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REVIEW ARTICLE

Amicable settlement between the disputed parties in a criminal matter: an appraisal of mediation as a method of alternative dispute resolution with special reference to Sri Lanka#

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Abstract: The system of victim-offender mediation presently in force in Sri Lanka provides the parties to bring their dispute to amicable settlement. Mediation operates as an alternative form of dispute resolution parallel to the formal adjudicatory system. Today, mediation is governed by the Mediation Boards Act No. 72 of 1988 which contains some new theories and practices. However, the history of Sri Lanka provides evidence of the existence of mediation as a form of dispute resolution even in criminal matters. Therefore, a question arises whether the amicable settlement of criminal disputes and removal of the causes of the dispute through restoring the relationship of the disputed parties is a new concept. Further, there are some concerns and issues relating to the present Act as to whether it has successfully achieved the idea of amicable settlement and restoring the relationship of the disputants in all criminal cases. This paper looks at mediation as a form of an additional dispute settlement and the issues associated with the process of mediation in Sri Lanka in jurisprudential point of view in order to test the following hypothesis; the present law relating to mediation is deviating from the original idea of amicable settlement of a criminal matter. Relevant information from books, treaties, statues, journal articles and websites are analysed as secondary sources and information and statistics gathered by relevant authorities are used as primary sources to complete the analysis.

Keywords: Amicable settlement, alternative dispute resolution, criminal cases, mediation, Sri Lanka.

INTRODUCTION

The victim-offender mediation presently in force in Sri Lanka aims at amicable settlement between them and reaching a mutually acceptable solution. This process operates as an alternative dispute resolution parallel to the formal adjudicatory system. Although, the contemporary mediation process demonstrates the incorporation of recent western concepts, when exploring the legal history of Sri Lanka, it is evident that mediation is a system adopted for dispute resolution with a long history which goes back to 523 BCE. Therefore, it is reasonable to argue that mediation is an age old dispute resolution mechanism based on traditional norms and values in Sri Lanka (Gunawardana, 2012). However, there is a doubt as to whether the Mediation Boards Act No. 72 of 1988, which governs mediation today, really succeeded in achieving its main goal of amicable settlement through restoring the relationship between the disputed parties in a criminal matter. This study examines the merits and demerits of today's mediation process as a form of alternative dispute resolution mechanism in criminal cases while discussing main features of alternative dispute resolution, mediation as a method of additional dispute resolution and its evolution with a critical evaluation of mediation in contemporary Sri Lanka. The study tests whether the present law relating to mediation deviates from the original idea of amicable settlement in a criminal matter.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

The term 'Alternative Dispute Resolution' (ADR) means a variety of dispute resolution mechanisms that are used as alternatives to the formal court process, where the disputants are encouraged to negotiate directly with each other. ADR methods encourage the parties to come to mutual agreement which allows a win-win situation for the disputed parties rather than winner-take-all, as in formal adjudicatory process. It increases accessibility to justice due to low cost and non-application of rules of evidence. It also emphasises improving efficiency and

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reducing court delay. The underlying core principles of ADR, such as a speedy process for mutual agreement between the parties, assistance of a neutral third party for reaching an agreement between the victim and offender, and maintaining confidentiality at the highest level have made ARD more confident and popular among the general public. In other words, the growing importance of ADR mechanisms is fuelled by the significant advantages that such mechanisms offer compared to the court process, such as speed, confidentiality, low cost, the possibility of defining the dispute and the procedure, as well as the invovement of an expert/ neutral third party in the matter concerned. ADR methods also generate a better understanding between the rival parties in the search for a resolution to a given dispute. ARD methods make it possible for the parties to reach agreements based on their common interests, resulting in an outcome that, as far as possible, allows the parties to put aside their differences. Therefore, these mechanisms can be defined or recognised as legal instruments designed to build agreements in any type of dispute between the parties, through means other than formal litigation. Such means may involve the intervention of a third party, expected to facilitate, in a neutral manner, in the negotiation process. ADR methods could be generally categorised as negotiation, conciliation/mediation or arbitration. These methods are applied in resolving both civil and criminal disputes.

MEDIATION AS A FORM OF ADR

Mediation is a unique alternative dispute resolution process which functions as an extrajudicial procedure that fits both civil and criminal disputes. It is a process in which an impartial third party called 'mediator' actively assists the communication and negotiation and promotes a common decision making by the parties in dispute through voluntary agreement (Honeyman and Yawanarajah, 2003). Mediation process depends on the willingness of the parties to reach a voluntary agreement which is called 'amicable settlement'. In some judicial systems it is compulsory for the litigants to follow the mediation process, prior to the formal litigation, irrespective of the nature of the lawsuit (whether it is civil or criminal). This study is limited to mediation in criminal matters.

