The Ideology of Popular Justice in Sri Lanka

A Socio-Legal Inquiry

Neelan Tiruchelvam

The de-professionalization of the administration of justice in the historical or planned development of a number of socialist societies is one of the more intriguing phenomena in contemporary legal history. It is reflected in the emergence of diverse institutional forms for facilitating popular participation in conflict management and law enforcement, distinctively labelled in each society and generally referred to as "popular tribunals". Each of these institutions reflects in varying degrees the State's commitment to the ideal of participation by non-professionals in legal administration.

The different configurations of structural and functional features represented by each of these institutions points to differences in the legal ideology of each society; which in turn is related to and shaped by its traditional and contemporary authority structures, and legal and social organizations.

This book analyses the goals of popular justice with a view to isolating some of the forces which may account for the emergence of these institutions in different countries. In particular, it studies the significance of popular tribunals in the legal history of Sri Lanka, and illuminates the socialist, revivalist, and reformist forces which vied with each other for dominance in the structuring of these institutions. It focuses on one of the central problems of popular tribunals in post-traditional societies: the tensions between traditional institutional forms and the socialist goals and aspirations of these institutions.

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TO SITHIE SUBAHANYA

"*Dharma* is the mainstay of the entire world, everything is established in *Dharma*. Neither the state nor the King, neither the mace (*danda*) nor the mace-bearer (*dandka*) govern the people, it is only by *Dharma* that people secure mutual protection"
—*Mahabharata*, Shanti Parva, 78-32

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Preface

This study endeavours to place an important phase in the socio-legal history of Sri Lanka against the backdrop of similar efforts to establish popular courts in the development of the legal systems of several socialist and developing societies. The statutory Conciliation Boards scheme in Sri Lanka symbolized the most formal phase of this process, and responded variously to the imperatives of socialist legalism, revivalism and reformism. This study explores the ideological underpinnings of these institutions, their structure, and the competing conceptions of these institutions which shape and constrain their operation. This phase in the development of Sri Lanka's institutions for conflict resolution came to an abrupt end in the late Seventies. The search, however, persists for alternative informal processes for the disposal of cases. The quest for cheap, expeditious and accessible institutions for settlement of disputes has proved elusive for almost a century and a half since Colebrooke and Cameron (1829-1832) reported on the administration of justice. There is an increasing political clamour for the revival of statutory conciliation, stripped of some of the negative features highlighted in this study. A state-sponsored system of voluntary conciliation with conciliators chosen by disputants from a panel of elders has been mooted by some policy-makers.

This study in its original form was partly undertaken while I was a graduate student at Harvard Law School, and a Research Fellow at Yale Law School in the early seventies. At Harvard I received constant encouragement and guidance, from Jerome Cohen and Henry Steiner. My friend, Roberto Unger, exalted standards of intellectual excellence and theoretical vision which I vainly sought to emulate. At Yale, the Law and Modernization

programme provided a critical and stimulating environment for the pursuit of inter-disciplinary inquiries into law and social change. I wish to gratefully acknowledge the support of Richard Abel, William Felstiner, Yash Ghai, Heleen Ietswaart, Laura Nader, Bonaventura Santos, Henry Steiner and David Trubek.

I devoted eight months to empirical work in Colombo and the Central Highlands of Sri Lanka. The officials in the Ministry of Justice and, more particularly, the Conciliation Boards Unit of the Ministry of Justice were enthusiastic about the project and rendered every possible assistance. In the villages in which I worked I received much kindness and assistance. My research assistants — T.G. Siriwardene and Geetha Wijepala — were meticulous in the collection of data and conscientious in the conduct of interviews with conciliators and disputants. George and Vijay Dissanaike generously shared their home and their time, and did everything possible to make my legal-anthropological field trips in the Central Highlands pleasant and enjoyable.

An earlier version of Chapter I was reprinted in Charles E. Reasons and Robert M. Rich: *The Sociology of Law, A Conflict Perspective* (Butterworth, 1978), and Chapter II appeared in its original form in the *Colombo Law Review,* Vol. 4, 1978.

Nelum Gunasekera, Valli Kanapathipillai and Nigel Hatch helped me with the bibilography and index. Mr M.A. Amsar retyped several sections of the book.

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I

The deprofessionalization of the administration of justice in the historical or planned development of a number of socialist societies is one of the more intriguing phenomena in contemporary legal history. It is reflected in the emergence of diverse institutional forms for facilitating popular participation in conflict management and law enforcement, distinctively labelled in each society and generally referred to as "popular tribunals".[1] While each of these institutions reflects in varying degrees the state's commitment to the ideal of participation by non-law professionals in legal administration, a cursory survey of the organic laws relating to these institutions reveals that the rubric "popular tribunals" often conceal fundamental differences in form, organization, recruitment patterns, jurisdiction, degree and nature of procedural regulation, sanctioning power and types of surpervisory control. The different configuration of structural and functional features represented by each of these institutions points to differences in the legal ideology of each of these societies; which are in turn related to

[1] The concept "popular tribunals" has been defined to include state institutionalized mechanisms for conflict resolution and law enforcement which are staffed primarily by persons who lack a specialized training in law. [See Stanley Lubman and Fred DuBow, in the Session on Popular Tribunals, in *The Proceedings of the Conference on Legal Anthropology* (1971), on file at the Yale Law School.] Such a definition tends to exclude those informal processes of social control which are not set up by the state and which tend to emerge more spontaneously in occupational guilds, ethnic communities, religious groups, etc. Our inquiry is further limited to the institutionalization of popular legal forms in societies which perceive themselves to be pursuing a socialist strategy of development or adhering to a socialist political ideology. Our study will not therefore encompass analogous lay institutions such as the "jury," in a capitalistic post-industrialized nation, or the "tribal council" in a more traditional socio-economic setting.

and shaped by their traditional and contemporary authority structures, and legal and social organizations.

In this chapter we shall analyze the goals of popular justice with a view to isolating some of these institutions in different countries. In doing so we shall group the countries which have adopted some form of popular tribunal into three categories. In the first category we shall place the Soviet Union, and other countries which seem to have been stimulated by the Soviet experience to initiate similar institutional innovations, such as Poland and Cuba. We shall also place in this category and briefly discuss for their academic significance, the abortive proposals to institute neighborhood tribunals in Chile. In the second category we shall place Tanzania, India and Burma. The popular tribunals in these countries appear to be of indigenous inspiration and represent post-colonial reactions to an imposed British court structure. Popular justice in China appears to be of a different order and will be dealt with separately in the third category. While many scholars see the origins of the general emphasis on peoples' mediation as a technique for coping with conflict and anti-social conduct in the traditional Confucian preference for conciliation,[2]. Chinese ideologists on the other hand rationalize it as a distinctive Maoist contribution to Marxist-Leninist thought.[3] The general discussion of popular justice in these three categories would provide a backdrop for a more detailed examination of the significance of popular tribunals in the socialist development of Sri Lanka.

Before we begin such an analysis we should be sensitive to some of the difficulties inherent in such an approach. Firstly, the goals of popular justice in design may be quite distinct from what they are in operation. State rhetoric may assert the principal objective of popular justice as the encouragement of local jural autonomy, but in operation these institutions may be used to facilitate the penetration of the national legal order. Conversely, tribunals designed to facilitate the implementation of national policies may in actual fact articulate local values

[2] See Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization", 55 *California Law Review* 1201 (1966).

[3] See editorial, "Does People's Mediation Work Well, Strengthen the Unity of the People, Impel Production and Construction?" in Jerome Alan Cohen, *The Criminal Process in the People's Republic of China* (1968), p. 125.

and interests and cushion the impact of these policies. Secondly, there tends to be an ambiguity or lack of unanimity amongst a nation's ideologists as to the goals of popular justice. Policy makers may oscillate between the "policy implementation" and "self-management" conceptions of local tribunals. Thirdly, the legal ideology of a society may be subject to shifts, and correspondingly, popular courts acquire a new significance at different periods of time. State propagandists may at an early phase of the establishment of popular tribunals emphasize its conflict-management function, but as the regime becomes radicalized, place greater emphasis on its pedagogic functions. Fourthly, different popular tribunals may occupy contradictory positions in the legal ideological landscape. One popular tribunal, by being empowered to dispose of minor crimes and anti-social conduct by the application of informal social pressure, may represent the withdrawal of the central legal order, while another tribunal by being vested with coercive sanctioning power over a wide range of social behavior not previously subject to state regulation, may represent a contradictory trend.

II

The re-emergence of popular tribunals in the Soviet Union followed the repudiation by the Twenty-first and Twenty-second Party Conferences of the public order concepts of the Stalinist era.[4] Khrushchev in his address to the latter Conference underscored the importance of popular participation in the maintenance of public order and the effectiveness of informal social pressure in the anticipation and deterrence of anti-social conduct.[5] Lipson, emphasizing the lack of "full-time paid professional staff, formal procedural rules and bureaucratic traditions" described the institutions which emerged to give expression to this policy as, "the non-courts (in the first place the comrades' courts and the anti-parasite tribunals) and the im-police (the DND or the volunteer people's guard)".[6] The

[4] See John N. Hazard, *et al.*, *The Soviet Legal System* (1969), pp. 14-16.

[5] See N.S. Khrushchev, *Problems of Theory*, Report to the 21st Extraordinary Congress of the Communist Party of the Soviet Union (January 27, 1959), excerpt in John N. Hazard, *et al.*, *The Soviet Legal System*, pp. 16-17.

[6] See Leon Lipson, "The Function of Extra-Judicial Mechanisms," in Donald W. Treadgold (ed.), *Soviet and Chinese Communism: Similarities and Differences*, (1967).

most important of these, the comrades' courts, were reconstituted in 1961.[7] The organic law relating to comrades' courts provides that the more important objectives of this court would include "the prevention of violations of law and misconduct that cause harm to society, the education of people through persuasion and social pressure, and the creation of conditions of intolerance towards any anti-social conduct."[8] A more detailed analysis of four goals emphasized by Soviet commentators as being served by comrades' courts would contribute towards a more general understanding of the significance of popular justice in Soviet society.

The first is the ideal of popular participation in the operation of the legal system, which must be seen in the broader context of the political role assigned to the "people" by Soviet ideology. A problem central to Marxist-Leninist thought is the proper balance between centralized direction and localized popular control in the organization and management of a socialist society. Lenin, after a review of the history of the trade union movement, concluded that the working class could not be relied on to spontaneously evolve a revolutionary socialist consciousness consistent with the objective conditions of its class, and that it required an elite party to direct the process of socialist transformation.[9] Lenin therefore assigned to the revolutionary party, by reason of its organizational superiority, the discipline and ideological unanimity of its cadres, an active interventionist role in the period of transition to communism.[10] The people, however, were not to be totally excluded from this process, and were allocated the role of participation in the administration of state functions. Lenin urged that the "whole of the population" be educated in the art of administration. He said,

> Our aim is to draw the whole of the poor in the practical work of administration . . . to ensure that every toiler after having finished his eight hours' lesson in productive labor, shall

[7] See H.J. Berman and J.W. Spendler, "Soviet Comrades' Courts," 38 *Washington Law Review* (1963), pp. 824ff.

[8] See Article 1, "The Statute on Comrades' Courts", July 3, 1961 in John Hazard, *et al.*, *The Soviet Legal System*, pp. 18-19.

[9] See V.I. Lenin, *Selected Works*, volume 11, p. 53.

[10] See V.I. Lenin, *Selected Works*, volume 11, p. 62.

perform state duties, gratis.[11]

Popular participation was to extend to the administration of legal institutions and the enforcement of laws. Lenin pointed out

> every citizen must be placed in conditions which would enable him to participate in the discussion of state laws, in the election of his representatives and in putting the state laws into practice.[12]

In the Soviet Union the Communist Party is therefore recognized as "the highest form of socio-political organization, the guiding and directive force of Soviet society".[13] Leninist conceptions of popular participation, although discarded during the Stalinist era[14], have been reaffirmed by Stalin's heirs in 1957.[15] Accordingly, popular tribunals are rationalized as implementing a broad programme for the transfer of state functions from governmental organs to "social" agencies.

This is clearly seen in the 1961 statute on comrades' courts. The statute gives strong expression to the concept of local control by providing that "comrades' courts shall be invested with the trust of the collective, shall express its will and shall be responsible to it".[16] Accordingly, the local Soviet work and residential units were vested with the power to constitute, elect members, review sanctions and exercise overall supervision over comrades' courts.[17] These provisions contrast sharply with earlier legislation entrusting central state agencies with supervisory control over comrades' courts.[18]

Lipson is, however, less convinced than Soviet commentators that the comrades' courts, the toilers' collectives under the

[11] See V.I. Lenin, *Selected Works*, volume VII, pp. 345-346.

[12] See V.I. Lenin, *Selected Works*, (4th Russian edition), volume 27, p. 185, cited in Denisor and Kirichenko, *Soviet State Law* (1960), p. 21.

[13] See the Rules of the Communist Party of the Soviet Union, adapted by 22nd Party Congress. See H.J. Berman and John B. Quigley, Jr., *Basic Laws on the Structure of the Soviet State* (1969), p. 59.

[14] See John N. Hazard *et al.*, *The Soviet Legal System*, p. 15, and H.J. Berman and J.W. Spendler, "Soviet Comrades' Courts", *op. cit.*, p. 848.

[15] See note 5, *supra*.

[16] See article 1 of the "Statute on Comrades' Courts", in John N. Hazard, *et al.*, *The Soviet Legal System*, p. 19.

[17] See Articles 2-(4) and 22, the "Statute on Comrades' Courts" in John N. Hazard, *et al.*, *op. cit.*, p. 19ff; see also H.J. Berman and J.W. Spendler, *op. cit.*, pp. 859-863.

[18] See H.J. Berman and J.W. Spendler, *op. cit.*, pp. 893-894.

anti-parasite laws (1957-65), lay prosecutors and defenders, and the voluntary people's militia represent a shift towards participatory institutions in the legal sphere.[19] By drawing attention to the centrality of party control in the operation of these institutions, he alleges that these tribunals are only "nominally" popular courts.[20] He further adds that the withdrawal of toilers' collectives from the investigation of violations of the parasite laws is indicative of the containment of even the "apparent" movement towards participatory legal organs.[21]

Second, the ideal of legal nihilism; Soviet jurists have often viewed law as a coercive instrument of the dominant social class. The classical Marxist vision is that in the final stage of the classless communist society, both the state and law as a coercive instrument of the state would disappear. The emphasis on non-coercive social pressures in the design of comrades' courts therefore led some Soviet commentators to regard the establishment of comrades' courts as signalling early stages in the gradual withering away of law.[22]

Other commentators, however, draw attention to the fact that the anti-parasite laws, by expanding the use of coercive sanctions over a wide range of social behavior and attitudes not previously subject to state regulation, reflect a trend in the opposite direction.[23] It has also been emphasized that the coercive powers vested in the comrades' courts were enhanced in 1965 by increasing the maximum fine they may impose for theft within their jurisdictions.[24]

Third, both in Khrushchev's speech to the Twenty-first Party Congress and in the organic law relating to comrades' courts there is strong emphasis on their educational role.[25] Berman regards the pedagogic function central to Soviet law and legal institutions, and often determinative of the procedure,

[19] See Leon Lipson, *The Functions of Extra Judicial Mechanisms, op. cit.*, pp. 163ff.

[20] *Ibid.*, p. 162.

[21] *Ibid.*, p. 162.

[22] *Ibid.*, p. 163; see H.J. Berman and J.W. Spendler, *op. cit.*, p. 856.

[23] See Leon Lipson, *op. cit.*, p. 156; A Boiter, "Comradely Justice, How Durable Is It?" 14 *Problems of Communism* 82, p. 91 (1965).

[24] See Leon Lipson, *op. cit.*, p. 162.

[25] See N.S. Khrushchev, *Problems of Theory*, Report to the 21st Extraordinary Congress of the Communist Party, pp. 16-17 and Article 1 of the "Statute on Comrades' Courts", *op. cit.*, pp. 18-19.

style and outcome of judicial proceedings.[26] Soviet jurists have remarked that the most "important task of the courts is the fundamental remaking of the conscience of the people";[27] the courts are accordingly enjoined to explore the causes that underlie crime and anti-social conduct and take steps to eliminate them.[28] The establishment of comrades' courts and other popular legal organs reinforces the "paternalistic" elements in the legal system. The relative absence of status differentiation between tribunal and disputants, the informality and the flexibility of their procedures, the social and physical proximity of the proceedings to the location of the dispute or the violation, enhance the effectiveness of the popular courts in reshaping the attitudes and behavioral patterns of workers and residents. With respect to the comrades' courts, the 1961 statute explicated the values which the courts should instil in the parties and others present in the court to include "the communist attitude towards labor and socialist property and the rules of socialist community life . . . a sense of collectivism and comradely mutual assistance and respect for the dignity and honor of citizens".[29]

Fourth, Soviet ideologists and jurists have strongly emphasized the role of participatory institutions in the protection of the public order through the identification of potential lawbreakers and the deterrence of anti-social conduct by the application of social pressure.[30] To enable these institutions to expose and correct criminal conduct at its earliest stage they are empowered to overview "not only questions of behavior on the job, but also questions of everyday behavior and morality".[31] Some commentators believe that these institutions may provide an ingenious solution to the problems of delinquency in post-industrialized societies caused by the breakdown of primary group loyalties and the disruption of old patterns of recreation,

[26] See H.J. Berman, "The Educational Role of the Soviet Court," *21 Int. Comp. L.Q.* (1972).

[27] I.T. Coliakov, a former President of the Supreme Court of the U.S.S.R. cited in H.J. Berman, *The Educational Role of the Soviet Court*, *op. cit.*, p. 90.

[28] See article 21 of R.S.F.S.R. of Code of Criminal Procedure, cited in H.J. Berman, *op. cit.*,

[29] See Article 1, "The Statute on Comrades Courts", in John N. Hazard *et al.*, *op. cit.*, p. 18.

[30] See N.S. Khrushchev, *Problems of Theory*, *op. cit.*, pp. 16-17; also see H.J. Berman and J.W. Spendler, *op. cit.*, p. 843.

[31] See N.S. Khrushchev, *Problems of Theory*, p. 17.

and the resulting anomie and depression.[32] Others regard the popular courts as part of the elaborate Soviet machinery for political control.[33] The latter commentators concede that the Soviet regime has become less repressive, but they draw attention to the wide range of conduct subject to the institutional supervision of popular legal organs in urging that the regime has become more comprehensive.[34]

At this point we may also briefly note that Eastern European commentaries on popular courts also highlight the value of the popular tribunals in the protection of the public order. Podgorcki points out that the constitution of workers' courts in Poland was inspired by the belief that

> old means of mass repression are becoming obsolete and are no longer sufficient to prevent certain forms of socially harmful behavior; and that in such the pressure of opinion of the occupational groups is more effective than legal sanctions.[35]

We may now turn to the Cuban popular tribunals, which were organized on an experimental basis in the rural areas in 1964, and were subsequently extended throughout the country.[36] It has been recently estimated that there are about 5,000 popular tribunals in operation.[37] In the absence of an organic law regulating the constitution of these tribunals, we must turn to a judges' manual issued by a panel of lawyers, for a statement of the goals of Cuban popular justice.[38] The preamble to the manual contains a coherent statement of the ideological basis of popular tribunals. It equates the establishment of

[32] Cf. H.J Berman and J.W. Spendler, *op. cit.*, pp. 848-849.

[33] See J. Azrael, "Is Coercion Withering Away?" 11 *Problems of Communism* 6, pp. 9, 21.

[34] See Leon Lipson, *op. cit.*, p. 165.

[35] See Adam Podgorcki, "Sociological Analysis of the Legal Experiment Survey of Workers," in Vilhelm Aubert, (ed.), *The Sociology of Law*, p. 149 (1969); on the popular courts in East Germany, see Edith Brown Weiss, "The East German Social Courts: Development and Comparison with China," 20 *Am. Journal of Comp. L.* 266 (1972).

[36] See Jesse Berman, "The Cuban Popular Tribunals," 69 *Columbia Law Rev.* (1969), p. 1317.

[37] See Luis Alameda Bates' lecture on "Cuban Popular Tribunals," delivered at the Yale Law School (1972). Notes on file with author.

[38] See *The Manual of the Cuban Popular Tribunals*, on file at the Yale Law School; a translation by Heleen F.P. Ietswaart of important excerpts from the manual is on file with the author.

popular tribunals with fundamental changes in the economic sphere such as the transfer of the ownership of basic means of production from private to public sectors. It then reiterates the familiar critique of law in a capitalist society as an instrument of oppression servicing the interests of the dominant social class. By way of contrast the popular tribunals are thought to complete on the one hand and reiterate on the other a new conception of popular socialist legality. In contrasting "bourgeoise" legality with the new legality attention is drawn to the fact that the former is "something official, something alien to the people, that comes down from above". Popular tribunals on the other hand symbolize that socialist legality is something "that arises from the people," in that the tribunals are organized and managed by the people. The close involvement of the tribunal in the life of the neighborhood is also emphasized. Its personnel are drawn from the local community, it is located within and otherwise intimately linked with the neighborhood. The justice it administers is therefore the "expression of the power of the working people in the socialist state".[39]

Besides giving expression to this vaguely defined new legality, the tribunal was also to educate the masses and protect the public order.[40] They would not only be instruments of coercion but also apply non-coercive sanctions such as a public admonition to rehabilitate offenders.[41] It also served important pedagogic functions in extolling the values of the new socialist man and of explaining the norms of the revolutionary regime, and thereby consolidating the socialist social order.[42]

Other commentators, however, perceive the significance of popular tribunals differently. They point out that these tribunals merely created a parallel legal order, which worked in disharmony with and had little impact on the pre-liberation legal order. The regular courts of law continued to operate with almost the same personnel and with little difference in proceed-

[39] See Preamble by Blas Roca, the Chairman of the Commission for Constitutional Studies in the Communist Party of Cuba, in *The Manual of the Cuban Popular Tribunals*, *op. cit.*, p. 1. See also Jesse Berman, *The Cuban Popular Tribunals*, *op. cit.*, p. 1318.

[40] See Jesse Berman, *The Cuban Popular Tribunals*, *op. cit.*, p. 1319.

[41] On the sanctions available to the tribunals, see *The Manual of the Cuban Popular Tribunals*, *op. cit.*, pp. 1329-1332.

[42] See Jesse Berman, *op. cit.*, pp. 1350-1351.

ings, style or in the codes of law they administered.[43] This evaluation seems, however, to be overstated. Even though the same court structure has been retained, the fundamental changes in outlook, role conception and function of the Cuban law professional must clearly inform the working of the official legal organs.[44] More recently, however, an attempt is being made to unify the dual court structures and extend the concept of popular participation to all levels of the integrated judicial organization, and thereby "synthesize the contradictions inherent in the legal system".[45]

We may, by way of contrast, briefly refer to the abortive proposal to institute neighborhood tribunals in Chile.[46] Chilean ideologists have been repeatedly critical of the failure of the central legal order to reach important sectors of Chilean society represented by slum dwellers and workers; and they attributed this lack of penetration to the contradictions between the legal system and the social and cultural reality "which these sectors represented".[47] The popular tribunals, therefore, presented an alternative legal framework for these alienated social groups to organize their daily lives in a "more humane and dignified way".[48] The tribunals would be managed by the working classes and deal with problems "which have little significance for the social groups of higher income but have a crucial importance for the working class".[49] The procedure would be public, oral and informal and the sanctions directed towards correction and re-education.[50] The norms would be simplified

[43] Dan Lund, "Cuban Popular Courts", a lecture delivered to the Yale Chapter of the National Lawyers Guild (1971). Notes on file with author.

[44] Cf. Jesse Berman, *op. cit.*, 1338-1341; see article on the "Abolition of Private Law Practice," *Gamma*, 5th September 1971.

[45] See article entitled, "The National Judicial System; An Integral Part of Revolutionary Power," *Gamma*, 5th September 1971.

[46] President Salvador Allende submitted a Bill on popular tribunals to Congress on January 1971, but later withdrew it amidst strong opposition, especially from the Christian Democrats. See *The New York Times*, January 27, 1971, p. 8 and March 5, 1971, p. 3.

[47] See President Allende's Message to Congress on the Neighbourhood Tribunals Bill, translated by Julio Faundez, in Henry Steiner and Roberto Unger, *Seminar Material on Law and Development* (1971-72), on file at the Harvard Law School.

[48] See President Allende's Message to Congress, *ibid.*, p. 2.

[49] See President Allende's Message to Congress, *ibid.*, p. 1.

[50] See Articles 35 and 52 of the Neighbourhood Tribunals Bill, translated by Julio Faundez in Henry Steiner and Roberto Unger, *Seminar Material on Law and Development* (1971-72).

to exclude the need for law professionals, and the technique of norm application would be changed. The tribunal would be required to be less conscious of the rule itself and be more attentive to "the social and human reality to which the rules are to be applied".[51] Accordingly, in the evaluation of evidence the tribunal was required to take into account "the degree of culture of the parties and the moral values relevant to the social group" in which it functioned.[52] The expectation was that the values of these social groups would be drawn into this process by the adoption of a new technique of norm application. The attempt here then was not to absorb the working classes and the slum dwellers into the existing legal framework, but to create a structure outside of this framework which would be informed by, and be responsive to, the needs and aspirations of these groups.

III

The next category of societies consists of Tanzania, India and Burma. We shall first deal with the new mechanisms in Tanzania for facilitating popular involvement in legal administration, namely the primary courts, the arbitration councils and TANU cell-leaders. The primary courts established in 1964, are composed of one professional magistrate and two lay assessors.[53] They replace the local courts which were created during the colonial period to apply customary norms and follow indigenous procedures in dealing with the controversies and the crimes of the African population.[54] The Africans, however, developed a deep distrust of the local courts and made little use of them. Three factors seem to have contributed towards this situation: (*a*) resentment over the discriminatory colonial court structure which excluded Africans from all but the lower courts; (*b*) the negative image of the courts as one of the instruments through which the colonial power exercised its domination; and (*c*) the availability of adequate processes

[51] See President Allende's Message to Congress, *ibid.*

[52] See Article 46, of the Neighbourhood Tribunal Bill, translated by Julio Faundez, *ibid.*, p. 5.

[53] See, on the historical evolution of the Primary Courts, P.T. George," The Court in the Tanzania One-Party State, in G.F.A. Sawyerr (ed.) *East African Law and Social Change* (1967), pp. 30-33.

[54] See P.T. George, *ibid.*, pp. 30-31.

within the community to deal with these problems.[55] Since independence several basic changes were instituted, including the integration of the dual court structure [56] and the separation of the exercise of judicial functions from that of the administration.[57] The establishment of primary courts also appears to give expression to a more general desire to provide persons in rural Tanzania expeditious and more easily accessible judicial institutions. Unlike its precursors the primary courts were also required to be subject to the Penal Code and the Criminal Procedure Code,[58] thereby reinforcing the determination of the architects of the primary courts to bring them within the fold of the central legal order.

Judicial administrators in recent years have also focused attention on the arbitration of disputes by local elders pointing out that while these elders helped ease the overcrowding of court dockets, in many instances they abused their powers and disregarded basic standards of evenhandedness.[59] Accordingly, they moved "to formalize and institutionalize" the resolution of disputes by such elders through the creation of arbitration councils.[60] Here again an attempt is made to extend the control of the central legal order over local remedy agents, by determining which elders are competent to resolve disputes, by strictly defining their jurisdiction and powers, subjecting them to an appellate process, and by requiring them to adhere to certain basic procedural standards.[61]

Another popular institution which we should note is the TANU cell-leader, the lowest unit of the Tanzanian mass party organization.[62] The cell-leaders were created in the expectation that they would primarily devote themselves to transmitting and explaining party policies and mobilizing popular support

[55] See comments by Y.P. Ghai, in *Seminar on Law and Socialist Development in the Third World* (1973), Yale Law School, on file with author.

[56] See P.T. George, *ibid.*, p. 32.

[57] See P.T. George, *ibid.*, pp. 35-36.

[58] See P.T. George, *ibid.*, p. 32.

[59] See speech of second Vice-President to the Republic of Tanzania, at the Judges Conference on 27th November 1967, pp. 3-4, on file with the author.

[60] *Ibid.*, p. 4.

[61] See the Regulations on Arbitration Councils, G.N. 219/1969 framed under the Magistrates Courts Amendment Act No. 18 of 1969.

[62] See generally on TANU, Henry Bienen, *Tanzania Party Transformation and Economic Development* (1967); and John R. Nellis, *A Theory of Ideology—The Tanzanian Example* (1972).

towards these policies; they were, on the other hand, found to devote most of their efforts towards the settlement of interpersonal disputes.[63] Very few TANU cell-leaders also seized upon the conflict-resolving situation as an opportunity to articulate party policies, and some commentators urge that there is an incompatibility between the reconciler role — which, they perceive, creates a need to draw on traditional values — and the mobilizational role, and the resultant attempt to instil new values.[64] Since the TANU cell-leaders are not often drawn from the traditional leadership of the clan, their role as para legal agents has also been interpreted as an encroachment by the party into the conflict management functions of traditional elders. The cell-leaders have also been found to be involved in policing duties and in the execution of court decrees, thereby relieving state agencies of some of the responsibilities of law enforcement.[65]

The Indian counterparts of popular judicial institutions are the statutory *nyaya panchayats;* the judicial limbs of the village level panchayat which in turn is a component of a three-tiered elective participatory structure of local self-government.[66] [The two others are the block level *panchayat samiti* and the *zilla parishad* (the district panchayat).] The panchayati raj concept derives its more immediate rationale and inspiration from the interrelated but relatively unsystematically developed body of social ideas which we shall herein refer to as "Gandhian collectivism".[67] Gandhi, like his counterparts in western social thought, the anarchists and utopian socialists, believed in the benign goodness of human nature and attributed the debasement of individual man to the evils of industrialization, the

[63] See Fred DuBow, "TANU Cell-leaders as Para-legal Agents" (1971), unpublished paper presented at the Annual Conference of the African Studies Association, on November 10, 1971, p. 8; Joel Samoff, "Agents of Change?—Cell Leaders in an Urban Setting", (1971), unpublished paper, presented at the Annual Conference of the African Studies Association, on November 10, 1971, p. 7.

[64] Fred DuBow, *ibid.*, pp. 17-18; and cf. Joel Samoff, p. 14.

[65] See Fred DuBow, *ibid.*, pp. 14, 15.

[66] On the *panchayats* in general see H.D. Malaviya, *Village Panchayats in India* (1956); on the judicial *panchayats* see, *Report of the Study Team on Nyaya Panchayats* (1962), Robert S. Robbins, *India: Judicial Panchayats in Uttar Pradesh*, *American Journal of Comparative Law* (1962), 239-246.

[67] See generally H.D. Malaviya, *ibid.*, Chapter IX, pp. 242-255; and on the Gandhian social order, see V.K.R.V. Rao, "The Gandhian Alternative to Western Socialism," 26 *India Quarterly*, 331-352 (1970); B.N. Ganguli, "Gandhian Contribution to Indian Thought and Practice," 26 *India Quarterly*, 353-361 (1970).

oppression of hierarchical political structures and the artificial wants created by a capitalistic economic order.[68] He believed that individual needs and aspirations find their highest level of material and spiritual fulfillment and expression in the solidarity of small groups and communities. Gandhi described this social order as follows:

> In the structure composed of innumerable villages there will be ever-widening, never ascending circles. Life would not be a pyramid with the apex sustained by the bottom. But it will be an oceanic circle where centre will be the individual always ready to perish for the circle of villages, till at the last the whole becomes one life composed of individuals, never aggressive in the arrogance but ever humble, sharing the majesty of the oceanic circle of which they are integral units. Therefore the outermost circumference will not wield power to crush the inner circle but will give strength to all within and derive its own strength from it.[69]

This non-acquisitive egalitarian social order was to be accomplished not by class antagonism but by moral persuasion; by which the propertied classes would be urged to forego their social and economic privileges and hold property (in excess of their basic needs) in trust for the welfare of the group.[70] In the ideal Gandhian collective there would be no groups or individuals competing for power or wealth and therefore one assumes that there would be little need for an autonomous legal order to reconcile their claims. The cohesiveness of the group is conserved by the internationalization of collective standards and values and by the resolution of disputes and differences by compromise and conciliation.[71]

At a programmatic level, despite the abortive efforts of some Gandhians at the Constituent Assembly to establish an Indian polity, composed of a federation of village governments,[72]

[68] See L.I. Rudolph and Susanne H. Rudolph, *The Modernity of Tradition* (1967), p. 217.

[69] See the *Harijan*, July 22, 1946 cited by H.D. Malaviya, *ibid.*, p. 250.

[70] On the Gandhian concept of "trusteeship" see V.K.R.V. Rao, *op. cit.*, p. 348ff.

[71] On the resolution of disputes in the Gandhian *panchayats* see the *Harijan*, January 4, 1948 cited in H.D. Malaviya, *ibid.*, pp. 252-253.

[72] A Gandhian publicist S.N. Agrawal, drafted a constitution based on Gandhi's concepts of political and social order; see S.N. Agrawal, *Gandhian Constitution for Free India* (1946). In an Introduction to the book Gandhi conceded, "There is nothing

Gandhi himself was enough of a realist to recognize the inevitability of the modern state. He did, however, feel that the autonomous and self-contained village could serve as a buffer between the individual and the state, by containing the impact of the forces of industrialization released by it.[73] As a concession to the Gandhian collectivists the Constitution contains a provision favouring the establishment of village panchayats as units of local self-government.[74] The state's commitment to the panchayat movement took more concrete shape with the recommendations of a Planning Ministry study team, headed by a Gandhian, Balwantray Mehta.[75] The Mehta team proposed a scheme which served as a model to subsequent state panchayat legislation.

Alternative explanations have also been suggested to account for the statutory panchayats. Some, while conceding the establishment of statutory panchayats to the Gandhian collectivist movement, perceive the latter as essentially a revivalist programme based upon a romanticized image of traditional organizational forms.[76] But such an explanation tends to overlook the anti-traditional elements in Gandhian social thought. Gandhi denied the immutability of what many believed to be religiously sanctioned hierarchical social arrangements, and believed that the social order is susceptible to change through collective effort.[77] Further, the social organization and the distribution of authority and economic power in the egalitarian Gandhian collective was envisioned to be

in it which has jarred on me as inconsistent with what I would like to stand for."

For a review of the confrontation in the Constituent Assembly between the Gandhian collectivists and the advocates of a modern political structure, see H.D. Malaviya, *ibid.*, pp. 258-260 and Glanville Austin, *The Indian Constitution, Cornerstone of a Nation* (1966), Chapter 2.

[73] See B.N. Ganguli, *ibid.*, pp. 358-360.

[74] See Article 40 of the *Constitution of the Republic of India* which provides: "The State shall take steps to organize village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."

[75] See Government of India, Planning Commission, *Report of the Team for the Study of Community Projects and National Extension Services* (1957).

