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Community Mediation:

Law and Its Implementation in Sri Lanka

Naveendra P. DE ZOYSA*

Abstract

Mediation Boards are a recent phenomenon in the history of community based dispute resolution systems in Sri Lanka. Law's delay in an adversarial system obstructed justice, and the need for an alternative system came into the debate one decade after the previous experience of Conciliation Boards. In this paper I tried to identify how Mediation Boards came into operation through passing of new law overcoming the faults of former Conciliation Boards. Identified reasons for the fall of Conciliation Boards had been utilized by the Ministry of Justice when they drafted the Mediation Boards Act. Discussion on the legislative process and a comparison study of the Mediation Boards Act with the Conciliation Boards Act reveal the necessary steps that have been taken through the Mediation Boards Act to eliminate the deficiencies of the former Conciliation Boards system. Lately raised criticisms to the Mediation Boards were not supported by justifiable facts.

Introduction

In common with other developing countries and some developed nations, law delay and least accessibility to justice for disadvantaged groups are long standing and basic problems in the Sri Lanka legal system. There have been various attempts to overcome the obstacles and promote a more efficient legal system in Sri Lanka. Conciliation Boards Act No. 10 of 1958 (CBA) was the first statutory framework for community based dispute resolution system after the independence.[1]

A recent endeavor to establish a community based dispute resolution system started with the legislation of the Mediation Boards Act No, 72 of 1988 (MBA). Attention from the academia regarding the Mediation Boards is very low and even lower for the Conciliation Boards. What still intrigued scholars, lawyers, politicians and even ordinary people was that, Mediation Boards is just a duplicate system of the failed Conciliation Boards or an extended alternative to the adversarial system. It is clear that the idea to introduce the community based dispute resolution came as a solution to the law's delay of formal legal system. But my concern here is to find whether the Mediation Board system is just a duplicate of the abolished Conciliation Boards that introduced based only on Sri Lankan

* PhD candidate at Graduate School of International Development, Nagoya University. The author would like to thank Professor Yasuda Nobuyuki and two referees of this Forum for their valuable comments.

experience with community based dispute resolution systems or is it armed with more advance provisions to overcome the problems of former system.

In the first section of this paper I discuss the Conciliation Boards system and its deficiencies. In the second section I explain emergence of the idea for community based dispute resolution system among the decision makers in Sri Lanka. Endeavors of Ministry of Justice in various stages to introduce the Mediation Boards as quite different from the failed Conciliation Boards have been discussed in the third section. Comparison study of Mediation Boards Act with the Conciliation Boards Act in section four discloses the new provisions introduced to the mediation law to accelerate the functions and eliminate the problems of the former Conciliation Boards. Finally, the implementation process of the actual Mediation Boards will be discussed, including its criticism. It can be seen continuous improvement of the Mediation Boards even though there are criticisms regarding some provisions of MBA and dispute resolution process.

Main concepts that I address in this article are 'mediation' and 'conciliation'. Many scholars believe that mediation and conciliation are almost same. Those are "interchangeable" concepts or "synonyms" to each other (Brown & Marriot 1999: 127). Mediation and conciliation demonstrate a same process of dispute resolution that parties find solution for their disputes with an assistance of impartial third party (NIDR 1991: 3, CDG 1998: Appendix A). In Sri Lanka also, the Conciliation Boards and Mediation Boards do not imply different systems. Those terms had been used to identify dispute resolution that informally resolves disputes among the community members with the support of their own community members. However there are differences in legal frameworks, which established Conciliation Boards and Mediation Boards, such as competence of boards regarding disputes, supervisory power on conciliators and mediators, and dispute resolution process. Those differences create characteristics which cause to accelerate or slow the functions of dispute resolution process in each system.

1. Conciliation Boards: Problems and fall

The CBA[2] provided the legal framework for Conciliation Boards. Introduction of Conciliation Boards was a considerable change at the institutional level of the legal system that expected to back the then government's[3] policies for populist and welfare economic system (Marasinghe 1994: 3). It can be understood that the nature of this legal reform and its political intention which support to the government policies concerning the objectives of this enactment. According to Tiruchelvam, there were two related objectives in establishing the system. First was "to facilitate the involvement of the working classes and the rural peasantry in the process of conciliation panels…." (Tiruchelvam 1984: 186). Second was "…to further reshape the prevailing values and attitudes of the disputants and other members to the needs of a socialist society" (ibid: 187). He further concludes that "neither of these

expectations has been realized" (ibid.). Marasinghe in support of this argument says that Conciliation Boards was a "new and radical approach to the settlement of disputes" in Ceylon that was needed to form a socialist society (1994: 3).

In contrast, Goonesekere and Metzger argue, "the scheme was an attempt to establish People's Courts along the lines on which they exist in the communist world, is unsupported by any evidence" (1971a: 48). They emphasized the influence of traditional Gamsabhava[4] and existed voluntary conciliation boards[5] in some parts of the Island to the introduction of Conciliation Boards (ibid.), but agree with Tiruchelvam's assessment that Conciliation Boards were introduced as an alternative to expensive and time consuming litigation (Goonesekere & Metzger 1971a: 35.; Tiruchelvam 1984: 90). Therefore, expeditious and inexpensive dispute settlements were among the primary goals of Conciliation Boards even it was influenced to reflect the popular courts in communist world.

The second decade after its implementation, Conciliation Boards system failed due to several reasons. Politicization was a major destructive cause to abolish the system that was identified by Goonesekere & Metzger (1971a: 78) and Tiruchelvam (1984: 106). Involvement of national and local politicians in various activities of Conciliation Boards became common practice during this period. This negative characteristic first links with the appointment process of Panel Members (Conciliators) to the Conciliation Boards. Recommendations of the Members of Parliament, members of the local government body or other influential politicians of the area were highly decisive in Conciliator appointments (Goonesekere & Metzger 1971a: 78–79). It was obvious; this privilege was freely disbursed by politicians to satisfy their political henchmen and supporters (Tiruchelvam 1984: 106). On the other hand during the operation of dispute resolution, those politically appointed Conciliators and Chairmen of Panels were biased against their political rivals. They misused powers and sometimes summoned people arbitrarily (Goonesekere and Metzger 1971a: 79). Gradually, politicization of Conciliation Boards reduced the trust of users and increased their dissatisfaction with this system.