In this process, mediator may use techniques to assist disputed parties to negotiate an agreement on a matter of common interest. The mediator invites the parties to take part in a 'brainstorming' session and thus to collect as many proposals as possible in order to find possible solutions to benefit both the victim and the offender. The mediator does not have the authority to decide or rule on a settlement (Bush and Folger, 1994). In other words the neutral third party is ethically bound not to impose an outcome or decision on the disputing parties. Due to the above characteristics, mediation is recognised as a non-binding informal process in settling disputes.

Positive features and motives driving mediation

As far as a criminal behaviour is concerned, it is a conflict between individuals, but its consequences not only concern the person who is the main victim, but also the society as a whole. Therefore, justice should demonstrate its ability to re-establish a positive relationship between the defendant and crime victim and in the society as a whole. The consequences of criminal acts leave traces, not only in victims, but also in perpetrators who need to abandon their antisocial behaviour and be reformed. In that context, mediation is one of the tools that help in restorative justice, aiming at the reintegration of both the victim and offender. The strategy adopted to achieve the above objective is making both victim and perpetrator responsible for improving relationship between them through repairing the physical, material and psychological losses resulted from the crime. This is clearly demonstrated in the mediation process. Therefore, it is not wrong to state that the victim and the offender and restorative justice are inseparable elements of a model that settles disputes.

Mediation provides certain benefits to parties in a dispute. Victim has an opportunity to confront the offender which does not exist in the normal court process. The offender has to undergo a punishment if the offence is proven beyond any reasonable doubt. The belief that a punishment imposed on an offender in a criminal case will bring about some kind of peace of mind to the victim is unfounded. Due to the difficulty in meeting the requirements of this heavy burden of proof, many criminal cases are concluded without proving the case. Therefore, satisfaction of getting revenge is also unfounded in many cases. Revenge does not restore the losses of victims, relieve fear or help to make sense of a tragedy. Further, being able to forgive someone who has caused harm provides a sense of healing to the victim of a crime. One way to meet these needs is confrontation with the offender and this is the type of justice that mediation can facilitate. Further, it is incorrect to assume that the benefits of meditation are limited only to the victims. Offenders are also given the opportunity to truly face the situation and make it right through repairing the harm caused by the crime. Retaining a degree of control enables offenders to

take responsibility of their action in a unique way. This supports them to wash off the guilt and label associated with their crime. Restorative justice promotes active participation of all parties in the mediation process.

Mediation involves a concept of popular justice viewed as a system or process that is locally grounded, non-professional, low-cost, procedurally informal and where decisions are made according to the social norms (Merry and Milner, 1993). As Tiruchelvam (1984) argues, popular justice process is a state institutionalised mechanism for conflict resolution which consists of ordinary persons who do not have expertise or special training in law. According to Santos (1982), popular justice is characterised by popular sovereignty, direct administration by people, the capacity of judges autonomously to exercise social power, a minimum level of institutionalisation and bureaucratisation, non-professional justice and little specialisation. It applies local standards, rules and common-sense forms of reasoning rather than strict laws. These characteristics provide a flexible way of participating in the process which can be identified as a win-win situation for both parties. Therefore, it is conceptualised as more natural than established laws and form of rules opposed to state laws. Since the process uses the existing social norms, it contributes to social transformation (Merry and Milner, 1993). The decision given under popular justice is relatively conciliatory and consensual rather that an imposition.

Furthermore, receiving true forgiveness for a criminal act is one aspect of mediation which is absent in traditional criminal proceedings. This may help reduce crime. These positive features of mediation enable people towards resolving their disputes including criminal matters through this process.

In judicial practice, compensation for victims is not possible except in a few cases. According to section 17 of Code of Criminal Procedure Act No. 15 of 1979, awarding a compensation is purely based on the discretion of the court. After the amendment introduced to the Penal Code No. 22 of 1995, rape victims are awarded compensation in addition to the mandatory punishment, imprisonment and fine. However, the mediation process differs from the ordinary criminal procedure and allows the victim and offender to resolve the matter by compensating the victim. Moreover, it maintains the social harmony, preventing people seeking justice through a cumbersome, long and rigid process. These positive features are more or less evident in the long-established mediation processes in Sri Lanka.

HISTORICAL BACKGROUND OF MEDIATION PROCESS IN SRI LANKA

For the purpose of this study, the history of the mediation process in Sri Lanka will be scrutinised in five main periods in their chronological order, namely: the period before Monarchy, the period of Monarchy, the period under European colonisation, period from 1948 to 1988 and period from 1988 to date.