[76] Dr. B.R. Ambedkar blasted the romanticized attributes with which the Gandhian collectivists attempted to endow the ancient village republics, "What is the village" he asked his critics, "but a stink of localism and a den of ignorance, narrow mindedness, and communalism?" cited in H.D. Malaviya, *op. cit.*, p. 258, cf. L.I. Rudolph, and Susanne H. Rudolph, *op. cit.*, p. 217.

[77] Cf. V.K.R.V. Rao, *op. cit.*, p. 335, and L.I. Rudolph and Susanne H. Rudolph, *op. cit.*, p. 124.

radically different from that in the traditional village model.

At the other extreme there are others who view the statutory panchayats as instruments of modernization, representing the expansion and not the containment of the modern state and the central legal order. They argue that the Indian elites regarded statutory panchayats as successors to the ineffective base level organizations in the community development programme; a centrally planned and directed effort to integrate the rural into the national polity. The expectation was that an elective panchayat would be more successful than its bureaucratically conceived precursors in generating local enthusiasm and support for the programme of rural development. Traditional symbolism and the emphasis on traditional values merely served the function of providing legitimacy to the new institutional forms. These considerations compelled one commentator to conclude, "the movement to panchayats then is . . . not an abandonment of the modern legal system but its extension in the guise of tradition".[78]

There is a third group which regards judicial panchayats as no more than an imaginative judicial reform providing a creative fusion of modern and traditional elements.[79] This group, therefore, perceives a continuity between the efforts of sensitive British administrators such as Munro and Elphinstone to devise judicial reforms which capture the features of indigenous procedures,[80] and the post-independent judicial panchayats. Both reforms are directed towards minimizing some of the negative consequences of the British court system, arising from its lack of congruence with traditional jural postulates and resulting in frivolous and vexatious suits, the use of falsified documents and the prevalence of perjured testimony, which in turn add to the expense and duration of litigation.[81] The traditional elements in the judicial panchayats,

[78] See Marc Galanter, "The Aborted Restoration of Indigenous Law in India", 14 *Comparative Studies in Society and History* 53, p. 60. Galanter has also stressed important structural differences between the statutory and traditional *panchayats*, with respect to composition, recruitment, mode of execution of decrees, and the normative standards to which they were subject, *ibid.*, p. 58.

[79] Cf. L.I. Rudolph and Susanne H. Rudolph, *op. cit.*, p. 268.

[80] On the efforts of English administrators to "traditionalize the modern administration of justice," see L.I. Rudolph, *op. cit.*, pp. 264-5.

[81] See Bernard S. Cohn, "Some Notes on Law and Change in North India", 8 *Economic Development and Cultural Change* 79-93 (1959); L.I. Rudolph and Susanne H. Rudolph, *op. cit.*, pp. 259-264.

the simplicity of the procedure, the absence of law professionals, the emphasis on compromise and the physical and social proximity to disputants on the one hand facilitate the cheap, informal and expeditious disposition of disputes. On the other hand, the precise delineation by statutes of the jurisdiction and powers of these tribunals, and their integration into the national court system, ensure the adherence to some of the basic procedural safeguards of the new legal order and impose consistency and uniformity in the disposition of like disputes. From this perspective the statutory panchayats tend to mediate between the modern and traditional components of the dual legal order.

The establishment of popular courts in Burma has been described as a "judicial revolution" which clearly goes beyond the reforms in Tanzania and India.[82] It envisages the replacement of the court structure with a "people's judicial system" consisting of tribunals staffed by popular judges working in rotation and a law professional serving as its Secretary.[83] The popular judges do not merely participate in the proceedings but exercise control, as the ultimate power of disposition rests with them. The participation of the law professional on the other hand is strictly limited to that of an advisor. Local control in the recruitment of the popular judges is ensured by delegating this function to a three-member judicial committee composed of the local representatives of the party, worker and peasant organizations. The popular courts are accessible and informal, their "language is simple, and proceedings now better understood, are speedier".[84]

The significance of the newly instituted popular judicial system can only be understood in the context of Burma's legal history. The traditional Burmese system of justice has been represented as the archetype of the informal conciliatory model of dispute resolution. The headmen and other village elders mediated family problems and disputes between villagers with the aim of maintaining the peace and harmony of the family and

[82] See M.C. Tan, "Dads and Mums", *The Far Eastern Economic Review*, August 19, 1972, Richard Butwell, "Ne Win's Burma at the End of the Second Decade", *Asian Survey* (1962), 901, p. 903.

[83] See M.C. Tan, *op. cit.*

[84] Private communication on Burma's Popular Courts (1972) by Dr. Maung Maung, the Minister for Justice, on file with author.

the village.[85] Early British administrators contained for some time efforts to superimpose English laws and judicial forms on Burmese society. They desired on the one hand to retain the expeditiousness and informality of the Burmese system and were determined on the other, to render it more impartial; and as a result applied Burmese customary norms and devised an adjudicatory system which combined "British and Burmese notions of justice".[86] The pressure for more basic changes, however, came from those who regarded the Burmese customary laws appropriate to an "isolated agricultural people" but no longer adequate to sustain the expanded commerce and economic life of an industrializing society.[87] By the turn of the nineteenth century, customary norms were almost entirely replaced by Anglo-Indian codes and the British common law, and the relatively informal and hybrid adjudicatory system was systematically replaced by a hierarchical court organization.[88] This process by which a formal-rational legal system and certain basic postulates such as formal equality and procedural regularity which underlie it, were transposed into Burma has been described as the introduction of the "rule of law".[89] Perspectives on the rule of law and its impact have, however, varied among the Burmese elite. On the one hand, several prominent leaders read "rule of law" to mean the exercise of authority in accordance with the law and the related principle of equality before the law, and regard it as one of the most valuable legacies of British rule.[90] Others associate the concept with the sanctity of formal rules and procedural technicalities and believe that it leads to the isolation and alienation of the courts from the social life it is expected to regulate.[91] Those of the latter persuasion see the undermining of the authority of the village headmen and the destruction of the traditional social order as one of the more pernicious effects of the introduction of

[85] On the Burmese headmen system see Maung Maung, *Law and Custom in Burma and the Burmese Family* (1963), p. 14 and J.S. Furnivall, *Colonial Policy and Practice*, p. 14 and pp. 36-39.

[86] See Maung Maung, *ibid.*, p. 86 and J.S. Furnivall, p. 31.

[87] See Maung Maung, *ibid.*, pp. 28-29.

[88] See Maung Maung, *ibid.*, pp. 29-30.

[89] See Maung Maung, *ibid.*, p. 23ff and J.S. Furnivall, *ibid.*, pp. 132-135, pp. 295-297.

[90] See speech by the then Prime Minister, U Nu, before the Chamber of Deputies, April 5, 1960 cited in Maung Maung, *ibid.*, p. 24.

[91] See Maung Maung, *ibid.*, pp. 24-25.

the rule of law. Furnivall seems to echo the concern of some of these persons when he notes that

> the substitution of the rule of law for custom encouraged wasteful litigation, favoured private interests, defeated social justice, sapped the foundations of communal life, and resulted in general impoverishment.[92]

The more recent socialist indictments of the judicial system tend, however, to be more intense and assume a more consciously ideological quality. One commentator summarizing these criticisms, notes

> [the judicial] system has been accused of being a creation of the ruling elite designed to preserve its supremacy and impose its will on the ruled; of giving too much power to individual judges and magistrates; of excluding the people from the work of administering justice; of being beneficial only to the rich, the crafty and the influential; of fostering "legal sophistry".[93]

Above all, it has been condemned as a "powerful and exclusive bureaucracy of bourgeoisie ways, totally out of place in a socialist democracy".[94] These perspectives seem to have shaped the hostility of the present military dominated socialist regime to the existing judicial institutions. One of the first steps taken by General Ne Win when he assumed power was to terminate the Supreme and the High Courts.[95] This policy of hostility towards the judicial organization is further reflected in the recent efforts to establish an alternative adjudicatory framework.

Besides being a repudiation of an alien structure, the establishment of popular courts is also consistent with the regime's overall ideological position on the role of the people in the organization and management of Burmese society. From this point of view it is closely related to the decentralization of the political organization through the creation of base-level security and administrative committees throughout the

[92] See J.S. Furnivall, *Introduction to the Political Economy of Burma* (1957), at aq-as.

[93] M.C. Tan, *op. cit.*

[94] M.C. Tan, *op. cit.*

[95] See Richard Butwell, *op. cit.*, p. 903.

country; and the debureaucratization of the administrative apparatus by the abolition of the Secretariat and the district unit of administration.[96] Another related development has been the effort of the regime "to base its organization primarily on the strength of the peasants and other working masses" through the creation of peasants' councils and workers' councils.[97]

Another factor which seems to have influenced these developments is the view shared by Burma's ruling elite that most law-related roles do not require legal expertise. Some commentators perceive in this a continuity between the traditional and contemporary approaches to conflict and its management.[98] Proponents of the popular institutions have also drawn attention to the persistent involvement of family elders and parents in the hearing and disposition of domestic disputes. "To decide which side is wrong, and which is right," the Burmese Justice Minister adds, "is a life-long work of everyone . . . [and] administering justice means doing just that."[99] On the other hand, one clearly detects important differences in recruitment, jurisdiction and powers between the traditional and contemporary models. While the evidence is unclear, it is also probable that the regime may require the popular courts, like other base-level organizations to play a mobilizational role. Different role conceptions may correspondingly give rise to important differences in function. We may, therefore, tentatively conclude that while the traditional judicial experiences may have influenced the government's decision to institute popular courts, in other respects the continuities between the traditional and the contemporary systems may be more apparent than real.

IV

In the third category we have contemporary China, in which mass involvement in the administration of justice is one of the most distinct features of its legal system. It is realized through diverse institutional innovations such as popular assessors who participate in the limited adjudicatory work of official legal

[96] General Ne Win described his reforms of the state administrative structure as instituting an "administrative revolution", see M.C. Tan, "Sudden Death of a Dragon", *Far Eastern Economic Review*, April 1, 1972 and Richard Butwell, *op. cit.*, p. 902.

[97] See Richard Butwell, *ibid.*, p. 902.

[98] See M.C. Tan, "Dads and Mums," *Far Eastern Economic Review*, August 19, 1972.

[99] Cited in M.C. Tan, *ibid.*

organs;[100] mediation committees and base level mass organizations which deal with an overwhelming majority of disputes and anti-social conduct in urban and rural China;[101] and the people's militia, the street committee, the residents' committee and the "commune" which are part of the complex public security and law enforcement apparatus.[102]

The emphasis on people's mediation as a principal instrument of legal policy had induced some scholars to search for continuities between the traditional and contemporary attitudes towards conflict and its resolution.[103] Confucian thought, which dominated traditional Chinese political and social life, viewed disputation as disruptive of the state of natural harmony which "linked the individual, the group, society and the entire universe". Accordingly, it was virtuous to "yield" to another's claim and thereby restore the harmony which had been disturbed by the state of conflict. The Confucian tenets of "yielding," compromise, and non-litigiousness combined with the state's institutional structure and the traditional social order (family, clan, village, guild) to produce a preference for mediation as a technique of social control.[104]

While at a superficial level both traditional and contemporary China seem to share a preference for dispute resolution through mediation, a closer comparison reveals important differences in the identity, style and role of mediators and, more significantly, in the functions of mediation. These dissimilarities in turn point to different ideological approaches to conflict and its resolution in Confucian and Maoist thought.[105] More significant continuities may, however, be detected between the legal experience in the Yenan province and other areas

[100] See Jerome Alan Cohen, *The Criminal Process in the Peoples Republic of China 1949-1963,* 431-5.

[101] See Jerome Alan Cohen, "Drafting People's Mediation Rules," in J.W. Lewis (ed.), *The City in Communist China, 55 California Law Review,* 1201 (1966).

[102] See Jerome Alan Cohen, *The Criminal Process in the Peoples Republic of China 1949-1963,* pp. 105-123, and Victor Li, "The Public Security Bureau and Politico-Legal Work in Hui-Yang 1952-1964," in J.W. Lewis (ed.), *The City in Communist China*, (1971).

[103] See Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization," 55 *Calif. Law Rev.* 1201 (1966), and Stanley Lubman, *ibid.*

[104] See generally S. Van der Sprenkel, *Legal Institutions in Manchu China* (1962) and Stanley Lubman, *ibid.*, pp. 1290-1300.

[105] See Stanley Lubman, *ibid.*, pp. 1353-1359. Cf. also Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization," *ibid.*, p. 1226.

"liberated" by the Communists before 1949, and contemporary people's mediation.[106]

The objectives of people's mediation may be understood through an analysis of the People's Mediation Committees, which by themselves, or fused with other base level legal organs such as the security defence committees, dispose of most of the inter-personal conflict.[107] Both the provisional rules for the Organization of Mediation Committees and the authoritative party statement on these Committees place special emphasis on two specific goals. Firstly, it is stated that one of the principal objectives of a Mediation Committee is to promote the internal unity of the people.[108] The argument runs that conflict and dissension weaken the collectivist spirit and the sense of unity of the masses which are deemed necessary to propel economic production and to realize social reconstruction. The base level courts and cadres are, however, overburdened with these disputes, which interfere with other "productive" work by these agencies and weaken their capacity to expeditiously and correctly deal with the problems of the people. The Mediation Committee is, therefore, presented as an "effective organizational form and work method" for the prompt resolution of disputes.[109] Secondly, the Mediation Committees are also regarded as "mass organizations for the people's self-education".[110] The rules accordingly instructed the Committee to conduct, through mediation, "propaganda education" concerning policies, laws, and decrees. To retain this pedagogic element, mediation must be "principled" in that it should be in conformity with the central programme of the state.[111] To ensure "principled" mediation, mediators are

[106] See Stanley Lubman, *ibid.*, pp. 1306-1309; Jerome Alan Cohen, "Drafting People's Mediation Rules," *ibid.*, pp. 31ff.

[107] See Jerome Alan Cohen, "Notes on Legal Education in China and North Korea" (1972), an unpublished paper, p. 5.

[108] See Article 1 of the Provisional Rules for the Organization of People's Mediation Committees, in Jerome Alan Cohen, *The Criminal Process in the People's Republic of China 1949-1963, op. cit.*, p. 124.

[109] See editorial "Does People's Mediation Work Well, Strengthen the Unity of the People. Impel Production and Construction?" (hereinafter referred to as the editorial in *Jen Min Jih Pas*) in Jerome Alan Cohen, *The Criminal Process in the Peoples Republic of China 1949-1963, ibid.*, p. 126.

[110] Editorial in *Jen Min Jih Pas, ibid.*, p. 126.

[111] See Article 6 of the Provisional Rules for the Organization of People's Mediation Committees, *ibid.*, pp. 124-125; and Editorial in *Jen Min Jih Pas, ibid.*, p. 128.

required to be in constant touch with party cadres and base level courts and to frequently consult them and obtain their advice.[112] Mediators are also warned against the application of coercive sanctions to compel parties into accepting or implementing an agreement; they are instead required to encourage the parties to resolve their differences through the application of "criticism and self-criticism".[113]

On a more general ideological level people's mediation is rationalized as one aspect of the extension of the mass line to legal work.[114] Such a rationale underscores the need to see popular mediation in the context of the evolution of the legal system as a whole, and more specifically those changes wrought in the legal system as a result of the extension of the "mass-line" doctrine.[115] To do so we shall now summarize the mass-line concept and evaluate its extension into legal work through a brief review of Chinese legal developments.

The "mass-line" concept is the Maoist answer to a problem which we referred to earlier as one central to Marxist-Leninist thought, namely the proper allocation of power and initiative between the "party" and the "people" in the programme of socialist transformation. There are two elements to this concept. The first underscores a deep reverence "for the political and inspirational powers of the masses," and therefore asserts the general need for constant intimate contact between the "party" and the "people".[116] The second sets out a technique for co-ordinating the efforts of the party and the "masses" in the formulation and execution of policy. This technique requires party cadres to study and synthesize the unsystematic views of the masses on questions of policy, to turn them into policy statements and to exhort the masses through discussion and persuasion to translate them into action. This prolonged process of dialogue has been referred to as "from the masses to the masses".[117] While this procedure on the one hand enables the party to make out that all policies originate from the masses,

[112] See Editorial in *Jen Min Jih Pas*, *ibid.*, pp. 128-129.
[113] *Ibid.*, p. 128.
[114] *Ibid.*, p. 126.
[115] On the mass line, see James R. Townsend, *Political Participation in Communist China* (1967), pp. 72-74.
[116] *Ibid.*, p. 72.
[117] *Ibid.*, p. 73.

on the other hand, the party has also asserted its ultimate authority to control policy. Where, therefore, by reason of "low level of consciousness" some of the masses resist the implementation of policy the mass-line would require the cadres to raise through non-coercive techniques, such as persuasion, criticism and thought reforms, their level of consciousness.[118]

The mass-line concept thus subsumes Maoist ideas on "mobilization," "popular participation," "re-education," and "thought reform".

As we turn to the Chinese legal system, we note that one of the first steps the Communists took after liberation was to decree the abolition of "all laws, decrees and judicial systems of the Kuomintang reactionary government which oppress the people".[119] The immediate practical impact of this provision was, however, less dramatic. Several judicial and law enforcement organs were retained with often no more than a change of name. Many pre-liberation judicial and police personnel continued to work until they were removed during the anti-rightist campaigns in the early Fifties.[120] From 1950-57, coinciding with the Soviet-style economic reconstruction, we witness the Chinese legal system evolving along different lines. Concerted efforts were made to structure judicial institutions, establish a procuracy, draft codes and other legislation, and to reorganize legal education and the profession on Soviet lines.[121] There was even brief period of experimentation with comrades' courts.[122] However, since 1957, the identification of the existing legal organs with "feudalism, capitalism and Soviet revisionism" accelerated the deprofessionalization of the legal system during the anti-rightist movement and, more recently, during the cultural revolution.[123] Under the further influence of Maoist ideology and more specifically the tenets of the mass-

[118] *Ibid.*, p. 74.

[119] See Article 17 of the Common Programme of the Peoples Republic of China, September 29, 1949, cited in Jerome Alan Cohen, *The Criminal Process in the Peoples Republic of China 1949-1963,* p. 298.

[120] See Victor Li, "The Evolution and Development of the Chinese Legal System," in John M.H. Lindbeck (ed.), *China: Management of a Revolutionary Society* (1971), p. 221.

[121] See Victor Li, *ibid.*

[122] See Jerome Alan Cohen, *The Criminal Process in the Peoples Republic of China*, pp. 170-177.

[123] See Victor Li, *ibid.*

line concept, the legal system assumed the following characteristics which are now regarded as distinctive of the Chinese legal model.[124]

Firstly, efforts to rationalize and systematize centralized normative directives through the enactment of codes and statutes was suspended, on the ground that such legislation would be both premature in a society in a state of revolutionary flux and a constraint on a radical programme of change. This was a hardening of an earlier approach, where there was some recognition of the importance of codes of law but an evolution of a new legislative process.[125] This process required the party to issue preliminary drafts embodying the people's experience and their view on specific problems; to select and evaluate the responses of the masses and other local state organs and social organizations to these drafts; to put the amended draft into effect on an experimental basis; and finally to issue a law after scrutiny and approval by the legislative organs.

With the decline in legislative activity the programme of the party has taken the place of what we may regard as "law". The articulation of the central party policy often in abstract and flexible terms has also facilitated the diffusion of norm-making authority to base level units of government and party cadres through techniques as diverse as newspaper editorials, pamphlets, radio broadcasts and public meetings.[126]

Secondly, there were important changes in the relative importance of formal legal organs, law professionals and the informal political-legal apparatus. The role of law professionals was gradually eliminated, and in judicial work they were replaced by party cadres recruited more for their ideological correctness, than their legal expertise. The judicial cadres informalized the procedures and transformed the work style of legal institutions to render them more accessible to the masses. On the one hand they "penetrated the masses" by investigating complaints at the scene of the dispute, and on the other hand "received the masses" in person to advise them on the

[124] See the section on the "Revolutionary Socialist Model" in Roberto Mangabeira Unger, "The Place of Law in Modern Society" (1971), an unpublished paper, p. 113ff.

[125] See Jerome Alan Cohen, "Drafting People's Mediation Rules", in J.W. Lewis (ed.), *The City in Communist China* (1971), 29 at p. 49.

[126] *Ibid.*, p. 50.

resolution of their problems.[127] Since the cultural revolution, however, the formal legal organs were limited to the review of the more serious criminal offences.[128] Almost total reliance is therefore placed on a network of base level participatory organs, which are often active in other spheres of political life, to manage conflict and to protect the public order.

Thirdly, with the fusion of the mobilization and conflict management elements in judicial and mediational activity, legal thought and the techniques of norm application became transformed. With the emphasis on "criticism," "re-education," and "thought reform" the vocabulary, style and technique of norm application was less distinct from that of political discourse and administrative policy implementation.[129]

V

To conclude this survey we may briefly summarize some of the factors which seem to account for the emergence of popular tribunals in the countries we have referred to above. All of these societies have recently replaced an alien or domestic regime either through a violent social upheaval or through a more orderly process of succession. In addition, many of them are also committed to a programme of social and economic change radically different from that of the prior regime. Where the substantive ends are broadly similar there is a commitment to a radically different strategy for realizing these ends. Popular justice in these situations represents the extension of the new "ideology" to the legal, and specially the judicial, sphere. As a result, any of the efforts to establish popular tribunals are often preceded or accompanied by an indictment of the inherited legal system. This takes the form of either a critique of the legal system for having served the social or political group represented by the dethroned regime as an "instrument of oppression," or for reflecting conceptions of the law and certain assumptions about the social and economic organization of society which are repudiated by the new regime. The theoretical foundation upon which the rejection of the inherited legal system is based,

[127] Victor Li, "The Evolution and Development of the Chinese Legal System," *ibid.*

[128] J.A. Cohen, "Notes on Legal Education in China and North Korea," *ibid.*, p. 4.

[129] Cf. Roberto Mangabeira Unger, *op. cit.*, pp. 147-151. For more recent efforts towards the modernization of the substactive laws initiated by Fifth and Sixth National Peoples Congress, and the reforms of judical administration see Sun Ya Min, *South Asia-China Dialogue* (Marga, 1983), pp. 49-51.

in turn conditions the rationalization of the new participatory institutions. Popular tribunals are, therefore, rationalized as responding to the needs and aspirations of emergent social groups and of reflecting in varying degrees, an approach to the nature of law, the organization of legal institutions, the role of law professionals, and of the nature of legal thought fundamentally different from that represented by the inherited legal system. This pattern is repeated in each of the three categories of societies.

The revival of comrades' courts (and the emergence of other forms of popular participation in the legal sphere) in the Soviet Union was preceded by a denunciation by the Twenty-first and Twenty-second Party Congress, of the Stalinist conceptions of the state and the approach to law as a coercive instrument to secure popular compliance with state policies and to protect the public order. This critique revived the vision of the withering away of the state and the disappearance of law as a coercive instrument in the ultimate stage of communism, and provided a doctrinal base for the rationalization of popular tribunals. Correspondingly, the Soviet explanation is that these tribunals illustrate the transfer of state functions to social agencies and emphasize the efficacy of non-coercive techniques for the protection of the public order and for the mobilization and education of the masses. Similarly, in Cuba (and perhaps in Chile) the perception of the inherited laws and institutions as being informed by the values and class interests of the dethroned social groups, led to the expectation that the popular legal institutions in the sectors in which they were established would express the values and interests of the working classes. They would, therefore, reflect a new popular legality and propagate the norms and values of the new social order.

When we turn to the next category of countries which inherited a British court structure we perceive a difference in the post-colonial approach to the alien institutions in Tanzania on the one hand, and in India and Burma on the other. In Tanzania the complaint has been that the British established a discriminatory court structure which barred Africans from the superior courts and thereby denied them many of the benefits of the western adjudicatory process. In India and in Burma (until recently) the complaint has been the opposite. It is charged that the policy of Anglicization was pursued with such vigour that

the British courts often undermined and eroded the traditional mechanisms for dispute resolution. In the latter case it is further alleged that the clash of values underlying the indigenous and imposed legal orders contributed towards litigiousness and the further disruption of the traditional order. As a result, in Tanzania the establishment of popular courts represents the containment of the conflict-managing role of traditional elders and the expansion of the inherited western legal order. The Indian panchayats present a more confused picture; while some perceive the panchayats as revising traditional forms of social and legal organization, the better view would be that they express a creative synthesis of elements of the inherited and traditional systems. There is an additional element in the Burmese situation. More recently, the indictments of the inherited judicial system besides being infused with nationalistic sentiments assume a more consciously socialistic dimension. Accordingly, the establishment of popular tribunals is presented as part of a broader programme of debureaucratization and the decentralization of the political structures. While the Tanzanian and Indian institutions are viewed as merely instituting "reforms" in the judicial system, the popular courts in Burma are regarded as establishing a "judicial revolution".

In China, we find the most extreme expression of the repudiation of the laws and legal institutions inherited from the Kuomintang government. The abolition of the inherited legal institutions precipitated the need to formulate a state policy towards the management of conflict and the protection of the public order. The concept of mass-line crystallized out of the mobilizational efforts in the provinces liberated before 1949, and reflecting the Maoist reaction to the bureaucratization and the consolidation and abuse of power, by traditional and Kuomintang governments, helped shape the state policy towards people's mediation. This doctrine which extols the value of, and provides a technique for, extensive mass participation in the discharge of state functions transformed the law-making process, the work style and techniques of norm application of Mediation Committees and of the entire public security apparatus. At later periods the reaction against Soviet-style legal reforms and the "struggle" by party cadres against legal specialists for the latter's adherence to the procedures,

forms and even values of the "bourgeois legal systems" further accelerated the pace of de-professionalization. The mass-line concept also provides the link between people's mediation and the legal experience in Yenan and other areas "liberated" before 1949.

II The Gamsabhava on the Eve of British Rule

"Here are no Laws, but the Will of King, and whatsoever proceeds out of his mouth is an immutable Law. Nevertheless they have certain ancient usages and customes that do prevail and are observed as Laws."— ROBERT KNOX, *An Historical Relation of Ceylon* (1681).

"The diligent judge shall administer justice in strict conformity to the Rules of Sootree, and the Wineys, and their exposition and commentaries — That which is recorded is of greater importance than oral traditions." — SIR JOHN D'OYLY, *A Sketch of the Constitution of the Kandyan Kingdom* (edited by L.J.B. Turner).

In Chapter I, we focused on the phenomenon of deprofessionalization as it occurred in eight different societies which describe themselves as "socialist societies," albeit "socialism" is perceived differently and assumes a different meaning in each of them. We reasoned that popular tribunals in each of these countries appeared to respond to a broad participatory ideology which called for the increased involvement of emergent groups variously described as the "masses," the "people", the "working classes," etc., in the organization and management of society. Popular tribunals represented the more specific extension of such a participatory ideology to the legal sphere. We also emphasized in this analysis the need to distinguish that category of societies in which popular tribunals represent at least partially an effort to revive traditional forms of legal organization, and to specially examine the competing social imperatives to which the institutionalization of such tribunals appeared to respond. We shall attempt to probe this issue in depth through a case study of the theoretical underpinnings and operative workings of a popular tribunal in a specific society, i.e. the Conciliation Boards in Sri Lanka.

One of the central issues which we shall deal with in this study is the extent to which the statutory Conciliation Boards represent efforts to revive the popular legal forms of traditional Sinhalese society. Such an approach leads us to focus on the most prominent and perhaps deeply revered of these institutions, the Gamsabhava, the village court of pre-colonial Ceylon.[1] A study of the Gamsabhavas on the eve of British

[1] The other popular legal institutions which may be distinguished from the Gamsabhava were the Rata Sabhava (an assembly of principal citizens peculiar to the Nuvarakalaviya district) the Sakki Balanda (a coroner's jury) and the Variga Sabhawa

conquest would not only provide us with a deep understanding of the place of popular tribunals in the elaborate judicial organization of the Kandyan kingdom,[2] but would also illustrate the function of these institutions in maintaining the jural autonomy of the village communities and in conserving the feudal social order.[3]

The genesis of the Gamsabhavas is buried in obscurity, although some scholars believe that they antedate to the fifth century B.C., when King Pandukabhaya "the ruler of Sri Lanka established village boundaries over the whole Island of Ceylon"[4] Both Codrington and Paranavitarna also refer to state inscriptions during the reigns of King Mahinda IV and King Udaya III which seem to recognize the existence of village assemblies in the tenth century A.D.[5] The clearest account of the existence of Gamsabhavas in the Kandyan kingdom is, however, found in the observations of Robert Knox, the undisputed authority on medieval Sinhalese society. Knox, in describing these institutions in the seventeenth century, states,[6]

(a tribunal peculiar to the Nuvarakalaviya district, which dealt with breaches of rules of an endogamous primary group known as the *variga*, a concept similar to although distinguishable from that of caste. For the distinctions between *kula* (caste) and *variga*, see Ralph Pieris, *Sinhalese Social Organization* (1956), pp 252-253.

Generally on the Gamsabhavas, see F.A. Hayley, *A Treatise on the Law and Customs of the Sinhalese* (1923), p. 62; R.K.W. Goonesekere, *The Eclipse of the Village Court* (1958), 2 *Ceylon Journal of Historical and Social Studies* 138-146 and Vijaya Samaraweera, Litigation, Sir Henry Maine's Writings and the Ceylon Village Communities Ordinance of 1871 (1973). The Ceylon Studies Seminar 1973 Series No. 5. On the Rata Sabhava, see Ralph Pieris, *Sinhalese Social Organization*, (1956), pp. 254-8, and K.A. Kapuruhamie, "The Ratasabhava", in 38 *Journal of the Royal Asiatic Society* (Ceylon) 42 (1948). On the Sakki Balanda, see Davy, *The Interior of Ceylon* (1821), pp. 181-182; and on the Variga Sabhava, see E.R. Leach, *Pul Eliya* (1961), pp. 70-74, and 307-309, and Bryce Ryan, *Caste in Modern Ceylon: The Sinhalese System in Transition* (1953).

[2] On the Kandyan judicial structure, see F.A. Hayley, A Treatise: *Laws and Customs of the Sinhalese*, (1923).

[3] On the traditional Sinhalese social order, see Ralph Pieris, *Sinhalese Social Organization*.

[4] See Volume 10 of the *Mahavamsa,* p. 103 (Geiger's translation, p. 75) cited by F.A. Hayley in *The Laws and Customs of the Sinhalese* at p. 59 (1923), cf. R.K.W. Goonesekere, *op. cit.*, p. 139 f.n. 5.

[5] See H.W. Codrington, *Ancient Land Tenure and Revenue* (1938), p. 3, S. Paranavitarna, "Village Communities of Ceylon," *3 Ceylon Literary Register* (Third Series, 1931), p. 49-53.

[6] For an evaluation of the importance of Knox's work as a historical source on Sinhalese society during the seventeenth century, see Ralph Pieris, *Sinhalese Social Organization* (1956), p. 267.

> In the hearing [of] Complaints and doing Justice among neighbours, here are Country-Courts of Judicature consisting of these officers, together with the Headmen of Places and Towns where the Courts are kept: and these are called Gom Sabbi, so much to say Town Consultations.[7]

From the beginning of western influence in the sixteenth century we observe a fundamental divergence in the history of the Gamsabhavas in the Central Provinces, from that in the remainder of the country. While they continued to flourish in the former until the nineteenth century, the Gamsabhavas in the maritime provinces did not escape the repeated assaults of colonial rule. They appear, however, to have survived Portuguese rule substantially unimpaired, in view of the overall legal policy of non-interference with local laws and institutions.[8] On the other hand, Dutch rule witnessed a more deliberate effort to introduce the Roman-Dutch law into the colony and to set up an effective western adjudicatory structure.[9] Goonesekere concedes that although the impact of these changes "was profound and probably led to the abrogation of many [indigenous] laws and institutions," evidence of the existence of a Gamsabhava in the Western Province in 1848 suggests that even in these Provinces the Gamsabhavas were not extinct on the eve of British rule.[10]

Although the overall British colonial policy was not conducive to the effective operation of the Gamsabhavas,[11] the more enlightened British administrators were intrigued by what

[7] Robert Knox, on *Historical Relations of the Island of Ceylon* (1681), p. 84.

[8] See P.E. Pieris, 2 *Ceylon, The Portuguese Era* (1913-1914), p. 85, cited by R.K.W. Goonesekere, *op. cit.* p. 139.

[9] See generally on Dutch colonial policy in Ceylon, K.W. Goonewardena, *The Foundations of Dutch Power in Ceylon 1638-1658* (1958) and S. Arasaratnam, *Dutch Power in Ceylon 1658-1687* (1958).

[10] See R.K.W. Goonesekere, *ibid.*, p. 139.

[11] Samaraweera points out that the Gamsabhavas were in effect superceded by the establishment of new courts in 1818 and received their "coup de grace" in 1843 with the creation of minor courts. See V. Samaraweera, *ibid.*, pp. 5-6. For a review of the attitude of the courts towards the Gamsabhavas from 1833 onwards see Charles Marshall, *Judgements of the Supreme Court,* (1839), pp. 36-37. Goonesekere and Metzger conclude that the enactment of the Charter of 1833 qualitatively transformed the Gamsabhavas; "it no longer functioned as a court" but "began to operate more as a species of arbitration". See R.K.W. Goonesekere and Barry Metzger, *The Conciliation Boards Act: Entering the Second Decade,* 2 *The Journal of Ceylon Law* (1971), 35, at p. 40.

they perceived to be an idyllic relic of the country's legal heritage, and made repeated efforts to revive this ancient institution. Colebrooke, one of the utilitarian reformists who were commissioned in 1829 to overhaul the judicial administration of the new colony, urged the revival of the "ancient mode of referring cases to a Gansabe or Village Council".[12] He reasoned that not only would the revival of such tribunals facilitate the effective management of rural conflict and the more efficient policing of the rural areas, but by encouraging villages to manage their own affairs "in accordance with their own customs, would also be some source of general satisfaction".[13] Similarly, from 1856-1871, official dismay at the public apathy and neglect of the ancient irrigation works led to a partial revival of the Gamsabhavas to resolve irrigation disputes and to undertake the reconstruction of irrigation works.[14] In 1870, Governor Hercules Robinson condemned the ill-effects of the imposition of the British court system on the rural peasantry, and looked upon the reactivation of the village tribunals as a means of deflecting the flood of vexatious and false suits which seemed to overwhelm the minor courts of law.[15]

The publication of Maine's classic study of the village communities of the East and West[16] fired the late eighteenth century revivalists into creating the Village Communities Ordinance of 1871 which, in addition to creating village courts, vested on elective Village Committees' quasi-legislative and administrative powers to regulate and manage the affairs of the village.[17]

[12] See communication by Colebrooke to Goderich dated 24 September 1832, cited in G.C. Mendis (ed.), *The Colebrooke-Cameron Papers* (2 vols., 1956), the Introduction at p. lvii; see also R.K.W. Goonesekere, *ibid.*, at p. 140, and Vijaya Samaraweera, *The Commission of Eastern Enquiry in Ceylon 1822-1837; A Study of a Royal Commission of Colonial Inquiry,* D. Phil. Thesis, Oxford University, 1969.