Lack of accountability also led to the failure of Conciliation Boards, as emphasized by Goonesekere and Metzger (1971b: 283). One of their recommended amendments to the Conciliation Boards Act was "establishment of on-going channels of communication between Panel Members and Ministry officials" (ibid.). This lack of accountability increased the inappropriate bias of Conciliators, and was evidence of improper conduct and abuse of position (ibid: 286). Case studies by Tiruchelvam during his experience at Palispattu East Conciliation Board clearly substantiate the domination and power-hungry actions of the Conciliators (1984: 155–182). Some Conciliators enjoyed their independence and justified it themselves by emphasizing the lack of assistance from the Ministry of Justice in resolving difficulties and problems that they faced during their work (Goonesekere and Metzger 1971a: 77).

Consequently, politicization and lack of accountability obstructed achieving the goals of

Conciliation Boards. Instead of representing "working class and rural peasantries" (Tiruchelvam 1984: 186), politically appointed traditional rural elites dominated in the Conciliation Boards (ibid: 187). They sustained characteristics of traditional Gamsabhava such as use of coercion in dispute resolution (ibid.), but didn't create an environment for consensual settlement among the parties which was expected by Ministry of Justice. There was also public dissatisfaction on quality of Conciliators who served in Panels. Bootleggers and local political leaders in the Panels created delays because of their biased practice in dispute resolution process (Goonesekere and Metzger 1971a: 78).

Opposition in the Parliament also continuously criticized the Conciliation Boards and charged the government as it created politically corrupted non-legal body (Marasinghe 1980: 411). Government change on July 23, 1977[6] was crucial to the Conciliation Boards as Ministry of Justice removed panel members and Chairmen of all Conciliation Boards forcing it to cease operation at end of July (ibid.). Finally, Conciliation Boards Act was abolished by section 62 of the Judicature Act No. 2 of 1978 (Judicature Act)[7] terminating the existing law in statutory books.

2. Reemergence of the Idea for Community Based Dispute Resolution

Importance of an alternative mechanism to the formal courts was highly convinced by the increased case load and its congestion emerged after the abolishment of Conciliation Boards. For instance in Gampola District Court there was only 49 pending civil cases in 1979, but it was 103 in 1982, and 249 in 1984 (WCR 1985: 65). Working load of courts had increased gradually creating a backlog. This situation is same in many courts during this period (ibid: 41–43).

There were several attempts to identify the reasons for this law's delay and solutions to overcome the problem. 'Seminar on the Administration of Justice' held on 1984 which based on the five committee reports[8] was one of major dialogues on this issue. Most of the results and recommendations were intended to amend the laws and formal procedures (Reports of Committees 1984). However introduction of a community based dispute resolution system like former Conciliation Boards, was a main recommendation of above committee reports to overcome the law delay (ibid: 21).

This idea has asserted by the 'Report of the Sri Lanka Law's Delays and Legal Culture Committee'[9] also. This committee also appointed to identify the causes of the delays, and to make its recommendations of ways and means of eliminating or reducing such delays. The outcome of this Committee is popularly known as 'Wanasundara Committee Report' (WCR) dated 30th June 1985. WCR identified six main causes[10] of delays in courts (1985: 9). "Alternative methods of dispute resolution, such as settlements and Conciliation" were significant among recommendations of WCR to overcome the law's delay (1985: 25).[11]

3. The Drafting and Legislative Process of the Mediation Boards Act

3.1 New Proposal for Community Mediation

Ministry of Justice was the authority which appointed above Committees, and some officers of the Ministry had worked with them. Therefore it is not surprising that the idea of introducing an alternative system appeared soon after those committee reports. In December 1985 Ministry of Justice discussed with the Legal Draftsman regarding the drafting process of the Mediation Boards Bill (MBB). New system should eliminate the causes of the failure of Conciliation Boards and utilize the effective characteristics. Following discussion reveals the effort of Ministry of Justice to perpetuate its' determination during the proposal and in the drafting process and finally in the Parliament on Mediation Boards as a different and much developed system from Conciliation Boards.

There were three important points in the proposal made to the government by the Ministry of Justice, with essential claims that this new scheme of Mediation Boards rectified the defects of the former Conciliation Boards. First, mediators should be neutral which failed to do in former Conciliation Boards. Second it sought to establish an impartial, independent, stable and non-political commission to maintain all activities of the overall system. Third, specialized training for mediators was introduced to help them understand differences between mediation and adjudication and to suggest ways to tackle the real issues of conflict apart form the legal issues.[12]

3.2 Drafting Process in the Ministry and Inner Governmental Considerations

As the first step of the two year long drafting process, the first draft of the MBB was submitted by the Legal Draftsman to the Secretary of the MoJ with a letter dated 14th January 1986 (File No- P.A 88/72). Ministry of Justice wanted to introduce a new name also which can attract the people than the contentious former system. However in the early steps of this process, Legal Draftsmen confused the name of Mediation Boards with former Conciliation Boards. In some drafts of MBB they simply mentioned it as Conciliation Boards Act No…. of 1986 (File No- P.A 88/72). Gradually, and with the instructions of Ministry of Justice, the term 'Conciliation Boards' was eliminated from drafts of the MBB.

The Law Commission was provided valuable recommendations to improve the validity of this draft Bill, but it see the Mediation Board system as perpetuation of the former Conciliation Boards or as a Court. On 11th February 1986 Ministry of Justice forwarded a draft of MBB for first consideration by the Law Commission (File No- P.A 88/72). With the letter dated 2nd April 1986 the Law Commission recommended that "setting up of Conciliation Boards was preferable to the Mediation Boards" (File No- P.A. 88/72). On the other hand, in other recommendations it emphasized that the Mediation Boards Commission[13] should be appointed by the Judicial Service Commission.[14] These recommendations show that the Law Commission considered the Mediation Boards as a constant

sample of former Conciliation Boards or as a Court. But the Ministry of Justice's attempt to make the Mediation Boards an extended alternative to the Courts and independent dispute resolution system was achieved through amendments to the draft of MBB. For example a letter sent by the Secretary of the MoJ to the Legal Draftsman on 3rd September 1986 (File No- P.A. 88/72) instructed that provisions be made concerning the appointment and powers of the Mediation Boards Commission. According to those instructions the commission should be appointed by the President instead of the Judicial Service Commission.