Mediation in the period before Monarchy

Mahavamsa (Mahawansa), the oldest chronicle in Sri Lanka[1], recorded a meditation by Lord Buddha in a dispute in the country. During this period the inhabitants of Sri Lanka consisted of tribes (clans) identified as *Yakkhas, Nagaas, Devaas* and *Rakksas*[2]. In this period it was believed that the best way of resolving disputes was through moral persuasion and agreement or compromise rather than coercion. There was no difference between criminal and civil matters as today and all disputes were settled as private matters between the offender and victim. Victims of crime were restituted for the loss suffered due to the crime committed by the offender or victims were compensated for the injuries that occurred from the crime. The restitution or compensation was borne by the offender with the expiation in order to re-establish the social harmony disrupted by him by committing the offence. Justice A. R. B. Amarasinghe, advocated this idea in his book *The Legal Heritage of Sri Lanka,* stating expiation as one of the main purposes of punishment that can be achieved by making the offender repair the harm or damage caused by the offence committed by him. For instance, where a person had caused physical injury to another, he may have been required to pay compensation to the victim; in case of robbery, the offender was required to give back the goods (restitution) to the owner. One of the main features of the said process was that the rival parties come to a final decision with an agreement (amicable settlement), to repair the harm done reached before an impartial third party or in other words, facilitator, which was very much similar to present day mediation.

Sri Lanka records one of the earliest instances of mediation by an impartial third party; a mediator (facilitator). This happened during the second visit of Lord Buddha in the fifth year of the Enlightenment in 5 B.E. or 523 BCE. Two *Nagaas,* Chulodhara and Mahodhara (uncle and nephew) had a dispute regarding the ownership of a Jewelled Throne. Chulodara with his followers were about to go to a war against Mahodara and his followers over the said dispute in *Nagadeepa*. Upon receipt of the information from Sumanasaman

deity, Lord Buddha is said to have visited Lanka to meet the two rival fractions of *Nagaa* tribe (clan). According to *Mahavamsa,* Lord Buddha had initially inquired from the disputing parties about the dispute and whether they wished that he facilitates (mediates) to resolve the dispute and come to a solution. Initially, the rival *Nagaa* parties did not want to listen to Lord Buddha. They, however, changed their mind after Lord Buddha performed a miracle and created darkness. On receiving the consent of the disputants for his intervention, Lord Buddha engaged the two rival parties in a process of mediation by providing them all possible opportunities to discuss the problem and to find a solution that both parties agreed to and accepted. Lord Buddha was successful in resolving the dispute and both parties jointly decided to hand over the custody of the Jewelled Throne to the *Nagaa* King Maniakkhika of *Kelaniya,* to gift it to Lord Budddha. Lord Buddha's participation as a neutral facilitator/mediator in resolving a dispute, demonstrates that mediation has a long history in Sri Lanka.

Mediation during the period of Monarchies

This period stretches from the 6th century BCE to the 16th century CE. During the 6th century BCE, the Indian Prince Vijaya reportedly landed in Lanka with his seven hundred followers. The Prince and his followers established a new kingdom and Vijaya became the first king in this kingdom.

In ancient Lanka, the king was the source of law, the fountain of justice and he exercised absolute authority subject to *Dhamma* and *Vyavahara.* Every man had a right to come before the king (Hayley, 1975) to obtain justice. However, his authority was delegated to his officials corresponding to their executive duties. State officials such as *Vidane, Korala, Mohottala, Disawa*, and *Adigars (Adikaram)* had judicial power over both civil and criminal matters within the ambit of their administrative positions. Among these officials *Vidane* had the least judicial power limited only to the village. He was the headman of the village. *Korala* had the judicial power over the area called *Korale* which comprised of several villages. *Mohottala* had the judicial power over the area called *Patthuwa* which comprised few *Korales*. *Disawa* had the judicial power over the district which comprised a number of *Patthuwas* and *Adigars* had the judicial power over the province which comprised of two to three districts. Appeals were possible from *Vidane* to *Adigar.* Since the king was considered to be the source of all justice, in each case there was a right of appeal to the next superior officer which extended to the king (Tambiah, 1977). With regard to the criminal justice system during monarchical period, it had a hierarchy of courts from village to provincial level where the king occupied the uppermost level. It was possible to appeal from the lowest court to the king as the top of the hierarchy of court systems then existed. Courts of law such as *Gansabhawa, Saakki Ballanta* and *Mahanaduwa* had the jurisdiction to hear criminal cases (Geiger, 1960).