[13] For an account of the arguments advanced by Colebrooke in support of the Gamsabhava revival, see R.K.W. Goonesekere, *Ibid.*, p. 141; and Colvin R. de Silva, *Ceylon under the British Occupation*, Vol. 2, p. 578.

[14] See Michael Roberts, "The Paddy Lands Irrigation Ordinances and the Revival of Traditional Irrigation Customs 1856-1871," 2*The Ceylon Journal of Historical and Social Studies* 114 (1967).

[15] See Vijaya Samaraweera, "Litigation, Sir Henry Maine's Writings and the Ceylon Village Communities Ordinance," *ibid.*, p. 3.

[16] See Vijaya Samaraweera, *ibid.*, pp. 2-3 and R.K.W. Goonesekere, *ibid.*, p. 144.

[17] See Vijaya Samaraweera, *ibid.*, pp. 7-9 and R.K.W. Goonesekere, *ibid.*, pp. 144-146.

As we shall note in Chapter IV an obsession with the Gamsabhavas continued to haunt the post-independence legal reformists. The revivalist school in the legislative assembly applauded the Conciliation Boards Act as a bold effort to resuscitate the Gamsabhavas,[18] and despite competing conceptions of this reform, government publicists, ministry officials, chairmen of boards and other public figures tended to often proclaim the similarities between the traditional and contemporary forms. The extreme "traditionalists" continue to agitate towards a further restructuring of the composition of these Boards to absorb the more traditional elements in Sinhalese society so that they may seize upon these institutions to inculcate traditional cultural and religious values into the rural populace.[19]

II

Was the Gamsabhava a purely judicial tribunal confined to the processing of rural conflict, or was it the effective instrument of village government combining legislative and executive powers with the judicial?

Social historians of medieval Sinhalese society believe that the Gamsabhava was more than a judicial tribunal and exercised many important functions relating to the general administration of village life. Paranavitarne, relying primarily on what he presumes to be a fundamental similarity in the organization of village communities in India and Ceylon observed:

> That these village and district councils of Ceylon performed judicial function is evident . . . In addition to this they had to perform multifarious other duties. The keeping in proper repair of the village roads, tank and the temple, the survey of communal fields and the supervision of the annual crop, the publication of royal orders issued to the village, the policing of the village, and the testing of the weights and measures used in the local market, were some of the numerous activities of the assembly.[20]

[18] See *infra*, Chapter IV, pp. 96-97.

[19] See *infra*, Chapter IV, pp. 106-107.

[20] See S. Paranavitarna, "The Village Communities of Ceylon," *Ceylon Literary Register* (Third Series, 1931), p. 53.

Paranavitarne buttressed this conclusion by reference to an edict of Kind Udaya (circa A.D. 942-952) defining the reciprocal legal and administrative jurisdictions of royal officials and the Village Assembly respectively.[21] This edict, inter alia, appears to have reaffirmed the vesting on Village Assemblies of certain fiscal, administrative and legal powers and responsibilities relating to the maintenance of order and to the general administration of village life.[22] Also, fifth century religious chronicles point to the ownership and regulation of irrigation reservoirs by the village communities in traditional Ceylon, thereby implying that these institutions performed an important function in the economic life of such communities by enforcing agricultural customs and by co-ordinating the cultivation practices of the villages.[23]

Although the historical data on the ancient Gamsabhavas is not very extensive and conclusive, there are several factors which may tend to corroborate the deductions which Paranavitarne seems to draw on the corporate character of village life and the fusion of administrative and judicial powers in the Village Tribunals. Firstly, the term "gama" (village) in certain contexts also meant "landed property" or "estate," or "caste",[24] and thereby seems to have signified much more than a territorial unit carved out arbitrarily for administrative purposes. In traditional Sinhalese society, the village was a unit of social organization, often inhabited by members of a single caste group, all of whom were believed to be the common descendants of a real or fictional ancestor.[25] For, as Knox seems to suggest, the village had a practical significance in the enforcement of certain caste rules; for example each Smith was assigned a parcel of villages which he alone could serve, and enjoyed a customary right to resist the encroachment by other members of his caste into his jurisdiction.[26] Consequently, the Village Community has also been referred to as a "merchants'

[21] See 3 *Epigraphia Zeylanica*, pp. 77ff. cited by S. Paranavitarna, *ibid.*, p. 51.

[22] See S. Paranavitarna, *ibid.*, p. 52.

[23] See S. Paranavitarna, "Some Regulations Concerning Village Irrigation Works in Ancient Ceylon," 1 *The Ceylon Journal of Historical and Social Studies* (1958), p. 5

[24] See Ralph Pieris, *Sinhalese Social Organization, ibid.*, p. 39, cf. S. Paranavitarna, *Village Communities of Ceylon, ibid.*, p. 53.

[25] See Ralph Pieris, *ibid.*, pp. 52-53.

[26] See R. Knox, *On Historical Relations of Ceylon* (1681), p. 108.

guild" and a "caste corporation," and it has been further emphasized that one of the functions of the Gamsabhavas was to ensure the observance of caste rules.[27]

Secondly, it is believed by many scholars that a system of communal ownership of land prevailed in medieval Sinhalese villages. The existence of such patterns of land ownership are recognized to be essential features of village communities, and consistent with the delegation of the responsibilities of village government to a representative council of villages. Tambiah notes that the

> . . . village and later the household (*gedera*), and not the individual was the owner of lands. Families . . . were often allotted lands which were cultivated in common. A portion of the land belonged to the village and was held in common and used for pasture and other common purposes.[28]

Faithful to Maine's evolutionary thesis[29] — communal to individual ownership — Codrington believed that the Sinhalese tenurial system went through different gradations of communal ownership, and in the tenth century A.D. assumed the characteristics of the Hindu joint family system.[30] In describing this system he notes:

> The cultivated land in the village was divided into *pangu* or shares . . . For purposes of service the *panguva*, whatever the number of the co-heirs may be, is indivisible and the co-heirs jointly and severally are liable for the service. Of the joint family all the male members own and have a right to the family property; no co-parcener is entitled to any special interest in the property nor to exclusive possession of any part of it. Private property belonging to a single person is unusual except in the case of self-earned property or gifts. The joint family property is generally managed by the eldest member.[31]

[27] See S. Paranavitarna, *Village Communities of Ceylon, ibid.*, pp. 51, 53.

[28] See H.W. Tambiah, *Sinhala Laws and Customs* (1968), p. 157.

[29] See generally Henry Maine, *Village-Communities in the East and West* (2nd ed. 1907).

[30] See H.W. Codrington, *Ancient Land Tenure and Revenue in Ceylon* (1938), p. 3.

[31] *Ibid.*

The persistence of certain forms of co-ownership of land and collective cultivation practices in contemporary society would also appear to point to the prevalence of some collectivist concepts of ownership and use of land in a much earlier period. The contemporary examples would include the still common holding of *panguva* by families in undivided shares, where the land is collectively cultivated and the produce proportionately divided according to individual interests. Sometimes the co-owners of such undivided land would adopt the *tatu maru* system of cultivation,[32] according to which the entire field is cultivated in rotation by individual members for durations of time proportionate to their shares. Another example of collectivist agricultural practices is the *kaiya* system (labour team), according to which individual cultivators are able to command, on a principle of reciprocity, the assistance of all other villages in threshing, harvesting and other activities associated with the cultivation cycle.[33] Others have pointed to the existing practices of *chena* (rough scrub jungle) cultivation by which individual villagers continue to assert the right to clear and cultivate any plot in the *chena* lands which they believe by ancient tradition to be vested in the village as a collective.[34] One also finds analogous principles of communal ownership and use applicable to the paddy-threshing floors[35] and to rights of fishing in village tanks.

Thirdly, there is considerable evidence that the village as a collective was held responsible and liable for the commission of certain offences within its territorial boundaries. As early as the tenth century A.D. the Vevalkatiya Slab Inscription refers to an edict by King Mahinda holding the local community responsible for the investigation of "all cases of murder, violence, theft and other offences against the community" and liable to a collective fine if the offender was not detected within 45 days.[36] Similar sanctions were directed towards the community if a suicide was committed by a person of sound mind within the village precincts.[37] The doctrine of collective res-

[32] See F.A. Hayley, *The Laws and Customs of the Sinhalese* (1923), p. 263.

[33] See E.R. Leach, *Pul Eliya* (1968), pp. 264-6 and pp. 271-283.

[34] See H.W. Tambiah, *Sinhala Laws and Customs* (1968), at p. 157 and E.R. Leach, *op. cit.*, pp. 61-64 and pp. 289 ff.

[35] See H.W. Tambiah, *op. cit.*, p. 158; and E.R. Leach, *op. cit.*, pp. 286-288.

[36] See in F.A. Hayley, *op. cit.*, pp. 264-265; also S. Paranavitarna *op. cit.*, p. 51.

[37] See Ralph Pieris, *Sinhalese Social Organization*, p. 151.

ponsibility even recognized the right of a member of village A, who had suffered an injury or loss by the act of a person from village B, to obtain satisfaction from any other inhabitant of village B.[38]

Fourthly, there were several ecological and economic considerations which may have contributed towards interdependence of village society and defined the need for a mechanism to co-ordinate and regulate all aspects of village life. The distribution of agricultural land, the scarcity of water and labour, and the complex rituals and technicalities of the cultivation cycle were such that there was a constant need for communality of action between the various homesteads in the allocation of irrigation resources and other customary obligations related to the cultivation of fields.[39] The protection of the fields and the agricultural crops from wild animals created a further need to organize work groups to construct fences and to form teams of night-watchmen.[40]

None of the accounts of Gamsabhavas during the Kandyan kingdom, however, refer to the performance of functions other than judicial by these institutions. This led some recent scholars to assert that by pre-British times the "Gamsabhava had evolved into what were distinctly judicial bodies".[41] The late nineteenth century British administrators however continued to believe that no such transformation had taken place, and envisioned the villages in the Kandyan region as "small agricultural republics"[42] administered by the "natural elders of the community."[43] It was this image of the pre-British Gamsabhavas that shaped subsequent British policy on local self-government.[44]

III

We must now turn to examine the Gamsabhavas as a

[38] See F.A. Hayley, *op. cit.*, p. 264.

[39] *Ibid.*, p. 262.

[40] *Ibid.*, p. 262.

[41] See Vijaya Samaraweera, "Litigation, Sir Henry Maine's Writings and the Ceylon Village Communities Ordinance of 1871" (1973), p. 7.

[42] See J.F. Dickson in *The Hansard* [Legislative Council] (1871).

[43] See H.S.O. Russel in *The Hansard* [Legislative Council] (1871), p. 53.

[44] See V. Samaraweera, "Litigation, Sir Henry Maine's Writings and the Ceylon Village Communities Ordinance of 1871" (1973), *Ceylon Studies Seminar (Papers)*, No. 5.

mechanism for conflict resolution; what structural attributes did it enjoy, what procedures and forms did it adhere to, and what sanctions did it enforce? In doing so we will have to piece together fragments of historical data ranging from the slab inscriptions of the fifth and tenth centuries A.D., the ancient Pali chronicles,[45] the notes and other impressions of energetic British administrators who researched these institutions, the decisions of the Boards of Judicial Commissioners in which reference to these institutions were frequently made, the travelogues of casual visitors to the Island, and finally the more systematic ethnographic accounts of foreign residents and local functionaries who either participated in or were present during the deliberations of the tribunals.[46] It is no wonder then that disparate and uneven references, such as these, to the Gamsabhavas at different periods of history (encompassing in its entirety a span of over two thousand years) should prove conflicting and contradictory. Such inconsistencies on the details of the organization and operation of these institutions may point more to changes in the historical evolution of these institutions from the medieval to the colonial period, than to inaccuracies in the documentary sources. Such differences may also reflect regional variations between the Central Provinces and the North Central Provinces where distinct social and ecological conditions must clearly have had a bearing on the forms and functions of legal institutions. Although we should acknowledge the infirmities in our primary and secondary data, which tend to compound the difficulties inherent in our analysis, we should be clear that our objective is not to deal in depth with the historical changes and the regional mutations in the evolution of the Gamsabhavas, but to provide as accurate a picture as possible of the Gamsabhavas in the Central Provinces on the eve of British rule. Such an objective would require us to place special emphasis on the commentaries on the Gamsabhavas as they operated in the Kandyan kingdom, and other material on these institutions issued in the early years of anglo-colonial rule.

Sir John D'Oyly the first British Resident in the Kandyan

[45] Ralph Pieris, *op. cit.*, p. 10, points out that "mythology and historical fact were not always distinguished by these chroniclers".

[46] For an evaluation of the different historical sources referred to herein see Ralph Pieris, *ibid.* pp. 266-269.

Provinces, on the basis of both his personal observations and data gathered from the Kandyan chiefs, provides us with an invaluable insight into the operation of the "Gansabe or Village Court" during this period. He observed:

> This Court is frequently held both in the Dissavonies and the Upper Districts and consists of an assembly of the Principal and experienced men of a village, who met at an *ambalama* or a Shady or other Central place upon the occurrence of any Civil or Criminal Matter as Disputes regarding Limits, Debts, Petty thefts, Quarrels, etc., and after Enquiry into the Case, if possible settle it amicably declaring a Party which in fault, adjudge Restitution or Compensation and dismissing with Reproof and Admonition, their Endeavours being directed to Compromise and not Punishment.[47]

This idyllic sketch of the Gamsabhava leads us then to a more careful reconstruction of the different attributes of this institution.

One of the controverted facts about the Gamsabhava relates to its composition. Knox, in his late seventeenth century account, claimed that they were composed of the senior officials in the royal administration and "the Headmen of the Places and Towns where the Courts are kept".[48] Similarly, in 1871, the Chief Priest of the Asgiriya Monastery while recounting the proceedings of a Gamsabhava, observed that it consisted of ten or fifteen members, who were "Headmen and late Headmen in that village, such as Durayas".[49] From these accounts it would seem that membership in the Gamsabhava was limited to village officialdom.[50] D'Oyly's description, however, seems to be at variance with this interpretation. He described the institution as an "Assembly of the Principal and Experienced men of a village",[51] and thereby suggested that it not only consisted of village functionaries (the headmen, the

[47] John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom* (L.J.B. Turner, ed.), (1929), p. 28.

[48] R. Knox, *op. cit.*, p. 84.

[49] See Appendix I.

[50] The number and type of village functionaries varied with whether the village was *gambadagam* (royal), *nindagam* (grants to feudal overlords), *viharegam* (temple) and *Koralagam* (free land). See R. Pieris, *Sinhalese Social Organization*, pp. 25-26, pp. 50-53, 61 and 76-77.

[51] See John D'Oyly, *op. cit.*, p. 28.

official responsible for activities relating to the paddy cultivation, the *liyana-rala* (the secretary or scribe) and other petty officials) but also included other respected elders on whom no official position or status had been conferred.[52] Colebrooke who observed the processing of a land dispute by a Gamsabhava near Kandy, went one step further. He described it as an Assembly of "the landholders of the village".

A later passage provides some clues as to what Colebrooke may have meant by the term "landholder". In recommending a scheme for the selection of village headmen, he urged the preservation of the ancient usages of the village communities by providing for the nomination of headmen by "inhabitants who are proprietors of land or houses".[53] Colebrooke seems therefore to suggest that the Gamsabhava was composed of all the heads of homesteads in the village, which meant that in the smaller village it consisted of at least ten members, while in the larger ones it may have even exceeded a hundred.[54] It is Colebrooke's impression of the Gamsabhavas, as "an assembly of Neighbours" which seems to have received the widest acceptance amongst latter day British administrators[55] and more recent scholars such as Hayley[56] and Pieris.[57] Tambiah, while broadly agreeing with this position, qualified it by stating that it was only "the heads of the Govigama (high cultivator caste) families who constituted the Gamsabhavas".[58] The Gamsabhava proceeding in *Kiria v. Poola*

[52] Cf. The Vevalkatiya inscription of tenth century A.D., in which the village tribunal constituted to resolve the conflict of the adjoining villages, was composed of "the headmen of the ten villages . . . and the *principal householders*" see S. Paranavitarna, *op. cit.*, p. 51.

Similarly the edict of King Udaya, III (circa A.D. 942-952) indicates that a body composed of the "members of the village assembly," "the merchants' guild," "the subordinate officers of the magistrate" and the "village headman who was a Royal offical" was delegated with the responsibility of fixing the fines due to the King from the villages. See S. Paranavitarna *op. cit.*, pp. 51-52.

[53] See G.C. Mendis, *op. cit.*, pp. 69-70.

[54] Cf. Ralph Pieris, *op. cit.*, p. 42.

[55] See Sir H. Robinson's statement, in V. Samaraweera, *op. cit.*, p. 8.

[56] Hayley, *op. cit.*, p. 59.

[57] Pieris refers to a case of assault where the "*principal inhabitants* of the village assembled at an *ambalama* after inquiry and examination of the injuries ordered the offender up to Kandy," *op. cit.*, p. 149. See also *R v. the Korala of Manassene* B.J.C. 12.11. 1816 (C.G.A. 23/1).

[58] Tambiah, *op. cit.*, p. 159; cf. also K.A. Kappuruhamie, (p. 44) who suggests that the officers of the Rata Sabhava are always confined to the *Rata etto* the middle ranks of the Govigama caste. See Appendix I.

appears, on the other hand, to suggest that no such rule of exclusive Govigama participation was recognized, at least by the late eighteenth century.[59] Only one member of the Gamsabhava assembled to adjudicate this dispute belonged to the Govigama caste, with most of the remainder being Durayas (low-caste headmen). Although it would appear that in this instance the dispute occurred in a village in which the dominant caste was Paddu (palanquin-bearers), one may reasonably assume that even in a Govigama dominated multi-caste village, the chief inhabitants of low ranking caste groups would find representation in the Village Tribunal.[60]

Even if we concede that as a general rule, Gamsabhava membership was not limited to the village officials and headmen, we must emphasize the important role of these functionaries in initiating, presiding over and in other ways managing the deliberations of the Gamsabhavas. In *Kiria v. Poola*, the chief priest of the Asgiriya monastery (acting on behalf of the incumbent of the local temple) directed the village headmen to convene the tribunal.[61] It would, therefore, appear that the authority to constitute the village council is vested in the village headmen. In fact, in some accounts, the Gamsabhava is referred to as the Advisory Council to the headmen in the resolution of disputes.[62] Although normally the village headmen would also preside during the proceedings, when the incumbent of the village temple, or a higher ordained monk is present, the latter would exercise the powers of the President of

[59] Although it would appear that caste exclusiveness in Medieval Sinhalese society was fortified by the segregation of different castes into distinct villages, the patterns of inter-caste relationships appear to have changed sufficiently by the time of the Kandyan Kingdom for several villages to become multi-caste in composition. But even in such multi-caste villages it was not uncommon to find low-caste villages confined to segregated hamlets. See generally on caste during the Kandyan period, Ralph Pieris, *Sinhalese Social Organization* (1956), p. 169 ff.

[60] Some oblique support for this view is found in the references to the appointment of lower caste chiefs as officials in the Service Departments of the Kandyan King's Court and 16 minor offices in the various Dissavonies (Provinces) and Ratas (Districts). See the list of Inferior Officers in the Province of Sabbaragamuwa, in Ralph Pieris, *op. cit.*, p. 33, and pp. 180-187.

Cf. Lawrie's collections of old Kandyan deeds which seem to suggest that the Gamasabhava assembled to witness land transactions were composed of "all high and low personages of the village" See F.A. Hayley, *op. cit.*, p. 292.

[61] See Appendix I.

[62] Cf. G.C. Mendis, *Colebrooke-Cameron Papers* (1956), p. 28.

the Village Court.[63] The authority of Gamsabhavas to hear allegations of public crimes, such as cattle theft, and impose a fine on the guilty party, would not be complete without the presence of a headman.[64] It was these village functionaries who, with the growing formalization of the proceedings of the Gamsabhava, maintained a record of the proceedings and sometimes recorded the decrees of the tribunals on palm leaves.[65]

What were the limits of the Gamsabhava's jurisdiction as it pertained to the management of village disputes? The early epigraphical data provide both a clear recognition of the responsibility of the village community for the administration of criminal justice[66] within its boundaries, and a definition of the range of criminal conduct which should fall within its purview. An edict of King Mahinda IV (circa A.D. 953-969) empowered local communities "to deal with cases of murder, violence, theft, robbery and other offences against the community".[67] This account would seem to suggest that the Gamsabhava in medieval Sri Lanka had extensive authority as a tribunal of first resort over both grave and minor crimes. The increasing differentiation in the organization of the central officialdom, and rapid expansion in the functions of the state in the maintenance of land records, in the preservation of tanks and other irrigation resources, in the exaction of feudal services due to the King, and in the collection of revenue, inevitably resulted in the assumption by royal officials of some of the responsibility of maintaining law and order within the villages.[68] As a result, by the time of the Kandyan period, the criminal jurisdiction of the Gamsabhavas had become considerably eroded.

The tribunal appears to have had no jurisdiction over high crimes such as "treason" and "sorcery," while its authority over crimes such as assault, murder and suicide were limited to

[63] See Appendix I. The temple in *Kiria v. Poola*, 3 Lorenz's Reports 43 had an interest in the case since it owned the land which was the subject of the dispute.

[64] See Simon Sawers, Judicial Commissioner in *Pallemeralavas vs. Kabelle Aracchilla*, B.J.C., 26-9-1819.

[65] Such a decree was known as a *settuva*. See Ralph Pieris, *op. cit.*, p. 164.

[66] See S. Paranavitarna, *op. cit.*, p. 51.

[67] *Ibid.*

[68] Generally on the organization and functions of the central government during the Kandyan Kingdom, see Ralph Pieris, *op. cit.*, pp. 8-26 and 96-126.

making a preliminary inquiry, apprehending the offender and transferring him for trial by higher royal officials.[69] The types of criminal conduct regarding which the Gamsabhava had authority to both inquire into and sanction, appear to have included "cattle theft,"[70] "robbery,"[71] "petty theft"[72] and "abuse".[73]

Although the precise limits of the Gamsabhava's civil jurisdiction has not been clearly defined it would appear that it could enquire into most disputes which ordinarily arise within the village limits. Land disputes were probably frequent during the Kandyan period, and there are many early references to inquiries by the Gamsabhavas into disputes over the partition of co-owned land,[74] boundary disputes between adjoining landowners,[75] competing claims to the hereditary tenancies of lands subject to feudal services,[76] and disputes over the intended sale of ancestral land to a "stranger".[77] D'Oyly refers to "limits" (disputes over boundaries and rights of way) and "debts" as examples of the type of civil conflicts adjudicated by the Gamsabhavas[78] Kandyan law also recognized the authority of the Gamsabhavas under specified circumstances to award maintenance to an indigent wife who had been abandoned without cause by her husband.[79] It would, therefore, appear that the civil jurisdiction of the Gamsabhavas was extensive and overlapped with respect to land disputes with that of the Dissavas and the Ratemahathmayas and with regard to

[69] See *R. vs. the Korala of Manassene*, B.J.C. 12-11-1816 cited by Ralph Pieris, *op. cit.*, p. 149.

[70] See *Pallemeralavas vs. Kabelle Aracchilla* B.J.C. 26-9-1819, cited by Ralph Pieris, *ibid.*, p. 149.

[71] See *Pallegedere Rulimanikrala vs. Kitulgastenne Vidan* B.J.C. 8-5-1819, cited by Ralph Pieris, *ibid.*, p. 149.

[72] See John D'Oyly, *op. cit.*, p. 28.

[73] *Ibid.*

[74] See A.C. Lawrie, 2 *A Gazetteer of the Central Province of Ceylon* (1911), p. 603.

[75] See the observations of W.M.G. Colebrooke in G.C. Mendis (ed.), 1 *Colebrooke-Cameron Papers* (1956), p. 28.

[76] See the reference to the Gamsabhava proceedings in *Kiria v. Poola* (1859), 3 Lorenz's Reports, pp. 143-144.

[77] See Proceedings of the Board of Judicial *op. cit.*, Commissioners, 11-9-1827 cited by Ralph Pieris, *op. cit.*, p. 150.

[78] See John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom, op. cit.*, p. 28.

[79] See Simon Sawers, "Memoranda and Notes on Kandyan Law", 38 in F.A.

other disputes, with that of the minor officials.[80] Possible exceptions would be disputes over ecclesiastical matters such as rights of succession to the incumbency of the village *vihare* (temple) or disputes involving higher officials or the local nobility which would probably be dealt with by the Principals of the temples or the Dissavas (governors) and other important officials.

The Gamsabhava, unlike the contemporary courts, did not meet at a fixed location at periodic intervals. It was an ad hoc tribunal constituted to hold an inquiry "upon the occurrence of any civil or criminal matter".[81] There were a variety of means by which the proceedings of a Gamsabhava could be set in motion. The village headman, upon the discovery of a crime or some other wrong, probably enjoyed the authority to constitute it on his own.[82] It was also common for an aggrieved party to direct a complaint to a village functionary, and urge that it be placed before a duly constituted village tribunal.[83] Customary usages and practices also recognized less direct techniques for invoking the intervention of the Gamsabhava. One such technique was for an unsatisfied creditor to seize the property (e.g. cattle) belonging to either the debtor or any other person residing in the same village as the debtor, while proclaiming aloud the grievance which compelled him to so act.[84] Another technique was for a man who had suffered an injury to declare publicly and aloud his intention to commit suicide unless the injury was redeemed.[85] An official in charge of the Gamsabhava, usually the village headman had the authority to determine its composition, decide on a meeting place and inform all parties concerned of the venue.[86] The Gamsabhava

Hayley, *The Laws and Customs of the Sinhalese* (1923), Appendix 1, p. 35.

[80] On the judicial powers of state officials, see Ralph Pieris, *op. cit.*, p. 152.

[81] See John D'Oyly, *op. cit.*, p. 28; see also R.K.W. Goonesekere, *op. cit.*, p. 140.

[82] Cf. *Pallemeralavas vs. Kabelle Aracchilla* B.J.C. 26-9-1819, cited by Ralph Pieris, *op. cit.*, was conceded that a Korala had the authority to refer a case of cattle stealing to a Gamsabhava.

[83] See *Kiria v. Poola* 3 Lorenz's Report 143 (1859) in which a Gamsabhava proceeding was initiated as a result of a complaint filed by one of the parties to the incumbent of the village temple.

[84] See *The K. v. Pahale Gamue*, B.J.C. 3-12-1819 cited by F.A. Hayley, *op. cit.*, pp. 263-264.

[85] See John D'Oyly, *op. cit.*, pp. 37, 80 and 90.

[86] See *Kiria v. Poola* 3 Lorenz's Reports 143 (1859).

normally met in an *ambalama* (the village resting place),[87] the precincts of the temple,[88] or under a shady tree.[89] It was probably also common to hold its deliberations at the scene of the dispute especially where more serious crimes had been committed or where a land dispute is involved.

The village headmen, or the highest official present during the Gamsabhava deliberations would preside during the proceedings. Where members of the Buddhist clergy were present, the highest ranking priest in the monastic order would be conferred precedence over all other temporal officials.[90] All other members of the village tribunal would be seated in a circle on seats around the presiding official. The proceedings are commenced without any rituals, with the Gamsabhava president explaining the substance of the complaint, and inviting the competing parties to present their evidence. No exclusionary rules of evidence or other concepts of strict relevance appear to have been adhered to by the tribunal. The object appears to be directed towards affording the parties an opportunity to fully air their grievances, and to enable the Gamsabhava members to supplement their personal knowledge of the antecedents of the disputants with details of the controversies between the contending parties. In the case of land disputes, it was customary to call for the production of deeds, *sittuva*, and other documentary evidence, which were carefully scrutinized and given appropriate weightage.

The edict of King Mahinda IV required the village council to "maintain a record of its proceedings 'that the same may be produced thereafter' if necessity arose".[91] But the practice of maintaining a written record became defunct during the Kandyan period, and was partially revived in the early years of the British rule by Gamsabhava presidents who had been exposed to the procedures of the British Court of Law.[92] A

[87] See *R. v. Korala of Manassene* B.J.C. 12-11-1816 cited by Ralph Pieris *op. cit.*, p. 149.

[88] See *Kiria v. Poola* 3 Lorenz's Reports 143 (1859).

[89] See John D'Oyly, *op. cit.*, p. 28.

[90] See *Kiria v. Poola* 3 Lorenz's Reports 143 (1859). Much of the account in the text on the procedures followed by the Gamsabhava in the processing of disputes is based upon the Gamsabhava proceeding in the above case.

[91] Cited by S. Paranavitarna, *op. cit.*, p. 51.

[92] See the observations of the Chief Priest of the Asgiriya Monastic Order before the District Court in *Kiria v. Poola*, *ibid.*, p. 143.

decree inscribed on palm-leaves (*sittuva*) continued to be issued to the victorious party in a land dispute.[93]

The Gamsabhavas attached considerable importance to local usage and customs, and were generally attentive to the principles of Kandyan law on inheritance, divorce and land tenure, in reaching a decision on the dispute.[94] These customary norms and standards were not, however, rigidly applied and equitable factors were sometimes taken into account to mitigate their rigour.[95] When , however, either questions of law or fact seemed intractable, the tribunal resorted to rules of common sense to reach a decision. Lawrie refers to an example: "A Gamsabhava which, having difficulty in dividing a field between two brothers, noticed a snake crossing the field and unanimously decided to adopt the line of its path."[96] Although it was common in Kandyan judicial procedure to resort to certain recognized "ordeals" to resolve disputes which seemed insoluble by the application of any other rational principle of conflict resolution, such "ordeals" were probably not invoked during the Gamsabhava proceedings, since they often had to be administered under the authority of a high official.[97] The only example of a situation in which divine intervention may be solicited by a Gamsabhava to resolve contradictory testimony or to establish the guilt of an accused is when the parties are required to swear to the veracity of their respective claims in a celebrated temple or place of worship such as the sacred Dalada Maligawa (Temple of the Tooth). Divine judgement is thought to have been pronounced when an injury (e.g. death of a kinsman, damage to crop, or loss of a buffalo) befalls one of the parties.[98]

D'Oyly's comment that the endeavours of the Gamsabhava were "directed to compromise and not punishment" has led many scholars to view this institution primarily, if not exclu-

[93] See *Kiria v. Poola, ibid.*, p.143.

[94] See *Kiria v. Poola, ibid.*, and Simon Sawers, *Memoranda and Notes on Kandyan Law, op. cit.*, p. 35.

[95] In *Kiria v. Poola,* although the Gamsabhava dismissed the defendant's legal claim, based on inheritance and possession, to be the hereditary tenant of the land in dispute, it allowed him to remain in possession of such land during his lifetime.

[96] See A.C. Lawrie, 2 *Gazeteer of the Central Province of Ceylon* (1898), p. 603.

[97] Cf. Ralph Pieris, *op. cit.*, pp. 160-163.

[98] *Ibid.*, p. 160.

sively, as a conciliatory tribunal.[99] Although the Gamsabhava did often attempt to harmonize the competing claims and interests of the parties and arrive at an acceptable compromise,[100] it more frequently operated as an adjudicatory body. The Gamsabhava enjoyed the authority to inquire into issues of culpability and liability and to impose a decision which was often deemed binding on the parties.[101] The Gamsabhava normally relied on its prestige in the community and the social pressures at its disposal to secure compliance with its decrees, but it was also open to a successful party to resort to self-help to enforce his claim.[102] There are limited circumstances in which the Gamsabhava would take positive steps towards the enforcement of its award, such as erecting a fence to secure the boundaries of adjoining landowners.[103] In some criminal cases, such as cattle theft, the village tribunal enjoyed the authority to visit the guilty party with a fine. The authority of the Gamsabhava to impose such sanctions on the accused in criminal cases, is contingent on the presence of the headmen during the proceedings of the tribunal.[104]

Hayley believes that the Rata Sabhava enjoyed appellate powers over the decisions of the Gamsabhava,[105] but there seems to be no clear evidence that the two institutions coexisted except in the Nuwerakelaviya and the Matale districts.[106] The Dissavas and other high officials were entitled to review the decisions of the Gamsabhavas,[107] and in the case of more serious crimes, the Gamsabhava being limited to a preliminary inquiry, would be required to commit the case for trial before the court of the higher officials.[108]

The romantic conception of the workings of the Gamsa-

[99] See Ralph Pieris, *ibid.*, p. 149, and Colvin R. de Silva, *Ceylon Under the British Occupation*, p. 298 (1953).

[100] See case reported in B.J.C. 11-9-1827 cited by Ralph Pieris, *op. cit.*, p. 150.

[101] See *Kiria v. Poola, ibid.*, p. 143.

[102] See *Pallegedere Rulimanikrala vs. Kitulgastenne Vidan* B.J.C. in 8-5-1819 cited by Ralph Pieris, *ibid.*, p. 149.

[103] See Charles Marshall, *Judgments of the Supreme Court,* (1839), p. 37.

[104] See *Pallemeralavas vs. Kabelle Aracchilla,* B.J.C. 26-9-1819 cited by Ralph Pieris, *ibid.*, p.149.

[105] See F.A. Hayley, *ibid.*, p. 60.

[106] See Ralph Pieris, *ibid.*, p. 150.

[107] See F.A. Hayley, *ibid.*, p. 60.

[108] See *R. v. Korala of Manassene* B.J.C. 12-11-1816 cited by Ralph Pieris, *ibid.*, p. 149.

bhavas is that of the ideal typical conciliator

> sitting under a palm tree and acting in a paternal manner, and, by agreement between the parties concerned, settling the dispute not in relation to any known law and procedure.[109]

This image does not, however, correspond to the available data on the processing of disputes by the Gamsabhavas. The powers of the Gamsabhava were not limited to conciliation; it included the authority to impose a definitive determination, and to visit the party in fault with certain sanctions. Certain recognized forms, procedures and rituals were adhered to during its inquiry into the dispute, and local customary standards were often applied in reaching a decision. Given these qualifications, it was still valid to state that there was less formalism in the deliberations of the Gamsabhavas, than in its popular counterparts (the Rata Sabhavas or the Variga Sabhavas) or in the Court of State Officials and the Maha Naduwa (the Great Court).

IV

Our effort here is to provide an overview of the institutional framework within which the Gamsabhavas have operated so that we may recognize its distinct place in the elaborate Kandyan judicial landscape, and more clearly comprehend its relationship to the courts of the state officials and to other popular legal organs such as the Rata Sabhavas.