3.3 Debates in the Parliament

The cabinet decision to present the MBB to Parliament was received on 11th May 1988. Accordingly, MBB was published in the Supplementary Gazette dated 5th August 1988. In a latter dated 14th September 1988, the Attorney General affirmed that provisions of the MBB were not inconsistent with the Constitution (File No- P.A. 88/72).

MBB was presented to Parliament on 21st October 1988 by the then acting Justice Minister Mr. Shelton Ranaraja, as the Minister was abroad (Hansard 21－10－1988: 1300). During the period of the second reading of this Bill, the Minister changed to Mr. E.P Paul Perea. Then on 25th November 1988 the Bill was presented to the Parliament with confident introductory note and acknowledgement to his predecessor Dr. Nissanka Wijerathne and the then secretary Dr. A.R.B Amarasinghe (Hansard 25–11–1988: 2295).

In an interview with Dr. A.R.B. Amarasinghe (6th May 2005) recalled, "MBB was warmly welcomed by all, and there was no opposition in the parliament". Most of legislators believed that this Bill was going to replace the former Conciliation Boards system. Mr. Chandra Ranathunga in his testimony emphasized, "Small matters could very easily be settled in these Mediation Boards which now take place of the earlier Conciliation Boards" (Hansard 25－11－1988: 2295). Mr. M.P.B Cyril also said that, "We had a dispute resolution system called Conciliation Boards similar to *Gamsabhava* during the last government. It made peace in the area settling minor crimes and suffering of people was alleviated" (ibid: 2299). This familiarity with the Conciliation Boards was a main reason why most Parliamentarians supported the new scheme.

But some legislators believed that there was a strong possibility that Mediation Boards would be corrupted, if necessary steps were not taken to avoid the shortcomings of the former Conciliation Boards system. Mr. Dew Gunasekara explained that "these Mediation Boards might turn out to be Kangaroo courts…" (ibid: 2297) if implemented without necessary precautions. He further emphasized the need for suitable mediators with mediation skills and techniques to serve the Mediation Boards in remote areas. Mr. Gunesekere also stressed the need for provisions to keep mediators unbiased and honest; "It is absolutely necessary to maintain the dignity, the purity and the integrity of the Mediation Boards and the personnel therein" (ibid). He raised another key issue to

prevent political influences on this system. "Let not the Members of Parliament send chits to the Mediation Boards in order to assist the voters. The whole exercise will be futile if you allow this mediation work to be interfered with particularly by politicians" (ibid).

Indeed above comments are important to build up an advanced mechanism to settle the community disputes. However there are clear provisions in the MBB to overcome the above highlighted problems. Justice Minister explained them affirming the advanced quality of the Bill. There were no special amendments proposed during the Second Reading of the MBB. Without any amendments other than technical matters like adjustment of differences between English and Sinhala Version, on the same day, 25th October 1988 the bill was read the Third Time and passed by the Parliament. It was certified by the Speaker on 17th December 1988.

4. Outline of the Mediation Boards Act in Comparison with the Conciliation Boards Act

Minister of Justice during the Parliament debate has affirmed elimination of the deficiencies of former Conciliation Boards. To find the enhanced provisions in the MBA we have to do a comparative analysis on the CBA and MBA.

4.1 Territorial Area and Disputes

Section 2 of the CBA defined the territorial area of the Conciliation Boards. According to those provisions, Conciliation Boards should operate in every village area and in other areas as determined by the Minister of Justice. "The expression 'village area' has the same meaning as in the Village Councils Ordinance"[15] (CBA 1958: Sec 2 (3)). In contrast the MBA does not define the territorial area of the Mediation Boards, but simply mentions that "the minister shall from time to time, by order published in the Gazette, specify each area" (MBA 1988: Sec 4). At present, Mediation Boards are operating within every Divisional Secretariat area but not in the north and east of the country because of civil conflict (MBC 2004: 3–4). As discussed before (see endnote 15) Pradeshiya Sabhas Act No. 15 of 1987 (PSA) continued the concept of lowest local government unit. Therefore, conceptually Mediation Boards are also operating in area that was superimposed on the lowest local government area as Conciliation Boards operated.

Section 6 of the CBA defined the competence of the Conciliation Boards on civil and criminal matters. This is the major and important part of the CBA but resulted in redundant or an ambiguous atmosphere in Conciliation Boards. This chaotic condition had opened the path for various judicial remarks[16] to define the capability of Boards. Concerning civil matters, Conciliation Boards accepted applications on civil disputes in respect of movable or immovable property that kept and in respect of any contract that made within its territorial area and any dispute in respect of any matter that may be cause of action arising in that the institution of an action in a civil court (CBA 1958: Sec 6). However

there is no provision to define the 'dispute' or limitations for this competence. This broad provision without clear limitations was too open for Conciliation Boards and included cases that are "inappropriate for conciliation" (Goonesekere and Metzger 1971b: 291). In this academic dialogue, Goonesekere and Metzger emphasized four categories of disputes that "should be expressly excluded from the Conciliation Boards jurisdiction" (ibid: 292).

First category is Non-contentious proceedings,[17] as parties cannot settle these disputes by themselves. "There is a special State interest" to maintain harmony in the society and the "special powers of court" are needed to decide these cases (ibid: 293). In contrast Marasinghe[18] said that some matters from above list are suitable for the conciliation as "social harmony" is expected from the Conciliation Boards (1980: 392). He supported this argument giving examples and said that matrimonial matters such as custody of a minor and adoption cases are most suitable for conciliation by "body of elders or respected citizens" drawn from the community (1980: 392–393).