There is no evidence that a system courts of law (formal mechanism of administration of justice) existed in pre-Vijaya era. The Great King Panndukabhaya (425 BCE), the first Sinhalese King of Ceylon, established the village boundaries over the whole Island of Lanka. A Village Council was established in each village to administer local affairs independently. This Council had the power to address people's grievances and to hear the complaints and deliver justice to local people (De Zoysa, 2006) by settling their minor disputes. This Village Council was known as *Gom Sabbi*[3] *(Mahawansaya* X, 103 Gei. 75 in Hayley, 1975) which was later named as *Gansabhhawa.* Each Village Council was composed of experienced and respected elders presided over by the local village Head-Man (*Vidane)*. They met at *Ambalam* (resting place) or under a shady tree regularly. The villagers were free to come to these meetings and present their disputes to the members of the council. According to Sir John D'Oyly (1975), these councils had both civil and criminal jurisdiction in boundary disputes, petty debts and petty offences. The council atteneded to complaints made by the villagers and settle them (Knox, 1979). Therefore, this Village Council performed as (the lowest) court in the administration of justice. However, obeying the final decision was not mandatory (De Silva, 1958).

Providing justice without any legal cost is an exceptional feature of this council. The institution of *Gamsabhawa* had the mandate to maintain peace and harmony at village level by facilitating the amicable settlement between the disputants if possible. Its role was to direct the disputing parties more towards conciliation (Knox, 1979). The members of *Gamsabhawa* who played a meditating and peacekeeping role, facilitated the disputing parties to come to their own solution with friendly agreement. Therefore, it can be said that *Gamsabhawa* played a dual role as a court of law and a mediation body. The history of this institution dates back to the reign of ancient Sinhala kings and *Gamsabhawa* existed until middle of the 19th century.

Mediation process under European colonisation

The Portuguese arrived in Ceylon in 1505 CE. They started to rule the maritime provinces of the country since 1505, did not come with a formalised judicial system and continued to use the system that existed then (Cooray,

1971). Also they did not make changes to the traditional judicial order during their period (1505 - 1658). However, by the *Malwana* Convention of 1597, a Tribunal and a Supreme Tribunal (General's Court) were established to investigate ordinary suits (minor offences) and serious offences. By the same Convention the Portuguese agreed to administer the laws of the Sinhalese in the coastal areas under their rule (Tambiah, 1977). Therefore the *Gamsabhawa* continued to function during the period of Portuguese colonisation.

The Dutch ruled the maritime provinces from 1656 to 1796 and introduced the Roman Dutch Law to Ceylon. They set up a significant system of courts. Over and above the existing tribunals conducted by the headmen, Justice was administered in three types of Courts; namely, *Radd van Justitie* (the High Court of Justice), *Land Raden* (District Court) and *Civiele Raden* (Town Court) (Nadaraja, 1972; Cooray, 1971; Tambiah, 1975). Each court was constituted according to certain rules and for the convenience of the practice of law, a clear distinction was made between civil matters and criminal matters. The judicial functions of the headmen in *Gamsabhawa* were reorganised by the Dutch rulers. They issued orders by means of Placcaats stating (Placcaat issued in 1744) that the natives (Sinahelese, Tamils and Muslims) should go to the judicial institution presided over by village headman, in the first instance. Further it stated that no inhabitant could by-pass the village headman to place his/her complaint in a higher tribunal which was introduced by the Dutch (De Silva, 1958; De Silva *et al.,* 1996). This institute provided an accessible, simple, inexpensive process without much delay to settle disputes amicably and to sustain the village solidarity. Accordingly, the complainant should submit his or her complaint to the village headman first. Then the headman had to examine the complaint carefully in the presence of elders and other nobles of the village after summoning all parties at the dispute. Parties were given an opportunity and they were encouraged to come to an agreement by actively participating in the discussion. The agreement was pronounced as the decision. It is significant to note that the disputants were not deprived of appealing to a higher judicial institution against the decision pronounced by *Gamsabhawa*. Therefore, it is not wrong to state that the Dutch rulers did not wish to eliminate *Gamsabhawa* from their system identifying it as an obstruction towards effective administration of justice in the colony. As Goonasekera (1958) claimed removing *Gamsabhawa* from the administration of criminal justice was a matter which was largely unrelated to their main interests; trade and military.

The British occupation of Ceylon started in 1796 CE. They captured all parts of the maritime provinces, which were under Dutch power. By introducing a number of reforms to the Dutch Law which was operating in the maritime provinces the British developed the administration of justice [*Queen* vs. *John Mendis* (1883) 5 SCC 180 – 187]. However, they implemented Roman Dutch Law in all civil and criminal matters in the first three years up to 1799. The entire Island came under the British Empire in 1815 CE, marking the end of Dutch rule in maritime provinces and indigenous rule in central Sri Lanka.