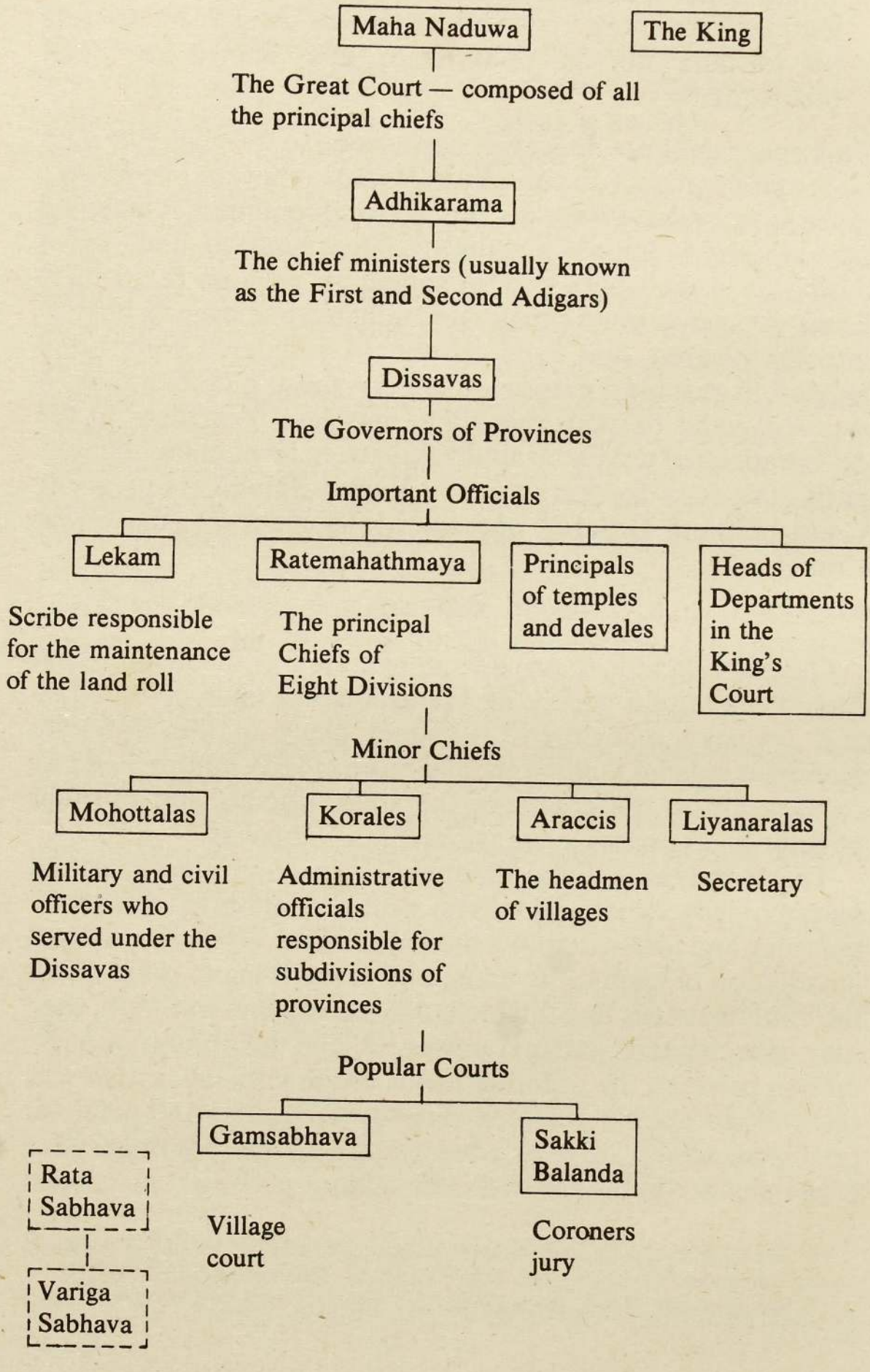
The Kandyan judicial organization was an elaborate and hierarchically structured system with a complex set of unwritten rules and forms defining the limits of the civil and criminal jurisdiction of each of its units, and prescribing in great detail the circumstances under which, and the manner in which, they may exercise their judicial power.[110] The devolution of jurisdiction between the different levels of the judicial system was often based upon a complex series of territorial and personal principles which corresponded in turn to the administrative organization of the central officialdom. Given the careful

[109] The Chief Secretary R.H. Drayton during the legislative debates on the Rural Court Ordinances No. 12 of 1945, cited by R.K.W. Goonesekere, *ibid.*, p. 138.

[110] See generally Ralph Pieris, *ibid.*, pp. 149-163, and F.A. Hayley, *ibid.*, pp. 58-71.

CHART 1

THE KANDYAN JUDICIAL STRUCTURE



demarcation of the respective jurisdictions of state officials, the discharge of their judicial functions was further regulated by a repertory of rules which prescribed, inter alia, the modes of administering oaths, the types of "ordeals" that may be resorted to reconcile conflicting testimony, the form and manner in which decrees or judicial orders may be issued, the range of sanctions at the disposal of each tribunal and how they may be applied, and the procedure to be followed in the execution of decrees. The complexities of such forms and ritual were further compounded by the need, both in the processing of disputes and the application of sanctions, to take account of the various gradations in the social status and ranks of different litigants.

At the apex of the multi-tiered court structure we find the King who, as the ultimate judicial authority, exercised jurisdiction over high crimes such as "treason, homicide and sacrilege"[111] and over civil disputes involving the higher officials, the principals of the temples or persons of noble antecedents.[112] But even the humblest of his subjects could petition the King for relief where a grave injustice had been perpetrated on him by one of the State officials.[113] The King rarely exercised his judicial powers in person, and referred these cases for inquiry and report by the Maha Naduwa, the Great Court. In later years the Maha Naduwa tended to assert greater independence, and even the need for the King to formally reaffirm its determinations was dispensed with. The authority to impose a sentence of death, however, continued to rest exclusively with the King.[114] He also exercised an independent judgement on the final disposition of disputes, in the determination of which the principal chiefs in the Maha Naduwa were sharply divided.[115]

At the next layer of the judicial system we find the Maha Naduwa, the Great Court, an advisory body which, during the last phases of the Kandyan kingdom, evolved into a more autonomous judicial tribunal.[116] The composition of Maha

111 See John D'Oyly, *Sketch of the Constitution of the Kandyan Kingdom* (1929), pp. 20-21.

112 See John D'Oyly, *ibid.*, pp. 20-21.

113 See Ralph Pieris, *ibid.*, p. 156.

114 See John D'Oyly, *ibid.*, p. 1.

115 See John D'Oyly, *ibid.*, p. 22; and Ralph Pieris, *ibid.*, p. 157.

116 See Ralph Pieris, *ibid.*, p. 157.

Naduwa appears to have undergone a basic change over the years. Originally, it was limited to the two Adhikars (ministers), the Dissavas, and the high officials who formed part of the King's retinue;[117] and in later years any chief of power, ability of mind and judgement was invited to serve on this tribunal.[118] Where the principal chiefs were absent from the city of Kandy, a Maha Naduwa was constituted with the lesser chiefs.[119] The proceedings of the Maha Naduwa were initiated by the referral of disputes by either the King or by one of the principal chiefs. When the latter procedure was adopted the Maha Naduwa assumed the same powers as the principal chief would exercise if he alone was to dispose of the dispute.[120]

The hearings of the Maha Naduwa were often held on the verandah of the audience hall or within the precincts of the royal palace. The principal Adhikarama would preside with all the other chiefs seated beside him according to their relative ranks. Ralph Pieris sums up the procedures followed by the Maha Naduwa in the following excerpt:

> The plaintiff or the prosecutor stated his case, the defendant answered and the evidence of the plaintiff, the defendant and their witnesses were heard. Evidence of witnesses unable to attend on account of illness was allowed, messengers being sent to bring their statements in writing confirmed, if possible, by oath at a neighbouring *devala* (temple). Witnesses who attended were sworn in at a neighbouring *devala* in the presence of two or three headmen, but only in important cases. The proceedings were oral, and no record was kept, except for the writing of lists of movable property in action, or a written statement of his case by either party, on a palm-leaf (*vitti vatoruwa*) . . . In land cases, palm-leaf decrees known as *sittu* were written and signed by the senior Adhikarama present . . . ; the *sittu* contained the name of the parties, the land in dispute, the decision of the court, and the date.[121]

We may now turn to the distribution of judicial authority

[117] See John D'Oyly, *ibid.*, p. 21.
[118] See John D'Oyly, *ibid.*, p. 21.
[119] See Proceedings of the Board of Commissioners for the Affairs of the Kandyan District dated 7th March 1817.
[120] See Ralph Pieris, *ibid.*, p. 157.
[121] See Ralph Pieris, *ibid.*

between different grades of the central officialdom. The most extensive judicial powers were vested in the Adhikarama (the chief minister). They had exclusive jurisdiction in all persons such as the whip-crackers who performed various services for them and were subjected to their administrative authority.[122] They also enjoyed concurrent jurisdiction with the Dissavas and the Ratemahathmayas over all individuals residing in the provinces and districts for which they had a special responsibility. They were, however, explicitly excluded from dealing with the disputes or punishing the offences of officers belonging to the King's retinue.[123] There was no monetary limit on the civil causes that could be inquired into by the Adhikarama, and their criminal jurisdiction included all crimes except high crimes such as treason and homicide. In all instances in which the jurisdiction of the Adhikarama overlapped with that of provincial governors and other chiefs, the concurrence of such chiefs was necessary for the exercise of any of the Adhikarama's judicial powers. Kandyan law strictly defined the types of decree that could be provided by the Adhikarama and the nature of sanctions that they may inflict on persons of different classes and social rank. In the Central Highlands (as opposed to the remoter provinces) it was possible for the Adhikaramas to issue *sittu* and *divi sittu* (swearing decrees) to successful parties. The Adhikaramas were able to inflict any form of punishment, including corporal punishment, imprisonment and fine "without a fixed limit," but were enjoined to take account of the social status of the parties in determining the manner in which punishment should be imposed.[124]

The Dissavas or the principal governors had jurisdiction similar to that of the Adhikaramas with respect to all persons and lands within their authority.[125] There were differences, however, in the types of decree they could issue and the forms of punishment they could inflict. The Dissavas could issue *sittuvas* with their own signature but could give *divisittu* only within their own provinces. They had the power to impose a fine or an imprisonment without, but could inflict corporal punishment only with their hands or certain twigs according to the

[122] See John D'Oyly, *ibid.*, p. 23; Ralph Pieris, *ibid.*, p. 152.
[123] See John D'Oyly, *ibid.*, p. 23ff; Ralph Pieris, *ibid.*, pp. 152-153.
[124] See Ralph Pieris, *ibid.*, p. 153ff.
[125] See Ralph Pieris, *ibid.*, p. 154.

rank and condition of the parties. On the issue of a *sittuva* or the communication of the decree of the Dissava, the successful party was often called upon to pay a fee.[126]

At the next level in the judicial hierarchy we find the vesting of judicial power in the more important state officials such as the Lekam, the Ratemahathmaya and the principals of the temples and the *devales* and the heads of department in the King's Court.[127] They too, like the Adhikaramas and the Dissavas, exercised judicial authority over all persons subject to their command. There were further refinements as to the types of decree or judicial orders that could be issued by such officials. As a general rule they could not issue *sittu* (ola-leaf decrees) or *divi sittu* but could communicate judicial orders in the form of a *vattoruva* (official order) to inferior chiefs enjoining them to restore successful claimants to the possession of disputed lands.

The jurisdiction and powers of the minor chiefs — such as the Mohattalas, Korales, Araccis, and Liyanaralas were more severely circumscribed.[128] In civil matters their judicial power was limited to boundary disputes of small fields and gardens, petty debts and disputes over the possession of fruit trees. Even such limited judicial powers were usually exercised only when the Dissavas were absent from their province. The circumstances under which this class of officials could issue judicial orders such as *vattoru* and commit persons under their authority to imprisonment, impose a fine or inflict mild corporal punishment were also severely limited by law.

Although the skeletal outline of the Kandyan judicial organization that we have set out above would tend to give the impression of a tightly co-ordinated and efficiently managed system of judicial administration, there is evidence to the contrary suggesting that both corrupt officials and capricious litigants were frequently able to manipulate these processes to perpetrate injustices on unsuspecting villagers. In fact there are many features in the operation of the Kandyan system which may have tended to encourage gross abuses such as the bribing of chiefs to issue *ex parte* decrees, the falsification of land titles,

[126] See Ralph Pieris, *ibid.*, p. 154.

[127] See Ralph Pieris, *ibid.*

[128] See Robert Knox, *ibid.*, p. 79; see also G.C. Mendis (ed.) 1 *Colebrooke-Cameron Papers* (1956), p. 151.

the frequency of vexatious suits and false complaints, and the deliberate use of dilatory tactics such as repeated appeals and the resort to other devious procedural manoeuvres. Firstly, most of the principal chiefs in the Kandyan kingdom such as the Adhikaramas, the Dissavas, etc., considered the mastery of the substantive and procedural laws and customs relating to the discharge of their judicial functions a drudgery.[129] They correspondingly tended to operate either in ignorance of these normative prescriptions, or lean heavily on the judgement of minor chiefs committed to their charge, or act on the advice of the members of their household.[130] Since many of these principal chiefs (drawn as they were from high-ranking noble families), were extremely lazy and inactive, they were probably quite content to delegate their judicial work to members of their entourage who were deemed to enjoy specificial familiarity with the localities under their command. These subordinates often found the opportunity to enrich their superiors (and thereby indirectly themselves) through the exaction and imposition of fines on helpless litigants, often too tempting to resist.[131]

Secondly, in the hearing of disputes by individual chiefs (as opposed to that by the Maha Naduwa) with the absence of well-defined procedures for the orderly presentation of testimony, and with the refusal of many of these chiefs to search for and apply those customary standards which may be applicable to the dispute, there is a tendency to too readily resort to non-rational techniques for the disposition of cases. Such procedures often took the form of an "oath" wherein the parties were required to swear to the veracity of their claim before a deity or temple,[132] or an "ordeal" wherein the parties were required to undergo a ritual which sometimes involved grave physical injury or even death to one of the parties.[133] The object of both procedures was to secure a divine judgement on the resolution of the dispute. In the case of an oath the verdict of the deity is thought to be expressed when some harm or injury befalls one of the parties. Similarly, in the administration of

[129] See John D'Oyly, *ibid.*, pp. 29-30.
[130] See John D'Oyly, *ibid.*, pp. 30, 31, and Robert Knox, *ibid.*, p. 51.
[131] See Ralph Pieris, *ibid.*, p. 159.
[132] See Ralph Pieris, *ibid.*, p. 160.
[133] See Ralph Pieris, *ibid.*, p. 159.

ordeals such as the "ordeal by oil" where each party is required to dip his fingers in boiling oil, having performed an elaborate ritual, the party whose fingers are blistered is considered to have been unsuccessful in his claim.[134]

Thirdly, ambivalence in the law on a number of important procedural matters often encouraged unsuccessful parties to adopt a series of devious strategies to override the determinations of lower chiefs or to delay for several years the execution of decrees. One such manoeuvre related to appeals from the decrees or judgements of officials and chiefs. Although in the Kandyan judicial system there were relatively well-defined lines of review, there was no principle which required an aggrieved party to exhaust the very next level in officialdom before he could appeal to an official higher up in the hierarchy; with the result that it was not uncommon for an unsuccessful claimant to bribe one of the superior chiefs to issue, after an *ex parte* inquiry, an order in his favour, setting aside the decree of one of the minor officials.[135] Also Kandyan law did not recognize any doctrine analogous to *res adjudicata* which barred the readjudication of a final decree before the same tribunal. So that when a dishonest suitor found his claim barred by a judge of unimpeachable character it was normal for him to bide his time until a less scrupulous successor was appointed, and to then demand a rehearing of his suit. The Board of Judicial Commissioners referred to a dispute in which the plaintiff, by repeatedly petitioning five successive Adhikaramas, was able to prolong a land dispute for over twenty-five years.[136]

Fourthly, the punishment and sanctions imposed by the state officials were often characterized by extreme cruelty. It was common for persons suspected of alleged crimes to be confined to a building, beaten up and subjected to all forms of torture with a view to exacting a confession from them. A very severe form of torture which was considered legitimate by the principal chiefs for the purpose of establishing the guilt of an accused was torture by insects where "a stick was thrust up (the) fundament.

[134] See John D'Oyly, *ibid.*, p. 38.

[135] See Ralph Pieris, *ibid.*, p. 155.

[136] See *Dinnewekke Medde Ganagada Lekam v. Welegedera Kariyakoranam Rala.* Board of Judicial Commissioners.

and insects put on (the) navel so as to oblige them to endeavour to escape through the body".[137]

It is important to note that many of the gross abuses that we have identified above in the administration of justice by state officials were clearly absent in the operation of the Maha Naduwa. As we noted above, the proceedings of the Maha Naduwa were characterized by a great deal of order and decorum in the presentation of evidence and the examination of witnesses, and a conformity to certain prescribed forms in the administration of oaths, in the admission of the evidence of absent witnesses and the recording of decrees. There also appears to have been a more self-conscious effort in this tribunal to determine and apply the laws and customs of the Kandyan Sinhalese.[138] Although the Maha Naduwa must probably have been aware that some of the principles of Kandyan law were modified by local usage in their application to the different provinces, no effort was made to accommodate such local customs in the adjudication of disputes.[139]

We may now consider the linkages between the Gamsabhavas and the other judicial authorities in the Kandyan system. Theoretically, the sphere of jurisdiction of the Gamsabhavas and that of several of the state officials who exercised authority over the village, tended to overlap and it was always open to a disputant to have direct recourse to these officials. The minor chiefs and the Dissavas and the Ratemahathmayas also enjoyed appellate powers over the decrees of the Gamsabhavas.[140] But the frequency of abuse and malpractice by state officials in the disposition of their judicial work must have clearly induced the rural litigant to be wary of these judicial forums, and to reinforce the endeavours of village communities to contain local disputes within the village limits. Also most persons accused of criminal wrongdoing in view of the harsher sanctions that could be meted out by the chiefs, probably preferred to have their alleged crimes inquired into and dealt with by the Gamsabhavas. In the remoter

[137] See *R. v. Neherrepola Mohottale,* Board of Judicial Commissioners, 6-12-1817 cited by Ralph Pieris, *ibid.*, p. 147.

[138] Cf. Memorandum of Simon Sawers dated 30th December 1826, reproduced in F.A. Hayley, *ibid.*, Appendix 1, p. 2.

[139] *Ibid.*

[140] See Ralph Pieris, *ibid.*, p. 152; John D'Oyly, *ibid.*, p. 23.

provinces such as Nuwerakelaviya where the authority of the central officialdom was weak, there was an increased tendency for local communities to assume primary responsibility for the maintenance of law and order.[141] Such districts were often subject to the dual control of a Dissava as the representative of the Kandyan King, and a Vanniyar as hereditary governor who often owed allegiance to the Dutch in Jaffna.[142] Difficult as it was for Kandyan officialdom to directly influence the affairs in the district courts from the city of Kandy,[143] early historical evidence seems to suggest that the royal officials were by no means indifferent to the law and order problems in these areas. Tenth century slab inscriptions point to regular circuits by royal officials, who secured a written inventory from the village headmen of all the crimes that had risen within the village and been inquired into by them.[144]

In the Nuwerakelaviya district and Matale there also existed a popular institution known as the Rata Sabhava (the District Council) which enjoyed the authority to review the decisions of the tribunals analogous to the Gamsabhavas.[145] The Rata Sabhava was a tribunal summoned by the Gamarala (the hereditary title of headmen occupied by the principal village elders) with the concurrence of the Vanniyar (the local governor) to deal with disputes that the Gamarala was unable to resolve amicably [146] The Rata Sabhava was generally com-

[141] Cf. Ralph Pieris, *ibid.*, p. 248.

[142] See Ralph Pieris, *op. cit.*, p. 249ff.

[143] Ralph Pieris, *op. cit.*, p. 249 points out that in view of the inaccessibility of these remoter provinces, royal officials were rarely able to collect taxes from the local residents or appropriate revenue collected at the toll-gates.

[144] See the Vevalkatiya Slab Inscription of Mahinda IV (circa A.D. 953-969) vol. 1 *Epigraphia Zeylanica*, p. 241ff. See also *1 Epigraphica Zeylanica* at p. 71ff. for a reference to a deputation from a village in the Province of Uva which complained to King Udaya III (circa A.D. 942-952) against excesses committed by officials exercising judicial authority in their region.

[145] Pieris seems to question the existence of tribunals distinctly labelled as "Gamsabhava" in the remoter provinces, but he concedes that the principal elders in a village, the Korala, and the Gamarala would often collectively inquire into agricultural disputes and impose a fine. See Ralph Pieris, *op. cit.*, p. 254.

Although the Ratasabhava was a higher tribunal than the quasi-Gamsabhavas in the remoter provinces, it is unclear whether the former ever exercised appellate powers over the decisions of the latter. There is no reference to such review powers in the detailed catalogue of the jurisdiction of Ratasabhava compiled by Kappuruhami. Cf. K.A. Kappuruhami, "The Rata Sabhava," 38 *Journal of the Royal Asiatic Society* (Ceylon), 42, pp. 44-45 (1948).

[146] See Ralph Pieris, *op. cit.*, p. 254ff; and K.A. Kappuruhami *op. cit.*, p. 42ff.

posed of the principal citizens and the officials in the district, with the Vanniyar (the hereditary overlord) in attendance with all his retinue and servants. Although the Rata Sabhava was constituted by and operated under the overriding authority of the Vanniyar, the most active official during the proceedings was the Mohottala (local official appointed by the Vanniyar).

The Rata Sabhava was the product of the peculiar social organization of the remoter provinces such as the Nuwera-kelaviya district, where the primary social unit was the *variga*, an endogamous group distinguished from other such units by rules barring association during marriage and funeral ceremonies.[147] The primary function of the Rata Sabhava is to preserve the exclusiveness of the *variga*, and its jurisdiction is correspondingly concentrated on the transgression of rules regulating social and sexual relations between persons belonging to different *varigas* and castes.[148] It also enjoyed certain ancillary powers to punish conduct in contempt of the authority of the Rata Sabhava, the making of false allegations and charges, and the practice of sorcery.

One of the most striking features of the Rata Sabhava were the exotic rituals and elaborate procedures which seemed to regulate even the most minute details of the Assembly's deliberations. Once the date for the meeting of the Rata Sabhava had been formally communicated to the Gamarala, immediate steps were taken to construct a temporary hall for the Assembly. Various occupational and caste groups who served the village, such as the artisans and the craftsmen, the blacksmiths, the washermen and the potters were enjoined to construct various parts of the Assembly Hall and to supply the furniture and other items used in these sessions. The Gamarala was by custom held responsible for the supply of rice and the preparation of meals.[149]

The commencement of the sessions of the Rata Sabhava was often preceded by a great deal of pageantry and fanfare. With the ceremonial seating of the Vanniyar, the Mohottala silenced the audience and delivered a religious incantation invoking the blessings of the gods in the work of the Rata Sabhava. Warnings

[147] See Ralph Pieris, *ibid.*, pp. 252-3.

[148] See Ralph Pieris, *ibid.*, pp. 254-55, and K.A. Kappuruhami, *op. cit.*, pp. 44-45.

[149] See Ralph Pieris, *ibid.*, p. 255.

are issued to the parties and the witnesses against the uttering of falsehood, and in any other way failing to assist the Assembly in its search for the true facts in the dispute. Similarly, the audience is strictly cautioned on pain of being fined to observe the very detailed rules of etiquette and decorum regarding the manner in which they may enter or leave the Hall, the way in which they should be seated, what gestures they may use, the circumstances under which they may talk or consume food, etc. The complainant's charge, the defence and the witnesses on both sides are heard in an orderly and systematic manner, and the verdict and punishment determined by the Mohottala. The verdict was then submitted to the Vanniyar for his confirmation. At this stage it was customary to ask the low-ranking washerman whether he agreed with the judgement, and he was correspondingly required to signify his assent.

To symbolize his condemnation by the *variga*, the convicted party was required to remove his headgear. If a fine was imposed, the offender was required to place the fine on a metal tray (known as the prohibition tray) and to ceremoniously present it to the Mohottala. The Mohottala by accepting this tray restored the offender to his *variga* status and released him from any "bar" that may have been issued (prohibiting other *variga* members from associating with the accused and his kinsmen). Such extreme importance was attached to the re-acceptance of the accused into the *variga* that the Mohottala cautioned the Assembly from repeating the charge or from discussing the substance of the case "when quarrelling, or in jest, at any time whatsoever".[150] He further warned that any person found disregarding this injunction would be subjected to a heavy fine. The offender then replaced his headgear, and as a further token of the total expiation of the wrong done to the *variga* community, the entire Assembly consumed a meal prepared by the offender and his kinsmen.

Although some scholars believe that during the Kandyan kingdom there existed a similar albeit distinct tribunal known as Variga Sabhava which dealt exclusively with caste disputes,[151] there is very little historical evidence to provide

[150] *Ibid.* p. 257.

[151] *Ibid.*, p. 255, where he states that "an assembly specifically convened to hear a caste dispute was . . . known as a Variga Sabhava".

credence to this theory. The discovery of a Variga Sabhava in the North Central Province as late as 1954,[152] coupled with the belief that the social system in this district had remained unchanged for several centuries[153] had spurred speculation on the probable existence of such institutions in the late eighteenth century. A careful comparison of the proceedings of the Variga Sabhava observed in 1954 with that of the traditional Rata Sabhava reveal striking similarities between the two institutions as they pertain to the role of the hereditary overlord and the washerman; the manner in which the Assembly is constituted; the procedures followed in the process of adjudication; the scheme adopted in the distribution of the fine; and, at a more general level, in the subordination of the judicial function to the social purpose of reinstating the accused in the *variga*. Such similarities tend to suggest that the Rata Sabhava of the late nineteenth century probably evolved over several decades into what is now described in these areas as the Variga Sabhava.

We may now look at some of the similarities and differences in structure and function between the Rata Sabhava and the Gamsabhava. Although Codrington[154] and Hayley[155] have at times tended to confuse the two institutions, it is important to emphasize many fundamental differences between these judicial forms. Firstly, while the Gamsabhava was at least technically a part of the judicial organization of the Kandyan King, the Rata Sabhava on the other hand belonged to the relatively separate and autonomous legal organization of the Vanniyar, the hereditary overlord. The Vanniyar authorized the constitution of the Assembly, and confirmed its decisions and his share of the fines levied by such an Assembly were probably the only emoluments of his office.[156] The hereditary overlord also exercised his power of appointing the Mohottala and other officers of the Rata Sabhava as one of the means of distributing patronage and asserting his political dominance over the province.

Secondly, the proceedings of the Rata Sabhava, in sharp

[152] See E.R. Leach, *Pul Eliya* (1961), pp. 33ff.
[153] See Ralph Pieris, *op. cit.*, p. 235, f.n. 13.
[154] See H.W. Codrington, *Ancient Land Tenure and Revenue in Ceylon* (1938), p. 3.
[155] See F.A. Hayley, *op. cit.*, p. 60.
[156] See Ralph Pieris, *op. cit.*, p. 250.

contrast to the brevity and relative informality which characterized the work of the Gamsabhavas, were both lengthy and highly formalized, being frequently interspersed with elaborate rituals, etiquette and exotic ceremonies.

Thirdly, although both the Gamsabhava and the Rata Sabhava were geared to the conservation of the prevailing social order, important variations in the social organization in the Uda Rata (the Central Highlands) and the district are reflected in the relative importance that they attached to the "conservationist" social structural, as against their dispute resolution, functions. If we look at the Gamsabhava we find that it attaches primary importance to the consolidation of the village community as a distinct sociological entity and to the maintenance of local customs and usage.[157] In the medieval period when the village was both a territorial unit and a caste corporation, the Gamsabhava's "conservationist" function overlapped with its obligation to enforce caste norms. Despite changes in caste composition and the emergence of new feudal relations, the *gama* (village) persisted as an important unit of social organization and continued to serve as a principal focus of concern of the Gamsabhava. To the extent the Gamsabhava proceedings were characterized by conciliation and compromise, its efforts were directed towards minimizing internal strife within the village community, and with shielding it from the disruptive effects of external influences. Thus, for example, on the receipt of a complaint from a family that one of its members contemplated the alienation of his land to a stranger, the Gamsabhava restrained the family member from doing so.[158] But the jurisdiction of the Gamsabhava was not limited to disputes which threatened the integrity of the village community or in some fundamental sense brought in issue the web of social relations which linked one member of the community to another. The civil jurisdiction of the Gamsabhava extended to all disputes existing within the territorial limits of the village,

[157] It was widely recognized that the group most conversant in local customs and usage were the local headmen, and their participation in the deliberations of the Gamsabhava is likely to have contributed to considerable attention being paid by that tribunal to the enforcement of such customs. See G.C. Mendis (ed.), 1 *Colebrooke-Cameron Papers* (1956), p. 56 and cf. Simon Sawers, *Notes and Memoranda on Kandyan Law, op. cit.*, p. 2.

[158] See Board of Judicial Commissioners dated 11-9-1827 cited by Ralph Pieris *op. cit.*, p. 150.

and the Gamsabhava also enjoyed the power to inquire into and sanction specific crimes designated to be within its special competence. The Gamsabhavas therefore enjoyed an important dispute resolution function, which was by no means submerged by its "conservationist" social structural function. The position is quite different with respect to the Rata Sabhava when the ostensible dispute resolution function is subordinate to the real goal of proclaiming the dogma of *variga* exclusiveness. The principal objective of the Rata Sabhava proceedings is not the prosecution and sanctioning of transgressions of the rules of *variga* endogamy, but the public purging by an accused of his offence and his ritual admission into the *variga*. The pageantry, the colourful ceremonies, and the communal feasting which accompany the deliberations of the Rata Sabhava are further designed to dramatize the corporate character of the *variga*. The persistence of the *variga* as a corporate form is so dependent on the existence of the Rata Sabhava as a legal institution, that the disappearance of the latter has been thought to precipitate the disintegration of the former as a functioning institution.[159]

To conclude this chapter we may sum up the main features of the Gamsabhava as it existed in the Kandyan provinces in the late eighteenth and early nineteenth centuries:

(1) Although the Gamsabhava in medieval Sinhalese society was the effective expression of village government, managing and co-ordinating every facet of village life, by the time of the Kandyan kingdom it had primarily become a legal institution geared to the management of conflict and to the maintenance of rural order.

(2) Generally, the Gamsabhava was composed of the principal elders, village headmen, and minor officials, with the village functionaries playing an increasingly dominant role by the early nineteenth century. The Gamsabhava had an extensive civil jurisdiction which overlapped in some areas with that of the superior chiefs who exercised authority over the village. The tribunal's criminal jurisdiction had, however, become considerably eroded in later years, such that it was limited to a preliminary inquiry in all cases involving "high crimes".

[159] Cf. E.R. Leach, *op. cit.*, pp. 28-29.

(3) The Gamsabhava was an ad hoc tribunal, constituted by means of certain established forms and procedures, on the occurrence of certain specific disputes. Although its proceedings were relatively informal and no exclusionary rules of evidence or strict concepts of relevance were adhered to, Gamsabhava did conform to certain customary procedures in the hearing of testimony, in the issue of a decree, and in its execution. Careful attention was paid to local laws and customs in the disposition of disputes, but the application of such normative standards was often tempered with equity and common sense. The Gamsabhava was an adjudicatory body and enjoyed the power to impose a binding decision on the parties; frequently, however, its efforts were directed towards compromise and conciliation.

(4) The Gamsabhava as a judicial institution was technically a part of the elaborate and hierarchically ordered Kandyan judicial organization. Although there were many formal linkages between the Gamsabhava, and the exercise of judicial power by state officials (such as overlapping jurisdiction, and the authority of the former to review the decisions of the latter) the Gamsabhava operated relatively independently of these official bodies and derived its authority from the consensus of the village community. Gross abuses in the discharge of judicial functions by the state officials accentuated the Gamsabhava's determination to contain conflict within the confines of the village, and to resist the penetration of the central officialdom into the rural areas. There were many fundamental differences in form, process, and function between the Gamsabhavas and the Rata Sabhavas, and there is no concrete evidence that they coexisted except in the Nuwerakelaviya district where tribunals analogous to the Gamsabhava may have operated in a subordinate capacity to the Rata Sabhava. The Gamsabhava's social-structural function was essentially "conservationist" and primarily geared to upholding the integrity of the "village" as a sociological and territorial entity, but unlike the Rata Sabhavas it also performed an independent conflict resolution function which was by no means superseded by its social structural function.

III Voluntary Conciliation

That the weak overcomes the strong
and the yielding overcomes the unyielding
Everyone knows this
But no one can translate it into action

— LAO TZU —78

I

This account will deal with the period immediately preceding the state institutionalization of Conciliation Boards and review the various voluntary organizations which emerged either spontaneously or with the support of the police or other state agencies to deal with the problem of rural and urban crime. It will draw attention to the magnitude of the crime problem in this period as reflected in official crime statistics and then review the different institutional arrangements which attempted to deal with the problem at different levels and, in turn, adopting different strategies. This period also corresponds to an important shift in official policy from specialized law enforcement agencies to an attempt to revive what was perceived to be the traditional concept of collective responsibility; a doctrine which sometimes held the village as a corporate group, responsible for infractions by a single individual.

The early attempts to create popular auxiliary law enforcement agencies represents a reaction by educationists, religious elders and police administrators in the urban centre to what they perceived to be an alarmingly high incidence of homicide and of grave crime. Early colonial administrators on the other hand have moaned the apathy and indifference of villagers to the problems of rural crime, and complained that the efforts to police these areas have often been frustrated by the non-co-operation of local residents.[1] More recent studies on the

[1] See *The Special Supplement to Ceylon Police Gazette*, Part II on Crime Prevention, dated February 16, 1971 (covering extracts from the Police Gazette for the period 1939-1959) and hereinafter referred to as *Crime Prevention*, p. 7.

sociology of crime seem to also confirm this schism on the one hand between the concern of the urban elite and the indifference, on the other hand, of most of the remainder of the population.[2] There appear to be two factors which seem to have shaped the elite's perspective on crime; firstly the romanticised image of the relative tranquility of village life in pre-colonial Ceylon and secondly the impression that the incidence of crime in contemporary Ceylon is one of the highest in the world. These elites noted that such a high incidence of homicide and crime was particularly reprehensible in a society inhabited by a majority of Buddhists committed to the tenets of non-aggression towards all forms of life.

Both conceptions of the incidence of crime in traditional and contemporary Ceylon have been questioned by some scholars. There are two isolated fragments of evidence which are relied upon in speculation about the state of crime in traditional Ceylon. The first is a rock inscription of the twelfth century A.D. which states that "such was the security established as well in the wilderness as in the inhabited places, that even a woman might traverse the country with a precious jewel and not be (questioned)".[3]

A more recent and reliable insight into the state of Sinhalese society is found in the ethnographic study by an Englishman, Knox, imprisoned in the Kandyan kingdom for almost twenty years in the latter half of the seventeenth century.[4] Knox, describing the temperament of the Kandyan Sinhalese, observes:

> They are not very malicious one towards another; and their anger does not last long; seldom or never is any blood shed among them in their quarrels. It is not customary to strike; and it is very rare that they give a blow so much as to their slaves.[5]

Others draw attention to the extreme and severe sanctions inflicted by royal officials on persons guilty of serious infractions of the law, to question the image of the non-aggressive

[2] A.L. Wood, *Crime and Aggression in Changing Ceylon*, Transactions of the American Philosophical Society (1961), p. 53.

