



## The Case for Therapeutic Justice by Integrating the Practice of Private Mediation in Sri Lanka Throughout the Life Cycle of a Case

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### Abstract

The concept of Therapeutic Justice focuses on the law's impact on the emotional and psychological well-being of the people, thus calls for therapeutic methods of resolving disputes against the negative effects of an adversarial setting. Eleven (11) cases litigated in Sri Lanka during the years 2021 to 2023 form the basis of an interpretive case research in a naturalistic setting that captures the complex emotional and psycho-social impact of the adversarial methods of dispute resolution on the disputants. Despite most such cases having achieved a so-called 'out of court settlement' through the collaboration of lawyers, the interactions between the disputants during the post litigation phase reveal persistent lack of confidence and distrust between the disputants as well as lack of therapeutic impact of 'out of court settlements'. Contextualised data was collected through observations and interviews of the participants in the court and from interactions with the lawyers. Using a thematic analysis, patterns emerged from the qualitative data directed towards the negligible therapeutic impact of 'out of court settlements' on the disputants and the potential use of private mediation as a therapeutic method of resolving disputes. The findings assume that Therapeutic Justice and mediation closely share attributes such as not only resolving underlying issues in a less-adversarial set-up but more importantly managing emotions, empowering litigants to actively participate in rehabilitating relationships, to achieve outcomes that benefit all parties through mediation. The findings highlight the need to adopt and experiment private mediation in Sri Lanka through court referrals throughout the life cycle of a case and of the corresponding need to set

up a vibrant mediation culture.

**Keywords:** Therapeutic Justice; Private Mediation; Emotional Intelligence; out-of-court settlement

### Introduction

At a time when private mediation is vibrantly practiced if not at least promoted in the world, time is ripe for judicial reforms in Sri Lanka to focus on private mediation for its people. The statistics of the Ministry of Justice reports that 1,122,113 cases are pending before the courts as at 31.12.2023<sup>1</sup>. Out of the case backlog, the bulk of cases (1,065,265) remain in the primary courts, District and Magistrates courts. The caseload speaks volumes of losses to the national economy by way of losing foreign direct investment but more importantly reflects on its undocumented and much ignored psycho-social impact on litigants and the society.

Therapeutic justice ('TJ') or therapeutic means of resolving disputes is a rather new term to the Sri Lankan legal fraternity, which suggests 'reforms to minimise the law's negative effects on well-being related goals such as achieving participatory justice, and it highlights the 'importance of management of emotions as well as a professional's interpersonal skills and emotional intelligence in dispute resolution'<sup>2</sup>. TJ

<sup>1</sup> Annual Performance Report of the Ministry of Justice of Sri Lanka, 2023

<sup>2</sup> 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, page 403

‘focuses on the law’s impact on emotional life and on psychological well-being, humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process’<sup>3</sup>.

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.<sup>4</sup>

Out of the mediation models, it has been argued that therapeutic or 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<sup>5</sup>.

The present study attempts to make a qualitative assessment of the need to adopt therapeutic methods of resolving disputes in the current judicial set-up in Sri Lanka by conducting a study of eleven (11) court cases to explore the therapeutic impact of resolving disputes on the disputants through the commonly known “out of court settlements”. Such “out of court settlement” in the Sri Lankan context would mean the practice of lawyers collaborating with the opposing counsel on behalf of their clients, thus consulting and advising clients towards a mediated settlement of the specific legal issues and reporting the settlement terms to court. Notably the process

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<sup>3</sup> D Wexler and B Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii (Carolina Academic Press, 1996)

<sup>4</sup> Douglas A. Van Epps, ‘Multi-Door Courthouse - Therapeutic Justice Adds to Prescriptions for Problems, 6 DISP. RESOL. MAG. 9 (Spring 2000)

<sup>5</sup> Nadja Marie Alexander, ‘The Mediation Metamodel: Understanding Practice Article in Conflict Resolution’ (2008) *Conflict Resolution Quarterly*

followed in the eleven (11) case studies, did not bring the disputants around one discussion table, hence there was no direct or effective communication between the disputants of their interests or expression of emotions. The study invokes an interpretive case study method to explore the disputants’ mental state and experiences throughout the life cycle of a case, especially with a focus on pre-litigation, litigation and post litigation phases and to make a qualitative assessment of the therapeutic impact of ‘out of court settlement’.