British rulers issued several proclamations to reform the existing administration of justice at the time. Introduction of a uniform system of justice, by the Proclamation of March 23rd 1826 and formation of a uniform system of law throughout the Island, by the Charter of 1833 significantly affected the *Gamsabhawa* (Kotelawele, 1995; Mendis, 1956). The Charter of 1833 was issued on the recommendation of the of the Royal Commissioners, Charles Hay Cameron and Colonel William Colebrooke report. By the 1833 Charter of Justice, significant structural and organisational changes were introduced to the administration of justice. All previous Charters issued from time to time prior to 1833 were repealed by this Charter of Justice. A totally new judicial administration system, which was aligned with then existed United Kingdom model, was established as a result of the promulgation of this new Charter. In the new hierarchy of the administration of justice system, a Supreme Court of the Island was established at the top of the new system and District Courts at the district level at the base.

The Supreme Court was vested with the original jurisdiction of major criminal matters throughout the island and appellate jurisdiction of the District Courts. The Supreme Court was to hold Criminal and Civil Sessions separately on circuit. However, the long established *Gamsabhawa* and its community-based procedure were secured even under the newly introduced system. Clause 4 of the Charter stated that nothing contained in the Charter shall be construed to extend, to prevent persons from submitting their differences to the arbitration of certain assemblies of the inhabitants of villages, known in the Island by the name of '*Gansabes'* (Kodagoda, 2003). This provision clearly indicates that the British rulers appreciated the nature and characteristics of *Gamsabhawa* and its service to the community in the amicable/friendly agreeable settlement of disputes. It is significant to note here that the terminology (arbitration) used in the Charter to describe the local mechanism of dispute resolution implies that there was no such mediation process adopted in the (well structured) administration of justice system in 1833 in the United Kingdom. Therefore, it is correct to state that mediation

is a locally originated concept based on our own traditions and norms which provides the disputing parties to come to a mutually agreeable solution. The judicial system introduced in 1833 and subsequent changes made to the administration of justice along with village level socio, economic, cultural and political changes, *Gamsabhawa* gradually became less attractive and effective and finally it disappeared from the system. Later, especially during the period from 1850 to 1870, the British Governors such as Sir Colin Campbell (1841 - 1846), Sir Henry Ward (1850 - 1860) and Sir Herculus Robinson (1865 - 1871) noted that the British legal institutions had failed to provide cheap and expeditious justice but enhanced perjury among the natives. They pointed out the advantages of *Gamsabhawa* in dispute resolution among inhabitants and the necessity of resurrection of the age-old *Gamsabhawa* to the contemporary legal system. As a result of the report by Sir Herculus Robinson, the British rulers re-established *Gamsabhawa* in the form of Village Tribunals in 1871 under the Village Communities Ordinance No. 26 of 1871. A Village Tribunal established in a village or a group of villages with a President appointed by the Governor and five other Councillors chosen from the natives of the relevant village/s who satisfied certain criteria such as wealth, knowledge of law and administrative capabilities. Members of this body were empowered to decide (summarily) all petty civil and criminal disputes up to the value of £ 2 (De Silva, 2003). According to the Ordinance, it was the duty of the Village Tribunals, to bring the parties in a dispute to an amicable settlement and facilitate to remove the real cause of the dispute between them with their consent, when a litigant brings a problem before the Village Tribunal. Refutation of legal representation was retained. The Village Tribunals existed until the Rural Courts Ordinance became law in 1945.

The Rural Courts Ordinance No. 12 of 1945 was passed by the Parliament. These courts functioned as courts at first instance. These courts were considered as independent people's courts which had the power to settle both civil and criminal (minor) matters (Goonasekera, 1958). They handled local problems through compromise and conciliation. Under this Ordinance the President of the Rural Court began to function alone. Although there was no such native community representation in the panel, the Ordinance sought to continue with the essential feature of these courts by conserving its main function, namely, to effect amicable settlements of dispute in rural society. The main purpose of the Ordinance was to encourage the amicable settlement of petty village disputes and to avoid cost and time in litigation. Approximately, one tenth of criminal disputes brought before the rural courts had been successfully settled. Rural Courts existed till the Administration of Justice Law was enacted in 1973.

Mediation in post-independence era with special reference to the period from 1948 to 1988

Sri Lanka gained independence in 1948. Some years after independence a necessity to establish a mechanism for dispute resolution out-side the normal adjudicatory framework arose. In 1958 the Conciliation Boards were introduced by an Act of Parliament; Conciliation Boards Act No. 10 of 1958 which was subsequently amended by the Act No. 12 of 1963. Conciliation Boards Act No. 10 of 1958 was the first statutory framework for community-based dispute resolution after the independence (De Zoysa, 2006).

