Perspectives of Dispute-Settlement: The Conciliation Boards of Ceylon

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Conciliation Boards[1] are the subject of an article which appears elsewhere[2] and which deals with the background and working of Conciliation Boards and a great many technical questions arising from the implementation of the Conciliation Boards Act. It is not my intention to cover the same ground in this essay. I propose instead to consider certain broad issues which have been thrown up by the functioning of Conciliation Boards for some time in many areas. I shall deal with three specific questions:

(1) Are Conciliation Boards courts?

(2) Does the creation of Conciliation Boards restrict a citizen's right of access to the courts?

(3) How do Conciliation Boards affect the legal profession?

(1) The question whether Conciliation Boards are courts may appear to be strange because we all know that they are not. My reason in posing this question is to draw attention to certain salient features of the Conciliation Board which may otherwise be overlooked. Being the creature of a statute with a definite objective in mind one does not make the mistake of expecting the proceedings before a Conciliation Board to be completely informal as in the case of a voluntary association having the same object. Certain provisions of the Conciliation Boards Act make this clear. Section 16 states that proceedings before the Board are deemed to be *judicial proceedings* within the meaning of the Penal Code. This means that giving or fabricating false evidence at the inquiry is punishable (under section 190 of the Penal Code); to insult or interrupt members of the Board in the discharge of their duties is also an offence (under section 223). The Board is given power to 'inquire' into a dispute, a word which has definite judicial connotations. Most important, the Board is given power to compel the

1. Conciliation Boards consisting of lay, unpaid, citizens, are established under the Conciliation Boards Act, No. 10 of 1958. The object of the Act is to provide a convenient and simply constituted forum for dispute-settlement at no cost and without the attendant bad feeling of a contested action in court. To strengthen this intent the Act also provides that no proceedings shall be instituted in a civil or criminal court without the production of a certificate from the Chairman of the Panel of Conciliators that the dispute was inquired into by a Conciliation Board and that it was not possible to effect a settlement (s. 14).

2. Goonesekere and Metzger, "The Conciliation Boards Act: Emering the Second Decade," 2 *Journal of Ceylon Law*, 35 (1971).

attendance of witnesses and others whose presence is considered necessary (section 8). It is this power to issue summons (which is an ornate and impressive document served by the Fiscal or Police) which creates in the minds of the parties and witnesses the impression that they are appearing before a court of law. When as sometimes happens the Board sits on a platform it is not difficult to imagine that proceedings take on the air of judicial proceedings. A provision in the original Act requiring witnesses to give evidence on oath or affirmation tended to confirm this impression but this provision was removed in 1963. Rules of evidence are not to be observed at the inquiry (section 7 (c)) except that witnesses are entitled to all the privileges as in a court of law (section 11).[3]

On the other hand, we find that members of a Conciliation Board are appointed by the Minister of Justice and not by the Judicial Service Commission. They are deemed to be public servants under the Penal Code (section 16). The proceedings before the Board in spite of section 16 are quite informal and intended to tax neither the parties nor the members of the Board. There are no pleadings as in a civil action nor a plaint as in a criminal prosecution, and only the dispute has to be stated. But the most striking feature about the Conciliation Board is that it lacks the power of adjudication. This makes the Conciliation Board unique in the history of legal institutions in Ceylon (if we leave out the highly specialised Debt Conciliation Board). Even the ancient gansabhava, which has been identified as a classic type of forum for dispute settlement by conciliation and from which the Conciliation Board drew inspiration, was in fact an adjudicating body. Although its object was amicable settlement the gansabhava had the power to impose a decision based on customs and usage. Its successor, the Rural Court, continues to exihibit this characteristic and in any case has been definitely brought within the system of courts of law empowered to deliver judgments.

While even a group like the gansabhava functioned as judges when necessary, the Conciliation Board is not composed of judges in this sense. The efforts of the members are directed towards helping disputants to arrive at a settlement, and where this is not possible the Board's functions come to an end with the issue of a section 14 certificate. This role is in sharp contrast to that of a judge. The latter operates at the level of legal rules and principles and his task is to discover the appropriate rules, to apply them to the conflict before him and arrive at a conclusion as to which of the parties is right. The value of his decision or judgment as putting an end to the dispute would depend on a number of factors—the authority of the judge, his impartiality, the power of the court to enforce obedience, the parties' respect for the rules and their desire to comply with the judgment.