Second are "Interim relief" cases such as applications for injunctions, arrest or sequestration before judgment and restraint of waste (Goonesekere & Metzger 1971b: 292). Here the objective of these applications is to provide the expeditious relief pending on a final judgment, but interferences of conciliation can delay the quick relief for parties (ibid: 296). Third is "Administrative actions" that handles by quasi-judicial or administrative tribunals such as the Labor Tribunal and Debt Conciliation Board. Objective of those institutions is also same as Conciliation Boards that is to provide a speedy dispute resolution. Therefore the subject area should not tangle each other (ibid: 296). Fourth is "Inappropriate parties and subjects".[19] These cases are for large claims or parties with State or State agencies (ibid: 299). Marasinghe said that, State or State agent cases are suitable for conciliation as "citizens have in such cases grasped an opportunity to judge their government" (1980: 393). But here we should be concerned about the capacity of community based dispute resolution systems. They are most suitable to settle disagreements among the neighbors but not the Sate matters or large claim matters.

It seems that above recommendations of Goonesekere and Metzger were utilized to define the competence of Mediation Boards that limited to resolve only minor disputes in the society. Section 6 of the MBA explains the civil disputes that can settle in the Mediation Boards and it same as in the CBA. However Mediation Boards cannot accept applications regarding disputes if one of the parties is a state or public officer, or if that dispute relates to a state property (MBA 1988: Sec 6 (2) (a) & (b)). Section 7 of the MBA provides that all civil maters of which value is less than twenty five thousand rupees should first go to the Mediation Boards before going to court. This is mandatory, and parties cannot file a case in regular courts on above matters without a certificate of non-settlement.[20] However the title of this section reads as "actions other than those involving the grant of any provisional remedy ……..." affirms the competence of parties to seek redress from court directly in a case of interim relief. And disputes specified in the Third Schedule to the Act are exempt from this

mandatory provision. Third Schedule embodies disputes explained by Goonesekere & Metzger in the categories of "non-contentious proceedings", "administrative actions", and "inappropriate parties and subjects" (1971b: 292). This exemption offers options to parties, either to settle those disputes by mediation or to seek a decision from court.

In terms of criminal matters, Conciliation Boards can deal with offences specified in the schedule (CBA 1958: Sec 6 (d)). Schedule of the CBA listed petty offences cited in some sections of the penal code, including voluntarily causing hurt, criminal trespass and assault or the use of criminal force. Goonesekere and Metzger appreciated the "criminal jurisdiction", saying that those offences are compoundable[21] according to the Code of Criminal Procedure, and also police already engaged in extensive settlement of such offences (1971b: 289–291). Mediation Boards also can deal with only 'petty offences' specified in Second Schedule to the Act. Mediation Boards cannot deal with offences where proceedings are instituted by the Attorney-General (MBA 1988: Section 6 (2) (c)).

4.2 Supervisory Power

The Justice Minister held various powers, including appointment of the Panel Members and Chairmen for each Conciliation Board and over their disciplinary control (CBA 1958: Section 3 & 4). Political influence on the Conciliation Boards seriously undermined their effectiveness. This political influence was facilitated by the supervisory systems maintained by the Justice Minister. Goonesekere and Metzger viewed, the Minister's power to remove members 'without assigning any reason' as a cause to political retribution by the minister (1971b: 286). In another sense, this "absolute discretion of the Minister of Justice" contradicts the "common law tradition of judicial independence" (Marasinghe 1994: 4). But Conciliation Boards were not expected to be a representative judicial body. Therefore, here the important issue is political influence from Minister as it held by a member of a political party.

To prevent such political influence, the MBA was accompanied by establishment of an independent commission, Mediation Boards Commission (MBC), which handles the aforesaid functions and activities instead of the Justice Minister. Furthermore, the Justice Minister has no role in the procedure to appointing the MBC. According to the MBA, the President shall appoint five persons for this MBC. Three of them should be former Supreme Court or Court of Appeal judges, and one of these three members shall be appointed as the Chairman (MBA 1988: Sec 2). It is obvious that these provisions are strong obstacles to the political influences that negatively affected the Conciliation Boards. Administrative matters such as appointment and disciplinary control of mediators were also shifted from the Justice Minister in the CBA to MBC in the MBA.

4.3 Panel Members

Selection Process

According to Section 3 (4) of CBA, any person who resides or works in the appropriate Conciliation Boards area should be eligible for appointment as Conciliator. Section 3 of the CBA very briefly explained the appointment procedure of Conciliators. For this purpose, after the notification of Minister of Justice for recruiting Conciliators, any local authority, administrative authority, co-operative society or organization, including Municipal, Urban, Town and Village Councils in the Conciliation Board area can nominate persons. Then Minister of Justice should select not fewer than twelve members for each Conciliation Panel (CBA 1958: Sec 3 (1)).

Section 5 and First Schedule to the MBA provides detailed description for selection system of Panel Members. It clearly states that proponent bodies, individuals, institutions or organizations which can nominate the Mediators should not be of political nature (MBA 1988: Item 1 of 1st Schedule). Further, selected Mediators have to follow a five day initial mediation training course (ibid: Item 3 of 1st Schedule), whereas there was no such course for Conciliators under the CBA. After the initial training MBC should appoint no less than twelve members to the Panel for each of the Mediation Boards Areas (ibid: Item 5 (1) of 1st Schedule).

Powers and Duties

Section 7 defines the powers of Conciliators as accepting applications on disputes or offences, summoning parties or witnesses, and admitting oral or written evidence (CBA 1958). Marasinghe said that the provisions of Section 7 of the CBA gave "new and extra-ordinary powers" to Conciliators (1994: 4). In the case of absence of a party after receiving summons, section 8 of the CBA gave power to Conciliators to decide whether the reason for absence was reasonable or not. Further absences deemed unreasonable could be punished after a summary trial before a Magistrate. This provision aimed to enforce parties to use the Conciliation Boards. Section 12 of the CBA defined the duty of conciliators as bringing the parties to a settlement, while broadening the powers of Conciliators. If any offence referred to a Conciliation Boards, Conciliators can prejudge through an inquiry into the allegation of such offence (CBA 1958: Sec 12 (2)). After an inquiry into whether the Conciliation Board is satisfied that "offence has been committed", it should make every effort to settle the matter. Here Conciliators can prejudge and labeled the parties as offenders that should be prosecuted by a court following accurate evidence consideration and procedures. Then, start the conciliation process from the position that offender had done the wrong thing.