These Reconciliation Boards were established as a part of a rural development programme (Tiruchelvam, 1984; Marasinghe, 1980). Originally these Boards consisted of three or four officers from the Rural Development Societies, educated elite and the village headmen. Then Minister of Justice became concerned about the limited access to justice for the poor, need for legal aid and demand for more responsive courts and these Boards were established nationwide (Tiruchelvam,1984). A Conciliation Board consisted of a panel of at least twelve members determined by the Minister of Justice for a designated geographical area known as Conciliation Board area. The chairman of the Board was also appointed by the Minister of Justice. Any public officer who resides in a particular Conciliation Board area could be appointed as a member of the Panel of Conciliators for that Conciliation Board area (section 3). Under the Act, the Chairman had the authority to select at least three members to constitute a Conciliation Board to conduct an inquiry regarding a dispute under consideration (civil or offences described in section 6). With regard to criminal offences, the Board had the legal authority to settle a range of criminal offences mentioned in the schedule of the Act. These offences were basically minor and mid level criminal offences such as causing hurt and theft. The purpose of the Act was to make every effort to induce the parties to settle their dispute through a mutual agreement and to avoid the applicability of rules of evidence and procedure in a formal litigation. People were required to submit their problems to the Conciliation Board before they go to a court. The Boards were empowered to impose sanctions on people who disregarded the summons issued by the Conciliation Board to attend to the inquiries, or who did not produce the relevant documents to the Board, or who were in any way disrespectful to the Board (Tiruchelvam,

1984). Although, these Boards were popular among the ordinary people, some factors; such as poor skills of conciliators, abuse of the discretionary power vested in them, deviating the main objective of the Act by forcing the disputing parties to come to settlement, (Goonasekera and Metzger, 1971) led to decrease in public confidence in the institution. Therefore, in 1978, all Conciliation Boards in existence were dissolved and the Conciliation Boards Act was repealed by the Judicature Act No. 02 of 1978 (Valters, 2013).

During the period from 1978 to 1988, no ADR method was used in settling criminal or civil disputes. The normal process of administration of justice was the only means of intervention. Some of the defects in the justice system such as delay in the conclusion of cases, cost that the litigants had to bear, difficulties in access to justice generated a public opinion that the system of administration of justice in place was not effective. Therefore, the policymakers were compelled to find new solutions to these problems and alternatives that provided justice to people who accepted it with required confidence.

Contemporary mediation process

In 1988 a statute was passed in order to address bottlenecks in delivery of justice effectively and efficiently. The Parliament passed the Mediation Board Act No. 72 of 1988, establishing the Mediation Board system. The objective of the new Act is to provide people a cost effective and expeditious mechanism of dispute settlement outside the courts. The mediation programme operating at present commenced in 1988.

Under this Act, the first Mediation Boards in Sri Lanka were established in 1990. Today the Mediation Boards are under the administration of the Ministry of Justice. The Ministry is currently responsible for direct administration of the Mediation Boards programmes along with mediator training and performance monitoring. Currently there are more than 300 community Mediation Boards operating across Sri Lanka. There are over 7,000 mediators handling an average of 112,000 cases each year, approximately. Information gathered from Ministry of Justice reveals that, at the beginning of the programme, the Mediation Boards had more than 2 million cases, both civil and criminal, and over 50% of them have been successfully settled and the settlement ranges from 53% to 60% of cases during the last 15 years (Gunawardana, 2012).

A project conducted to measure the efficiency of the mediation programme found that from 1990 to 1998, approximately 525,000 disputes (including civil and criminal) were referred to the Mediation Boards all over the Island, except North and East. The study found that of these disputes, approximately 325,000 disputes were successfully resolved making a settlement rate of 64%. According to the Mediation Boards Commission reports, published by the Mediation Boards Commission during the period from 1991 to 2000, the Mediation Board received 900,151 disputes (both civil and criminal) and settled 497,371 disputes in a ratio of 55.25%.

Table 1 reveals that from year 2001 to 2006 the settlement ratio of each year has exceeded 50%.

Table 1: The settlement ratio of mediation in Sri Lanka from 2001-2006

Year	Total number of disputes received	Number of disputes settled	Percentage of the settlement ratio
2001	117200	61935	53%
2002	109863	55213	50%
2003	95066	56572	60%
2004	122065	61825	50%
2005	108965	55384	51%
2006	69857	36522	52%

Source: Mediation Boards Commission Reports (2001-2006)

However, it should be stated that the popularity of Mediation Boards slowly reduced after 2006 and only a lesser number of cases were referred to them.

Though there are slight differences in the statistics presented by the various projects conducted to evaluate the service provided by the mediation process, it may be stated that mediation process has been quite successful in Sri Lanka. However, none of the assessment reports carry statistics relating to the criminal matters referred to mediation and the ratio of criminal cases settled amicably.