3. It is not clear in what manner this last provision is likely to interpreted by the Boards, whose members are, it can be expected, innocent of the law of evidence.

The judge is not usually concerned with the interests of the parties or how the decision will affect them. Sometimes he may allow this sentiment to influence him but it will operate extra-judicially. Conciliation is different, for what the mediator seeks to achieve is the reconciliation of the parties by appealing, not to the rights and wrongs of the dispute, but to the real interests of the parties, or to canons of reasonableness and justness. In Ceylon it is not a common practice for parties to a dispute to meet for the purpose of arriving at an amicable settlement by the process of give and take. It is in the absence of reconcilement that conciliation which requires a third party becomes meaningful. The role of the third party in conciliation proceedings is different from that of an arbitrator. The latter is a person to whom the parties submit their dispute and who gives a decision on the merits. He performs a quasi-judicial function (see *e.g.* arbitration under Industrial Disputes Act). The third party who is a mediator however functions in a lower key; he helps the parties to reach an agreement. Conciliation Boards belong to this latter category and their object is to make the good offices of a neutral third party readily available to disputants.

How does the Conciliation Board discharge its role as mediator? Apart from ordering an inquiry into the dispute the Act is silent as to how the Board should proceed. The word 'inquiry' to describe the Board's function is unfortunate for it conceals its real function which is to "make every effort to induce such parties to settle such dispute" (section 12 (1)). In mediation the third party does not play a passive part and therefore the Conciliation Board may suggest the terms for reconcilement and work on the parties, minds as to where their common interest lies, or what is the just or decent thing for one party to do. It is inevitable that compromise solutions have the greatest chance of success but there is nothing to prevent the Board bringing pressure to bear on one side only. The success of all conciliation efforts lies in the confidence which the mediator can inspire in the parties. His status and prestige and ability to command respect are important considerations.

As already shown where the conciliation efforts fail the proceedings before the Board must terminate. The Act does not give the Board the power to decide on the merits and in this respect the Boards differ from the Rural Courts. The Rural Court, like the Village Tribunal and the gansabhava before it, although set up "to endeavour by all lawful means to bring the litigant parties to an amicable settlement, and to abate, prevent or remove, with their consent, the real cause of quarrel between them" (Rural Courts Ordinance s.23), has the power to render a decision binding on the parties. This dual authority has proved to be a failure for it has been the experience of the Presidents of Rural Courts that whenever they have tried to procure a settlement and failed, the resulting judgement has been viewed by the unsuccessful party as biased. Naturally, Presidents have

increasingly in recent years viewed their role as mediators with misgiving and make only half-hearted attempts at settlements. This confirms the view of a Scandinavian jurist that it is difficult to combine the role of the judge and the role of the mediator in a satisfactory way, and "By mediating one may weaken the normative basis for a later judgement and perhaps also undermine confidence in one's impartiality as a judge."[4] Conciliation Boards are not courts of law nor are they courts of equity because even the latter conjure the application of norms by a judge.

Since Conciliation Boards are clearly not courts it is unfortunate if they should create this impression in the minds of the simple litigant (and the equally naive Board member) for it engenders the wrong attitude towards conciliation proceedings. It must be remembered that in Ceylon anyone in the position of a judge is accorded great respect and treated deferentially. The very limited scope given to Conciliation Boards in conflict resolving, on the other hand, is deliberate for there is no attempt to undermine the authority of the courts as the ultimate body with power of adjudication. The original Act was based on this scheme but an amendment in 1963 was responsible for blurring the somewhat simple picture of the Conciliation Board in the framework of the carefully graded systems of courts which were established by the British as an index of their passion for justice. Previously it appears to have been assumed that settlements agreed upon by both sides would be honoured by them. Indeed it would be correct to say that this is basic to the idea of conciliation. No provision was therefore made for enforcement of settlements although surprisingly there was provision for repudiation of a settlement by a party (section 13). This could be explained as confirming the view expressed above that there was no intention to oust the regular courts, so that persons who had second thoughts about a settlement were not prevented from recourse to a court of law. By the 1963 amendment provision was made for settlements, unless repudiated, to acquire the status of decrees of courts (section 13 (3). This was an important provision altering significantly the impact of Conciliation Board on the legal structure. It elevated the nature of the proceedings before the Board, and in particular the successful outcome of its mediation by investing it with the quality of a *legal* conclusion. The implications of this will be considered later. What is most significant is that a settlement drawn by laymen who are supposedly not looking backwards at the events leading to the dispute but forwards at establishing a harmonious relationship between the parties at the level of their interests should be given a force which is reserved for an entirely different kind of decision. In addition it must be noted that although the court in which a settlement is filed can be compelled to use its powers to enforce the settlement it does not appear to have any power to scrutinise the terms of the settlement.

