

XVI Conciliation

"Diversion", besides being an updated version of the long-standing practice of police and prosecutorial screening, also represents a formalisation of conciliation and mediation processes which exist in some Commonwealth countries as a means of avoiding court hearings. As we have seen, a general practice in diversion schemes is that where there is an identifiable victim, the diversion agency may mediate between the offender and the victim to promote a reconciliation, often by way of some form of restitution to the victim. Mediation not only has the cathartic effect of enabling the disputing parties to sort out their own grievances, but it also helps to reduce the workload of the criminal courts.¹

The use of conciliation and arbitration before any formal court proceedings are undertaken has been promoted and expanded in several Commonwealth jurisdictions. In Tanzania it is a long-established practice that the less serious cases go through an arbitration process before reaching the courts. The process covers such offences as minor assaults, assaults within the family group and petty thefts where the parties are in some way related.² It has been found that this does reduce the flow of cases going to court and should therefore be encouraged, but it is feared that any attempt to institutionalise these informal arbitration proceedings would serve only to create another layer of courts. Villagers would still seek informal settlement before moving on to arbitration proceedings, as the essence of the present system of arbitration is its absolute informality. The parties are not restricted in regard to their choice of persons as assessors. Neither are they restricted as to the manner in which the reference is to be made, and the arbitrators themselves are not confined as to the methods which they can use to settle the matter. Often, they do not act as arbitrators at all, but merely as mediators, bringing parties together and persuading them to accept what appears to be a reasonable solution. Seldom do they arrive at a conclusion which they impose on the parties, which is the normal function of an arbitrator.³

The desire to place more emphasis on achieving compromises between disputing parties while ensuring that no guilty party benefits from his wrongdoing resulted in a measure of institutionalisation of the mediation process in Papua New Guinea.⁴ Unofficial dispute settlement still takes place: it is made up of moots and meetings of family heads and does not occur in any uniform prescribed way, instead adjusting its membership and procedure according to the importance of the case and/or of the litigants. But this has now been supplemented by a more formal Village Court system

that was brought into existence by the central government.⁵ These courts were introduced in Papua New Guinea to give emphasis to the idea of mediation and compromise, and to encourage popular participation in dispute settlement. As we saw earlier, the Village Courts have proved to be quite successful in this task.⁶

After independence, India established a quasi-judicial mechanism called the "nyaya panchayat" which was to be set up at the village level throughout the country. Previously, the panchayat had been an organ of village government, thus, providing these bodies with adjudicatory powers marked a historic break with the panchayat system as it had existed prior to independence.⁷ It has been characterised by one commentator as "experimentation in legal access for village populations".⁸

One of the objects of the establishment of the nyaya panchayats was that many of the small disputes or petty offences which often disturb the peace and harmony of village life should, in the interest of the village community, be disposed of expeditiously and cheaply by a local tribunal of the villager's own choice.⁹ An emphasis on the amicable settlement of disputes is an important aspect of nyaya panchayat ideology. Accordingly, conciliation is often emphasized over adjudication in some state legislation. In Bihar and Kerala, for example, it is obligatory on the nyaya panchayat to first resort to conciliation in all matters, including criminal cases, whereas in Rajasthan conciliation is permissible though not obligatory.¹⁰

In many legal systems, both modern and developing, both Eastern and Western, concern is mounting over increasing delays in the courts and over the rising costs of litigation both to the litigant and to the State. This concern has focused attention on inexpensive and expeditious alternatives to court-room adjudication. Attention has focused on arbitration and conciliation as viable alternatives. Of recent experiments with such devices, none has been as ambitious and comprehensive as Ceylon's Conciliation Board's scheme.¹¹

The Conciliation Boards Act of Ceylon¹² (now Sri Lanka) was passed in 1958 with the object of putting an end to wasteful litigation by promoting the amicable settlement of disputes, civil and criminal. It was meant essentially for village areas and the arbitrators were therefore men of the village. This represented a continuation of a 2500 year old tradition of settling disputes within the local community by conciliation through the Gansabha or village tribunal. It was envisaged that every citizen troubled by a civil dispute or minor criminal act would come before a Conciliation

Board composed of leading citizens of his community. The Board was to enquire into the matter and attempt to get the parties to resolve the problem amicably. No man should proceed to court without first attempting to settle his dispute before a Board; no court should entertain an action except where proceedings before the Board had failed to effect a settlement. The provisions of the Act were extended to urban areas after 1963 when the Minister of Justice was given wider powers to constitute the Panel of Conciliation.¹³

In each area a "panel of conciliators" is to consist of not less than twelve persons who are chosen usually on the basis of their social standing in the community and education. Practising lawyers were named to some of the earlier panels, but present policy is to exclude them. Conciliation boards which hear the cases consist of three or more members of the panel who are appointed by the chairman of the panel.