It seems that the use of some terms in the MBA had done deliberately to obstruct the wrong interpretations that integrate the powers to Mediators. There are only duties of Mediators in one section that entitled "duties of Mediators" (MBA 1988: Section 10). After receiving complaint on any dispute or offence to the Mediation Boards, should "notify" the "disputants and such other parties" to present one's case at a mediation conference and to bring any witness or document that may "assist

the disputants in arriving at a settlement" (ibid: Sec 10 (a) & (b)). The Mediators are not armed with powers to consider the absent or disregard of notices by the parties but have a duty to convene the parties to arrive at a settlement (ibid: Sec 10 (c)).

4.4 Constitution of Boards

The constituting process of Conciliation Boards from the Conciliation Panels was defined in the section 5 of the CBA. Chairman of the Panel should select not less than three members from the Panel as Conciliation Board and should appoint one of them as the President of the Conciliation Board (CBA 1958: Sec 5 (1) & (2)). According to sub section 3 of the above section any number of Conciliation Boards can constitute from a Panel to inquire about grievances. Even though the minimum statutory size of a Conciliation Board is three, in the practice, there were often five, eight or even ten members (Goonesekere & Metzger 1971b: 288). This large size for a Conciliation Board affected functioning in two ways. First, parties do not feel that the "psychological weight" of number of members will work well for their interests, and second the President has difficulty to control such groups which consisted large number of members (ibid.).

According to the provisions of section 9 of the MBA number of members in each Mediation Boards should be three. MBA stipulates that each party should select one Mediator from the Panel and that the two selected Mediators should select a third Mediator who acts as the Chief Mediator (1988: Sec 9 (1) & (2)). However, according to provision of section 3 of Mediation Boards (Amendment) Act No. 15 of 1997 (MBAA) that came into force as a part of feedback from mediators to expedite the process (CDG 1998: 2), Chairmen can pre-constitute three member Mediation Boards. But parties can make any changes to the membership or select their Mediator according to their own preferences (MBAA 1997: Sec 3).

4.5 Manner in Initiation Complaints

According to the provisions of Section 6 of the CBA, parties could directly complain to the Conciliation Boards regarding their dispute or offence. No another provisions in the CBA where made to identify the ways that complaints were to be brought to the Conciliation Boards. Marasinghe (1980: 403 – 404) as well as Goonesekere and Metzger (1971a: 57) said that this one explanation in the CBA for institution of proceedings is not enough to identify the person who can make complaints. In the Conciliation process there were four ways to bring complaints to the Conciliation Boards. Tiruchelvam has explained these four ways according to the Palispattu East Conciliation Board experience. First are criminal complaints on referral from the police; second are criminal and civil complaints on referral from the Village Officers; complaints filed directly by disputants are third; fourth are complaints filed by Goda Perakadoru (village proctors)[22] who have no direct interest in the matter (1984: 157).

In comparison, there are three basic ways complaints can be brought to the Mediation Boards,

which are spelled out clearly in the MBA. First, complaints can be brought directly by the parties (MBA 1988: Section 6). Second, complaints may be brought by the police concerning offences listed in 2nd schedule of the MBA as parties first go to the police in such matters (ibid: Section 7). Third, with the written consent of the parties, Courts can refer cases to an appropriate Mediation Board (ibid: Section 8). The provisions of Section 15 of the MBA prevent the involvement of lawyers or agents. CBA lacked this kind of provision and consequently, as Tiruchelvam, has explained, in the actual process of Conciliation Boards, Village Proctors made complaints complicating the effort of parties to reach a settlement (1984: 157).

4.6 Enforcement

Concerning offences, Conciliation Boards were required to record if they settled an offence, and to issue a copy to the appropriate parties (CBA 1958: Sect 12). Section 13 (1) of the CBA provided that any party to a civil dispute settled by the Conciliation Board, could within thirty days after the settlement notify the Chairman of the Panel of Conciliators in writing to report their repudiation of the settlement. If the Chairman of the Conciliation Board did not receive any notification of repudiation within thirty days after the settlement, the Chairman should forthwith transmit a copy of the settlement to the Court, which has jurisdiction regarding such dispute (ibid: Section 13 (2)). The court should then take further steps to record such settlements, which are deemed decrees (ibid: Section 13 (3)). This repudiation is not admissible to the offences that are compounded by Conciliation Boards. The purpose of this repudiation provision lively to give another chance to the Conciliation Boards to effect the settlement (Goonesekere & Metzger 1971a: 61). Or to the parties futile chances to reconsider their matter after enter to a settlement, but it should be before enter to a settlement or during the discussion.

Some of above provisions were not followed by the MBA. Mediation Boards transmit the results (settled or not settled) only if the case was initially referred by the Court (MBA 1988: Section 11 (1) (b) & 12 (b)). If the matter (civil dispute or offence) has been settled and was not referred by a court, Mediation Boards write the terms of the settlement[23] and hand over copies to the relevant parties (ibid: Section 11 (1) (a)). If there is no settlement for any civil dispute or offence, the Mediation Board should issue a Certificate of Non-Settlement to the appropriate parties (ibid: Section 12 (a)). Instead of the repudiation provision in CBA, section 14 of the MBA provided that, parties can report to the Mediation Board any time, if the other party violate terms of the settlement. Then Mediation Boards should notify to the parties and provide necessary assistance to enter a "fresh settlement" or if there is no settlement they should issue a Certificate of Non-Settlement (ibid: Sec 14 (2)).

In sum, the MBA improved provisions with regard to disputes, supervisory powers and powers of the panel members, dispute resolution process and enforcement of the results than the CBA.