4. Thorstein Eckhoff, "The Mediator, the Judge, and the Administrator in Conflict Resolution," *Acta Sociologica*, Vol. 10 (1966).

(2) Does the creation of Conciliation Boards restrict the citizen's right of access to the courts?

Judicial opinion whenever expressed has been in total agreement with the object of the legislation. *viz.*, cutting down wasteful litigation. Even Alles J. who has consistently sought to minimise the impact of Conciliation Boards (see *Wickramaratchi* v. *I. P., Nittambuwa* (1968) 71 N.L.R. 121, *Nonahamy* v. *Halgrat Silva* (1970) 73 N.L.R. 110 (*dissentiente*) *Wijetunga* v. *Violet Perera* (1971) 74 N.L.R. 107) has referred to the Conciliation Boards Act as a 'salutary piece of legislation' (*Wickremaratchi's* case). But the same Judge expressed uneasiness, which may be more universally shared, if unexpressed, over the danger of Conciliation Boards curtailing a citizen's right to seek redress in a court of law, that they constitute an erosion of judicial power (*Wickremaratchi's* case). By contrast, the Chief Justice was inclined to take a more optimistic view and saw the Conciliation Boards as imposing only a slight restraint on litigants which may be to their ultimate advantage, (*Nonahamy's* case).

The latter view is consistent with the simple provisions of the Act which as pointed out above contemplate neither adjudication nor forced settlements. What is envisaged is that a dispute will be promptly inquired into with a view to reconciling the parties and that if this is not possible that a section 14 certificate will equally promptly be issued to enable the parties to go to court. It must be conceded that in practice this procedure is capable of misuse and abuse. There could be a delay in a dispute being referred by the Chairman to a Board (see *e.g., de Silva* v. *Ambawatte* (1968) 71 N.L.R. 348); what is worse, even if it is clear that one party is not amenable to a settlement, proceedings before the Board may be unduly protracted and the issue of a section 14 certificate deliberately delayed. In these events the possibility of a denial of speedy access to the courts is real and would cause more heartburn and frustration than the original complaint.

The root cause of malfunctioning of the scheme could be that conciliators do not properly appreciate their role and take every failure to bring about a settlement as a personal defeat. Such thinking can lead to Board members going beyond the permitted limits of mediating by skilfull inducement of settlement to forcing settlements on unwilling parties. The Chairman of one panel is known to have boasted that he enjoyed 100 per cent success because he summoned the parties to his home at 9 p.m. and if they were unwilling to settle he did not let them go but laid by the inquiry ostensibly to give them more time to reflect. By 2 a.m. even the most recalcitrant party was willing to settle!

There is only one way to counter this trend and that is by proper instructions given to conciliators not to regard each settlement chalked up by them as an index of their usefulness, although from a statistical point of view this may be correct. Mediation works best where both parties

are interested in a settlement when they will cooperate actively in finding a solution. Where mediation consists of exerting undue pressure on one party it defeats itself because an important characteristic of a mediator—impartiality—is invariably lost.

Another question which conciliators should ask, or receive instruction in, is whether they should use known, or vaguely understood, rules of law in the settlement of disputes. Undoubtedly there can be an advantage in referring to legal rules because the party against whom the legal rule operates can be made to drop an unreasonable attitude; conversely, even where a legal rule favours one party an appeal can be made to him not to insist on his legal rights but to temper them by other valid considerations. Compromises are helped this way. It is obvious however that, in the wrong hands, playing with legal rules in this fashion can be a dangerous business. It can turn conciliator into a judge who will use his little knowledge of the law and his position to browbeat ignorant parties into accepting settlements which are to his satisfaction sound in law. The danger is real in Ceylon because, however intricate the law may be, there are many persons in the village and in the town who profess to "know" the law, particularly land law, and who are able to sound convincing to the uninitiated. Even the parties may refer to legal norms and invoke their application to the dispute. Here too the conciliator should be on his guard against being drawn into an argument on the legal merits of a party's case. If he allows himself to be overly influenced by what he considers to be the rights and wrongs of the dispute under the law there is another danger, namely, he will render himself incapable of functioning as a conciliator. When therefore the parties dispute the correctness or applicability of legal norms, the conciliator should clearly adopt another approach, perhaps by referring to other norms. He should not substitute himself in place of a court or create in the parties the impression that the settlement he propounds contains a legal pronouncement. The whole point of conciliation is to create the belief that compromise is the better solution of disputes than the strict application of legal rules.