[3] E. Muller, *Ancient Inscriptions in Ceylon*, Rock Inscription No. 143 (Dambulla).

[4] On Knox's study, see Ralph Pieris, *Sinhalese Social Organization* (1956), p. 267.

[5] Robert Knox, *An Historical Relation of Ceylon* (1681), p. 102

traditional Sinhalese. One scholar, on the basis of this slender evidence, speculates "that Ceylon's traditional culture of several centuries may well have attained a homicide rate perhaps more than the median for contemporary nations".[6] These scholars have also challenged two other misconceptions about crime. Firstly they pointed out that the conception of a continuing increase in the incidence of homicide is not borne out by statistical evidence. The incidence of homicide per unit of population seems to have steadily climbed from 1920 up to a peak in 1944, and then declined at a uniform rate until about the middle Fifties when it experienced a minor fluctuation (see table 1). A similar pattern is repeated in the incidence of grave crime (table 2). Secondly, they deny that the incidence of homicide is one of the highest in the world. They draw attention to the fact that although Ceylon falls within the category of societies with high rates of homicide, the homicide rate in several countries within this category is much higher than that in Ceylon (table 3).

Although the negative reaction towards crime during this period was grounded upon an exaggerated conception of the incidence of crime and a romanticised image of the state of law and order in traditional Sinhalese society, it nonetheless precipitated the efforts to promote popular involvement in law enforcement work.

II

The first of such institutions was the somewhat sporadic emergence in the Thirties of various voluntary organizations in different parts of the country which were known in official circles as anti-crime societies. The purpose of these societies was, through discussion and propaganda, to inculcate into apathetic villagers an attitude of intolerance towards crime and other anti-social conduct. The official police attitude towards these societies has been somewhat ambivalent. On the one hand they cautioned against too close a police involvement in the workings of these societies, fearing that it would confirm the suspicion of rural residents that they were devices to obtain information on suspected criminals, and to thereby intrude into

[6] A.L. Wood, *Crime and Aggression in Ceylonese Society*, 51 Transactions of the American Philosophical Society (1961), p. 162.

their private lives. On the other hand they attributed the low level of success of these organizations to their attempts to ignore and even supplant the existing state machinery for law enforcement.[7]

There were others who recognized a more basic weakness in the design of anti-crime societies, namely that they were not oriented towards identifying and dealing with the underlying social and economic causes of crime. Accordingly, in 1939, an imaginative police officer instituted an experimental popular organization which would not merely complement the regular law-enforcement apparatus but also have the capacity to confront the social and economic problems which give rise to crime and anti-social conduct.[8] The latter objective was to be realized through a programme of "practical rural reconstruction" executed by a village welfare society and a volunteer rural patrol.

The village welfare society was initially instituted in backward areas in which "crime, immorality or poverty" was acute.[9] In establishing these societies all the social and religious voluntary organizations in a headman's unit of administration, are fused to constitute a single body responsible for the welfare of the village. Responsibility for co-ordinating the activities of the society, such as providing relief to the impoverished; the unemployed and the landless, are vested in a central committee composed of a prescribed number of males and females. The committee also handles the resolution of disputes; where the committee cannot reach a settlement it appears that the dispute is sometimes referred to the village as a whole.[10] There are two other aspects of these societies which we may specially note; namely the close involvement of the police in the working of these societies, and the intrusion of politics into the operation of these institutions. Since the initiation of these societies in the North-Western Province, police officers have been urged by their superiors to become active in the constitution and management of village welfare societies in their areas. Members of the society were in turn encouraged to maintain close contact with police officers, and all societies within a

[7] *Crime Prevention* (1971), p. 7.
[8] *Ibid.*, pp. 17-23 and 26-28.
[9] *Ibid.*, p. 9.
[10] *Ibid.*, p. 22.

specific district were placed under the supervision of a local police station. Model rules were issued by the police to guide the working of these organizations,[11] and the local police officers were requested to screen applicants who desire to organize such societies with a view to weeding out those who may manipulate these institutions to advance their own political interests. Police administrators were conscious that official involvement to this degree could discourage participation by most villagers in the work of these societies. They however believed that as soon as villagers recognised the capacity of these institutions to make a contribution towards the upliftment of the rural areas, popular confidence in these institutions and even the police services would soon follow.[12]

Secondly, the official policy on the politicization of these societies was not always consistent. The model rules on the management of these societies and circulars issued by police officials lay considerable emphasis on the need to maintain the apolitical character of these institutions.[13] There was considerable concern that these voluntary organizations should not become enmeshed in the struggle for power between indigenous political groups. On the other hand early British administrators saw in these institutions a different political purpose. Their immediate enthusiasm for the establishment of these organizations was based upon faith in their potential use as instruments for combating anti-British propaganda by "Sama Samajists" and other "subversive groups" which were active during this period.[14]

We may now turn to the rural volunteer patrol scheme which was designed as an adjunct to the village welfare society movement. The aim of this movement was to create a nucleus of villagers committed to assisting the police and headmen on the maintenance of law and order in the rural areas. Their duties ranged from accompanying policemen and headmen on patrol, investigation and raids, the supervision of local criminals and other potential law-breakers, to invoking the assistance of the village welfare society in the settlement of disputes. The rural

[11] For a translation of Model Rules Issued for the Village Welfare Societies in the Kegalla District, see *Crime Prevention, op. cit.*, pp. 20-21.

[12] *Ibid.*

[13] *Ibid.*, p. 21.

[14] *Ibid.*, p. 5.

patrol normally consisted of three to ten volunteers who were initially selected by the headmen often from the membership of the village welfare society. On approval by the local revenue officer and the police, letters of appointment were issued by the government agent. Official reports claim that an attempt was made to ensure that the membership in the rural patrols was not confined to any "particular class, creed, community or political party". The recruits were then given a brief orientation and required to undergo a four-month period of probation during which they worked in close co-ordination with the police to obtain training in crime prevention and detection.[15]

Both the village welfare societies and the rural volunteer patrols which were initially constituted in the Kegalle district, spread gradually to the North-Western Province, and by 1950 they were established in all parts of the island. Official statistics point to a sharp decline in crime in most areas in which the popular law enforcement agencies were instituted; and police administrators soon attributed this achievement to the effectiveness of these agencies in facilitating the detection of offenders, the expeditious resolution of disputes and quarrels, the more comprehensive policing of rural areas, and more generally in ameliorating some of the social and economic conditions which contribute towards crime. An extract from the District Report of the Kegalle village welfare societies illustrates the range of activities undertaken by 54 of these societies within a period of six months.

No. of land disputes settled	297
No. of miscellaneous disputes settled	503
No. of persons for whom employment was found	632
No. of acres of privately owned land handed over to the landless	368
No. of acres of new land, brought under cultivation	1298, etc.[16]

Similarly, rural patrols are thought to have considerably improved the rate of detection in areas in which they were active.[17] In the North-Western Province where the movement

[15] *Ibid.*, pp. 42-43.
[16] *Ibid.*, p. 23.
[17] *Ibid.*, pp. 44, 45.

for practical rural reconstruction was most prominent, the official claim is that these volunteer popular agencies contributed towards a reduction in total crime from 4,000 cases in 1944 to 2,174 in 1947.[18]

The urban counterparts of these popular auxiliary law enforcement agencies were the town protection societies. This scheme was instituted by the police in a major town in the interior of Ceylon to deal with what was then regarded as a high incidence of crime and anti-social conduct. The traders and proprietors of business establishments were encouraged to constitute a society which would hire an auxiliary security force to police the bazaar areas. The expenses of employing these guards were to be met out of the society's subscriptions. An attempt was made to ensure that all communities doing business in the area were represented. The police were closely involved in the work of these societies; they circulated model rules, they ensured that retired police officers would hold honorary office, and they trained and sometimes supervised the work of auxiliaries. Although after a year or two the scheme was found to be effective[19] and the police recommended that it be instituted throughout the island, it does not appear to have gained wide acceptance.[20]

For almost a decade the Ceylon Police Service demonstrated its capacity to structure and execute an imaginative and sophisticated scheme for crime prevention through "practical rural reconstruction". One criminologist noted that it is rare to have a police administration "fully conscious of the social factors in the behaviour of offenders and as constructive in their plans for crime prevention".[21] Nonetheless, there were many difficulties in the involvement of the police in the programme of rural reconstruction. As one police administrator pointed out, "the organization and supervision of these societies is skilled work requiring both intimate knowledge of the area and time".[22] A law enforcement agency is clearly not equipped to assume primary responsibility for this work. It was inevitable

[18] *Ibid.*, p. 44.

[19] For a statistical assessment of the impact of Town Protection Societies on the incidence of crime in Kurunegella Town, see *Crime Prevention*, p. 58.

[20] *Ibid.*, pp. 57-58.

[21] A.L. Wood, *op. cit.*, p. 46.

[22] *Ibid.*, p. 26.

that many overworked officers in charge of police stations considered rural development as peripheral to concerns of a police service, and did not display the same enthusiasm and committment for this work as was expected of them by the architects of this movement. Besides, with the growing number of government departments becoming involved in the rural areas, it became increasingly clear there was need for a separate unit of government to co-ordinate this work and be accountable to the local revenue office in the administrative districts.

III

In response to these concerns the government established a separate Department of Rural Development "to create conditions of social and economic progress for the whole community with the active participation and with the fullest possible reliance on the community".[23] Although some effort was made to follow the Indian community development programme, many of the institutional forms inherited from the previous scheme were retained. It is significant that one of the close associates of the "practical rural reconstruction" scheme in Kegalla was appointed as the first commissioner. The Conciliation Tribunal, and the rural patrols of the welfare societies were absorbed into a new elective body known as the Rural Development Society. A specially recruited and trained officer known as the Rural Development Officer was attached to every district revenue office to co-ordinate and supervise the work of the rural development societies in his area.

The Rural Development Officer provided a vital link between the bureaucratic apparatus at the district level, and the village level rural development society. On the one hand he co-ordinated the work of government departments and local authorities in the rural areas, and was therefore an integral member of the staff of the district revenue office. On the other hand, he worked closely with the villagers in constituting a rural development society, drafting a set of rules for its operation, supervising the election of office-bearers, and planning and executing the society's programme of activities. He further helped transmit state policies and dispensed state funds

[23] *The Administrative Report of the Department of Rural Development* (1955), p. 6.

approved for rural developmental projects. Most of these Rural Development Officers were young, educated up to the high school level and often committed to their work. The success of the rural development movement largely depended on the enthusiasm of the RDO, his capacity to mobilize the confidence and support of persons of influence within the community, and the quality and integrity of the society's office-bearers.[24]

Despite the organizational changes in the rural development society there was little change in the range of activities undertaken by its predecessor, the village welfare society. The society was primarily geared to instituting modern methods of sanitation, health care, education and production with a view to improving the social and economic conditions in the village. State subsidies were awarded to underwrite up to a half of the costs of the more important construction works undertaken by the society; such as the building of roads, schools, weaving centres, etc. Most of such work was however accomplished as a result of the voluntary donation of labour by society members and groups from outside the village. This co-operative work method was one of the most distinctive features of traditional Sinhalese society, but declined in importance in the colonial period, except for certain activities related to paddy cultivation. One of the more important goals of the rural development movement appears to be the revival of this traditional work style in the expectation that it would regenerate the collectivist spirit and a commitment to work for the welfare of the village as an entity.

To turn to the conflict management and law enforcement functions of the rural development societies: many of these societies set up Conciliation Boards and also established one or more rural patrol squads. In 1954 there were 5,869 rural development societies, 4,754 Conciliation Boards and 6,727 rural patrol squads with a membership of 47,928.[25] The requirement that rural development societies organize Conciliation Boards for the settlement of village disputes is another link in the chain of experimentation with non-formal conflict resolution which began in Kegalla in 1949. Recalling the earlier

[24] See Christopher Sower, "Rural Development Societies as Cultural Agencies" in Ralph Pieris (ed.), *Traditional Sinhalese Culture* (1956), 74ff. and the *Administrative Reports of the Department of Rural Development.*

[25] C. Sower, *op. cit.*, p. 81.

efforts one police administrator noted that they were "based on the Panchayat system" and that their immediate impact was such "that not only was there a marked reduction of crimes of violence, but even the village tribunals had less work". The only complaint he noted came from the legal profession which complained "that the police were dabbling in things that were not their business".[26] Since neither the rural development society nor the Conciliation Board constituted under its aegis are statutory bodies, we have no uniform rules on their constitution, composition, jurisdiction or procedures. In the absence of very specific administrative directives, it also seems likely that there were many regional variations. It is however possible to gather a general impression of how these Boards were set up and operated by analyzing the records of an RDS Conciliation Board in the Central Province, and an ethnographic note on how land disputes were processed by a Board in the Western Province.[27]

The composition of the Board tends often to be limited to the three or four office bearers of the rural development society. The village headman as the patron of the society is co-opted as a member of the Board.[28] A police constable in attendance either as a witness or to maintain order, frequently intervenes during the proceedings and is often invited to participate in the deliberations. While it is probable that village elders, such as the village priest, who does not hold formal office in the society are also invited to serve on the Boards, such a practice appears to be more the exception than the rule.

The procedure followed by the RDS Board tends to be informal and flexible. The proceedings may be initiated by one of the parties by writing a letter to an office bearer, often the president of the society. Oral complaints were also acceptable but they were probably reduced to writing by the secretary, before the inquiry. No special forms were issued by the Department for Rural Development for the filing of complaints, the issue of summons or the recording of determinations. The defendant and all other parties who may have an interest in the

[26] *Crime Prevention*, *op. cit.*, p. 92.

[27] See extracts from a diary maintained by the Chairman of the Giddawa-Wardiwela R D S Conciliation Board (supposedly from 1949 up to 1966) on file with author. See also A.L. Wood, *ibid.*

[28] See A.L. Wood, *op. cit.*, p. 169.

dispute are summoned to the inquiry by an officer either orally or by letter.

There does not appear to be a fixed date on which the Board meets. The interval between consecutive meetings of the Boards may vary from a day to several weeks. The meetings are usually held at one of the buildings of the society such as the weaving centre, the village school or the community centre. Besides the members of the Boards, the parties and their witnesses, a few onlookers from the village are likely to be present. As we noted earlier a police constable is also probably in attendance. The president or, in his absence, the vice-president, would normally preside. The secretary of the society maintains the tribunals calendar which contains the names of parties, the nature of disputes, the dates of the inquiries and the determination. No detailed record of the proceedings is maintained.

At the commencement of the inquiry the president, having been satisfied that the parties summoned are in attendance, would either read out the written complaint or request the complainant to state it. The complainant is often requested to amplify this statement, and questioned by the Board on "important details". From this stage there appears to be little regularity in the proceedings. If the inquiry relates to a land dispute, each party having an interest in the land may be requested to state the nature of his interest in the land and produce evidence establishing his interest. It is common for these presentations to be interrupted by opposing parties and for considerable cross-talk to take place. An opportunity is also provided for the defendants to state their case. No effort is made to systematically examine witnesses in support of each opposing party. Although the president and Board members tend to question the parties on their presentation, no formal right of cross-examination is recognized by the Board.

If the complaint had been previously inquired into by the headman or the police constable, their evidence is given considerable weightage. Parties who believe that these officials have an interest in the dispute or are biased against them have little hesitation in impugning their credibility. Where such allegations surface during the proceedings the Board tends to be more cautious of such evidence.

The general aim of the proceedings then is not to hold a trial

on narrowly defined issues, but to have a general, and at times open, discussion by all persons present at the inquiry to enable the Board to set out all the competing claims and interests. No attempt is even made to limit interventions and comments by "busy-bodies" who are attracted to the proceedings more out of curiosity than real interest in the dispute. Little sanctity appears to be attached to any rituals or rules of evidence and procedure. Concern is however expressed over reaching a determination in the absence of a person who may have a claim relevant to the inquiry. Where practical contingencies, such as the need to determine competing claims to cultivation before an impending cultivation season, may tend to outweigh the concern for procedural regularity, an interim solution is proposed by the Board. In such a situation it is often left open for unrepresented parties to state their claims before a final determination is issued.

The disposition of disputes by the RDS Conciliation Boards generally falls within four categories. The first, and in design the principal objective of the proceedings, is "conciliation". While we have no national statistics on the rate of settlement of disputes by RDS Boards, gross figures issued by the Commission for Rural Development indicate that 26,378 disputes were settled by Boards in 1954.[29] In one Board in the Central Highlands in 1949 the records indicate that almost half the disputes inquired into by the Board were "settled".[30] The typical case would be one in which the subject of the dispute is an argument or quarrel resulting from a long-standing enmity or arising out of a provocation by one of the parties. The Board in such inquiries would reprimand both parties for their conduct, lecture to them on the virtues of familial unity or rural harmony, and then advise them to live in peace with each other. But where competing legal claims to land are in issue and conflicting documentary evidence is produced, the Board tends to dictate a decision. This leads us to the second category of disputes in which the Board reaches a "determination", where the acquiescence of the parties is either presumed or coerced through the subtle application of social pressures. Many of the

[29] Sower, *op. cit.*, p. 81.

[30] From the record maintained by the President of the Giddawa-Wardiwela R D S Conciliation Board, on file with author.

cases classified as "settled" in the records would probably fall within this category.[31]

The records provide a clear instance in which sanctions were directly applied to one of the parties. A group of boys were found guilty of "teasing" some girls in a Buddhist temple. Such conduct was not merely offensive to the social norms of the village, but was doubly reprehensible since it took place within the precincts of a place of worship. These circumstances probably prompted the temple to take the unusual step of imposing a fine on the accused. It is significant that the fine consisted of five joss-sticks, five blocks of wax, and two boxes of flowers, all of which are normally utilized during religious observances, thereby implying the need to expiate the disrespectful conduct towards the temple. There is another dispute in which the Board decided that compensation would have to be paid to a party whose paddy fields were damaged by the cattle of the defendant. The evaluation of the quantum of the damage was delegated to the headman.

The third category covers "dismissals," "withdrawals" and "postponements". An example of the first would be one in which the complaint of a lunatic was dismissed presumably on the basis that it did not present a coherent claim upon which any action could be taken. The dismissals also take place when both parties fail to appear at an inquiry. A withdrawal is recorded when the complainant decides on his own motion that he does not want the inquiry to proceed. Postponements cover an ambiguous group of cases, varying from inability to serve summons on a party who had left the village, to the non-production of important documentary evidence. In most cases of postponement very little attempt seems to be made to resume the inquiry. As a result the dispute remains unresolved or is shifted to another forum.

The fourth category covers cases in which the Board operates as a "screening agency" and directs complaints for further action or inquiry by other village functionaries such as the headmen or the courts. When it is clear that the parties are so intransigent that a settlement seems unlikely the parties are advised to take the dispute to the nearest court. There was

[31] It seems that many parties were ignorant of the limitations on the power of the Rural Development Society Board.

another instance in which an administrative complaint was referred by the Board to an appropriate government department for further action. In these situations the Board is providing counselling services to the disputants and acting as a legal-administrative conduit pipe through which local grievances are channelled to higher state agencies.

Popular reaction to these Boards is generally positive. A survey conducted in the late Fifties indicated that at least a third of the interviewers preferred to take their disputes to informal agencies of social control such as the RDS Boards than the courts or local officials.[32] On the other hand, as a result of public complaints "hundreds of these societies, volunteer patrols and boards . . . had to be liquidated because politics, corruption or other factional interests had gained control".[33]

Since the RDS Boards have no statutory authority and the settlements they record have no more validity or binding quality than a non-notarially executed contractual agreement, the willingness of villagers to resort to the Boards and abide by their determinations turns on the degree of public confidence in the members of these Boards. Public confidence is in itself shaped by a number of factors such as social and cultural differentiation, education and integrity of Board members and their general commitment to the welfare of the village. One study of rural development societies reached the general conclusion that one of the reasons for the lack of success of these institutions was their dominance by members of the higher castes and the traditional elite.[34] The government appears to have anticipated that the hereditary landowning classes, the village school master, the ayurvedic physician, etc., who constitute traditional leadership would, by reason of their higher level of literacy, prestige and influence, control the rural organizations. Although one effort was made to create a new elite through a programme of leadership recruitment, the programme appears to have had only a limited impression on the patterns of rural leadership. A more intensive study of three villages in the south seems to reveal that, independent of the leadership recruitment programme, massive social and economic changes

[32] A.L. Wood, *op. cit.*, p. 46.

[33] *Ibid.*, p. 46.

[34] United Nations, *Report of the Rural Development Evaluation Mission in Ceylon*, New York (1962).

have given rise to three different patterns of dominance in rural development societies.[35]

Firstly we have a situation in which the descendants of the traditional elders continue to occupy positions of influence in the society, but, with the weakening in the social constraints which traditionally acted as a check against the abuse of authority, employ force and other illegal techniques to engage in illicit activities. The traditional authority, although present, is in the process of decline, and is propped up by force and violence to secure the obedience and cooperation of the villagers. The second situation is one in which the dominance of the traditional elite over rural life is challenged and even displaced. This results from the accentuation of the economic disparities between an identifiable group of hereditary landowners, and the remainder of the village, and the increasing politicization of both groups. The socio-economic orientation of the landowners had become so conservative "that all meaningful social contact with the villagers (ceased) . . . they live(d) in different worlds".[36] The new leadership in the rural development society however lacked the traditional authority or qualities of leadership to effectively discharge their duties. They collaborated with criminal forces in the community to manipulate these societies as instruments of power and to distribute rewards and favours. In the third situation, like the first, the traditional groups continued to dominate the social and political life of the village. Although this village like others tends to be divided by political differences, and envy and hostility result between social groups, the rural development society is able to overcome these difficulties as a result of extraordinary leadership and thereby engage in an intensive programme of rural reconstruction.

Although the voluntary and non-mandatory character of dispute resolution by the Boards would tend to militate against their potential manipulation as instruments of oppression, popular confidence in these Boards is likely to be more significant in the third as opposed to the first two situations.[37]

[35] A.L. Wood, *op. cit.*, pp. 47-53.

[36] A.L. Wood, *op. cit.*, p. 50.

[37] We have little information on the Rural Patrol Movement since 1948. More recently however the Police Commission reported that the movement had declined, as many police administrators tended to attach a low level of priority to these activities.

Before we turn to an evaluation of this period of state-supported voluntary conciliation, we should briefly refer to two other institutionalized schemes for extra-judicial settlement. The first is police conciliation, a scheme instituted in 1947 and subsequently expanded to encourage the local police precincts to become more actively engaged in the settlement of "petty complaints". This scheme required all police precincts to maintain a duty register of all complaints whether civil or criminal (other than grave crime) known as a "petty complaints register". The village headman was then provided with a report of such complaints and directed to inquire into it and, preferably, settle it. If he failed to do so, a police constable who, in the normal course of duty patrols the village, is urged to make a further attempt together with other village functionaries to effect a settlement.[38] Even after a petty complaint had been dealt with, the police were urged to "inquire from the parties subsequently how things are, to make quite sure that the cause of friction no longer exists".[39] In 1956 this scheme was expanded to require the officers in charge of police precincts to devote one day each week to inquire into and settle petty complaints which had been referred by the headmen. The inquiry was usually held on a Sunday at the police station, with both parties and their witnesses being advised in advance to be present. Annual police reports make the extravagant claim that a vast majority of such petty complaints are amicably resolved by police conciliation.[40]

Secondly, we would like to refer to a few community groups which independently set up Conciliation Boards in some of the principal towns in the coastal belt of the western province. We mention these Boards since the Ministry of Justice officials were familiar with their establishment and organization in 1957, when they were drafting the bill to establish Conciliation Boards. The Moratuwa South Village Welfare Conciliation Board was clearly one of the more important of these com-

[38] *Crime Prevention, op. cit.*, pp. 38-39.

[39] *Ibid.*, p. 39.

[40] The Inspector General of Police claimed in 1955 that police had amicably resolved 67,314 petty complaints (see *Administrative Report of the Inspector General of Police for 1955*, p. A-22). In 1969 it was claimed that 250,000 disputes were settled by police conciliation (see *Ceylon Daily News*, 2 October 1969).

munity councils.[41] It was established by a voluntary organization known as the Youth Welfare League which was actively involved in social activities in the hamlets in the southern sector of the town. One of the striking features of this Conciliation Board is the formalism in its organization. It is set up under a constitution which carefully defines the goals, jurisdiction, composition, procedure and the manner of disposition of disputes of the tribunal. It is also set up in close coordination with the official law enforcement agencies, in that the Board was competent to inquire only into disputes which had been referred to it by the police, the magistrate, rural courts, and the district revenue officer.[42] A report on the disposition of the dispute is in turn made to the respective agency.

Conciliation Board members represented the villages and localities in the area, and sometimes co-opted the police, the headmen or members of the clergy in the processing of specific disputes. Although the objectives of the Board as set out in its constitution seem to envisage a relatively independent tribunal committed to the promotion of harmony in the locality and the avoidance of feuds, it in fact operated as a subordinate and auxiliary mechanism for state agencies.

IV

The institutionalization of a statutory conciliation scheme in the mid-Fifties was partially an outgrowth of the voluntary schemes that we have described in this section. We should, therefore, conclude this discussion of voluntary conciliation by drawing attention to three developments which seem to have an important bearing on the formulation of the statutory scheme; namely (*a*) the linkage of law-enforcement to rural reconstruction; (*b*) the interrelationship between the voluntary conciliation and the official court structure; and (*c*) the articulation of a new concept of revivalism.

(*a*) In our account of the nascent phases of the movement towards voluntary conciliation, we drew attention to the voluntary societies which emerged in the early Thirties to

[41] A similar Conciliation Board was established in Panadura. See R.K.W. Goonesekere and Barry Metzger, "The Conciliation Boards Act: Entering the Second Decade," 2 *Ceylon Law Journal* 35, p. 45 (1971).

[42] See the Constitution of the Moratuwa South Youth-Welfare League, Conciliation Board (on file with author).

dramatize what was perceived by some leaders to be an alarming incidence of crime, and to mobilize popular support for law enforcement agencies. In the later Thirties we recognized the formulation of a new approach which decreed that crime prevention, to be effective, required much more than appeals to the civic consciousness of the rural citizenry or improved methods of detection and law enforcement. What was needed was a concerted assault on the social and economic causes which bred conflict and crime in rural society. One of the most important outcomes of these early reforms was the recognition of the interdependence of law enforcement, conflict management and rural reconstruction. The changes instituted in the late Forties do not in any way represent a weakening of confidence in such a holistic approach, but reflect an awareness that rural reconstruction was too important a state concern to be exclusively delegated to those who are primarily specialists in law enforcement. The constitution of a Department of Rural Development, the appointment of RDOs and the organization of rural development societies respond at different levels to this demand for a special agency. The law enforcement and conflict managing mechanisms, were tacked on almost casually to the rural development society. This soon led to the complaint that these societies tended to neglect, and therefore ineffectively discharge, their law enforcement and conflict management functions.[43] It was inevitable, therefore, that the holistic approach should be discredited and that the severance of the problems of public order from those of rural development should regain favour in official circles.

(*b*) A noteworthy feature of the RDS Boards and the other conciliatory mechanisms we have referred to in this section, is that they all operated outside the official court structure. Although state agencies were directly or indirectly involved in the establishment of these institutions, they had to largely rely on the authority and prestige of their constituent members to induce disputants to avail themselves of the services of the Boards, to require parties and witnesses to attend the inquiries, offer testimony, and to secure compliance with the terms of settlement. The non-enforceability of an RDS Board's determination in a court of law has been commented upon as one of the

[43] Cf. *The Dinamina* Editorial in January 1958.

more serious weaknesses in this scheme.[44] Although we know of no instance in which the courts were required to pronounce upon the legal status of these agreements, it would seem that they were no more enforceable than a non-notarially executed contractual arrangement. The irregularity of the Board's sittings, the absenteeism of parties from inquiries, and the ability of the parties to disregard settlements with impunity were further symptoms of the shaky authority of these tribunals.

(*c*) This period is also significant for its reaffirmation of certain traditional approaches to law enforcement, and the endorsement of a more general doctrine of "institutional revivalism" which has found increasing favour amongst the post-independent elite. Osmund de Silva who had initiated many of these reforms wrote in 1956, "the success of the rural development and rural volunteer movements also goes to prove that social evils can only be remedied by applying principles that are in harmony with the genius of the people".[45] Such an approach, de Silva believed, assumes a special significance as a corrective to the social and economic imbalances which accompany colonial rule. He argued "if a hospitable and contented peasant proprietorship is replaced by fragmentation of land and alienation of property; if in place of respect of the authority of elders, contempt for them is encouraged, old family ties are broken upon in the struggle for existence, the whole social fabric is punctured by outside influences inimical to accepted social customs and practices of centuries and, above all, spiritual values have lost their meaning, it is not a matter for surprise if a dispute over a jak tree or a nickname shall lead to bloodshed".[46] The specific remedy that he proposed was the reaffirmation of the doctrine of collective responsibility which he believed was the bedrock upon which the security and tranquility of traditional Sinhalese society rested.

This concept held the village as a corporate entity responsible for certain types of crimes or offences committed within its territorial limits. The typical case is one in which a homicide is committed within a village, and the murderer is neither detected nor apprehended. In such a case a fine is

[44] Wood, *op. cit.*,
[45] *Crime Prevention*, *op. cit.*, p. 92.
[46] *Ibid.*, p. 92.

imposed on the village.[47] It is reported that in Kumbaloluwa (a village in the Central Highlands) the villagers, on discovering a corpse in the village, were so anxious to apprehend the person responsible that they made offerings in the local *devale* dedicated to two demons. The murderer soon rushed into the premises of the *devale* like a man possessed and, when seized upon by the villagers, confessed to the crime.[48]

This account suggests that the rationale for the doctrine was to deter villagers from shielding fugitives and suspects of high crime from the officers of the King who were often strangers to the locality. But other evidence of the administration of justice in traditional Ceylon seems to suggest that the doctrine embodied a more fundamental principle of moral and criminal responsibility than that of efficient law enforcement. Davy points out that when a suicide is committed in a village and upon an investigation by the Sakki-balanda composed of the principal men in the village and some minor officials, it appears that the deceased was of sound mind "the Sakki-balanda inflicted a fine on the inhabitants of fifty *ridis* (about twenty-nine shillings) which were to be divided between the officers and the Dissava . . . and the body could not be burnt or buried till the fine was paid — a prohibition that insured its payment. A heavier fine of one hundred or even two hundred *ridis* was imposed on those who allowed a corpse to decay unburied or unburnt".[49] The purpose of the fine was to ensure the obligation of the community to provide comfort and assistance to persons disturbed by their personal and emotional problems and to reprimand the community for being derelict in this obligation. No fine was however imposed by the Sakki-balanda if it concluded that the deceased was not of sound mind, since it was believed that no community could be required to maintain an incessant vigil over lunatics.[50] One may conclude therefore that the doctrine of collective responsibility fuses notions of both legal accountability and moral responsibility by a community for the acts and conduct of its members.

[47] John Davy, *The Interior of Ceylon* (1921), p. 181.

[48] *R. v. Sitduriyalage Nandaruve,* B.J.C., 14-7-1871 cited in Ralph Pieris, *Sinhalese Social Organization* (1956), p. 143.

[49] John Davy, *op. cit.,* pp. 181-2.

[50] *Ibid.*, see also Ralph Pieris, *op. cit.,* p. 151.

The doctrine of collective responsibility should not however be construed to imply that the maintenance of law and order in rural areas was the exclusive concern of local communities.[51] We have noticed in an earlier discussion that the Sinhalese King and his officials were concerned with and assumed responsibility for the law and order problems of even the remotest regions. All officials in the elaborate and hierarchically ordered central officialdom had the authority to adjudicate disputes and to inquire into allegations of wrongdoings in the villages within their jurisdiction, and to inflict appropriate sanctions. Even where in practice it would seem that all but "high crimes" (i.e., treason, homicide, rebellion, etc.) are dealt with by local functionaries, the village headmen probably remained accountable to the royal officials on annual circuit on the disposition of all disputes and crimes.

[51] Osmund de Silva appears to draw this inference. See *Crime Prevention, op. cit.*, p. 88.

IV Revivalism, Reformism and Socialist Legalism—Competing Conceptions of Statutory Conciliation Boards

I

In this chapter we shall focus on the different conceptions and domain assumptions about statutory conciliation which seemed to wrestle with each other for dominance during different phases of the administration of this state institutionalized conflict-resolution scheme. In doing so we shall be attentive to ideas about the organization of the judicial system which may have influenced the principal author of the Conciliation Boards scheme, the foreign and domestic models of conflict resolution consulted by the legislative draftsmen, the different rationalizations offered by the protagonists of this scheme during the legislative debates, and the shifting legal ideologies and more specific legal policies pursued by the Justice Ministry during the years which followed the enactment of this legislation.

The architect of the mandatory Conciliation Boards scheme was M.W.H. de Silva, the then Minister for Justice in the socialist coalition which was propelled into power in the general elections of 1956. Although relatively unknown in political circles, Mr. de Silva assumed this appointment after an extremely distinguished legal career which has been described as "unique in the annals of the legal history of the Island".[1] He was at various periods trial lawyer, Law Officer of the Crown, legal administrator, and judge, having served as

[1] The then Attorney General C. Nagalingam, cited in 2 *Ceylon Law Recorder* (1946), p. XIV.

District Judge, Solicitor General, Attorney General, Legal Secretary and ultimately, Justice of the Supreme Court. He therefore had a deep understanding of the workings of the different units of the legal system, and commanded the esteem and confidence of the Bar and the Bench. An evaluation of M.W.H. de Silva's role as a legal reformer must be preceded by an analysis of the role of the Minister of Justice as it was perceived by the authors of the Constitution and prior incumbents to this office.

One of the more controversial issues confronted by the Soulbury Commission on Constitutional Reform related to the establishment of a Ministry of Justice. While the protagonists believed that the law-enforcement and proseutorial agencies should come under the supervision of a Cabinet Minister, many however, opposed such a proposal on the ground that it would heighten executive control over judicial administration and undermine the independence and impartiality of the courts of law. The Constitutional Commission was forced to compromise. The Constitution did provide for a Justice Ministry but its powers were curtailed. The Attorney General remained the principal legal adviser to the government and exercised all statutory powers regarding the indictment, prosecution and compoundment of criminal offences. The appointment, promotion and disciplinary control of the minor judiciary was vested in an independent Commission of Superior Justices. As a result the Justice Ministry was designed to "no more than . . . secure that a minister would be responsible for the administrative side of legal business, for obtaining from the legislature financial provision for the administration of justice, and for answering in the legislature on matters arising out of it".[2] Although the Minister for Justice had administrative responsibility for the working of the several departments under his authority such as the Attorney General's, the Fiscals, the Prisons, etc., whatever power he exercised was of limited policy significance. In practice much of the work of the Ministry is devoted to the processing of numerous applications for appointments as Justices of Peace, which office in lieu of a system of national honours was disbursed with liberality as a

[2] *The Report of Soulbury Commission on Constitutional Reform* (1946), section 396.

form of party patronage. Since the functions of the Justice Minister were more administrative and political than judicial the Constitutional Commissioners conceded that "it would be immaterial whether he were a lawyer". On the other hand they suggested that "if there were a lawyer of distinction among the (Prime Minister's) supporters (he) might possibly wish to offer him the portfolio".[3] The practice emerged since independence for the party in power to invite an eminent member of the profession who, although not a political activist, was broadly sympathetic to its political platform, to become the Minister of Justice. M.W.H. de Silva's appointment seemed therefore to fit this pattern.