5. Implementation of the Act and Criticisms

5.1 Implementation Process

As a first step for this implementation process, the MBC was appointed by the President according to the provisions of the MBA. A five member commission, including three reputed former judicial officers, was appointed on 1990. Former Supreme Court Justice, Mr. E.A.D Athukorale, was the first Chairman of the MBC, which included retired judges of the Court of Appeal Messrs. Siva Selliah and J.S.A. Abeywardena. MBC selected mediators from 12 Divisional Secretariat areas to commence the first Mediation Boards, established on 18th July 1990 (Rubasinghe 2003). On November 26th of the same year, 31 new Mediation Boards were established. The largest number of new Mediation Boards (147) was introduced in the year 1991. By the year 2000 there were 240 Mediation Boards. According to the 2004 Mediation Boards Commission Status Report, there are 261 active Mediation Boards with the support of nearly 6000 trained voluntary mediators. MBC was unable to establish Mediation Boards in some parts of the North and East of Sri Lanka due to the civil war, but

Table 1 Progress of the Mediation Boards at the End of 2003

Year	No. of Mediation Boards	Submitted Cases	Party Absent	Rejected	Withdrawn	Mediated Cases	Settled Cases	Settlement rate
1991	193	13280	NDA	611	485	12184	6625	54%
1992	193	64515	NDA	3017	2082	59416	35454	60%
1993	193	87708	NDA	4901	2612	80195	52469	65%
1994	193	93117	NDA	5533	3017	84513	54713	65%
1995	198	110449	NDA	6946	3774	99729	62755	63%
1996	198	101639	NDA	6057	3093	92489	55540	60%
1997	219	98814	NDA	6683	3411	88320	53690	61%
1998	222	107365	NDA	4441	2809	100115	56489	56%
1999	229	104105	NDA	4570	2954	96581	57292	59%
2000	240	119159	18194	3763	3334	93868	62304	66%
2001	242	117200	14744	4105	3979	94372	61935	66%
2002	252	109863	14842	3813	3984	86924	55213	64%
2003	252	112653	14363	3726	3729	90631	55083	61%
Total	252	1239867	62146	58166	39317	1079337	669562	62%

Note NDA- No Data Available
Settlement Rate is according to the mediated cases
Source NMBC Status Report 2004

it plans to take the necessary steps to establish Mediation Boards in government control areas in North and East.[24]

The total number of cases submitted to the Mediation Boards has gradually increased. There were 13,280 new cases submitted in 1991 and 6,625 of them were settled, representing 50% settlement rate. In the year 2000 there were 119,159 new cases, of which 62,634 were settled, representing a 55% settlement rate. At the end of 2003 there were 112,653 cases, of which 55, 083 were settled showing a 61% settlement rate (MBC 2003 & 2004).

As a government funded system, Rs 18,000,000 has been spent annually for the maintenance of Mediation Boards such as administrative costs, salaries of MBC members, mediation trainers and office staff (MBC Circular 1/2000 issued on 2000-07-05). Mediators do not receive a salary as volunteers but a small stipend for traveling and stationery costs. Therefore, each mediator received Rs 100 monthly (MBC Circular 15/92 issued on 1992-10-05). After a Cabinet decision taken on September 1st 1993, from January 1st 1994 each mediator receives Rs 50 for one Mediation Board meeting, increasing to a monthly allowance of up to Rs 250 (MOJ Circular 15/92 (1) issued on 14th December 1993).

5.2 Criticisms to the Mediation Boards

There are also various criticisms of some provisions of the MBA and practices of Mediation Boards. In an influential newspaper article, Dias (2003) noted some key criticisms the first of which concerns the mandatory provision in section 7 of the MBA. Civil disputes with a value of under Rs. 25,000 and offences that are specified in the 2nd schedule to the Act should first go to the Mediation Boards before going to the regular court. As with the former Conciliation Boards it has been argued that a "citizen's right to seek redress from a court of law was so fundamental that it could not be taken away even by the legislature" (quoted from Tiruchelvam 1984: 105).[25]

But the Court has affirmed that the Certificate of Non-Settlement was only a pre-requisite to initiate a court action. Justice Nanayakkara, judge of Court of Appeal, in *Rodrigo V. Raymond* (2 SLR 78 / 2002) affirmed that the certificate of non-settlement is needed to institute an action in regular court for specified cases. He said that "it should be stated that the absence of certificate does not create an absolute bar to the institution, and the maintenance of an action even where the value of the action is less than Rs 25,000" (*Rodrigo V. Raymond.* 2 SLR 78).[26] Thus, the provision in section 7 of the MBA only aims to motivate parties towards mediation. Parties can refuse the settlement and can receive a certificate of non-settlement at any time to institute a case in a Court.[27]

Provisions on criminal matters which can deal in the MBA also were subjected to criticisms. Wrnakulasuriya, emphasizing a statement made by Chief Justice on crimes in Sri Lanka, said that only 4% are convicted of those charged in courts of law and other 96 % settle without any punishment for offenders (2003). He clarified the Chief Justice's statement to make an argument that settlements are

restricting the punishments for wrongdoers. He further explained this appalling condition in Sri Lanka taking as an example the conviction rate of 99% for cases in the criminal court in Japan (ibid.). According to his analysis settlement by Mediation Boards and Courts are the major reason for this low conviction rates. However victim compensation and forgiveness by apologizing for minor criminal matters are long standing practices in Japanese society, even though there are no specific organizations or training for Victim-Offender Mediation (Haley: 1992), and Japanese court annexed-mediation or conciliation called as *chotei* covers basically the civil matters.[28]

Warnakulasuriya further argued over the definitions of criminal matters that can be dealt by the Mediation Boards. His example was, breaking someone's limb or stabbing someone with a sharp cutting instrument is a crime for which imprisonment may extend up to twenty years in USA, but in Sri Lanka these types of crimes have been assigned for settlement by lay people who are not trained in law (2003). Offences specified in the second schedule to the Act, should first be tried by the Mediation Boards as a mandatory provision (MBA 1988: Sec 7 (1) (c)). But Mediation Boards are dealing only with minor offences. All those offences are "compoundable offences" under the provisions of Code of Criminal Procedure (1979: Sec 266). On the other hand, when such a matter occurs parties directly go to the police and during investigations police also try to settle such matters. At times court, judges also try to settle such matters without going to trial. Here Police and Courts screen the offences that are appropriate for mediation by Mediation Boards giving a guarantee as 'petty offences'.