While this is generally true it has to be recognised that there are disputes which are more properly resolved only by a judicial decision. Such cases are best left to the courts. Unfortunately it does not appear that a Conciliation Board is given this power to terminate the proceedings on the ground that the dispute is not suitable for conciliation. The only remedy would be for the Board to suggest to one or both parties not to reach a settlement!

In the case of Conciliation Boards what is difficult to fit into the ideal of conciliation is the provision relating to judicial enforcement of settlements. At one and the same time it encourages and predicates the use of legal norms and can create in the parties the expectation of a judicial resolvement of the dispute. The other provision enabling unilateral repu-

diation of settlements while it should serve to spotlight the limitations of conciliation, is however not generally known, or if known, its function is not fully appreciated.

It is in the light of all these possibilities that one should examine the recent decisions of the Supreme Court on the effect of the jurisdictional bar created by section 14. The decision in *Fernando* v. *Fernando* (1971) 74 N.L.R. 57 implies that a section 14 certificate is not something that a court can insist on at the time plaint is filed, and that a defendant who does not raise an objection to jurisdiction in time is deemed to waive it. In effect this means that going through the conciliation process is not obligatory on a plaintiff. *Gunawardene* v. *Jayawardene* (1971) 74 N.L.R. 248 while following this went further and held that even where defendant takes objection, thereby intimating to court a possible jurisdictional defect to the action, it will not bar the court from entering a valid decree in terms of a settlement agreed upon by the parties. To compel parties at this stage to go before a Conciliation Board would be nothing short of ridiculous since the dispute has ceased to exist. As Silva J. observed, once the parties had agreed in court to settle the case, "nothing further could have been gained even by recourse to the Conciliation Board."

(3) How do Conciliation Boards affect the legal profession?

One of the notable characteristics in the administration of justice under the British was the place given to the professional classes of lawyers in the courts established by them. Lawyers made their appearance at the same time as the courts and have been prominent throughout the modern period in the adjudication of disputes (although for a long time trial court judges were drawn from a non-lawyer class). As far as parties to a dispute were concerned it was to the independent lawyers that they came for advice and who represented their interests in the various stages of litigation. The gansabhava was still available for the informal hearing of petty disputes but its usefulness waned with the increasing popularity of the courts of law.

The gansabhava was in any case outside the system of British-imposed courts and lawyers were in the main unconcerned with its functioning. They were a little more perturbed when Village Tribunals were established on the model of the gansabhava but with the difference that they were now part of the system of courts. What was disturbing was that for the first time lawyers were expressly excluded from a modern court possessing power to impose decisions affecting the rights of persons. But because of the very limited jurisdiction of the tribunals (or the Rural Courts of today) this did not matter. Besides it later became the practice for lawyers only to be appointed as Presidents of these minor courts.

A more recent development has been for certain disputes to be removed, initially at any rate, from the ambit of the normal courts. Thus we have Rent Control Boards, Debt Conciliation Board, Income Tax Board of Review, Land Acquisition Board of Review, Industrial Courts and Labour Tribunals. In all these cases however the right of a party concerned to be represented at the hearing by a lawyer has not been denied. In fact, some of these tribunals have been recognised as areas of specialised practice for lawyers. We can say that lawyers have got used to the fact that for a variety of reasons certain kinds of disputes are considered more suitably disposed of outside the regular courts or by the application of norms which are not legal norms.