Mr. de Silva however had a conception of his role as Justice Minister fundamentally different from that of most of his predecessors. He saw himself primarily as a restless reformist who would direct his energies towards the overhauling of the administration of justice to render it both more efficient and responsive to the needs of poor litigants.

Unlike many of his professional colleagues, M.W.H. de Silva was, for many years, disturbed by popular dissatisfaction with the administration of justice. This is clearly seen in the speech he delivered at the ceremonial welcome accorded by the members of the Bar in his appointment to the Supreme Court. Such occasions were often punctuated by an exchange of pleasantries between the new appointee and the Attorney General, with the former often reminiscing on the illustrious legal career which culminated in his judicial appointment. It was rarely an occasion for serious reflection on the workings of the judicial system. M.W.H. de Silva, however, did not seize upon this opportunity to address these larger issues. He began by drawing attention to what he described as "the very unsatisfactory conditions of litigation in the Island both in the criminal as well as the civil departments". He bemoaned the hardships to litigants caused by the dilatoriness of the courts in processing land disputes, and the pain and anxiety which the accused and their relatives suffered as a result of the long delay between arrest and trial in criminal proceedings. "This state of affairs" he pointed out, is "due to the fact that the arrangements made for litigation in this Island have now proved to be

[3] *Ibid.*, section 396.

not sufficiently elastic, and not sufficiently adequate, in view of the present state of affairs in the country."[4] He added "that increasing litigation, and the more elaborate proceedings with regard to litigation, have made the present conditions in the Court inadequate to meet the demands of the times".[5]

While conceding that there were inherent problems in the organization of judicial institutions which incapacitated the system from responding to new demands and pressures, he implied that the profession was not entirely without blame for bringing about this state of affairs. He underscored the special obligation on both the judiciary and the Bar to ensure the effective and smooth functioning of the courts of law and urged the Bar to take several positive steps to accelerate the clearance of court dockets.[6]

When M.W.H. de Silva became Minister he was afforded a rare opportunity to implement some of the ideas that he had developed during his long legal career. The then Prime Minister, S.W.R.D. Bandaranayake, who had some familiarity with de Silva's ideas, gave him a broad mandate to institute whatever reforms he deemed appropriate.[7] de Silva, despite his age, was a tireless worker and his close ministry associates have pointed out that no Minister since independence placed such a high priority on law reform.[8] He was responsible for the formulation of "about fifty proposals and amendments relating to this subject, of which only a fraction was eventually implemented".[9] His primary concern was with the problems of litigiousness and the social costs of an inefficient adjudicatory system specially to indigent litigants. He instituted a voluntary scheme of legal aid to the indigent in the Provincial Courts. He appointed a commission to examine problems of legal assistance for the poor, which ultimately led to the institution of a

[4] Mr. de Silva's address was delivered on January 15, 1946, during a period of acute political activity and intense national consciousness culminating in the promulgation of a new Constitution a few months later.

[5] *Ibid.*, 22 *Ceylon Law Recorder* (1946), p. XV.

[6] This pronouncement made almost a decade before he assumed office, provides us with an early indication of de Silva's dedication to the reform of the judicial process.

[7] Interviews with S. Canagarayar, the then Asst. Secretary in the Ministry of Justice and G.C.T.A. de Silva, the then Permanent Secretary, on file with the author

[8] Interview with S. Canagarayar, *ibid.* A bill on the suspension of the death penalty was defeated in the Senate, although it had been passed by the House. See 37 *Parliamentarian* 673 (1956).

[9] *Ibid.*

legal aid scheme in 1958. He also closely examined the working of the different courts of original and appelate jurisdiction and searched for new solutions to improve their operation.

It soon became clear that litigiousness could not be reduced by merely tinkering with the procedures of the regular courts of law. What became necessary was a new institutional form stripped of the technicalities and the procedural rituals of the regular courts of law.[10] At public meetings and in memoranda submitted by the public to the Ministry it was frequently proposed that such a body be set up, composed of "ayurvedic physicians, teachers, priests, etc".[11] M.W.H. de Silva was familiar with the scheme of voluntary conciliation set up by the police and state agencies since the Thirties, and the more spontaneous Conciliation Boards which were established in Panadura and Moratuwa. He appears also to have been deeply impressed by the *nyaya panchayats* in India, and secured through the assistance of the High Commission, data on their constitution and operation.[12] In a memorandum to the Cabinet issued in 1957 he "argued the need for legislation to provide an inexpensive and speedy means of promoting harmony among persons estranged by evil disputes or breaches of certain penal laws by amicably settling these disputes and compounding the offences arising out of those breaches".[13] That the reform is intended to deflect the flow of complaints and disputes from the regular courts of law to a new conflict-resolving mechanism is underscored in other official documents. The explanatory clause in the draft Bill points out that "the Conciliation Boards ... are intended to serve as a means of reconciling these differences expeditiously and satisfactorily *without invoking the aid of a court of law in the first instance.*"[14]

II

Once the policy decision was made to institutionalize a new conflict-resolving mechanism, there has been some speculation

[10] *Ibid.*

[11] A public proposal submitted at a meeting in Yakkala dated July 12, 1956, on file with the Ministry of Justice.

[12] Ministry files indicate that a copy of the West Bengal Panchayat Act was made available by the Indian High Commission at the request of the Minister.

[13] Memorandum by the Minister of Justice on the establishment of Conciliation Boards dated November 26, 1957, on file with the Ministry of Justice.

[14] The explanatory clause appended to the draft bill on Conciliation Boards.

as to the extent to which foreign models were consulted during the drafting process. Although an opposition member angrily charged during the Senate debate, that the Conciliation Boards Bill was an attempt to politicize the judicial system along the lines of the people's courts in communist countries, there is little concrete evidence to suggest that M.W.H. de Silva made any effort to study socialist models. Our interviews with his officials in the Ministry also reveal that very little was known at that time of popular justice in the Soviet Union or in China.[15] We have already mentioned M.W.H. de Silva's interest in the statutory *nyaya panchayats*, and it appears that he did examine the West Bengal Panchayat Act of 1957. A copy of the Act was also available to the legal draftsmen during the drafting process. As a result there are some similarities between the Conciliation Boards legislation and the West Bengal Panchayat Act which need to be explored. Firstly, in both societies although there have been several previous efforts by the state to encourage the extra judicial settlement of disputes,[16] the effectiveness of these schemes to a large extent depended on the esteem and recognition which the tribunal received from the community in which it was located. It was soon felt that the success of such reforms were too important to be left to the vagaries of local community sentiments, and that the new mechanisms for conflict-resolution needed to be propped up by the authority and prestige of the state. Under both the West Bengal and the Ceylonese Acts, the state assumed the obligation to establish these tribunals in areas covered by the Act, and to arrange for the recruitment of members.[17] The state indirectly compelled disputants to take their claims to these tribunals by either limiting or barring access to the official courts of law. It imposed sanctions through its judicial machinery on persons who disregarded summons to attend inquiries or to produce documents, or in any other way conducted themselves in a

[15] See interviews with S. Canagarayar and G.C.T.A. de Silva.

[16] For Ceylon see chapter on "Voluntary Conciliation," and for West Bengal, cf. H.D. Malaviya, *Village Panchayats in India* (1956), pp. 340-341.

[17] The West Bengal Act in addition renders the awards and sanctions imposed by the *nyaya panchayats* as enforceable as court decrees. See sections 78 and 107. Similar provisions were inserted into the Conciliation Boards Bill in Ceylon by an Amendment passed in 1963.

disorderly and disrespectful manner towards these tribunals.[18]

Secondly, as we turn to more specific provisions we see similar recruitment schemes adopted in the Conciliation Boards and the West Bengal Panchayat Acts. As regards the statutory *nyaya panchayats* in the various Indian states, the question as to whether a system of nomination was to be preferred to a system of selection at the local level has been thought to raise difficult questions of policy. The protagonists of the nominative scheme have pointed out that nomination by a central authority would render it possible for objective criteria such as education, social standing, etc., to be taken into account in the recruitment of *panchayat* members. Besides it would prevent the interjection of local factionalism and rivalries into the working of these tribunals which might otherwise tend to be overwhelmed by such forces. The opponents however, pointed out that the intervention of an external authority in the recruitment process would tend to alienate the local populace from these institutions. Most Indian states have leaned in favour of a scheme of local selection, but have qualified it by adopting the procedure of indirect elections.[19] The West Bengal Act is not however typical of these schemes since it adopts a hybrid procedure combining centralized nomination and local election. The first step involves the election of *nyaya panchayat* members by the representatives of *gram panchayats* who constitute a *panchayat* circle (the *anchal panchayat*). The persons so selected have to be approved by the state government authority for appointment to become effective.[20] The Conciliation Boards Act also prescribed a scheme combining local selection and central appointment. Each community group in the locality such as the rural development society is urged to nominate persons suitable for appointment as Board members. The Minister of Justice on whom the ultimate power of selection is vested, is required to take these nominations into account in making the appointments.[21]

Thirdly, we must draw attention to another substantive

[18] Cf. the discussion on the merits and demerits of the nominative and elective schemes in the *Report of the Study Team on Nyaya Panchayats* (1962), pp. 47-54.

[19] *Ibid.*

[20] See section 70, The West Bengal Panchayat Act, no. 1 of 1957.

[21] See section 3 (3) and 3 (5) of the Conciliation Boards Act no. 10 of 1958.

provision found in both legislations allowing settlements to be set aside within thirty days. In the Conciliation Boards, the parties notify the Chairman of the Board of their intention to repudiate,[22] while in the *panchayats* the intervention of a judicial authority is necessary to set aside the determination.[23]

Notwithstanding the similarities that we have drawn attention to above, the differences between the two models are more striking. Firstly there are jurisdictional differences in the two tribunals which point to their relative importance in the judicial systems of West Bengal and Ceylon respectively, and to the degree of commitment in each of these societies to the ideal of popular participation in judicial administration. While the civil jurisdiction of the *panchayats* is limited by a Rs. 100 monetary ceiling,[24] the competence of the Conciliation Boards to inquire into civil disputes which arise within its locality is unlimited.[25] The criminal jurisdiction of the two tribunals is not, however, different. The enormous civil jurisdictional gap between the Conciliation Boards and the *panchayats* is somewhat narrowed by the absence of sanctioning powers in the former. The *panchayats* may on the other hand impose a fine up to Rs. 50 on a person found guilty of a criminal offence, and make awards in civil claims. It may not, however, impose a sentence of imprisonment. The jurisdictional sweep of the Conciliation Boards is such that lack of a sanctioning power would seem less significant. These factors seem to suggest that while the Conciliation Board was envisioned to be an improvement on and a viable alternative to the regular courts of law, the *panchayat* was designed to be a minor tribunal with jurisdiction over petty disputes and offences. From this perspective the Conciliation Board Bill seems to reflect a much more radical commitment to the concept of popular justice than the West Bengal Nyaya Panchayats Act.

Although, as we noted, both tribunals enjoy the support and backing of the state in the exercise of their powers there are important differences in the autonomy and discretion conceded to these bodies in determining the manner in which they should exercise their statutory powers. The West Bengal Act subjects

[22] See section 13 of the Conciliation Boards Act no. 10 of 1958.
[23] See section 93 of the West Bengal Panchayat Act no. 1 of 1957.
[24] See section 80 of the West Bengal Panchayat Act, no. 1 of 1957.
[25] See section 6 of the Conciliation Boards Act, no. 10 of 1958.

the *panchayats* to detailed regulation on how applications should be filed, summons issued, inquiries conducted, and sanctions and decrees enforced. It is further subject to the supervision and control of the regular courts of law,[26] and its decisions may be set aside by such judicial authorities. The model is that of extreme centralized regulation and that of subordination to local judicial authorities. The Conciliation Boards model is an opposite one; once the tribunal is constituted it is given a great deal of leeway as to the procedure it would follow, and the rules of evidence it would comply with. Even the normative standards the tribunal should apply are left open. In the Act passed in 1958 there were no enforcement proceedings, and no judicial or administrative body may intercede during a Conciliation Boards proceedings or set aside its determinations. The Ceylonese model, then, is that of extreme self-regulation.

Our discussion, while conceding some influences to the *panchayats* scheme, leads us to conclude that the two tribunals represent fundamentally different models of conflict-resolution. Such a conclusion will lead us to reject the suggestion that the Conciliation Boards represent the transposition of the *nyaya panchayat* model to the Sinhalese social milieu.

III

This discussion leads us to legislative debates on the Conciliation Boards Bill and the different perspectives which emerged on the goals of this legislation. Although the legislation in itself did not provoke a great deal of national controversy, the general feeling among legislators was that it was an extremely important legal reform.[27] One of the ministers in the Bandaranayake government described the Bill as one which would take "pride of place among all legislation concerning legal reform".[28] Although legislators of all political shades were generally very enthusiastic about the proposed reform they seemed to rationalize it differently. For the purpose of our

[26] See section 100 of the West Bengal Panchayat Act.

[27] See generally the debates on the Conciliation Boards Bill, the proceedings of the Senate (1957-58), volume 11, *Hansard* 1157-1158, and the proceedings of the House of Representatives (1957-58), volume 30, *Hansard*, 1640-1682.

[28] See the Honourable P.B.G. Kalugalla in the Proceedings of the House of Representatives (1957-58), 30, *Hansard.*

analysis it would seem convenient to distinguish three different schools of opinion, which we shall refer to as the "reformists," the "socialist legalists" and the "revivalists". First, the "reformists"; those in this school looked upon the legislation as a purely judicial reform intended to render the operation of the British court system more efficient and effective. There is no effort here to question the judicial postulates or values which underline the court system; but an attempt to attribute the ineffectiveness of the court system to the anachronistic procedures which have developed around it or to inherent weaknesses in the moral character of the disputants. M.W.H. de Silva seemed most representative of this position. He was anxious to uphold the integrity of the judicial system of which the courts were an essential component. Like the nineteenth century reformists he felt that the willingness of the rural disputants to rush into the courts for even the most frivolous of causes and the corresponding inability of the court system to cope with the flood of litigation, bred public contempt for the judicial process. One way of protecting the courts from such pressures was to establish a screening mechanism which would shut out those controversies amenable to amicable resolution. What was uppermost in M.W.H. de Silva's mind was the need for an efficient conflict-resolving mechanism to subdue the spirit of litigiousness which seemed to haunt the rural populace. Although implicit in M.W.H. de Silva's observations is a critique of the legal profession, the principal thrust of his attack is not, however, directed towards this occupational group. Although he conceded that the profession is one of the chief benefactors of the litigiousness of Sinhalese society, he did not regard the former as being a principal contributory factor towards the malaise in the administration of justice. Nor did he seem profoundly disturbed by norms being weighted in favour of privileged social groups such as landowners, employers, moneylenders and other secured creditors as against tenants, employees and debtors.

The "socialist" conception of the Conciliation Boards was, however, somewhat different. They perceived the legal system in classical Marxist terms as an instrument through which the dominant social class maintains its hold over the remainder of the populace. Correspondingly, legal norms, institutions and processes are geared to serve the objectives and the class

interests of the dominant social groups. The legal profession, by reason of the class origins of its members and its fidelity to the existing legal order, is the intermediary through which the interests of the ruling class are safeguarded. During the British colonial period it served the interests of the colonial power, and in the post-independence period, that of its successor, the western-educated elite. Public antagonism towards the legal system often tends to concentrate on the role of lawyers as "capricious exploiters of poor litigants and as the opponents of all social reform legislation". The object of the Conciliation Boards scheme was to reverse this pattern of legal domination. The management of the legal system including that of the judicial process must pass from the elite class of legal specialists to the masses, and specially to those who came from the lower levels of the social ladder. The new popular legal institutions and processes would, by facilitating the involvement of emergent social groups in judicial administration, transform the class orientation of the legal system by infusing its operation with a new social consciousness.

Two of the legislators, during the debates in the House of Representatives, seemed to approach the Bill from this perspective. P.B.G. Kalugalla, one of the Ministers in the Cabinet, began his presentation by extolling the sagacity of the rural peasantry and their capacity to be excellent conciliators. He then underscored his antagonism to the existing court structure and its class orientation by expressing the hope that this legislation would lead to the closing down of all the courts of law in Kegalla. The controversial Minister for Agriculture[29] D.P.R. Goonewardene, a doctrinaire Marxist, seems to have shared similar perspectives on this problem. His concern was that the legislation did not go far enough. There were paraprofessionals in the rural communities popularly known as the "village proctors" who had an interest in undermining the operation of this scheme. The provision enabling parties to repudiate settlements provided a loop-hole for such persons to induce parties to disregard the settlements and refer claims to a court of law. To render the scheme more effective, he would confer greater finality on a settlement entered into by the parties.[30]

[29] *Ibid.*
[30] *Ibid.*

The "revivalists" looked upon this legislation as an attempt to reinstitute the traditional village court which had been suppressed during much of the Anglo-colonial period. Unlike the reformists they were sensitive not merely to the formal differences between the traditional and the western judicial institutions, but also to the fundamentally distinct value postulates upon which the two systems were based.[31] The revivalists argued that the transplantation of an individualistic court system on a communal face-to-face society caused great confusion amongst societal members. Many such persons could have no proper comprehension of the purpose of new institutions which seemed strange and alien to them. They soon recognized that the proceedings in these new courts of law tended to be cumbersome and slow. Since the judge had no familiarity with local conditions and great faith was placed on procedural formalities, the villager found that he could, with impunity, forge documents and provide perjured testimony.[32] The revivalists believed that the debasement of the values of the rural disputants brought about by alien institutions could be remedied by their substitution with legal forms more consistent with the central cultural traditions. Senator Somaratne appeared to be the leading spokesman of the revivalist group. He provided a brief review of the traditional mechanism for conflict resolution in rural Ceylon and drew attention to the essential continuity between the traditional and the contemporary models, and believed that the existence of such links would guarantee the success of the scheme. Similar arguments were advanced in the House of Representatives by Mr. T.B. Tennakoon.

IV

Each of these perspectives competed with the other for the dominance of Ministry of Justice policy at various periods of time. M.W.H. de Silva's reformist approach appears to have guided the implementation of the Conciliation Boards scheme

[31] Cf. Bernard Cohn, "Some Notes on Law and Change in Northern India," in P. Bohannan, *Law and Warfare* (1967), 139-159.

[32] Compare the comments of the following British administrators on the attitude of the Ceylonese villager towards the inherited court structure. See Aelian King, District Judge of Badulla, 1869 Administrative Report, 188; R. Morris, Government Agent Kurunagala, 1869 Administrative Report 120.

during the first decade. The authority which a Justice Minister normally enjoys over the formulation of government legal policy was strengthened in this instance by certain personal qualities of the Minister. He was an authoritarian figure who maintained strict discipline over both the executive and clerical members of his staff.[33] His commitment to a cause which he believed in was total, and he fervently believed that the Conciliation Boards Act was perhaps the most significant legislative reform he had introduced during his association with the Ministry.[34] His interest in the Conciliation Boards scheme was such that he even became personally involved in the execution of the various administrative responsibilities prescribed by the Act. He wrested the initiative (which the Act seemed to vest in local communities) on the constitution of Boards by urging government agents and district revenue officers to identify two village council areas in each district which were suitable for the establishment of Conciliation Boards. He appears to have relied more on such official recommendations than on the opinion of local residents in deciding whether a panel should be constituted.[35] Despite his enthusiasm for the scheme, the Minister appears to have moved cautiously in both the constitution and establishment of Conci liation Boards. During the first year of the Act's operation no more than twenty Boards were constituted and their terms of office were limited to two years, a year less than what was permissible under the Act.[36] The Minister appears to have summoned and personally attended meetings of the community in a locality in which the Act was to be implemented. At such meetings the suitability of proposed candidates for appointment as conciliators was openly discussed. The local police officers who were usually required to be in attendance during these sessions were also asked to report on the character of various candidates.[37] M.W.H. de Silva's desire to ensure that

[33] See interviews with G.C.T.A. de Silva, the then Permanent Secretary and S. Canagarayar, then Asst. Secretary in the Ministry of Justice.

[34] See interview with S. Canagarayar, the then Asst. Secretary.

[35] Information obtained from Ministry files on the implementation of the Conciliation Boards Act.

[36] *Ibid.*, Ministry files; cf. R.K.W. Goonesekere and Barry Metzger, " The Conciliation Boards Entering the Second Decade," 2 *Ceylon Law Journal* (1971), p. 35 and p. 76.

[37] Interview with S. Canagarayar, and interviews with T.G. Siriwardene, formerly Administrative Secretary of the Conciliation Boards Unit, (on file with author).

conciliators would retain the impartiality and detachment of judicial officers and adhere to the precepts of procedural fairness of the British adjudicatory system is seen in his insistence that the Member of Parliament be excluded from the list of persons eligible under the Act to make recommendations towards the appointment of conciliators.[37a] It would also appear that active political involvement by a candidate would be considered a disqualification by M.W.H. de Silva.

Since M.W.H. de Silva's resignation from the cabinet there were a series of domestic disturbances which led to a lull in the implementation of the Act from 1959-1962.[38] Towards the end of 1961 the then Minister of Justice gave serious consideration to the reimplementation of the scheme.[39] He appointed a Ministerial Committee composed of a Chairman of Conciliation Boards and a Justice Ministry official to study the Act and make appropriate recommendations towards its revision.[40]

Several policy changes on problems as varied as the recruitment of conciliators, the remuneration of their services, the panel's relationship to the regular courts of law and other state agencies, and the role of party representatives and Members of Parliament, were examined by this Committee. These questions were given further consideration at a meeting between the Committee and the Justice Minister, Sam P.C. Fernando. A review of the discussion at this meeting provides valuable insights into how Justice Ministry officials perceived and responded to some of the problems of implementing this scheme.[41]

One of the Ministry officials present at the discussion inquired whether an educational qualification should be required of conciliators. No other participant appears to have favoured such a general requirement. Some however, felt that the Chairman sould be one who already enjoyed some position of responsibility in the community. One participant suggested

[37a] *Ibid.*

[38] R.K.W. Goonesekere and Barry Metzger, *op. cit.*, at pp. 75-76.

[39] The Minister of Justice at that stage was Sam P.C. Fernando.

[40] The Committee was composed of Mr. D.P. Siriwardena (Chairman, Aluthgama Village Area), Senator A.D. Jayasekera (Chairman, Kanuwanna Village Area), Mohandiram D. Alagiyawanna (Chairman, Megodapotha Village Area), and D. Wimalaratne, Asst. Secretary to the Ministry of Justice.

[41] The succeeding analysis of the Committee's recommendations is based on the notes of a Conference on the Conciliation Boards, March 11, 1961, on file with the Ministry of Justice.

the appointment of an administrative official such as the revenue officer, while another participant raised the possible appointment of a lawyer, or at least, a Justice of the Peace. The latter proposal was strenuously opposed by almost all other participants including the Minister. The consensus was that it was more important that the Chairman should be an individual who resides in the community in which the Board operates than that he have some special qualification. Although there appears to have been earlier agitation on the part of conciliators that they should be compensated for their services,[42] the Ministers took a firm stand in favour of the existing scheme of honorary conciliators.

The absence of a special mechanism for the enforcement of settlements reached by Conciliation Boards was perceived as a major flaw in the entire scheme.[43] A closer co-ordination between the Conciliation Boards and the regular court of law and other state agencies was felt to be necessary to strengthen both the authority of the Boards and the effectiveness of their settlements. One member suggested a fusion of the Conciliation Boards and the rural courts as one of the ways in which the objective of closer institutional collaboration can be achieved. Another suggestion which seems to have received considerable support was that the Boards should enjoy the authority to directly transmit settlements to the regular courts of law for enforcement as the decree of such courts. The Minister reiterated the importance of close co-operation between the police, rural organizations and the Boards, while not expressing a view on any of the specific proposals.

Clearly, one of the more sensitive issues raised at this conference was the role of elective political officials, such as Members of Parliament, in the working of the conciliatory scheme. Although the Committee appears to have been sensitive to the possibility that such a reform could lead to the politicization of the scheme, they conceded without much discussion that a Member of Parliament would inevitably have to be consulted before a panel could be constituted in his electorate. This represented an important policy shift since it

[42] See Proposals on the Reforms of the Conciliation Boards Act formulated at a meeting of the Ministerial Committee on August 27, 1960, on file at the Ministry of Justice.

[43] *Ibid.*

signalled a growing abdication of the statutory powers vested in Ministry officials to elective political officials. The Committee was, however, silent on the question of whether the local parliamentarian should also become involved in the recruitment process. These deliberations, while providing a valuable insight into the state of thinking within the Justice Ministry, also resulted in four major amendments.

The first related to an expansion in the operation of the Act from rural to urban areas. This step seemed to signify both the government's recognition that "litigiousness" was not peculiar to rural areas, and its increasing confidence in the capacity of the Conciliation Boards scheme to deal with this phenomena in all areas of the country. Second, the amending Act eliminated the requirement that an oath be administered on all persons who offer testimony before the Board. The purpose of this reform was to increase the informality of these proceedings and to reduce the likelihood of harassment of witnesses by hostile Board members.[44] Third the finality and enforceability of settlements were strengthened in turn by imposing a thirty-day limitation on the repudiation of settlements, and by attaching to settlements entered into by Boards, the same enforceability as that of a decree of a court of law. Fourth, the authority of Conciliation Boards was enhanced by establishing a special procedure for the prosecution of those who act in contempt of its powers.

To sum up, the overall strategy during the period 1963-65 then was to continue the reformist policies of M.W.H. de Silva. One of the members of the Ministerial Committee emphasized this orientation when he pointed out that their main objective was to ensure "that justice is meted out to those who cannot go to court to settle their disputes".[45] The purpose of the 1963 amendments were to enable the state to pursue these policies more comprehensively and effectively. Subject to an overall similarity in objectives and goals between this and the 1958-61 period, we perceive two other trends. First, we noticed

[44] It was also felt that since the scheme was voluntary (the boards derived their authority to bring about settlements from the consent of the parties), to compel a witness to testify under an oath would not be in accord with the spirit of this legislation. See Recommendations on the Reform of the Conciliation Boards Act issued by the Ministerial Committee (undated), on file with the Ministry of Justice.

[45] Senator A.D. Jayasekere at the Conference on March 11, 1961.

the Ministry successfully resisting moves on the part of some officials to formalize and judicialize the Conciliation Boards scheme by assailing the apparent non-differentiation in education, social standing or official rank of conciliators and other members of the community, and the voluntary and honorific character of their duties. Second, we perceive a step towards the politicization of the scheme through a recognition of and concession to the growing power and importance of the local Member of Parliament and the representative of the ruling political parties. Even before the formal enactment of the Conciliation Boards Bill there was widespread public apprehension that such a scheme would fall victim to the political factionalism which had overwhelmed many other social and charitable organizations instituted by the state.[46] During the legislative debates on the 1963 amendments, opposition members repeated the charge that these Boards had become the instruments with which the ruling party harassed its political opponents.[47] Although such charges were vehemently denied by official spokesmen, our discussion points to a relaxation in the Justice Ministry policy which had previously excluded elective political officials and party representatives from any involvement in the operation of the Act.

V

The succeeding period of 1965-1970 witnessed for the first time the administration of the Act by a conservative government. Many feared that the new Minister of Justice would not display the same enthusiasm as his predecessors for what was regarded by some as a socialist reform. But contrary to such expectations the application of the Act was progressively extended to different parts of the Island. The number of panels functioning at the commencement of this period was almost

[46] The article entitled "Do Not Entrust the Herd of Cattle to the Tiger," *Lankadipa*, January 1958.

[47] During the Senate Debates on the 1963 Amendments, one of the Senators read excerpts from a letter by a party who had several complaints filed against him for abuse by a person of a different political party. This defendant had been ordered to appear before the tribunal on four different occasions; and on each one of these occasions the Chairman rejected his repeated plea to have the case remitted to a Magistrates Court, and even threatened the recalcitrant party that "he is all powerful," 1963 Senate Debates Column—1914.

trebled towards the end of this period.[48] The Minister was even quoted as favouring the establishment of a Conciliation Board in every village in the country.[49]

Despite this proposal to expand the coverage of the Act, there was generally a tendency during this period to treat the Conciliation Board as a somewhat subordinate tribunal competent to deal only with petty rural disputes. It was rationalized that such jurisdictional limitations would enhance the overall effectiveness of the scheme.[50] In pursuance of this policy instructions were issued by the Ministry of Justice to all Conciliation Boards Chairmen to refrain from inquiring into complaints involving the Paddy Lands Act, the Rent Restriction Act and disputes in which either the Crown or a public corporation was one of the parties to the controversy.[51] It is, however, important to remember that such a de-emphasis of Conciliation Boards took place in an atmosphere of intense agitation by the profession against the full implementation of this scheme.

We have mentioned earlier that the legal profession was caught flat-footed by the enactment of the Conciliation Boards Act, and that subsequently, for several years, both practising lawyers and even some lower court judges continued to ignore its prescriptions.[52] But once the far-reaching implications of this legislation on the workings of the court system became clear to more members of the profession, they began to pressurize the government to limit the scope of this reform. Several members of the Bar wrote newspaper articles or addressed memoranda to the Ministry protesting against the scope of this legislation and the manner of its operation. Professional associations such as the Law Society presented

[48] In 1965 there were 128 conciliation panels functioning, while in 1970 the number of panels had increased to 324. See Table 1, in R.K.W. Goonesekere and Barry Metzger, *op. cit.*, p. 96.

[49] See interview with D.J.R. Gunawardena, the then Permanent Secretary to the Ministry of Justice in *Lankadipa*, November 5, 1966.

[50] Cf. D.J.R. Gunawardena, *ibid.*

[51] Interview with T. Gilbert Siriwardena, the then Administrative Secretary to the Ministry of Justice, *ibid.* It appears that there is no statutory authority vested in the Ministry to curtail the civil jurisdiction of these Boards.

[52] See N. Tiruchelvam, *Popular Tribunals and Political Development in Ceylon* (unpublished paper; Henry Steiner and Roberto Unger, *Seminar Material on Law and Development* [1970-1971], Harvard Law School), and also R.K.W. Goonesekere and Barry Metzger *op. cit.*, p. 81.

memoranda to the Minister reviewing the Conciliation Boards, and proposing several amendments to the principal legislation.[53] They were particularly apprehensive of the broad sweep of the panel's jurisdiction and questioned the capacity of lay conciliators to inquire into many disputes which were normally dealt with by law professionals. They cautioned that in the absence of proper procedural safeguards and the lack of technical competence on the part of conciliators these tribunals could degenerate into corrupt and perverse instruments of oppression and thereby threaten the integrity of the entire system of judicial administration. They urged the government to curb the jurisdiction of these Boards, formalize their procedures and subject them to the supervisory control of law professionals.[54] The Law Commission, which was required by the government to recommend amendments to the principal legislation, reported along similar lines. One of its principal recommendations was to severely limit the jurisdiction of the Board to inquire into applications in which expeditions relief is claimed and other disputes such as partition actions, mortgage claims, matrimonial causes, testamentary actions, etc.[55] It also proposed that the scheme be made voluntary and that settlements should be conferred the effectiveness of court decrees only for the limited purposes of enforcement.[56]

A negative posture towards this reform was initially adopted by the judiciary in a series of cases in which the jurisdictional limits of these tribunals was controverted. The early judicial reaction was to contain the operation of the Conciliation Boards Act. A constitutional challenge to the mandatory effect of Section 14 (1) of the Conciliation Boards Act was upheld by a district court judge in a highly publicized decision.[57] The judgement reasoned that to the extent this provision attempted to bar litigants who had not resorted to pre-trial conciliation from the regular courts of law it was tantamount to an inter-

[53] See Memorandum by the Ceylon Law Society dated June 24, 1965, on file with the Ministry of Justice.

[54] A frequently repeated suggestion in these memoranda is that the Chairman of Conciliation Boards should be a lawyer.

[55] See Draft Report of the Law Commission on the Conciliation Boards Act, on file at the Ministry of Justice.

[56] *Ibid.*

[57] See the judgement of District Judge J.G. Swaris in *E. Coates and Co. Ltd. v. A.F. Jones and Co. Ltd., The Times of Ceylon*, 10 September, 1966.

ference with the exercise of judicial power. In this and two other cases which reached the Supreme Court, the Court avoided the broader issue by upholding the jurisdiction of the courts of law on narrow technical grounds.[58] The broader question relating to the mandatory effect of this Act was directly confronted in four successive cases in 1967 and 1968. In three of them the Court affirmed the argument that resort to Conciliation Boards was obligatory on all parties who intended to initiate action in the regular courts of law.[59] In the other Justice Alles held that such a proposition would be tantamount to an erosion of the jurisdiction vested in the established courts of law, and added 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.[60] In view of these conflicting judicial pronouncements the legal position on whether resort to conciliation was optional or compulsory was left uncertain until a divisional bench of the Supreme Court clarified the law in 1970. In *Nonahamy v. Silva*, the Court held that a district court had no jurisdiction to entertain even an application for an injunction where the parties had not previously referred the dispute to a Conciliation Board.[61]

Another significant development during this period of administration of the Act was the increased politicization of the Conciliation Boards scheme. At a debate on the Appropriation Bill, it was charged that several conciliation panels were reconstituted by the government apparently because of the left-wing orientation of its chairmen and other members.[62] It was

[58] For the Supreme Court decision in *E. Coates and Co. Ltd. v. A.F. Jones and Co. Ltd.*, see 70 N.L.R. 351 (1968) (dispute between a public servant residing in the area and the government need not be referred to the Board, since it did not entirely arise with the area). See also *A.K. Wilasinhamy v. G.L. Karunawathie*, 79 C.L.W. 84 (1970) (a substitute plaint filed in 1963 in lieu of an earlier plaint, did not require a Conciliation Board certificate since no Board was constituted in the area when the original plaint was filed). See R.K.W. Goonesekere and Barry Metzger, *op. cit.*, 56-57 and 63-67.

[59] See *Samarasinghe v. Samarisinhe*, 70 N.L.R. 276 (1969); and *Broheir v. Saheed*, 71 N.L.R. 51 (1968).

[60] *Wijeyawardena v. Inspector of Police, Panadura*, 70 N.L.R. 281 (1967).

[61] See 71 N.L.R. 217 (1970); for the dissenting judgement of Justice A.C. Alles, see *ibid.*, p. 223. The effect of Nonahamy's case was to some extent mitigated by *Fernando v. Fernando*, 80 C.L.W. 14 (1971) where the court implied that unless the objection to the jurisdiction of the court was taken at the trial stage of the proceedings the parties would be taken to have acquiesced in the jurisdictional defect.