The power of a Conciliation Board is solely to bring the parties together and, on the basis of a confrontation in an informal setting, encourage them to arrive at a mutually acceptable settlement of their differences. The Board has the power to summon any person to attend its meetings to give evidence and to produce documentary or real evidence. Failure to obey such summons brings liability to punishment by fine in the Magistrates' Court. The Board may accept evidence without regard to the Evidence Ordinance except that it must allow a witness all privileges he would be entitled to in giving evidence before a court of law. Moreover, the Board has no punitive powers and they are not adjudicative bodies. They have no power to make determinations, enter judgements or compel action of any person except insofar as is necessary to gather evidence in the course of an inquiry. The Board simply encourages the disputants to agree upon a settlement although it often suggests what it views as a just and reasonable settlement. If a settlement is not possible, a certificate is issued to the complainant stating that inquiry has been made by the Board and that a settlement has not been achieved. Armed with this certificate, the complainant may proceed to court.¹⁴

As to their use and effectiveness: the first Board was constituted in February 1959, but at the end of 1965 only 75 Boards had been established. After 1965 the number of Boards increased steadily so that by July 1, 1970 there were 324 in operation, although they were not distributed evenly throughout the country. Statistics kept by the Ministry of Justice reveal that up to 1969, 29,441 disputes were referred to Conciliation Boards, and of these, 13,710 (or nearly 50 per cent) were settled. These figures are taken as an indication of the good results flowing from the implementation of the Act.¹⁵ The institution of the Conciliation Boards has also had an impact

on the workload of the criminal courts. One evaluation of the operation of the conciliation system during the 1960s found that those areas which have a high concentration of Conciliation Boards in operation experienced on an average an increase of only three per cent in the business of the Magistrates' Courts whereas in those areas with a low concentration of Boards, the Courts' business increased dramatically by 31 per cent.¹⁶

Quantitatively, the Conciliation Boards have had a demonstrable impact on the Island's courts, an impact which has not been fully appreciated by lawyers and judges alike. Qualitatively, the Boards' impact is more difficult to assess. Have the Boards contributed to basic changes in the "quality of justice" of Ceylon's legal system? The "justice" dispensed by the Boards is quicker, cheaper and, from the parties' perspective, more understandable and more equitable than the justice dispensed by the regular courts. More understandable and equitable because the entire scheme is founded on the consent of the parties to a settlement - a settlement based not on technical rules of law only vaguely comprehensible to the average citizen, but rather one based on common sense notions of what is fair and equitable in the facts of the case. Settlements generally give to each party a part of what he sought; each can walk away from the Board satisfied that he has been vindicated at least in part - a resolution seldom realised in a court with its winner-take-all procedure. The Conciliation Boards settle disputes without reference to law. In attempting to label this trend as desirable or undesirable, we confront a rhetorical question better left for the scholars of jurisprudence. Is the purpose of a legal system to resolve disputes in an orderly fashion, or is its purpose to resolve disputes in an orderly fashion according to given substantive rules? In other words, is the important factor that the dispute has been resolved, or is it more important how (in terms of substantive rules) the dispute has been resolved?¹⁷

Conciliation Boards have also been set up in Bangladesh under the Conciliation of Disputes (Municipal Areas) Ordinance.¹⁸ Criminal cases which must be dealt with by a Conciliation Board are those relating to offences under the Penal Code and the Cattle-trespass Act specified in the Schedule of the Ordinance (generally property offences where the value of the property does not exceed 5,000 taka). The Board, however, has no jurisdiction where an accused has been previously convicted of a cognizable offence.

When a dispute to which the Ordinance applies arises, either party may apply to a commissioner of a Pairashava for the constitution of a

Conciliation Board for the resolution of the case. The Board consists of a Chairman and four members, two being nominated by each of the parties. It has no power to pass a sentence of imprisonment or fine but, in criminal cases, it may order the payment of compensation not exceeding 5,000 taka. The decrees of a Board are enforceable as if they were tax debts, and the decisions of a Board are final and not appealable if the Board has reached its decision unanimously or by a majority of 4 to 1. In other cases, a party may appeal to the Subdivisional Magistrate.

In Britain, a few fairly recent Acts of Parliament have provided some scope for conciliation as a better means of securing compliance with the law than proceedings in court. In the sensitive area of race relations, the Race Relations Board has been successful, more often than not, in settling disputes without recourse to the courts. In much the same way, local housing authorities have preferred to seek a reconciliation between landlord and tenant where there has been a breach of the Rent Acts. Under this legislation, it is a criminal offence to "harass" the occupier of rented premises. Before taking proceedings in court, the local authority normally tries to restrain the landlord by explaining the law and warning him that he is liable to a fine or six months' imprisonment on summary conviction. In a large number of cases, these efforts at conciliation prove successful.¹⁹

A number of African nations have enacted provisions which place an onus on the court to promote conciliation and the amicable settlement of a case. Section 156 of the Ugandan Magistrates' Courts Act, 1970, reads as follows:²⁰

In criminal cases, a magistrates' court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such court, and may, thereupon, order the proceedings to be stayed.

Substantially similar provisions exist in the Southern States of Nigeria;²¹ Malawi;²² Seychelles;²³ Kenya²⁴ and Zambia.²⁵ Although these cases do go to court, informal and flexible negotiations may expedite a settlement which will prove satisfactory to both sides.