## Materials and Methods

A combination of research methodologies has been used in the present study mainly including doctrinal and qualitative methodologies to achieve the objectives of the study.

The concept of Therapeutic Justice and therapeutic attributes of mediation have been explored based on a literature review, while interpretive case study methodology was employed to observe the participants in their natural settings that enhanced the ecological validity of the study. The data collection tools used were mainly observational together with interviews that formed a part of an effective strategy. The researcher’s empathic neutrality, mindfulness-based insights formed an important part of the research enquiry to interpret 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’ interactions with the opposing party throughout the life cycle of a case during the years 2021 to 2023. The semi-structured interviews of the Participants were based on three (03) key attributes, namely the mental state of the participant in interacting with the opposing party in all three phases of a case, secondly the participants’ satisfaction of the outcome of the case especially regarding an actual/potential “out of court settlement” and thirdly of the use and awareness of private mediation.

During the research phase, data was collated as In-

interview transcripts, texts and documents as well as observational notes of the researcher. Thereafter summary of each participants' responses to semi-structured interview questionnaire and their narrations were produced in an excel sheet against each phase of litigation, namely pre-litigation (normally one or two months before filing action in court), litigation (the time lapse from commencement of proceedings until reporting of the 'out of court settlement'/verdict) and post litigation (within a lapse of one to three months, during which period formal court documents are filed and applied from court registries) for analysis and comparison purposes.

The semi-structured questionnaire consisted of three main parts. Firstly, regarding the participants' emotions when being present in court and when directly communicating with the opposing party. Secondly, the questionnaire captured their satisfaction level of the lawyer's role in bringing forth collaboration and the benefits of reaching an 'out of court settlement'. Third part of the questionnaire was to elicit the participants' knowledge on the use of private mediation in court cases.

Few quotes of the participant's interviews that depict the state of fear, distress and lack of trust to communicate and collaborate with the opposing side are given 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 heart-broken. 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 council 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 summary that was generated from triangulation (combining interviews with observations) gave rise to the patterns such as emotional insecurity in communicating with the opposing side and the breakdown of communications between the disputants not only during pre-litigation and litigation phases but more so during post litigation phase that was interpreted as having little therapeutic impact on the participants or their relationships from an 'out of court settlements'. The findings of the study have been arranged under three broader themes as discussed in the succeeding section.

## Results and Discussion

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 between spouses and of their children. 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.

Eight (08) cases reached "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 8 months.

**Table 1.** Case Study Summary

No		Court	Participant	Time taken to conclude	Outcome	Phase
1	Divorce	DC Nugegoda	Plaintiff (male)	6 months	"Out of court settlement"	Pre-litigation stage
2	Divorce	DC Kaduwela	Plaintiff (female)	4 months	"Out of court settlement"	Pre-litigation stage
3	Divorce	DC Homagama	Plaintiff (female)	7 months	"Out of court settlement"	Pre-litigation stage
4	Divorce	DC Colombo	Defendant (female)	5 months	"Out of court settlement"	Pre-litigation stage
5	Divorce	DC Moratuwa	Plaintiff (female)	7 months	"Out of court settlement"	Pre-litigation stage
6	Money Recovery	Colombo Commercial High court	Plaintiff (corporate)	2 years	At pre-trial stage the case was dismissed	No settlement
7	Divorce	DC Nugegoda	Defendant (female)	9 years	"Out of court settlement"	Litigation stage
8	Divorce	DC Nugegoda	Plaintiff (male)	2 years	"Out of court settlement"	Litigation stage
9	Testamentary	DC Colombo	Plaintiff (female)	2 years	On-going	No settlement
10	Divorce	DC Moratuwa	Plaintiff (female)	8 months	Ex-parte order	Unofficial 'Out of court settlement'
11	Arbitration	Institutional arbitration	Respondent (corporate)	3 + years	ongoing	No settlement & court like procedure