[62] See the speech of Dr. Colvin R. de Silva, at the Debate on the Appropriations Bill 1967-68 (*Hansard*). He alleged that in one of the Conciliation Boards in Agalawatte

also charged that the government had quite blantantly politicized the process by which conciliators were recruited, and had not made even a pretence of applying objective criteria in evaluating the suitability of applicants for appointment as conciliators.[63] Not only did the government delegate the responsibility of recruitment to its local political representative (often a member of Parliament), but it further provided him with a list of applicants indicating the political affiliation of each candidate.[64] It was widely believed that appointment to Conciliation Boards was a form of political patronage freely disbursed by the local parliamentarian to his active political supporters.

The *Sun* a morning daily, in a strong editorial condemned the practice by which "the boards were becoming the political stooges of the party in power", and implored the government to purge politics from the administration of the scheme so that the Boards may "function with an integrity for which all our legal institutions are justly famous".[65] The Minister of Justice, however, defended the scheme arguing that the exclusion of all persons with some involvement in politics would severely limit the pool of qualified candidates for appointment as conciliators.[66] One Member of Parliament pointed out that the appointment of party sympathisers was the inevitable though unfortunate by-product of a political process in which elective political officials feel obliged to reward their supporters with favours and honours in exchange for the support they had received during an electoral campaign.[67]

We also note that towards the end of this period there was considerable pressure from "revivalist" groups to restructure the Conciliation Boards to revive traditional values and interests, and to serve as vehicles through which Buddhist

the Chairman was removed by the Minister and the entire Board reconstituted for patently political reasons.

[63] Dr. Colvin R. de Silva, *ibid.*, read out a letter to this effect, issued by the Ministry of Justice to a member of the Government's Parliamentary Group but which inadvertently reached a member of the opposition.

[64] *Ibid.*,

[65] *The Sun,* 15 October, 1967.

[66] Senate Proceedings as reported in *Lankadipa* 14 March, 1969.

[67] K.P. Ratnam, M.P. for Kayts, the Debate on the Appropriations Bill 1967-68, pp. 28-39.Cf. A.L. Wood, *Crime and Aggression in Changing Ceylon, op.cit.,* p. 68; cf. the revivalists' position in the legislative debates on the Conciliation Boards Bill, *supra*, p. 12.

precepts could be inculcated in the masses.[68] This movement was spearheaded by a group of newspapers belonging to a consortium known as the Independent Newspapers of Ceylon, which were owned and managed by an ultra-nationalistic and mildly conservative commercial interest in the country.[69] These groups painted a romantic picture of the harmony and amity in traditional Ceylonese society which they claimed was brought about by "the power of the truth which radiated from the village temple".[70] The dependence of the laity on the moral and spiritual guidance of the clergy was such that the entire community became akin to a "Council of Peace" (Sama Mandalaya).[71] The factionalism and strife seen in the villages over the past two decades they argued was the result of the pernicious growth of party politics in rural areas and the increasing detachment between the "village" and the "temple".[72] To correct this trend the Maha Sangha (the Supreme Monastic Council) should be drawn into the administration of the Conciliation Boards scheme, and "responsible, educated and disciplined" members of the clergy should be appointed as chairmen of these tribunals.[73] Such a step would result in the restoration of the stability and order which prevailed in the ancient village communities. The government however appears to have taken the firm position that although members of the clergy would be given equal consideration with other candidates for appointment as conciliators, they would clearly not be appointed as chairmen.[74]

We have attempted, through a review of the various steps taken by the Ministry with respect to Conciliation Boards, to reconstruct the overarching policy which seems to have guided the conservative government during this period. We have also drawn attention to various pressure groups, such as the law professionals, and the ultranationalists who were attempting to push the government, to adopt various conservative postures

[68] *Ibid.*

[69] The newspaper published by this group included *The Sun* (an English daily) the *Dawasa* (a Sinhalese daily) and *Rivirasa* (a Sinhala weekly). See, *The Europa Year Book* 1972, Volume 11, pp. 317, 319.

[70] See the *Dawasa*, 11 January, 1969; and the *Dawasa*, 27 December, 1969.

[71] See the *Dawasa*, 11 January, 1969, and the *Dawasa*, 27 December, 1969.

[72] *Ibid.*

[73] *Rivirasa*,10 January, 1969.

[74] Statement issued by L.H.R. Pieris to the *Rivirasa*, 17 January, 1969.

towards these tribunals. Although no composite picture emerges clearly from this account we are able to discern certain distinct trends. The government appears to have downgraded the importance of this legislation as instituting no more than a procedural reform in the administration of justice. Although the number of tribunals were substantially increased, the state severely curbed the jurisdiction of the Boards to exclude those disputes in which the state was either a party, or where its interests were indirectly in issue, as when the dispute involved governmental social welfare programmes. Since the conservative government, unlike the socialist, had no commitment to the absorption of emergent social classes in judicial administration, the Boards at best were regarded as auxiliary mechanisms for the resolution of petty conflict. Even the government's faith in these Boards as efficient managers of minor disputes seemed shaky, as seen in the repeated appointment of party activists whose effectiveness as conciliators would appear to be crippled by their political partisanship.

VI

As we turn to the current period of implementation of the Conciliation Boards Act by the socialist coalition,[75] we find operative a different set of domain assumptions about Conciliation Boards.

These assumptions about the role of Conciliation Boards arose out of the legal ideology of the socialist regime, i.e., the dominant ideas of the regime on how the inherited legal order

[75] This represents the third and most radical of socialist governments in Ceylon, since Independence, the first being the Bandarnayake government of 1956. The socialist orientation of the Bandaranayake policies and the impact of the alliance of the Communist Party with the Government Parliamentary Group of 1964 have received varied critiques. See B.H. Farmer, "Nine Years of Political and Economic Change in Ceylon" 21 *The World Today* 189, (1965).

This socialist coalition, charged with corruption and mismanagement, was defeated in 1965, bringing back the right-wing UNP, which however was strongly rejected at the general elections of 1970, as a result of nationwide dissatisfaction with its performance.

The victory of the socialist coalition ushered in the third phase of socialism. Its most enthusiastic backers, however, soon became its most virulent critics, the attack against the government being spearheaded by clandestine groups of left-wing intellectuals who had established intimate contact with segments of the non-plantation rural peasantry. For two distinct perspectives on the Ceylon Insurgency, see Fred Halliday, *ibid.* and "Politius", "*April Revolt in Ceylon*" 12 *Asian Survey* (1972 p. 258).

may be restructured to accomplish socialist goals and objectives. Although there has been no governmental attempt to issue an explicit and comprehensive statement of its legal ideology, it is clear that the ideologists of the socialist coalition do share a broad set of ideas on the new direction along which the legal system should move.

We shall attempt to explicate these ideas by a careful analysis of the policy statements of the socialist parties and the state,[76] to the extent that they implicate the legal system. There are basically five major value orientations in the socialist ideology[77] of the Ceylonese elite, namely:

(*a*) nationalism, socialism, state ownership and equality;
(*b*) democracy, popular participation and social responsibility;
(*c*) stability and order;
(*d*) productivity, efficiency and growth; and
(*e*) welfarism, redistribution, and raising living standards.

[76] The policy statements we shall examine include the *Common Programme of the United Left-Front*, the Party Manifesto of the United Front in *Ceylon Daily News, Seventh Parliament of Ceylon* (1970), p. 171; the *Throne Speech* 1970, and the *Throne Speech*, 1971. The *Budget Speech*, 1970-71, on the political programme which it instituted. See Marshall Singer, *The Emerging Elite: A Study of Political Leadership in Ceylon* (1964) for the view that the 1956 general elections resulted in a social revolution in which the class nature of political leadership was radically changed. For an analysis of the social origin and policies of Bandaranayake's Freedom Party and a comparison of it with the right-wing UNP, see Fred Halliday, "The Ceylonese Insurrection", *The New Left Review*, (1971).

Nationalization of the Port Authority and all private omnibus companies, under the Agrarian Reform legislation, and the Sinhala Only Act which precipitated communal violence in 1958, and the enactment of the Public Security Act following the expression of dissent by the urban working class in 1959 marked this period. See Howard Wriggins, *Ceylon, the Dilemma of a New Nation*, 1960.

S.W.R.D., Bandaranayake's assassination by a Buddhist monk in 1959 and the ensuing political confusion led to the second phase of socialist rule in Ceylon under the vanguardship of his widow, Sirimavo Bandaranayake. This period was relatively uneventful except for the controversial legislation in 1961 to nationalize the assets of the Anglo-American oil companies.

Dissatisfaction with the government and unrest among the working class in 1962 and 1963 resulted in the "common programme" — a series of economic and political demands, which led the government to make moves towards the Trotskyite group. See The *Budget Speech*, 1971-72 and the *Directive Principles in the Constitution of Sri Lanka*, 1972.

[77] We should also bear in mind that the socialist ideology is interlaced with several neo-traditionalistic ideas on linguistic and religious revivalism. These ideas find their strongest expression in the Constitutional provisions which decree Sinhala as the official language of the state, and which enjoin the state to protect and foster Buddhism. These policies have clearly had a divisive effect on the nation by alienating its ethnic

(*a*) The nationalism doctrine dictates the severance of the formal political and legal links between Ceylon and her former colonial power, Britain, and her economic dependence on foreign developed nations and "imperialistic" agencies.[78] More specifically, it urges that despite the acute foreign exchange crisis, the flow of foreign capital into the country should be under conditions "consistent with the self-respect of the nation".[79] The commitment to a socialist development implies more specifically state management of all basic and essential industry;[80] the development of collective forms of property in the means of production, distribution and exchange;[81] and the elimination of economic and social privilege, disparity and exploitation.[82]

(*b*) The democratic component of the ideology requires the state to resist all trends towards authoritarianism, by safeguarding the democratic rights of the people, especially the funda-

and religious minorities and have been characterised by many as being anti-socialist and even "reactionary". See Fred Halliday, "The Ceylonese Insurrection," *The New Left Review* (1971); cf. B.H. Farmer, *Nine Years of Political and Economic Change in Ceylon*, 21, *The World Today* (1965), 189, p. 192. Apologists of the coalition would, however, refute this by arguing that Buddhist-Sinhalese being the religio-ethnic group which suffered the greatest disabilities under several centuries of foreign domination deserved preferential treatment in the post-independence social order. For a review of doctrinal arguments on the compatibility of Theravada Buddhism and Marxism, see Ronald Smith, "The Politics of Buddhism," 16 *World Politics* 12 (1973).

[78] The socialist coalition has been repeatedly critical of the terms of the loan arrangements and the "letters of intent" contracted by the U.N.P. with the International Monetary Fund and has dubbed these arrangements as a "sell-out of the national interests . . . to imperialism and neo-colonialism" see *The Election Manifesto*, *op. cit.*, 172-173 and the *Budget Speech*, 1970-71, pp. 6-11.

[79] Dr. N.M. Perera, the Finance Minister, further added "that aid arrangements must be consistent with our self-respect, our independence and our sovereignty" *ibid.*, p. 13.

Dr. N.M. Perera, the Trotskyite Finance Minister pointed out in his first budget speech that the programme of the socialist coalition was founded upon the thesis that no developing country could leave "development at the mercy of interplay of forces which are motivated solely by the profit instinct", *ibid.*, p. 3. He added that while this doctrine recognized a role for the private sector in the development of the economy, it required the commanding heights of the economy to be firmly under the control of the public sector.

[80] In furtherance of the general policy of state interventionism in the economy the government promised to nationalize the banking system, the import-export trade, and control and direct the plantation industries through state agencies and to regulate agency houses. See the *Election Manifesto*, 174-175.

[81] See section 16 (2) (e) of the Principles of State Policy, in the Constitution of Sri Lanka (1972).

[82] See *ibid.* section 16 (5).

mental right to change the government through the elective process;[83] and by broadening the democratic structure of government to permit popular participation at every level of national life, including the civil administration, the management of the economy and the administration of justice.[84]

(*c*) The transition from private to public control of the economy should be orderly and should take place with the minimum dislocation of the economy.[85] This commitment to stability and orderly change implicitly rejects the alternative strategy of revolutionary change through violent social upheaval.[86]

(*d*) The emphasis on productivity, efficiency and growth to be realized through rapid development of all sectors of the economy according to a National Economic Plan,[87] increased productivity in both the industrial and agricultural sectors realized through improved managerial efficiency in the state enterprises.

[83] Dr. N.M. Perera in his first budget speech pointed out that one of the basic commitments of the government was to establish the foundations for a socialist economy "*while preserving the democratic traditions* to which we as a people have pledged ourselves", *ibid.*, 4-5; cf. also the *Election Manifesto, ibid.*, p. 181 wherein it is provided that "all laws and regulations which restrict the democratic rights of the people will be repealed or amended"; cf. sections 72 and 75 of the Constitution of Sri Lanka which guarantee that elections to the National Assembly would be free and secret and ensure the continued operation of those laws which protect the orderly conduct of elections.

[84] See section 16 (5) Principles of State Policy, in the Constitution of Sri Lanka, cf. the *Election Manifesto, ibid.*, p. 173.

[85] See the Budget Speech of Dr. N.M. Perera (1970-71), p. 4.

[86] In 1970 N.M. Perera emphasised that the government was embarking on the unique task of attempting a socialist transformation through the ballot. *Ibid.*, p. 4. This question assumed much more than academic significance when the J.V.P., believing that socialism can only be realized through violent revolution aimed at dismantling the existing political-legal framework, set in operation an insurrection which almost toppled the government. In reviewing the havoc caused by the insurgency to the already ailing economy N.M. Perera reiterated his conviction that there could be no short-cut to socialism in a traditional society. He added that those who desired "an instant revolution had succeeded in pushing back revolutionary changes for a considerable time"; see the *Budget Speech* for 1971-72, volume 96 of the Parliamentary Debates, p. 171 (1971). To buttress this argument he reviewed the circumstances which led the Soviets, even after a violent overthrow of the feudal and capitalist overlords, to institute a New Economic Programme which retained the involvement of private enterprise in small and middle scale industries and trade.

[87] The *Election Manifesto* states that the United Left Front seeks to "develop all branches of the economy at a rapid rate and according to a National Economic Plan" .... *ibid.*, p. 175. See also section 16 (2) (c) of the Principles of State Policy in the Constitution of Sri Lanka; and the *Budget Speech*, 1970-71, p. 5.

(*e*) A commitment to upgrading the living standards of ordinary citizens, by securing full employment,[88] improving the wage structure and conditions of employment of the working class,[89] and ensuring the equitable redistribution of the social product through welfare schemes.[90]

We must now consider the implications of these value commitments to the legal system. What changes in the conception of the law, or in the organization and management of the institutional complexes and processes which form part of the inherited legal system, were precipitated by the adoption of the strategy of socialist development, that we have described above? There are two distinct and somewhat divergent developments that we may herein describe as "the instrumental conception of law" and "deprofessionalization".

The former refers to the conscious use of the law as the instrument with which the fundamental restructuring of social and economic life is to take place. Implicit in such a conception of the law is the doctrine which dictates that there exists a differentiated body of norms, complex of institutions and processes, modes of thought and decision making which may be distinctly labelled as "legal".

Such a conception of law further presupposes the existence of a group of law professionals with specialized knowledge of the content of the body of norms, and training in the modes of reasoning associated with this form of normative ordering. The instrumental conception of law also embraces two related ideas. The first stresses fidelity to certain pre-determined processes of political-legal decision making, and points to a certain constancy in form and style in the expression of these policies.

[88] The United Left Front promised that its "programme" for the rapid industrialization of Ceylon, the extension of irrigation and power resources, the reorganization of the rural economy and the development of fishing would provide employment on a wide scale in both towns and villages"; see *Election Manifesto, ibid.*, p. 177. Subsequent policy statements also underscore the urgency of the problems of unemployment and describe some of the immediate steps which the government proposed to take towards both a short-term and long-term solution to the problem; see the *Budget Speech*, 1970-71, p. 5 and 28-29; and section 16 (2) (b) the Directive Principle of State Policy in the Constitution of Sri Lanka.

[89] See *Election Manifesto, ibid.*, p. 177.

[90] In the 1970-71 *Budget Speech*, Minister Perera pointed out that one of the more basic policies of the government was its commitment to "those social welfare measures which are an integral part of the [nation's] social fabric". See p. 5.

The second emphasizes the law as the principal modality through which societal goals and aspirations may be realized. In other words it points to a commitment to work primarily with the facilitative frameworks, the conflict-resolving mechanisms, the enforcement agencies which are distinctly labelled as legal, to accomplish the state policy objectives. The law, therefore, is both the effective expression and the principal instrument of state policy.

The concept of deprofessionalization on the other hand refers to the divesting of legal specialists of their monopoly over certain law jobs such as law-making, conflict management, advocacy and counselling and to permitting the performance of these jobs by persons who do not possess specialized legal training. It sometimes takes the form of an effort to contain the operation of formal legal institutions which are usually staffed by law professionals (e.g. the courts of law) by relieving it of its jurisdiction over certain types of problems. The categories of problems are then referred to newly constituted popular or quasi-popular tribunals or allowed to be dealt with by existing mechanisms of informal social control.

Although the doctrine of "deprofessionalization" appears to be directed at the organization and management of legal institutions it has important implications for the normative components of the legal system. As the institutions and the processes devoted to the finding and application of legal norms become less autonomous from other social institutions and processes, and the personnel who manage these institutions are less differentiated from other societal members, the law's distinctiveness as a special form of normative ordering would correspondingly suffer. And as the repertory of norms, concepts and principles which constitute the legal order lose their autonomy, legal reasoning would in turn become increasingly fused with other modes of political thought and economic reasoning in the community.

We may now demonstrate how each of these strands of thought are accommodated within the legal ideology of the socialist coalition.

We may begin by examining the extent to which the instrumental conception of the "law" finds expression in the policy statements of the government. In our elaboration of the instrumental conception of the law, we pointed to two distinct

and related aspects of this conception, which we shall herein refer to as the concept of "governmental fidelity to law," and the concept of "law as the principal vehicle of societal change". The concept of governmental fidelity to law finds expression in the socialist coalition's faithfulness to the existing political-legal framework"[91] and its commitment to the idea that all governmental activity should be in accordance with pre-established legal standards, to the extent that it would be possible for any individual to predict which governmental agency has the authority to exercise its coercive power in a given circumstance, so that he would be able to plan his affairs on the basis of such knowledge. It is manifested in policy statements which emphasize the need for stability and order in the process of socialist development and denounce the revolutionary alternative of a violent social upheaval;[92] and is also seen in the state's commitment to the ideal of "equal protection before the law,"[93] and in its proscriptions against depriving any individual of his "life, liberty or security except in accordance with the law".[94]

In this limited sense of governance in accordance with the law, the instrumental conception of the law does point not to a break but an essential continuity between the colonial[95] and the contemporary approaches to the law. It is, however, different with regard to the use of the law as a vehicle of societal change. Fundamental transformations had taken place in the conception and function of the state, which had important implications for the law. The state, unlike in the colonial period, dominated

[91] See *supra* notes 83, 85 and 86.

[92] The Leader of the Opposition in a bipartisan expression of support to the government for its actions against the insurgency of April 1971, reiterated in Parliament, "We do not approve of the use of violent means to replace a Government lawfully elected by the people . . . We must all co-operate to preserve the democratic way of life. That alone is the way of peace and progress. There is no other way." See 52 *Parliamentarian* 216 (1971).

[93] See section 18 (1) of the Constitution of Sri Lanka which provides that "all persons are equal before the law" and are entitled to "equal protection of the law".

[94] See section 18 (1) (b) of the Constitution of Sri Lanka.

[95] On the colonial period see N. Tiruchelvam, *Popular Tribunals and Political Development in Ceylon* (1971) in Henry Steiner and Roberto Unger, *Seminar Material on Law and Development* (1970-71), on file at Harvard Law School; G.C. Mendis, *The Colebrooke-Cameron Papers* (1956) the introduction in volume 1; and C.R. de Silva, *Ceylon Under British Occupation: 1795-1833* (1941 and 1942), 2 vols.

as it often was by doctrines of laissez-faire,[96] was no longer limited to the collection of revenue and the maintenance of law and order. The commitment to a socialist ideology spelt an unprecedented involvement of the state as the provider of basic social services and welfare measures, as the regulator of the development of all sectors of the economy, and as the entrepreneurial economic actor directly or indirectly controlling the basic means of production and distribution.[97] Correspondingly, the use of law as the principal instrument with which the state accomplishes the multifarious functions which it is called upon to perform, places an enormous demand on the resources of the legal system. More specifically, the accomplishment of the goals of welfarism and equalitarianism require more social-welfare legislation providing for the establishment of certain administrative mechanisms for the equitable distribution of the social product with a view to providing all persons with some of the basic amenities of life.[98] Such legislation has also been directed towards the acquisition of surplus land from the wealthy landowners and redistribution to the landless,[99] control of rent and allocation of public and private housing units,[100] and the imposition of a ceiling on income.[101] The ideal of rapid

[96] See G.C. Mendis, *ibid.*; and K.M. de Silva, *The Colebrooke-Cameron Reforms*, 2 *Ceylon Journal of Historical and Social Science Studies*, 244 at 249 (1959).

[97] Cf. for a general treatment of some of these questions W. Friedmann, *The State and Rule of Law in a Mixed Economy* (1971); for an historical account of the expanding economic role of the state in post-independence Ceylon, see Henry M. Olver 2. *Economic Opinion and Policy in Ceylon* (1957), pp. 50ff.

[98] For the government's commitment to social welfare schemes see the *Budget Speech*, 1970-71, p. 5; increasing outlays on the subsidizing of food, medical, educational and transportation expenses inevitably made such serious inroads into the surplus available for development that the government was most reluctantly compelled to cut back on some of these measures; see the *Budget Speech*, 1971-72, pp. 246, 255-259. For an example of social welfare legislation see the Food Controls Act no. 25 of 1950 and regulations framed thereunder which set up an elaborate mechanism for the distribution of subsidized food rations.

[99] The Land Reform Act imposed a ceiling of fifty acres on the ownership of all forms of land except those that belonged to public companies. See the *Budget Speech*, 1971-72, p. 258, where the Finance Minister describing the proposed legislation predicted that it would bring about an agrarian revolution in the country.

[100] For an account of the several steps that the government proposed to take against what was described as "urban landlordism"; see the *Budget Speech* 1971-72, p. 259. See also the Rent Restriction Act of 1972.

[101] See the *Budget Speech* 1971-72, pp. 249, 261. This measure was justified on the basis that it was "socially desirable that all salary scales whether in the public or private sectors should bear some reasonable relationship to the general pattern of individual earnings.

economic growth in accordance with developmental plans is pursued through a series of regulatory laws which attempt, through a system of incentives and prohibitions, to control and direct the development of different sectors of the economy. Examples of such regulatory laws would be industrial licensing laws,[102] fiscal laws designed to control consumption and to encourage savings and capital formation,[103] and price control laws directed towards the regulation of prices and the even distribution of scarce resources.[104] Similarly, the pursuit of the goal of increased state ownership and management of the economy has given rise to a new form of legal associations such as public corporations, co-operatives and collectives.[105] These new legal frameworks have facilitated and defined the increased interventions of the state in the internal and external trade,[106] essential industries,[107] and in the plantation and agricultural sectors.[108]

[102] See the Industrial Products Act no. 18 of 1949, and the Imports and Exports Controls Act no. 9 of 1955, the Exchange Act no. 24 of 1953.

[103] See the Compulsory Savings Act no. 6 of 1971; *Department of Inland Revenue Booklet on Compulsory Savings Levy* (1971); the *Budget* 1970-71, 249-250, and the Bank Debits Tax Act no. 27 of 1970.

[104] See Control of Prices Act no. 29 of 1950. The Finance Minister promised in 1970 that a comprehensive price control system would be evolved to combat the cost of living. See the *Budget Speech* 1970-71, p. 39.

[105] See on public corporations, A.R.B. Amerasinghe, *Public Corporations in Ceylon* (1972).

[106] The government established several State Trading Corporations with a view to regulating the import and export trade and to conferring on the state a monopoly over the importation, exportation and distribution of several commodities such as textiles, subsidiary foodstuff, tea and coconut products; see the Sri Lanka Trading Corporations Act no. 33 of 1970; and the *Budget Speech* 1971-72, p. 207.

[107] To further the state policy of managing all "heavy basic and essential industries" the government decided to set up several industrial development corporations to facilitate the developmental planning and the coordination of the production programmes of different sectors of the economy. See the *Budget Speech* 1970-71, pp. 35-36.

See also, the Business Undertakings (Acquisition) Act no. 35 of 1971 which enables the government to gain control of the business operations of "recalcitrant employers and anti-social businessmen (who attempt) to frustrate the application and execution of government programmes," 52 *Parliamentarian* 134 (1971).

[108] Although the Trotskyites for almost two decades advocated the nationalization of the plantation sector, once they assumed power they opted for a more cautious policy of "purposeful intervention," according to which the government, through the issuance of directives, tax incentives and subsidies, attempts to protect and improve prices paid by importers, ensure the efficient management of estates and to generally stimulate investment in the plantation industries. See the *Budget Speech* 1970-71, p. 204. See also Tea Control Act no. 28 of 1949 and the Rubber Control Act no. 29 of 1949.

The assumption by state of the multifarious functions that we have described herein as "provider," "regulator" and "entrepreneur", besides creating an entirely new body of economic laws and mechanisms for the enforcement of these laws, also seems to envisage an important role for the law professionals in their formulation and administration.

They seem to presuppose the involvement of law professionals in the planning of alternative legal schemes for the realization of given policy objectives, in the setting up of a machinery for the implementation of the scheme defining the parameters of its powers and formulating a system of legal or bureaucratic controls. Correspondingly, the services of such law professionals would also become necessary in the counselling of economic actors on the implications of specific schemes, and in their representation before managers of state enterprises, the courts or other tribunals deemed competent to deal with the problems which arise in the enforcement of these schemes.

The doctrine of deprofessionalization was initially reflected in efforts to restrain the powers of the official courts of law, which since independence continued to assert their autonomous power to determine judicial controversies without any external interference and to pronounce upon the validity of arbitrary actions of the executive,[109] and even to invalidate unconstitutional legislation.[110] The exercise of such awesome power by non-elective tribunals which seemingly obstructed the process of social and economic transformations on "technical" and "legalistic" grounds was found to be particularly irksome to members of the socialist coalition.[111] It was

[109] For an account of the circumstances under which the Supreme Court would (in exercise of the supervisory jurisdiction conferred on it by the Courts Ordinance) review executive action see J.A.L. Cooray, "The Supreme Court of Ceylon," 9 *Journal of the International Commission of Jurists,* 96, p. 105ff (1968). Justice H.N.G. Fernando in *Anthony Naide v. The Ceylon Tea Plantation Co. Ltd.,* (1966), 68 New Law Reports 558 at 570 implied that the legislature could not by ordinary legislation take away the court's power to review administrative actions through the issue of the prerogative writs recognised in sections 42 and 45 of the Court's ordinance.

[110] See J.A.L. Cooray, "*The Supreme Court of Ceylon*," *op. cit.,* pp. 99-102. See also the judgement of District Courts in *Mundanayke v. Sivagnanasunderam* (1951), 53 N.L.R. 25.

[111] See the comments on the judiciary during the legislative debates on the Interpretation Ordinance (Amendment) Act of 1971; see 53 *Parliamentarian* 238-240 (1972) and 52 *Parliamentarian* 134 (1971).

thought to be especially reprehensible and inconsistent with the nationalistic aspirations of political sovereignty when such power was exercised by a foreign tribunal, such as the Privy Council, which stood at the apex of the multi-tiered pyramidal court structure. Accordingly, one of the early legal reforms implemented by the government was to abolish the appellate jurisdiction of the Privy Council and to vest it in a National Court of Appeal.[112] Consistent with the coalition's desire to weaken the judicial arm of the government and correspondingly concentrate power in the legislative, was its decision to eliminate the "non-elective" second chamber, an essential component of "Parliament" as defined by the previous Constitution.[113] One of the more fundamental postulates of this New Constitution is that which by rejecting the prevailing conceptions of separation of power, attempts to restructure the allocation of powers between the different organs of government. Section 4 of the Constitution of Sri Lanka provides, "that the Sovereignty of People is exercised through the National State Assembly is the supreme instrument of state power of the Republic." In effect, it means that the panoply of state power would be vested in a tribunal which is primarily a legislative institution, the National State Assembly being the lineal successor to the House of Representatives under the previous Constitution.[114] To further remove any doubt on this issue, the Constitution adds that while the legislative power would be exclusively exercised by the National State Assembly, the executive and judicial power would be exercised on its behalf by the Cabinet and courts of law respectively. Section 5 therefore provides that, "the National State Assembly exercises:

(*a*) the legislative power of the people;

[112] See Court of Appeals Act no. 44 of 1971.

[113] See the Ceylon (Constitution and Independence) Amendment Act no. 36 of 1971; see also B.C.F. Jayaratne, "The Abolition of the Senate of Ceylon" 53 *Parliamentarian* 104 (1972).

[114] This is clearly seen in the constitution of the first National State Assembly which was composed of all members of the former House of Representatives. See section 42 (1) of The Constitution of Sri Lanka. In addition, the members of the National State Assembly continue to be designated as "Members of Parliament" (section 29), enjoy the same powers, privileges and immunities as those of the House (section 38), and continue to regulate the proceedings of the Assembly in accordance with the Standing Orders of the House of Representatives (section 37).

(*b*) the executive power of the people . . . through the President and the Cabinet Ministers; and

(*c*) the judicial power of the people through the courts and other institutions created by law. . ."

There were other steps taken by government to weaken the jurisdiction and authority of the courts of law, and to further compound its subordination to the National State Assembly. The Constitution explicitly took away from the courts the power to inquire into or pronounce upon the validity of any legislation.[115] Instead, a Constitutional Court was established as an appendage to the legislature and to advise the latter on the constitutionality of legislative proposals, and to enable the legislature to cure any defects by adopting a special procedure to enact the law.[116] Similarly, an Amendment to the Interpretation Ordinance severely restricted the grounds on which the superior courts of law could, through the issue of prerogative writs, inquire into the validity of the executive acts of the government.[117] This legislation which was subjected to considerable criticism by the national press, the Bar Council, and several trade union groups was defended by the Minister as "an attempt to restrain the court from assuming the role of the legislature".[118]

Apart from the subordination and circumscription of the powers of the courts of law, deprofessionalization is also reflected in the continuing effort to constitute popular and quasi-popular tribunals with execlusive or concurrent jurisdiction over disputes which are normally handled by the regular courts of law.[119] The constitution of such tribunals has important implications for the legal profession, since their

[115] See sections 48 (2) and 49 (2) of the Constitution of Sri Lanka.

[116] See sections 54 and 55 of the Constitution of Sri Lanka.

[117] See the Interpretation Ordinance (Amendment) Act of 1972; section I construed the phrase "shall not be questioned in a court of law" as barring any inquiry by a court into the validity of any act on which the legislature had conferred this effect; section 2 strictly defined the circumstances in which a writ of *certiorari*, *mandamus*, or injunction may be issued by the Supreme Court to set aside the acts of an executive authority or to compel it to perform an obligation; see 53 *Parliamentarian* 240(1972). Section 121 (3) of the Constitution of Sri Lanka explicitly reserves in the National State Assembly the power to further limit by law the Superior Court's supervisory jurisdiction.

[118] See 53 *Parliamentarian* 240 (1972).

[119] See N. Tiruchelvam, *Popular Tribunals and Political Development in Ceylon*, *op. cit.*

enabling legislation often places restrictions on the involvement of lawyers as either judges or as advocates of the interest of parties. The government even considered extending this policy to tribunals which has been constituted in the pre-1970 period. One such example would be the labour tribunals; where although the original Industrial Disputes Act in 1957 conferred on licensed practitioners an equal right of representation with trade union officials, employers' representatives and other para-professionals,[120] the government gave serious consideration to totally excluding licensed practitioners from such proceedings. Such a step would deprive several younger members of the profession of an extremely important source of income. Fiscal policies such as the imposition of a ceiling on income had the indirect effect of limiting the legal fees chargeable by lawyers and other professionals.[121] The general economic depression and the resulting decline in commerce and land transactions further eroded the economic base of the profession.[122]

The process of deprofessionalization we have sketched above was accelerated by a continuing confrontation between the government and the profession. Some law professionals perceiving certain tensions between the liberal and socialist components of the state's ideology, deeply believed that it was the special responsibility of the profession to ensure that the former was not consumed by the latter. They correspondingly mobilized several members of the academic community, journalists, trade unionists, and other professionals to form a Civil Rights Movement to combat potential encroachments by the state on the civil liberties of the people. The successive efforts of the government to enact the Criminal Justices Act, the Interpretation (Amendment) Act, the Press Council Act, and the Lake House Acquisition Bill became the focal points of controversy between the Civil Rights Movement and the

[120] See section 46 of the Industrial Disputes Act no. 43 of 1950 (as amended by Act no. 62 of 1959).

[121] See *supra*, note 101.

[122] During the debates on the Business Undertakings (Amendment) Bill, the opposition urged the government to accept an amendment rendering it possible for aggrieved parties to appeal against an acquisition order in a regular court of law. The government however rejected the suggestion arguing that it would defeat the purposes of the Bill, as the process of appeal to the courts of law would take several years of delay., See 52 *Parliamentarian* 134 (1971).

socialist coalition. The lawyer-dominated Civil Rights Movement considering such legislative proposals to be in derogation of the civil liberties and the fundamental freedoms guaranteed by the Constitution, launched a public campaign through the national press against the enactment of such legislation. The Movement and other individuals even had recourse to the constitutional court to impugn the validity of these legislative attempts.[123] We have already alluded to the fact that the socialists in the government had, for a long time, a negative view of the profession for its persistent opposition to legal reforms and its general indifference to the legal needs of the poor. The involvement of several prominent law professionals, some of whom had in the past actively supported the socialist parties in the campaign to obstruct what the government regarded as "progressive legislation" exposed the legal profession to further attack and criticism for being antagonistic to the aspirations of the working classes and the rural peasantry.[124]

There are two other developments that we should refer to in this respect. Firstly, although the state has recently taken several steps to undermine the monopoly of the legal profession over law-related services, it has left undisturbed the authority of the courts of law to guarantee the most sacred right of the people in a pluralistic society, that of constituting their government at pre-determined intervals through an independent electoral process. Stringent election laws vest in the election judges a wide range of sanctions against candidates, their agents and supporters to ensure the legality and the fairness of both the campaign and the voting during parliamentary elections.[125] Their powers include the authority to impose the most severe sanction of invalidating the election of a candidate guilty of corrupt practices, such as impersonation, treating, undue influence and bribery. The Constitution of Sri Lanka both reiterated the most basic right of the people to elect their

[123] See *The Sunday Observer*, 4 February, 1973 for the brief filed by counsel to the Civil Rights Movement before the Constitutional court impugning the constitutionality of the Press Council Bill of 1972.