Conciliation Boards however are quite different. There is absolutely no scope for the lawyer in the proceedings before the Board and practising lawyers are deliberately excluded from appointment to Panels of Conciliators. What was contemplated was that the parties could be induced to lay their dispute before the Board for a hearing without legal assistance on either side. In a number of disputes this is happening and the influence of the lawyer (and I include the judge in this term) as a central figure in dispute-resolving could very well diminish, particularly because of the all-embracing nature of the Boards' jurisdiction when compared with Rural Courts and special tribunals. But it is too simple a view to take that because of Conciliation Boards there would no longer be occasion to see a lawyer when one has a legal problem. The business of going to courts for the purpose of obtaining effective redress became less intimidating when there was the comforting presence of a lawyer to look after your interests. Even if litigation was not contemplated, it became a practice to consult a lawyer the reason being that a proctor is often able to suggest a course of action which does not involve litigation. Many more settlements are reached out of court in this manner than is commonly believed. Even after an action is instituted the percentage of settlements is high, mostly due to lawyers' efforts.

It is not at all unusual therefore to find that even in areas where Conciliation Boards have been established a party would consult a proctor before going to the Conciliation Board either to make a complaint or in answer to summons. Where it is the plaintiff who consults him the proctor can still perform his role of conciliator or give other advice pertaining to his problem—the implications of a settlement before the Board, the terms of a safe settlement, *etc.* The same holds true where he is consulted by the defendant. It may be argued that there would be a tendency to advise against settlements for purely selfish reasons but in the long run such conduct would only hurt the proctor's business. It is also possible for a party to seek the advice of a proctor after a Conciliation Board settlement if he has a doubt as to the wisdom of the terms of settlement. If this is done within the period given for repudiation a lawyer can advise him correctly as to what he should do. It is obvious that settlements induced by the

Board have a greater chance of survival if a party who in any case intends to consult a lawyer does so before he agrees to the settlement.

What should be the lawyer's attitude to Conciliation Boards? Most lawyers would agree that on the whole Conciliation Boards have had a salutary effect in keeping down useless litigation. Some have also had reason to view the Boards in their areas as a hindrance when a dispute is not suitable for settlement or the client insists on getting a judicial decision. Should the proctor institute an action without the requisite certificate? Such a course is practicable only if the other side will not take objection, either because it is of the same view in regard to the dispute or because it is unaware of the establishment of a Conciliation Board in the area and its powers. It is in this context that the tacit understanding prevailing in some bars not to object to the plaintiff's failure to attach a section 14 certificate to the plaint must be considered. Undoubtedly the decisions recognising a party's right to waive the jurisdictional defect arising from the absence of the certificate has given some effectiveness to these "gentlemen's agreements" among lawyers. But a note of caution must be sounded.

A proctor who institutes an action without the certificate runs the risk of being held liable in damages to his client if the action is dismissed on this ground. This may equally be the case if the defendant's proctor deliberately decides not to object. It will not be advisable in future for a proctor to rely on a 'gentleman's agreement' with his colleagues as defendants with increasing awareness of the purpose of Conciliation Boards can insist on the objection being taken. Only a joint decision by the parties themselves renouncing their right to take the dispute to the Conciliation Board can be safely acted on, but even this may be defeated if the Chairman of the Panel takes into his head to refer the dispute to a Conciliation Board, as he is empowered to do. On the whole such agreement between the parties is unlikely in the normal case, or, it may be that its existence could never be established to the satisfaction of the plaintiff's proctor. In the latest decision on the subject, de Kretser J. held that an objection to jurisdiction should be permitted at any point of time before judgment (*Jayawickreme* v. *Nagasinghe* (unreported). This certainly gives the defendant the upper hand for he is encouraged to postpone making up his mind on the jurisdictional defect until he can see which way the wind is blowing. Few plaintiffs are going to relish this prospect.

All that this means is that in spite of the Supreme Court decisions all persons with a grievance, big or small, will trek to the Conciliation Board, some of them only to get a certificate which will give them the green light to proceed to a court of law. This will not however be a simple exercise with Boards whose sittings are irregular and hours of business undefined. The person who has the misfortune to be enmeshed in a complicated legal dispute must take his turn not only with others like him but

with the many others whose problems are only 'sub-legal' or 'non-legal.' He must wait patiently while these are painstakingly resolved. The likely delays in this preliminary stage alone may induce in him the desire not merely not to litigate but even to desist from seeking conciliation. He may chose to deal directly with the other party. Whether in the long run this will be advantageous to society must necessarily depend on the nature of the dispute and what form this reaction takes. The very informality of the proceedings of the Conciliation Boards when coupled with their wide jurisdiction may ironically be the weakest point.