One criticism concerning the mediation process of the Mediation Boards is that the quality of mediators is low and there is still not enough training for mediators. This low quality reduces the trust of people in important judicial institutions (Dias 2003). However, there are enough provisions in the MBA and facilities in the MoJ to overcome the above difficulties. Persons selected as mediators by MBC follow a preliminary training course in mediation skills and techniques (MBA 1988: Item 3 of 1st Schedule). International organizations, such as CIDA, USAID and Asia Foundation have been assisting the MoJ and MBC to maintain the above training programs. As a funding agency, the Asia Foundation supported several public education series, including television program and instruction materials for the mediators (MoJ 1994). "Between September 1995 and December 1997, USAID has contributed approximately $ 110,000 to the Mediation Boards program" (CDG 1998: 3). The Canadian International Development Agency (CIDA) has also provided technical assistance to maintain valuable training courses for mediators (MoJ 2003a & 2003b). "This technical knowledge is really important to improve mediation skills and convince the scope of mediators."[29] Through these mediation training programs, the MoJ is expected to adopt 'interest-based'[30] mediation to develop neutrality of mediators (MoJ 2003b: 96). Some District level mediation trainers under the MoJ (who also work as District Coordinators) have been sent to visit foreign countries such as USA and India for exposure to other mediation techniques (CDG 1998: 3).

In the same article, Dias also claims that some mediators try to work as second-class judges and exploit the parties in the disputes (2003). However, the MBA provided powers to MBC to control disciplinary matters of mediators (MBA 1988: Section 3). For a practical example, the MBC received a compliant against one of the Chief Mediators in Polonnaruwa District,[31] which concerned his bad behavior and harsh style of speaking to the disputants. MBC was also verified his poor coordination with MBC, and ordered him to answer the charges in the complaint. Since he rejected all charges through his answer, MBC had to consider the District Coordinator's report regarding him. After a final inquiry held by the MBC, this individual was found guilty of the charges and removed from the position of Mediator.[32] In another incident that occurred in Kesbewa Mediation Board in Colombo district, mediators split into two groups because of their different political views. After a preliminary inquiry, MBC used powers provided by section 3 of MBA to dissolve the Mediation Panel and appoint new mediators for Kesbewa Mediation Board.[33] The above evidence indicates that criticisms of the Mediation Boards are unfounded.

Conclusion

Organized legal framework guarantees the efficient functions and better outcome of an informal dispute resolution mechanism. CBA failed to provide such a strong legal framework for Conciliation Boards. However to the development of community based dispute resolution in Sri Lanka well-built legal framework which created through the MBA was highly decisive. It is clear that MBA is not mere copy of CBA or just a step in the historical development of community based dispute resolution systems in Sri Lanka. It is an extended law to establish a community dispute resolution mechanism. Mediation Boards are performing informal dispute resolution within a formal legal framework provided by MBA. It protect the mechanism from external influences such involvements of politicians, controls the use of abuse power by mediators, and assures the disputants interests. On the other hand provisions for close coordination with courts and monitor by an independent body were essential to reach the expected outcome from Mediation Boards.

Notes

1 During the colonial period Village Communities Ordinance No. 24 of 1889 established the Village Tribunals to settle community disputes.

2 Amended by the Conciliation Boards (Amendment) Act No. 12 of 1963.

3 Collation government elected on 1956 in the fourth election of independent Sri Lanka (called as Ceylon before 1972) tried to change many parts of the society and economy. Utilizing socialist ideas they broadened domestic welfare programs and expanded the populist economic policies in different areas such as, transportation, medical, and education. But Roman-Dutch law and English law continued as the common law of Sri Lanka as all ruling bodies did before.

4 The history of community dispute settlement in Sri Lanka starts from the traditional Gamsabhava practiced during the 5th century B.C. There is ample evidence of the long history of this system. "For the hearing of complaints and doing justice among neighbors, there are country-courts of judicature, consisting of these officers, together with the Head-men of the place and towns, where the courts are kept; and these are called Gom Sabbi, as much as to say, town consultations" (Knox 1681: 181). There are more explanations in (Codrington 1938).

5 There were voluntary conciliation boards functioning in Panadura and Moratuwa area before 1958 (Goonesekere & Metzger 1971a: 48, Tiruchelvam 1984: 65–85).

6 Tremendous victory of the United National Party by 1977 general election was crucial to the economy as it introduced the open market or liberalized economy (Athukorala & Jayasuriya 2004), to the society, as it created new opportunities as well as conflicts (Hettige 1999), and to the political and legal system as it introduced the executive Presidential system with a new Constitution (De Silva 2002).

7 The Judicature Act was part of the "constitutional rearrangement" that accompanied the 1978 Constitution (Heart 1993: 380). Higher courts of Sri Lanka (Supreme Court, Court of Appeal and the High Court) instituted by Chapter XV of the Constitution, while the Judicature Act set up the hierarchy of first instance Courts in Sri Lanka, as follows: 1. High Court, 2. District Court, 3. Family Court, 4. Magistrates' Court, and 5. Primary Court.

8 Ministry of Justice has appointed following committees consisting judicial officers, lawyers and Ministry officers to find out the problems of administration in justice system. First is Committee on Courts of Appeal, second is Committee on the High Court and Magistrate's Courts, and third is Committee on District Court and Family Courts fourth is Committee on Primary Courts, and finally Committee on Labor Courts and Tribunals. Reports and discussions of these committees based on responses to the questionnaires circulated among judges and lawyers in December 1983.

9 Supreme Court Justice R.S. Wanasundara was the Chairman of this committee that contained two other members; named Mr. M.C Sansoni retired Chief Justice, Mr. J.F.A Sosa who was also on the Supreme Court bench and Mr. P.B. Herat worked as the secretary. This team commenced its activities on 1st October 1984.

10 "(1). Deficiencies in the court structure and the applicable laws, especially those of procedure (2). Conduct of Judges (3). Conduct of Lawyers (4). Conduct of Litigants (5). Mal-administration of court office (6). Delays on the part of court agencies and government departments" (WCR 1985: 9).

11 The Wanasundara Committee identified that the "existing system of the administration of justice needs restructure and overhaul" (WCR 1985: 3). Therefore most of its proposals focused on changing the administrative parts of the formal courts (WCR 1985: 25).