Thus, where a victim of a crime exists, be it a crime against his person or his property, perhaps it should not be rather automatically assumed that adjudication on the adversary model is the best way of resolving the problem, particularly where a prior relationship exists between offender and victim. There are at least three possible alternatives:

- (1) the handling of the situation by the community or a section thereof. For the most part, this method would probably be most appropriate for small, closeknit communities;
- (2) the use of a conciliation board of some description or a diversion agency. This, of course, does carry an inherent drawback in that it necessitates the setting up of a quasi-judicial structure which will entail considerable expense and may not in the end result in any overall saving in time. The parties to the dispute may, however, be more satisfied with the outcome; and
- (3) the use of existing police, prosecutorial and judicial manpower in promoting informal dispute settlement. To a remarkable extent, the police fulfil this function already. For prosecutors and judges, a significant redefinition of their roles would be required. Hence, in deciding to adopt informal case settlement, a jurisdiction can choose a model most suited to the level of social development within the jurisdiction and the resources available for such a scheme.

Measures designed to keep cases out of the courts do have the potential to expedite the hearing of criminal cases by reducing the workload of the courts. The inherent difficulty with such solutions (decriminalisation excepted) is that the number of cases is not actually being reduced; there is merely a reallocation of the cases to bodies outside the formal criminal justice system. The creation of alcoholic treatment centres and conciliation boards, for example, is an expensive proposition, though not without its merits in that these bodies allow the cases left in the system to be processed more quickly. The cases in the new system are handled more expeditiously and in addition, this may be a more appropriate response to the behaviour concerned. There is the further danger, however, that having invested money in providing these new agencies and relieving the criminal courts, the work of these bodies will subsequently expand to meet the resources available. In other words, criminal justice officials will not be as restrained in channelling people into the system if the delay and caseload situation improves. Having enacted measures such as those reviewed above, vigilance must be maintained, otherwise the caseload crisis will simply recur.

Footnotes

¹A. Paliwala et al., "National Goals and Law Reform", (1976) 4 Melanesian Law Journal 259 at p. 263.

²In Western Samoa, reconciliation is also carried out according to traditional practices for minor offences within the family, more as an apology than a reconciliation although acceptance of the apology leads to reconciliation. This procedure generally applies even to the most serious crime in the land. It is normally made before the accused is charged or before the trial but in no way overtly affects the administration of justice, that is, it does not result in suspension of criminal proceedings - correspondence from the Office of the Attorney General, Western Samoa dated January 12, 1979.

³"Report on Judges' and Magistrates' Conferences November 1967 - March 1968", (1968), 1 East African Law Review 167 at p. 168.

⁴A. Paliwala et al., supra footnote 1.

⁵Papua New Guinea, Village Courts Act, 1973, as amended. For commentary see B.D. Ross, "A Review of the Judiciary in Papua New Guinea", (1977), 5 Melanesian Law Journal 5 at p. 7.

⁶See ante, Chapter XIV, footnote 25 and accompanying text.

⁷U. Baxi, "Access, Development and Distributive Justice: Access Problems of the "Rural" Population", (1976), 18 Journal of the Indian Law Institute 375 at p. 406.

⁸Id. at p. 411.

⁹K.N. Chandrase Kharan Pillai, "Criminal Jurisdiction of Nyaya Panchayats", (1977), 19 Journal of the Indian Law Institute 438 at p. 456.

¹⁰U. Baxi, supra footnote 7 at p. 416.

¹¹R.K.W. Goonesekere and B. Metzger, "The Conciliation Boards Act: Entering the Second Decade", (1971), 2 Journal of Ceylon Law 35 at pp. 35-36.

¹²No. 10 of 1958.

¹³Conciliation Boards (Amendment) Act, No. 12 of 1963.

¹⁴R.K.W. Goonesekere and B. Metzger, supra footnote 11 at pp. 48-60.

¹⁵R.K.W. Goonesekere, "Conciliation Boards", (1970), 1 Journal of Ceylon Law 143 at pp. 143-44.

¹⁶R.K.W. Goonesekers and B. Metzger, supra footnote 11 at p. 88.

¹⁷Id. at pp. 90-91. For an examination of the continuing role of Conciliation Boards in Sri Lanka's newly restructured criminal justice system see L.J.M. Cooray, "Administration of Justice in Sri Lanka", (1976) 6 Hong Kong Law Journal 67 at pp. 80-81.

¹⁸No. V of 1979. See note at (1979), 5 Commonwealth Law Bulletin 614.

¹⁹A.F. Wilcox, The Decision to Prosecute (London, 1972), pp. 109-110.

²⁰For commentary on this provision see D. Brown, Criminal Procedure in Uganda and Kenya, (2d ed.), (London, 1970), p. 169 and H.F. Morris and J.S. Read, Uganda: The Development of its Laws and Constitution (London, 1966), p. 271.

²¹F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), p. 1.

²²Malawi Criminal Procedure and Evidence Code, cap. 8:01, section 161.

²³Seychelles Criminal Procedure Code, cap. 45, section 165.

²⁴Kenya Criminal Procedure Code, section 176.

²⁵Zambia Criminal Procedure Code, cap. 160, section 8.