surrounding an 'out of court settlement' related mainly on the speed within which the cases were concluded and the related cost savings. Seemingly there was very little therapeutic impact on the individual life of the disputant as there did not appear to have any improvement of the relations with the opposing party during the post litigation phase, as it continued as estranged relationships marked by avoidance and insecurity.
3. Absence of use of private or professional mediation during pre-litigation and litigation phases and the lack of knowledge and awareness of the therapeutic attributes of such mediation amongst the disputants, their lawyers and others involved in the justice system.

Emergent Themes of the Case Studies

There are three main themes as discussed below.

The mental state of the disputant in interacting with the opposing party throughout the three phases (pre-litigation, litigation and post-litigation)

The mental state of each participant during the pre-litigation phase was characterized by anxiety and frustration and inability to find confidence to interact with the opposing party in a progressive manner towards negotiating a settlement. This was observed in the initial legal consultation phase of the participant with the lawyer, prior to filing legal proceedings in court as it is customary for the disputant to retain a lawyer for such purposes. Under normal circumstances the lawyer of each party becomes the listener of all the grievances of the participant. Despite the legal training to elicit only those facts to pursue a successful suit in court, lawyers of the case studies showcased sensitivity towards the interests and needs of the participants beyond the legal interests by identifying the value of an early settlement. Hence, based on ethical grounds rather than based on legal obligation, lawyers in the eight (08) case studies have advised their clients of the benefits of a potential 'out of court settlement' and reached out to the opposing counsel via telephone to collaborate and negotiate on an early settlement.

The interviews and observations made of the disputants during the litigation phase indicated that the participants showed reluctance to attend court hearings due to the unpredictability of the outcome (despite the hope of an early settlement) and the adversarial nature of the processes aggravated the emotions and stresses resulting from a broken relationship with the opposing party in court (who is either a family member or friend/acquaintance). The fact of reaching an 'out of court settlement' did, to a certain extent reduce the emotional tension. However, the interactions with the opposing party revealed that the participant still lacked confidence in engaging the opposing party in a progressive conversation without any suppressed feelings of anguish or antagonism.

The interviews and interactions of the disputants in the immediate post-litigation phase, revealed similar mental states as during pre-litigation and litigation phases with much aggravated mental stresses coupled with insecurities in not only interacting with the opposing party but more so in general about the incidents that led to a court battle due to lack of emotional closure. The emotions were one of bitterness against the opposing party, nervousness in interacting with such party even after the proceedings have come to an end, which is evident of the fact that there has in fact been no therapeutic impact on the participant and that the personal and social conflicts persist.

Disputants' satisfaction of the outcome of the case especially in regard to 'out of court settlement'

In the eight (08) cases that reached an 'out of court settlement', the disputants showed a sense of relief regarding the less time taken to conclude the case (than otherwise would be) and the related cost reduction. However, there was no direct communication between the disputants facilitated by a neutral third party such as a mediator. The participants felt anxious and fearful throughout the case, even after settlement of the case. There was only a sense of relief that the litigation came to an end and due to cost and time savings.

However as highlighted above, satisfaction as to the mental well-being of the disputant remained low, due to lack of confidence in interacting with the opposing party, which continued as a cause of stress as there seems to be unresolved matters of the heart.

The knowledge and awareness of private mediation of all parties involved in the cases

All eleven (11) cases depict lack of awareness on the part of the disputants, the lawyers and the judiciary of the beneficial use of private mediation at any stage of a court case, and of the ability to mediate a settlement more efficiently more so in a therapeutic manner. There was also a lack of trained mediators or mediation providers in Sri Lanka which is mainly due to the absence of a practice backed by legislative framework that allows local courts to make referrals to private mediations, together with a lack of regulatory body to train and provide on-going professional development to mediators within an established ethical & professional framework.

Hence, due to lack of knowledge of the benefits of professional mediation and the unavailability of known mediation practitioners or professionals, the disputants were not able to resolve their disputes in a therapeutic manner when they could have had an opportunity to heal their hurt and mend the relationships. The outcome of the study regarding the three attributes that formed the basis of the evaluation depict the negligible therapeutic impact on the disputants from an 'out of court settlement' within an adversarial set-up.

Conclusions

In light of the above findings, the paper argues for private or professional mediation to be accepted as part of the justice system and to be implemented within a framework of 'Therapeutic Justice' which is rooted in a vibrant mediation culture and ethics that take account of the psychological well-being of the disputants. Supported by the success stories of mediation as an effective method of dispute resolution in countries such as Singapore, China, Malaysia, the United State as well as in Australia and New Zealand[67], it is apt to bring to the forefront the discourse on justice reforms to lend therapeutic lenses to professional mediation with its capacity for healing humans in conflict. The eleven (11) court cases that formed the basis of a qualitative study depict the existing non-therapeutic impact on the disputants despite having reached 'out of court settlements' via direct negotiation of their lawyers. Notably, where often a prior relationship is the root of a court case, the study of the mental state of the litigants was observed to be heightened with emotions, such as anger, loss of identity, low self-esteem, resentment or stress as the adversarial system is geared towards aggravating such emotions and creating further strife leading to a total breakdown of relationships. The dispute resolution processes followed in the eleven (11) case studies, did not bring the disputants into direct or effective communication to explore their interests or in opening space for expression of emotions leading to potential healing. Both the lawyers and the disputants were unaware of any private

[67] Causton P, 'What different Systems of Mediation are there in countries around the World' (2022) promediate.co.uk

mediation to help them achieve not only an early settlement but also the possibility of healing their emotional stresses and mending relationships. The research provides evidence that the participants continued to have negative emotions surrounding the conflict during post litigation phase, depicting the need for therapeutic impact at a personal level with wider repercussions on the society. Thus time is ripe to recognise the value of 'Therapeutic Justice' and to incorporate its values into mediation culture and ethics as an effective method of resolving disputes in the current judicial set-up, which in fact can be used at any stage of a case, including pre-litigation, litigation and even post-litigation.

The findings of the absence of private mediation in the current judicial set-up highlights the potential role of therapeutic mediation to transform how parties relate to each other, healing and reconciliation of relationships, while stressing the mediator's role to create an environment in which the parties can engage in a transformative dialogue by articulating their feelings, needs, and interests and to recognize and acknowledge those of the other party'[68] . Against this background, therapeutic justice is placed as a pre-requisite which can well be introduced through private or professional mediation in Sri Lanka due to its therapeutic attributes and shared principles of party autonomy, procedural fairness and neutrality and other skills of mediators backed by a legal framework and a vibrant professional culture. The findings point to the need to elevate therapeutic justice as one of the primary considerations in the legal and judicial culture[69] and specifically to provide a basis to experiment the therapeutic impact of professional mediation in Sri Lanka throughout the life cycle of a case.

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