The majority of Eight (08) cases that achieved "out of court settlements" depict the important role played by the lawyers representing their clients in bringing about a mutually agreed settlement during the pre-litigation and litigation stages. However, the researcher continued to observe the participants and their interactions with the ex-spouse/ex-partner for about three months period during post litigation. The qualitative assessment of the findings of the study with special focus on post-litigation phase are summed up under three (03) headings pursuant to thematic analysis methodology.

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 distress 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 lit-

tle 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 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 administration of justice.

### Emergent Themes

1. 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 their interactions with the lawyers during initial consultation stages. 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 case in court, lawyers in case studies showcased sensitivity towards the interests and needs of the participants by identifying the value of an early settlement. Hence, based on ethical grounds rather than based on legal obligation, lawyers in all the case studies have advised the participant of the benefits of a potential 'out of court settlement' and reached out to the opposing counsel, usually via a telephone call to collaborate 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 that added up to the emotional 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 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 a 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 at an individual level and the personal conflicts persist.

2. 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 savings.

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

3. 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 in 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 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'.



## Conclusion

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<sup>6</sup>. Against this background, therapeutic justice is placed as a prerequisite which can well be introduced through private mediation due to its therapeutic attributes backed by a legal framework and vibrant professional culture.

The findings point to the need to prioritise therapeutic justice as part of the legal and judicial culture<sup>7</sup> and specifically to provide a basis to experiment private mediation throughout the life cycle of a case in Sri Lanka.

## Reference

- Alexander, N.M., 'The Mediation Metamodel: Understanding Practice' (2008) *Conflict Resolution Quarterly* <https://www.researchgate.net/publication/43500735>.
- Annual Performance Report of the Ministry of Justice of Sri Lanka, 2023.
- Astor, H., *Quality in Court-Connected Mediation Programs: An Issues Paper* (The Australasian Institute of Judicial Administration, 2001) <https://aija.org.au/publications/quality-in-court-connected-mediation-programs-an-issues-paper/>.
- Epps, D.A.V., 'Multi-Door Courthouse - Therapeutic
- 
- The Mediation Metamodel: Understanding Practice Article in Conflict Resolution Quarterly · June 2008, DOI: 10.1002/crq.225, [https://www.researchgate.net/publication/43500735\\_The\\_Mediation\\_Metamodel\\_Understanding\\_Practice](https://www.researchgate.net/publication/43500735_The_Mediation_Metamodel_Understanding_Practice)
- Justice Adds to Prescriptions for Problems' (2000) 6 *Dispute Resolution Magazine* 9.
- King, M.S., 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.
- Marder, I.D. and Wexler, D.B., 'Mainstreaming Restorative Justice and Therapeutic Jurisprudence through Higher Education' (2021) 50 *University of Baltimore Law Review* 399.
- McHugh, M., 'Mediation and Negotiation in Legal Disputes' (2021) 31(2) *Australasian Dispute Resolution Journal* 104-113.
- Mediation Boards Act 1988, No. 72 (LK).
- Schopp, R.F., 'Integrating Restorative Justice and Therapeutic Jurisprudence' (1998) 67 *Revista Jurídica de la Universidad de Puerto Rico* 665.
- Town, M.A., 'Court as Convener and Provider of Therapeutic Justice' (1998) 67 *Revista Jurídica de la Universidad de Puerto Rico* 671.
- Welbourne, P., 'Adversarial Courts, Therapeutic Justice and Protecting Children in the Family Justice System' (2016) 28 *Child & Family Law Quarterly* 205.
- Wexler, D.B., 'Therapeutic Justice' (1972) 57 *Minnesota Law Review* 289.
- Michael A. Town, 'Court as Convener and Provider of Therapeutic Justice' (1998) 67 REV. JUR.U.P.R. 671 (1998) Pg 671