12 Interviews with Dr. A.R.B. Amarasinghe, the then secretary to the Ministry of Justice and former Supreme Court Justice, on file with author.

13 Discussed in Section 4.2 of this paper.

14 Article 111D of 17th Amendment of the Constitution established the Judicial Service Commission consisting of the Chief Justice (as Chairman) and two other Judges of the Supreme Court appointed by the President. Among its basic powers and functions are appointing, promoting, transferring, exercising disciplinary control and dismissing judicial officers and scheduled public officers.

15 Village Communities Ordinance No. 24 of 1889 enacted to forward the activities of former Ordinance No. 26 of 1871. It established two important institutions, first is Village Committees whereby villagers arrange village affairs, and the Village Tribunals for dispute resolution. The main objective of this Ordinance is to extend the function of local administrative bodies. In doing so, villagers are able to make rules to maintain their activities. According to Section 6 of the Ordinance, people can make rules that effect construction of infrastructure like rural roads, bridges, watering and bathing places. Cultivation, fisheries, animal husbandry, prevention of gambling and dispute resolution is also covered by those rules. Section 16 of the Ordinance asserted that inhabitants could elect a Committee to make rules on their behalf. This Village Committee should consist of not less than six men, and, achief headman as the ex-officio chairman. During the period from 1940 to 1980 the term 'Village Committees' was changed as 'Village Councils'. Again considerable change in the local government system occurred with the Pradeshiya Sabhas Act No. 15 of 1987 (PSA). Concerning the territories of a Pradeshiya Sabha, section 2 (1) of the

Act reads as "the administrative limits of every Pradeshiya Sabha area so declared shall, as far as possible, correspond to limits of an Assistant Government Agent's division" (local administration office and lately changed as Divisional Secretary Division) even the Minister has power to define the area. According to the Section 221 of the PSA, Town Council (established on 1946) or a Village Council shall deem to be reference to a Pradeshiya Sabha and by the section 225 of the PSA, Village Councils Ordinance and Town Councils Ordinance had repealed. At present each Pradeshiya Sabha or Divisional Secretary Division consist with number of Grama Niladari (Village Officer: a lowest agent of the government in villages) Divisions (compose of two three villages). There are 5 Grama Niladari Divisions in Katharagama Pradeshiya Sabha showing the lowest number and 151 in Attanagalla showing the highest number (Department of Census and Statistics 2003). PSA was expected to formulate best local government units increasing people's participation in development intervention (Perera 2001).

16 In the *R. Arnolis and 2 others v. R. Hendrick* (75 NLR 532) Supreme Court Decided that partition cases should be excluded from the Conciliation Boards jurisdiction. Rent Act is not an obstacle to the operation of Conciliation Boards- *Perumal v. Nanayakkara* (78 NLR 573). "The State is not bound by the Conciliation Boards Act in reference to civil rights" (*Lorden v. The Director of Machinery and Equipment, Irrigation Department Ratmalana* 76 NLR 454).

17 There were ten actions in this category including Matrimonial, Partition, Adoption, and Testimony (Goonesekere & Metzger 1971a: 292).

18 He has appreciated some recommendations that proposed by the Goonesekere & Metzger.

19 This includes actions on Admiralty, Election Petitions, or Enforcement a Foreign Judgment. And parties either who are under Legal Disability, State, Clergy.

20 Certificate of Non- Settlement is issued by the Mediation Board if it fails to settle the dispute. The parties and chief mediator should sign this certificate mentioning the reason for non-settlement. There is a standard format for this Certificate of Non-Settlement.

21 "The word 'compound' in the Statute is used in a non-technical sense: It means condoning a liability for an offence committed upon payment of money, forbearing to prosecute upon a private motive, or coming to terms with a person for foregoing his claim for an offence committed against him" (Marasinghe 1980: 396).

22 "The Goda Perakadoru (Village Proctor) does not have formal training in the law but is one who performs or has performed some role in the processes of the court of law as either court clerk, bailiff, proctor's clerk, petition-drafter, or even as an experienced litigant" (Tiruchelvam 1984: 158).

23 There is a standard format to write the terms of settlement.

24 Interviews with present Chairman of the MBC, Mr. Justice Dharmasiri Jayawickrama, on file with author.

25 There were controversial judgments on this matter affirming that a Certificate of non-settlement issued by the Conciliation Boards was needed to initiate an action on particular matters in regular courts. In *Nonahamy v. Halgrat Silva* (73 NLR 217) Supreme Court said that, District Court have no jurisdiction to grant an injunction under the absence of certificate issued by the Conciliation Boards. Further this case overruled the previous decision of *Wickramaratchi v. Inspector of Police Nittambuwa* (71 NLR 121), that "Conciliation Boards Act doesn't apply in a case where parties do not desire to refer a dispute to a Conciliation Board". So the court had decided that Conciliation Boards are "not a threat" to the courts (Marasinghe 1980: 408), even in a situation that it enjoyed a broad jurisdiction as I discussed before.

26 But in this case the defendant-petitioner failed to raise this issue in first instance at the District Court.

27 Considerable evidence can be collected from American experiences to justify this mandatory provision. Decision makers and leaders of the community mediation identified that without close relation with the courts there was very low case load for community mediation. Harrington and Merry claim "that while mandatory mediation might require disputants to go to mediation, the process itself is consensual and noncoercive" (1988: 721).

28 Law for Conciliation of Civil Affairs and Law for Adjudgement of Domestic Relations (EHS 1998 & 1999/ Funken 2003).

29 Interviews with present Senior Assistant Secretary (Legal) to the Ministry of Justice Mrs. K.F. De Silva, on file with author.

30 "That is, the intent of this specific form of mediation is to assist the parties to have dialogue with each other to resolve their differences in a way that leads to the reparation of any harm done and to repair or enhance the relationship between them" (MoJ 2003b: 96).

31 There are six Mediation Boards in Polonnaruwa District (MBC Status Report 2004).

32 Interviews with present Chairman to the MBC Mr. Justice Dharmasiri Jayawickrama, on file with author.

33 Interviews with present Chairman to the MBC Mr. Justice Dharmasiri Jayawickrama, on file with author.

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