The Mediation Commission exists at the apex of the mediation system. The Mediation Commission consists of five persons appointed by the President of Sri Lanka. At least three members of the Mediation Commission should be selected from persons who have held judicial office in the Supreme Court or the Court of Appeal in Sri Lanka. The President should nominate one of the three members who held judicial office as the Chairman of the Mediation Commission (Section 2.1). As section 3 of the Act stipulates, the functions of the Mediation Commission are to appoint, transfer, dismiss and exercise disciplinary control over mediators, supervise and ensure the effective performance and discharge of duties by mediators and issue necessary directions to mediators. Though the appointments are made by the

uppermost political authority in the country, the criteria established by the Act in relation to the appointments attempts to reduce political favouritism. Therefore, it is reasonable to state that the Mediation Commission is an independent body whose functions are free from political or administrative influences.

The Minister of Justice has the power to specify the Mediation Board areas to which the provisions of the Act should apply (section 4). The Mediation Commission has been empowered by the Act to appoint a Chairman and a Panel of Mediators per each such Mediation Board. A panel of twelve to forty mediators is appointed to each Mediation Board. A specific Mediation Board consists of three mediators selected from the local panel based on the preference of the disputants. In order to ensure total independence, the mediators from a given board must be nominated by a religious dignitary, a head of school, the chairperson of the mediation boards or a government official. The criteria for selecting them are that they should be respected community members including teachers, surveyors, engineers, government servants, clergy and native physicians who reside in that community and that they should possess the necessary skills to be a successful mediator (section 5 along with the First Schedule of the Act).

Mediation Boards possess both criminal and civil jurisdiction. The criminal jurisdiction consists of a range of criminal offences. Criminal offences that are required to be mandatorily referred to Mediation Boards are stipulates in the present Act. The Act sets out the offences with reference to the Penal Code sections. Those offences and sections are as follows: affray (sections 156, 157 of the Penal Code), causing hurt including grievous hurt on provocation, causing hurt by an act which endangers life, causing grievous hurt by an act which endangers life or the personal safety of others (sections 314, 315, 316, 323, 325, 326, 329 of the Penal Code), wrongful restraint or unlawful confinement (sections 332, 333 of the Penal Code), assault, criminal force or force, (sections 343, 346, 348, 349 of the Penal Code), dishonest misappropriation of property where the loss is to a private person (section 386 of the Penal Code), mischief when the loss is caused to a private person (sections 409, 410 of the Penal Code), mischief where the loss is to a private person (sections 411 , 412 of the Penal Code), criminal trespass (section 433 of the Penal Code), house trespass (section 434 of the Penal Code), printing or engraving matter known to be deformation or sale of printed or engraved substance containing defamatory matter (sections 481, 482 of the Penal code), insult (section 484 of the Penal Code) and criminal intimidation (section 486 of the Penal Code). With regard to the specific criminal offences prescribed in other statutes, the possibility of mediation should be stipulated in the particular Act.

According to the present Act, mediation is permitted only for minor and mid criminal offences. There is a substantial hesitation among the Sri Lankan policymakers in taking mediation into the realm of serious crimes, including sexual offences. The main argument against the extension of mediation to sexual offences (rape, sexual abuse and incest) is rooted in the concern for the victim and potential for re-victimisation. Another argument against mediation in serious crimes including sexual offences is that it is loosing the voluntariness of the victims and has a negative impact on social stability. According to the criminal law of Sri Lanka, repentance, whether or not through mediation, can be considered by the court in plea bargaining and exercising their sentence discretion. Mediation gains its success by solving the problem of compensating, especially the economic loss of the victim. Sometimes the offender likes to go for mediation, to get away from the punishment by merely paying money to the victim without any repentance/ remorse where the rehabilitation of the offender or their reintegration cannot be achieved. Therefore, in serious crimes, especially in sexual crimes, the basis for the legitimacy of such compensation defeats the purposes of restorative justice and finally the social values of the society seriously. Further, the victim's party may have to accept mediation merely because of its financial attraction. Under such circumstances mediation loses the minimum bottom line of 'voluntariness'. However, it is significant to note that according to the present Act, the disputes which cannot be mandatorily referred for mediation can also be referred for mediation if the parties are willing to do so. But this interpretation should be understood subject to the section 7 of the Act.

Accordingly, if one disputing party is the State, where the particular dispute relates to the recovery of any property, money or other dues on behalf of the State or where the Attorney General has instituted proceedings for any offence, such disputes cannot be referred for mediation even with the consent of the parties (section 7). Therefore, criminal matters which could be referred for mediation with the consent is confined to the summary offences prescribed in the Penal Code and other specific statutes.

The Act permits any person (other than the parties involved in a dispute) to make an application for seeking mediation for a dispute. Therefore, a person who has no personal or official interest also can make an application to a Mediation Board and it would be a deviation from the original idea of amicable settlement between the disputing parties. In practice the Officer-

in-Charge of a particular police station which conducts the corresponding investigation, makes such application seeking the intervention of the Mediation Board frequently.

According to the Act when a dispute or offence is referred to the Board[4], the Board should take all lawful means to bring the disputants to an amicable settlement, to remove real root cause of the conflict, to identify their needs and interests with their consent and to find a solution accepted by the both parties in order to prevent a recurrence of the dispute[5]. Further, the Board should convene as many mediation conferences as necessary to arrive at a settlement (section 10). Also the Board has a duty to complete its proceedings within thirty days of registering a dispute. In the event of failure to do so, the Board should issue a certificate of non-settlement in the prescribed form signed by the Chief Mediator stating that it has not been possible to settle a dispute through mediation process (sections 10, 13).

Prior to 1997, Mediation Boards did not have any authority to compel parties to attend to the mediation conferences/meetings. However, section 4 (2) of the mediation Board Amendment Act No. 15 of 1997 introduced a subtle inducement for parties to attend the mediation conferences/meetings. The non-attendance to the meeting is a clear indication of the parties' unwillingness to settle the dispute. This indirect compulsion may defeat the original idea and the aim of mediation.

There is a significant difference between the judiciary process and the Mediation Boards in Sri Lanka. Lawyers or other legal practitioners are not allowed to participate as representatives during the community mediation process. However, if a disputant is a minor or a person under any disability, such disputant's parent, guardian or caretaker is allowed to represent (section 15).

The rules of evidence are not applicable in mediation process. Statement made before the Mediation Board is inadmissible in civil or criminal proceedings. This is also a plausible feature which supports the disputing parties to reach a mutual agreement within a free environment. Further, the settlement reached before a Mediation Board is not legally binding and, therefore, cannot be enforced following formal judicial procedures (Gunawardana, 2012).

Under the Act, a person who wishes to be a member of a Mediation Board should voluntarily apply for the position. The selected volunteer mediators are given a forty-hour training in mediation techniques and skills and, after completing the course, they are officially appointed by the Mediation Commission for a three year term. After the completion of the three-year term, the mediator has the chance to be nominated for reappointment, but they must go through the interview, training and evaluation process again. Their activity is permanently monitored and further they receive specific trainings for particular types of mediation (Gunawardana, 2012). Like previous ADR methods in the country, the main goal of the present Mediation Boards is to facilitate a voluntary settlement of minor disputes, using interest-based mediation (Gunawardana, 2012). However, as some authors (Valters, 2013) argue, present mechanism (due to this compulsory trainings and influence made on bringing the parties to mediation conferences/meetings) is often closer to arbitration. Due to these reasons they are of the view that though Sri Lanka may have a history of ADR, the interest-based professionalised modern approach is new to the country. Some are of the view that these new principles and changes deviate from the original idea of mediation in early Sri Lanka (Lanka).

CONCLUSION

This article explored the theoretical and practical frameworks within which mediation as a traditional mechanism consists of western ideas. It examined mediation as a method of ADR which has a long history going back to ancient Sri Lanka. Mediation process currently functions in regard to minor and medium scale criminal offences and is not applicable to serious criminal cases. It is placed within criminal justice as a pre-requisite to the institution of criminal proceedings which sometimes defeat the idea of mutual agreement and contributes to the reluctance of some parties to come to the Mediation Boards. According to the present mediation process there is an active intervention of trained mediators to make the parties come to a solution. In the present process, it has been observed that mediators assumed a position of authority and after the initial gathering of information from both parties regarding the dispute, expressed their view as the most appropriate solution. Therefore, subtle manipulation of the parties may occur in the process. This demonstrates that the present law relating to mediation may actually defeat the original idea of amicable settlement of disputes.

END NOTES

1. Sri Lanka was known as Lanka before the European colonial period and sometimes Sri Lanka was named as Ceylon during the period of European colonisation.

2. Part 1- Chapter 1- Visit of the Thathagatha http://mahavamsa.org/mahavamsa/original-version/01-visit-thatagatha/

3. According to Robert Knox, for the hearing of complaints and doing justice among neighbours, there were Country–Courts of Judicature consisting of officers (the lower officials) together with the Head-Men of the Places and Towns, where the Courts are kept; these were called *Gom Sabbi* , as much as to say Town –Consultations. This *Gom Sabbi* were subsequently known as *Gansabhawa* and later as *Gamsabhawa*.

4. Disputes may be brought to the Mediation Board directly by the disputants (section 6.1) or referred by the police or the court (section 8).

5. Interest-based mediation which did not determine the guilty or innocence or pronounce judgment or find the right or wrong of the past events but provide guidance to settle the problem amicably.

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