[124] See the criticisms of the Civil Rights Movement by the Minister of Justice in the debates on the Criminal Justices Commission Bill.

[125] See The Ceylon Parliamentary Elections (Order in Council), as amended by Act no. 9 of 1970.

representatives to the National State Assembly,[126] and left intact the responsibilities and powers of the courts of law to safeguard the independence and the freedom of the electoral process.[127]

Secondly, unlike some other societies which were subjected to similar ideological changes,[128] the state has done very little towards interfering with the autonomy of professional organizations. Internal divisions and power struggles within the General Council of Advocates have, however, considerably undermined the cohesiveness and the unity of the Bar and weakened its ability to protect the interests of the profession. The more reform-oriented groups in the Advocates' Association, frustrated by their failure to dethrone conservative senior practitioners from dominant positions in the governing council, seceded from the parent body to form a rival organization. Once however it became clear that the left-wing groups could gain control over the parent body, the two units were fused. The Advocates' Association continues to be plagued by intense factionalism which often has ideological overtones. Curiously, however, these pressures did not affect the Law Society, the professional organ of the proctors.[129]

It is important to note that deprofessionalization of law jobs is just one manifestation of the participatory ideology of the socialist government.[130] From this perspective it is clearly related to the debureaucratization trend in the administrative sphere. Dr. N.M. Perera, the Finance Minister and perhaps the most articulate doctrinaire socialist in the Cabinet, emphasized that the latter was a novel social experiment by which existing forms of bureaucratic management would give way to socialist forms

[126] Section 4 of the Constitution of Sri Lanka provides that the "sovereignty of the people is exercised through a National State Assembly of *elected representatives* of the People" [my emphasis].

[127] See Chapter XI of the Constitution of Sri Lanka on the constitution of the National State Assembly, and section 75 on the continuance of existing laws relating to elections.

[128] See Farhat Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (1968).

[129] For a recent clash between the two branches of the profession over a Bar Council ruling on an advocate's right of representation before labour tribunals and the regular courts of law without the assistance of a proctor, see 2 *Ceylon Law Journal* at 314 (1971).

[130] See *supra*, pp. 23-24, category (b) in the discussion on the value-commitments of the socialist coalition.

of management.[131] The objective, he said, was to establish mass organizations which would vest the people with some responsibility for "the formulation of plans and their implementation; for efficiency in management, for the curbing of profiteering and the suppression of corruption".[132] The new institutional forms which were established to give expression to these goals were the people's committees.[133] the workers' advisor council and the elected employee councils.[134] Germane to these developments were the attempts to create divisional developmental councils to decentralize the planning process,[135] and the promise to reorganize the armed forces and the police "to identify them with the national and progressive aspirations of the people".[136] The ultimate goals of these institutional forms was the creation of a worker managed economy with the "workers councils being the training ground of the future worker-managers".[137]

The fundamental importance of popular participation to the socialist developmental strategy of the government was repeatedly stressed by Minister Perera. While explaining the difficulties the government could face in implementing its programme, Dr. Perera pointed out, "A mass upheaval such as we have witnessed in many East European countries, in China and in North Korea would have, in a sense, simplified the task of socialist reconstruction. A revolutionary mass upheaval teaches lessons to the masses in the very process of that upheaval. It awakens people to a high degree of social consciousness. We, on the other hand, are conditioned by an environment charged with old prejudices, old inhibitions and old traditions."[138] To overcome these obstacles it was important to mobilize the whole of society and "raise its social consciousness on a coherent ideological appeal that of socialism".[139] Popular participation at all levels of government

[131] See N.M. Perera in the *Budget Speech* 1970-71, p. 13.
[132] *Ibid.*
[133] See The Peoples Committees Act no. 16 of 1971; and N.M. Perera in the *Budget Speech* 1971-72, p. 207.
[134] The *Budget Speech* 1970-71, p. 13.
[135] *Ibid.* p. 199.
[136] 51 *Parliamentarian* 311 (1970).
[137] The *Budget Speech* 1970-71, p. 13.
[138] *Ibid.*, p. 4.
[139] The *Budget Speech* 1971-72, p. 222.

as a means of enhancing popular consciousness assumes then a critical significance in a society such as Sri Lanka which had not emerged from a protracted revolutionary struggle. The working class must recognize, Dr. Perera added, that "the struggle to emancipate ourselves from capitalism cannot be accomplished without their assistance and active co-operation".[140]

As the legal ideology of the socialist coalition continued to take shape it became increasingly important to accommodate the Conciliation Boards scheme within its framework. Policy statements of the government began to rationalize the conciliatory scheme as one of the principal planks of the governmental programme of deprofessionalization, and as being consistent with its broad participatory ideology. To the extent that lawyers were excluded from appointment as conciliators[141] and from the representation of disputants before such tribunals, the reform had, to a very significant extent, facilitated popular participation in the management of inter-personal conflict. The successful disposition by these Boards of almost half the controversies that were directed to it was found to have a negative impact on the volume of cases handled by the regular courts of law[142], which in turn adversely affected the practice of the legal profession. The new effort to integrate the Conciliation Boards scheme into the socialist ideology of the government is manifested in the principle of state policy in the new Constitution which provides that the "state shall strengthen and broaden the democratic structure of government . . . by affording all possible opportunities to the people to participate at every level in national life and in government, *including the civil administration and the administration of justice*".[143]

[140] *Ibid.*, p. 174; Dr. Perera pointed out that during the days following the government's decision to demonitize higher currency notes, those who helped the "tax evaders and hoarders of currency were the workers and (others from the poorest) sections of the people. For temporary gain they helped the rich capitalists escape the rigors of a very useful legislation . . . . Indeed the very people whom we wished to help joined hands with the exploiters." p. 173.

[141] Although there is no statutory provision excluding the appointment of lawyers, in practice the government has strictly adhered to this policy. See the interview with Ratnasiri Wickremanayake, Junior Minister for Justice, (on file with author, 1972).

[142] See the statistics on the Disposition of Disputes by Conciliation Boards (1964-72) on file with the Ministry of Justice; R.K.W. Goonesekere and Barry Metzger, *op. cit.*, pp. 97-100.

[143] See article 16 (6), The Constitution of Sri Lanka (1972).

The government's decision to enhance the powers of the Conciliation Boards and to vest in such tribunals the jurisdiction of the rural courts is consistent with the socialist conception of these institutions.[144] For the impact of such a reform would be to vest coercive powers in such tribunals and qualitatively transform these from conciliatory bodies to popular "courts of law".

One consequence of such a transformation would be to blast the revivalists' imagery of these boards as the lineal descendants of the traditional Gamsabhavas. The socialist coalition, in initiating such changes, appeared in turn to show less concern for conserving the Conciliation Boards links with its historical antecedents than with manipulating these institutions to be responsive to the social needs and the developmental problems of contemporary Sri Lanka. Correspondingly, the then government decided to further restructure the Conciliation Boards to enable them to deal with the problems of "indebtedness that hang so heavily on the rural folk".[145]

[144] See the Speech of the Minister of Justice at the Annual Conference of Judicial Officers, 1972, on file at the Ministry of Justice; see also the Policy Statement of the Government of Sri Lanka (23 June 1972) in 53 *Parliamentarian* (1972) 351.

[145] See the *Budget Speech* 1971-72, pp. 258-259. Memorandum by the Legal Research Division on the draft law to relieve rural indebtedness, dated 14 August, 1972, on file at the Ministry of Justice; see Draft of Settlement of Debts Act (1972) on file at the Ministry of Justice, and Memorandum on the Draft Law by D.L. Mendis, on file at the Ministry of Justice.

V The Structure of Statutory Conciliation

"He that takes the Seat of Judgement — should not appear either pleased with the good, nor displeased with the bad, but must maintain equanimity."

— SIR JOHN D'OYLY, *Constitution of the Kandyan Kingdom* (edited by L.J.B. Turner, 1928).

I

In comparing the statutory Conciliation Boards with the *nyaya panchayats*, we emphasized that the Conciliation Boards Act by merely providing a skeletal framework for this system of conflict resolution sets up a model of self-management. The provisions of the statute are limited to defining the civil and criminal jurisdiction of Conciliation Boards, to cloaking them with the authority to issue summons,[1] to endowing them with the power to penalize those who act in contempt of its authority[2] and to vesting their settlements with the effectiveness of a decree of a court of law.[3] The Act, by barring access to the regular courts of law, also indirectly compels disputants who seek a judicial resolution of these controversies, to exhaust the process of statutory conciliation.[4] But within this broad statutory framework each Board is free to determine the procedures it would follow, the rules of evidence it would abide by,[5] and the normative standards which it would apply towards the disposition of disputes. Although the discretion of each Conciliation Board to regulate the processing of disputes is seemingly unbridled, there are certain domains of central control which clearly narrow the discretion available to individual tribunals. The constitution of Boards,[6] and the recruitment of Board members are two areas in which central

[1] See section 7(c), of the Conciliation Boards Act no. 10 of 1958.
[2] See section 8(4) of the Conciliation Boards Act no. 10 of 1958.
[3] See section 13(3) of the Conciliation Boards Act no. 10 of 1958.
[4] See section 14 of the Conciliation Boards Act no. 10 of 1958.
[5] See section 7(c) of the Conciliation Boards Act no. 10 of 1958.
[6] See section 2 of the Conciliation Boards Act no. 10 of 1958.

administrative control is recognized by the statute. Our empirical study[7] of the implementation of the scheme also identified other spheres of central regulation which were sanctioned neither by the statute nor by any rules framed thereunder. Our concern in this section would be to examine the nature and degree of centralized control, and the mechanism through which that control is exercised in the organization of Conciliation Boards in Sri Lanka.

The administrative mechanism for the implementation of this popular conflict management scheme, was the Conciliation Boards Unit, located in Hultsdorp, the seat of the Supreme Court of Sri Lanka, the District Court of Colombo, and the Ministry of Justice. Although the Unit is considered an integral component of the Justice Ministry, it is staffed by a distinct group of officials and is located in a building physically separate from that in which the other Ministry offices are found. It is headed by an Administrative Secretary, a member of the Executive Grade of the Clerical Service, who although technically subordinate to the Assistant Secretaries in the Justice Ministry, frequently discharges his responsibilities without prior consultation with the upper echelons of that Ministry. There are about five area specialists, clerical officers who are responsible for overviewing the work of all the Conciliation Boards located in their respective regions. This small and overworked administrative unit was responsible for constituting, supervising, and disbursing funds to an island-wide network of almost four hundred Conciliation Boards.[8]

The Conciliation Boards Unit was therefore the nerve centre of this scheme of statutory conciliation. It was responsible for initiating all the procedural steps regarding the establishment and constitution of Conciliation Boards, for the processing of applicants, and for the final release of Gazette notifications. It organized orientation meetings to instruct conciliators on their statutory responsibilities and to inform the general public of the

[7] Chapters V and VI are based on an empirical study conducted in Sri Lanka from March 1972 to September 1972 on the implementation of the Conciliation Boards Act. I am grateful to Saleem Marsoof, Geeta Rodrigo, Gilbert Siriwardena, and Lakshman Weerasinghe, field research assistants, for their assistance in compiling the field data.

[8] On March 1972, Ministry records indicated that there were 378 Conciliation Boards operating in various parts of the country.

purposes of the Act. It served as a storehouse for most of the records of individual Boards and provided both the public and the legal profession with up-to-date information on whether a particular locality was being served by a functioning Conciliation Board. It was also a disbursing agency, processing the monthly returns of every Conciliation Board with a view to determining its eligibility for the clerical allowance which the Government was committed to providing. Incidental to its disbursement function was the compilation of statistical data[9] on the territorial coverage of the Act and on the volume of cases inquired and disposed of by these Boards. Such data facilitated the formulation of ministerial policy on the expansion of the scheme and helped secure legislative appropriations towards its support.[10] The Unit was also the conduit-pipe through which policy directives on jurisdiction or other matters pertaining to the exercise of the tribunal's powers were disseminated. It was in turn the recipient of proposals from Board members and the general public on the reform and more effective management of the statutory scheme. Above all this Unit was analogous to an appellate tribunal, in issuing advisory opinions to Board chairmen on how they should discharge their responsibilities and in inquiring into and reviewing the specific complaints of discontented parties. It is clear therefore that an examination of the more important functions of the Conciliation Boards Unit is crucial to an appraisal of the relative balance between central control and local regulation in the organization of the scheme, and to a broader comprehension of the structure of statutory conciliation. We may begin such an analysis by reviewing the role of the Unit in the establishment of Conciliation Boards and in the recruitment of panel members.

II

The statute recognizes two distinct steps before a Conciliation panel could begin its function in a specific area. The first step involves a ministerial order declaring the statute operative

[9] The Ministry of Justice maintained a statistician who overviewed the compilation of statistical data by the Conciliation Boards Unit.

[10] In 1970-71, the total appropriations to the Ministry of Justice amounted to 34 million rupees of which 281 thousand rupees were allocated to the Conciliation Boards Unit. About all of this money is applied towards the support of the Conciliation Boards Unit, and the payment of clerical allowances to chairmen.

in an area constituting a unit of local government;[11] and the second relates to the appointment of a panel of conciliators.[12]

Section 2(2) of the Act places no fetters on the Minister's authority to determine the applicability of the statute to any local authority area. In the exercise of such a power the Minister may also subdivide the area into different sub-units if he recognizes the need for more than one panel in the locality. Factors that he would probably weigh in exercising this option would include population density, the size of the area and the distance that persons residing in the outer boundaries of the area would need to travel, and the volume of disputation and petty crimes that normally arose in that region.[13]

As we have alluded to earlier, Minister de Silva, the author of the Conciliation Boards scheme, moved cautiously and hesitantly in establishing Conciliation Boards. To set the statute in motion, he directed each district revenue officer to identify two village council areas which the latter would consider appropriate for the setting up of these tribunals, on an experimental basis. These areas were identified not by the level of litigiousness or the state of crime, but by the degree of social cohesiveness, the respect for authority and the tradition of popular involvement in the community organizations set up to promote the social and cultural advancement of the villages.[14] It was only in 1963-64 that a conscious policy decision was made to vigorously expand the coverage of the Act, and within a decade the number of operative panels increased from about thirty to almost four hundred.[15] Some of the policy considerations which should shape the decision to expand the scheme to any specific area were more clearly defined within the Justice Ministry. Popular enthusiasm for the scheme, as reflected in the pressures of local associations and groups was soon recognized as an important factor. An important shift in the statutory policy of excluding elective political officials from any involve-

[11] Section 2 of the Conciliation Boards Act no. 10 of 1958.

[12] Section 3 of the Conciliation Boards Act no. 10 of 1958.

[13] See interview with .G.C.T.A. de Silva, former Minister of Justice, on file with the author.

[14] See interview with G.C.T.A. de Silva, former Minister of Justice, on file with the author.

[15] See statistics on the constitution of Boards, on file with the Ministry of Justice; and R.K.W. Goonesekere and Barry Metzger, "The Conciliation Boards Act: Entering the Second Decade" (1971), *2 Ceylon Law Journal*, 35, p. 96.

ment in the scheme, was the ministerial directive to consult the opinions of the local Members of Parliament. The opinion of the Member of Parliament (if he belonged to the Government Parliamentary Group) was soon decisive on whether a conciliation panel should be set up in his electorate. The appearance of regional imbalances in the distribution of panels amongst the various provinces caused some concern within the Conciliation Boards Unit. A more conscious effort was correspondingly made to establish panels in regions in which only a few or no panels had previously existed.[16] Despite such a concentrated drive by the Conciliation Boards Unit the objective of comprehensive coverage continues to elude legal administrators, and almost 40 per cent of the local authority areas remained outside the coverage of the Act.[17] Some regions such as the Northern and Eastern Provinces, as a result of a mix of ministerial indifference and neglect, and ambivalence amongst the local populace about the real significance and value of the reform, continue to be poorly represented by conciliation panels. An imbalance also exists in the number of urban Boards proportionate to rural Boards. The Junior Minister for Justice conceded that such a bias in favour of rural Boards existed within the Ministry, and rationalized that the tribunals were likely to be more effective in rural areas where "the social structure and the economy was closely interrelated, such that problems could be resolved at a local level".[18]

We may now turn to perhaps the most important function discharged by the Conciliation Boards Unit, namely the recruitment of panel members. In an earlier discussion we have pointed out that the Act provides for a hybrid scheme; a mix of central control and local participation in the recruitment process. The statute is quite specific on the procedure that should be followed in this respect. It provides that once the ministerial order to extend the operation of the Act has been issued the Minister must publicly announce his intention to constitute a panel and call for local recommendations.[19]

[16] See interview with T.G. Siriwardene, former Administrative Secretary to the Conciliation Boards Unit, on file with the author.

[17] See statistics on file with the Ministry of Justice.

[18] See Interview with Ratnasiri Wickremanayake, Junior Minister for Justice, on file with the author.

[19] See section 3(2) of the Conciliation Boards Act no. 10 of 1958.

Section 3(3) lists the local institutions and individuals who are competent to forward such recommendations. They include the "local authority, the Rural Development Society, Praja Mandalaya (Community Centre), the Co-operative Society, ... the District Revenue Officer, and the Grama Sevaka (Village Headman)". The only qualification that panel members should possess relates to residence within the local authority area. Public officers who worked in the area were, however, exempt from the residence requirement. Section 3(5) mandates that the Minister of Justice should take into consideration the recommendations he has so received in determining the composition of panels. One member of such a panel should be appointed Chairman by the Justice Minister.

The practice of the Conciliation Boards Unit in the recruitment of panel members has consistently been at variance with the statutory prescriptions that we have described above. Even when an administration was faithful to the formal procedures, it quite blatantly and consciously disregarded the spirit of local participation which underscored the statutory formula for recruitment. In the early years of the administration of the Act, Minister de Silva, ignoring the requirement of written recommendations, personally visited the local government area for the purpose of consulting the local residents on suitable appointees. Such consultations often took place at a public meeting, in the presence of government officials, local functionaries, and concerned citizens. The merits and demerits of possible appointees were quite openly and candidly discussed at such gatherings.[20] With the rapid increase in the number of panels constituted each week, such an informal system no longer became feasible. The Conciliation Boards Unit, in an effort to more systematically follow the dictates of the statute, bureaucratized and formalized the process of community consultation. Soon after the issuance of a Gazette notification of the intention to constitute a panel, "recommendation forms" were distributed by the Unit to all the local organizations and individuals mentioned in Section 3(3). The form, printed in all three languages, called for the following information about the nominee: full name, address, age, occupation, education,

[20] See interview with S. Canagarayar, Senior Assistant Secretary, Ministry of Justice, on file with the author.

income, wealth, an evaluation of his character, and his involvement in the social and cultural activities in the area. The forms were either directly transmitted to the local organizations or channelled through the nearest district revenue office. The local response tended to average from fifty to sixty nominations for each panel, and came from a wider class of organizations and individuals than that set out in Section 3(3). Several literary associations, religious groups, local political organizations and trade unions tended to submit recommendations on behalf of their members or other individuals. A few individuals have submitted applications on their own behalf, while some others have received the endorsement of more than one local group. In one instance a former Chairman of the Board nominated several persons in his village. No attempt is made to disregard those nominations which do not meet the statutory requirements, and one of the area specialists in the Unit is made to compile a master list of all the nominees with the details of their socio-economic backgrounds. This list is then forwarded to the appropriate district revenue officer for a report on the accuracy of the data and for an assessment of the character of the nominee. A police report on each nominee is obtained to ensure that he has no prior record of criminal activity or any other form of misconduct.

The district revenue officer is also required to forward in the order of priority, the names of three persons in the list whom he would consider suitable for appointment as chairman. Whenever the DRO exercises an independent judgement on this issue, he evaluates the educational qualifications of the nominee, his social status in the community, and the qualities of leadership that he has displayed as reflected in his involvement in the religious, social, and developmental activities of the region. The DRO's report often reveals the different weightage that he attached to each of these factors in reaching his decision.

The ostensible purpose of the new procedure established by the Unit was two-fold: (*a*) it was an attempt to declare to the public the Ministry's fidelity to the statutory requirement that the communities' views be given serious consideration in the recruitment process, and (*b*) it was an attempt to make out that objective criteria such as education, social standing and character are applied in the selection of panel members. In effect, however, these procedures tended to obscure the real

process through which the recruitment of conciliators takes place. As we have alluded to earlier, by the mid-Sixties the Justice Ministry had almost completely abdicated its statutory responsibilities as regards the constitution of conciliation panels to the Member of Parliament or the government party representative.[21] The government's parliamentary representative in the local area would often submit an independent list of names which was invariably rubber-stamped by the Ministry. To maintain the fiction of community consultation the list is added to the master list, and then forwarded to the DRO for police reports. This was partly because the MP's list would contain several names which would not be reflected in the recommendation forms. Sometimes the Unit would abandon the pretext of processing the forms, and forward only the Member of Parliament's list for the usual police report. Even the practice by which the DRO recommended the chairman of the panel, became subverted by the politicization of recruitment. Most of the DROs delayed the forwarding of recommendations until they had ascertained the Member of Parliament's choice for this position.[22]

In early 1972 an important change was effected in the recruitment procedures. The Junior Minister for Justice issued a circular eliminating the role of the DRO in the process, and requested each member of Parliament to assume responsibility for the good character of their nominees. This procedural change was justified as a measure designed to expedite the process of constitution. The circular also details the qualities which a conciliator should possess:[23]

> Persons to be appointed as conciliators should not have been convicted in a Court of Law. They should also be of good character and conduct. Further, . . . the persons proposed for appointment to a panel should be willing to be its members. They should be kind and honest persons who could act with impartiality and responsibility and are capable of making their settlements in a dispute acceptable. Therefore, it would

[21] See *supra*, Chapter IV, pp. 20-21.

[22] See interview with a District Revenue Officer in the Central Province, on file with the author.

[23] See circular issued by Junior Minister for Justice, to Members of Parliament on the appointment of Conciliators (1972), on file with the Ministry of Justice.

> be more desirable to name members so as to represent every ward in a local body where a Panel . . . is to be constituted. . . .
>
> You are also to inform me as to who should be appointed as Chairman of the Panel . . . it is not proper [however] to name Clergymen, Chairmen of Village Communities, V.C. members who are engaged in politics, and lawyers as Chairmen. . . .

The Junior Minister in a subsequent amplification of the statement felt that the most important quality should be that the member be of unimpeachable character so that he could throw across a suggestion and have it accepted. He considered it desirable that the panel's membership should reflect the entire spectrum of occupational categories in the community. He felt quite strongly that no educational qualification should be required of panel members, except that the chairman should be literate.[24]

As to what extent Members of Parliament adhere to the guidelines that the Ministry has formulated is controversial. The national press, the legal profession, public officials, and many members of the public have uniformly condemned this system, believing that Members of Parliament irresponsibly disburse appointments to the Boards as a form of political patronage.[25] Some of these appointees, they charged, have criminal records and lacking the procedural constraints of a court of law, misuse these positions of authority to either enrich themselves or to persecute their political opponents. Although these charges are not entirely without substance, they partly reflect the general cynicism towards radical institutional innovations which seem to be commonly shared by most nations which have recently emerged from a long colonial experience. Ministry records reveal that there are Members of Parliament who are most conscientious in the discharge of their responsibilities, and select with great care a panel of conciliators which is representative of the diverse ethnic, religious, and caste groups in the community.[26] These are a few instances in

[24] See interview with Ratnasiri Wickremanayake, Junior Minister for Justice, on file with the author.

[25] See *supra*, Chapter IV, pp. 20-21.

[26] But some lawyers have charged that most Conciliation Boards in poly-ethnic communities are primarily composed of the Govigama Sinhalese with no representation of other ethnic or caste groups in the area. See interview with the Proctors in the Teldeniya Circuit Court, on file with the author.

which chairmen of panels of proven ability have been reappointed by Members of Parliament of radically different political persuasion.[27] But such examples point to exceptions rather than the general norm, which is that even the more responsible parliamentarian tends to limit his choice of conciliators to a pool of his political sympathizers and supporters. The importance of politics in this process is clearly dramatized during change of governments, when a Cabinet directive is invariably issued to the Unit to reconstitute all Boards whose members are partial to the prior regime, on the ground that "they were found to be unsuitable".

There are, however, certain factors inherent in the task of conciliation which tend to shape and limit the choice of conciliators by even Members of Parliament. Ministry officials, in the continuous emphasis they place on the "social standing" of conciliators and their "capacity to require disputants to listen to them," point to an important aspect of the process of conciliation. The tribunal lacking the authority to issue a binding decree, is heavily dependent on the confidence it evokes in the members of the community, and in their willingness to respond positively to its conciliatory efforts. To be effective it should also be capable of mustering the social pressures of the community to require recalcitrant disputants to submit to and abide by the terms of settlement it proposes. In the villages social prestige and authority have traditionally been vested in the rural intelligentsia; the village headman, the school teacher, the ayurvedic physician, the incumbent of the village temple, and elderly cultivators. Such "traditional" elders continue to wield influence within the village and dominate local authorities, the rural development societies, the local religious and cultural associations.[28] The urban counterparts of these local elites were the headmasters of schools, the professionals, retired public servants and businessmen and traders. Despite the turbulent political and social transformations that have taken place at the national level, "traditional" conceptions of authority and patterns of social influence continue to persist at the local level. This was more so as it

[27] One such example would be the Battaramula-Talangama Town Council Board.

[28] See the Report of the Rural Development Evaluation Mission in Ceylon, United Nations, 1962.

pertained to judicial authority, where conceptions of a judge as one who was socially and culturally differentiated from other members of the populace, became crystallized as a result of several centuries of exposure to the colonial adjudicatory system. The persistence of such attitudes circumscribed the class of persons from whom Members of Parliament could recruit conciliators. A few efforts to place persons in the lowest levels of the social and caste order in Conciliation Boards have provoked strong reactions from other members of the community. The appointment of a fish vendor to an urban Conciliation Board provoked a confrontation between a disputant and the Board member, in which the former exclaimed "it is shameful that a vendor from the market place should pretend to administer justice!"[29] Similarly, a vegetable vendor, on being appointed as a conciliator, was discredited as a woman of low morals and was accused of being the mistress of a local politician. Again, an Assistant Superintendent of Police, when summoned to appear as the defendant before a Conciliation Board in the Kegalla district, was incensed to find that one of the members was a peon employed in his office.

Many parliamentarians, recognizing that persons of low social status would face many difficulties in discharging their responsibilities, appear to be wary of such appointments. This was very clearly reflected in a multi-caste district in the Central Provinces. From the time of the Kandyan kings the dominant caste in the district had been the high-ranking Govigama (cultivator) caste. The Rathemahathmaya, and the more important chiefs were drawn from this caste, and, since independence, the elective positions in the local authorities and the national legislature were occupied by Govigama persons. In 1965 an important change in the political power structure took place, when a person of the low-ranking Paddu caste supported by the socialist coalition, was returned as the local Member of Parliament. There was some speculation that the Member of Parliament may attempt to further consolidate the wresting of political power from the Govigama caste by appointing a person of the Paddu caste as chairman of the conciliation panel. A Govigama chairman of one of the Village Councils threatened that his "entire caste would rise up in anger" if such an appointment took place.

[29] See interview with chairmen of the Kandana Town Council Conciliation Board.

Despite such provocations, the Member of Parliament approached the problem with considerable caution. Although proclaiming himself to be the "champion of the oppressed people in the area," he candidly confirmed that the chairman of the panel should be a person from the "right social group and the right social class" if he is to be effective in the area. He therefore expressed a preference for the reappointment of the previous chairman, a member of the Govigama caste, although he had strongly opposed the former in the previous political campaign.

The continuing significance of traditional conceptions of social status, such as age, education, affluence, and high caste rank in the recruitment of conciliators is further demonstrated by an analysis of the socio-economic background of panel members. Table 4 indicates that conciliation panel members are structurally differentiated from the remainder of the population with respect to age, education, occupation, and possibly income. These differentiations become accentuated when one compares chairmen of panels with other members of society. Age is clearly an important differential; more than half the chairmen and more than a third of the panel members are above the age of fifty, while much less than a fifth of the population belongs to this age group. At the other end of the scale we find that while about three-fourths of the population is under thirty-five, much less than a third of the panel members, and a fifth of the chairmen have been drawn from this category. Panel members also have a much higher level of education. While only about 40 per cent of the population have secondary education, more than 90 per cent of panel members and 98 per cent of the chairmen have reached this educational level. It is equally significant that 37 per cent of the panel members and 52 per cent of the chairmen have educational qualifications equivalent to the senior school certificate (analogous to the high school diploma) and above. Only eight per cent of the nation would fall within a comparable category. The statistics on occupations are not strictly comparable since the national survey was limited to the distribution of occupations amongst the "employed" population, and no category equivalent to "traders and businessmen" is available in the breakdown of occupational groupings. Nonetheless, a few cautious and tentative inferences may be drawn from these tables. Although

80 per cent of the employed population constitute the "working class" (labourers) and the rural peasantry, only 34 per cent of the panel members and 15 per cent of the chairmen have such "proletarian" backgrounds. The high concentration of panel members and chairmen is amongst the socially prestigious, professional, managerial and commercial groups. In the rural areas, conciliators tend more frequently to be teachers, traders, and the more affluent landowners and cultivators. In the urban areas, teachers, businessmen, clerical workers, and retired public servants constitute a major proportion of panel members (see Tables 6 and 7). A comparison of the incomes of panel members with that of other members does not reveal many significant differences, except that very few persons from the lowest income groups have been appointed to conciliation panels. The income differential assures a much greater significance when one considers the chairmen of panels; where almost 40 per cent of the chairmen have an annual income exceeding five thousand rupees, while the comparable national figure is less than 20 per cent.

Before we end this section we should refer to another function of the Conciliation Boards Unit related to its responsibility to constitute panels and recruit conciliators; namely, its duty to reconstitute panels whose tenures of office had either expired with the effluxion of time or were otherwise terminated as the result of a ministerial directive. This is one area in which the performance of the Conciliation Boards Unit has been the focus of a barrage of criticism from the legal profession and the general public.[30] The time gap between successive Boards sometimes runs into several years causing great confusion and disarray in the legal relationships between disputants. Complaints which had not been processed by the defunct Board on the expiration of the panel's term, became "frozen" with little or no prospect of an early disposition. Moreover, the "touts" and "the village proctors" quickly exploited the interim period to cajole the villagers into directly filing plaints in the regular courts of law. Minor disputes and controversies which would normally have been promptly and effectively dealt with by these Boards, tend to fester and to become aggravated,

[30] See interview with Proctors in the Teldeniya Circuit Court, on file with the author.

precipitating violence and other dire social consequences which the statutory scheme was designed to avoid. The social structure was not, however, without its own corrective, and the dormant process of social control (such as the rural development society) would probably become reactivated to fill in the institutional vacuum. The local functionaries such as the headmen and the police would probably intervene more frequently and promptly to resolve disputes and controversies and to maintain the peace. Eventually, most of the disputes processed by the Boards may be channelled to different remedy agents in the community. Nonetheless, the long delays in the reconstitution of Boards are disruptive of the settled patterns of conflict resolution in the community, and are particularly costly in the degree to which they erode public confidence in the system of statutory conciliation.

III

We may now focus on a different technique of central control, namely the organization of "orientation meetings". The proclaimed objective of such meetings is pedagogic, i.e., to instruct panel members on the nature of their statutory powers and to provide them with some guidance on how they should approach their tasks as conciliators, and to inform the public of the general purpose of the Act and of some of the benefits of statutory conciliation. Observations of such a meeting in Wenderuva Korale in the Teldeniya district revealed that the "orientation meetings" also serve certain "symbolic" and "political" purposes.[31]

The scheduling of an orientation meeting is often handled by the area specialist in the Conciliation Boards Unit in consultation with the local Member of Parliament and the Junior Minister for Justice. If the Minister for Justice or some other Cabinet Minister has a special interest in the region in which the Board is located, every effort is made to accommodate their convenience in fixing a date for the meeting. All government officials in the region, including the district revenue officer, the officer in charge of the police station, and the chairmen of all

[31] For a complete transcript of the proceedings of such an "orientation meeting" see Report on the "orientation meeting" of the Conciliation Board in Wenderuva Korale, on file with the author.

local authorities are also informed in advance of the date and venue of the "orientation meeting".

The orientation meeting is often held in the premises of a public building, such as the government secondary school or town hall. A *pandal* is constructed at the entrance of the building, and decorated with palm leaves and the white inflorescence of the coconut tree. The national flag and the blue and red flags of the socialist coalition are displayed prominently in various parts of the building. Traditional motifs, handwoven with shredded coconut leaves adorn the walls of the central hall, while the ceilings are covered with multi-coloured paper crepes. The air is filled with the blare of popular film music, which is occasionally interrupted to permit a chorus of school-girls to sing folk songs through the public address system. The building is filled to capacity with the residents of the surrounding villages, including the elderly and the womenfolk. Younger children play their games in the large compound adjoining the building, uninhibited by and unconcerned with the ceremonies and proceedings in the central hall. All the village functionaries, the chairmen of the panel, and other prominent individuals congregate quietly at the entrance awaiting the arrival of the Ministry officials and the Member of Parliament.

The explosion of fire-crackers announce the arrival of the Member of Parliament who is ceremoniously greeted by the chairmen of the panel and by other public officials, and after the ritual lighting of an oil lamp, is conducted to a platform amidst enthusiastic greeting by members of the assembly. After a brief religious observance, the meeting is called to order by the Member of Parliament who functions as the Chairman of the Assembly. The Ministry officials are then introduced to the public and the administrative secretary is invited to commence the official business of issuing instructions to the newly appointed panel of conciliators. The talk by the administrative secretary is primarily directed towards the conciliation panel, accommodated in the front rows of the Assembly, who are in turn most attentive, asking questions at the end of the talk or taking notes for future reference. The administrative secretary begins by recounting the history of the Conciliation Boards Act. He points out that this salutary piece of legislation was introduced by Justice Minister M.W.H. de Silva of the first Bandaranayake government. He then reaffirms the revivalist

argument that the scheme was modelled on the traditional Gamsabhavas, and the village panchayats of India. He emphasizes the primary importance that the present government attached to the implementation of the scheme and outlines the Conciliation Boards Unit's proposals towards the expansion of the operation of the Act in urban and rural areas.

The administrative secretary then placed strong emphasis on what he perceived to be fundamental differences between the Conciliation Boards and the courts of law. "The Conciliation Boards are not courts of law," he argued, "they inquire into cases not according to law, but according to what is fair and just." He then restated and explained some of the statutory provisions relating to territorial and substantive jurisdiction, the filing of civil complaints by disputants, the role of the Grama Sevaka and police in the referral of criminal complaints, the issuance of summons, the constitution of Boards, the quorum stipulated by the Act, and the circumstances under which the tribunals' contempt process should be invoked, and the procedure for transmitting settlements to the court and for issuing Section 14 certificates. He then issued a series of guidelines on matters of jurisdiction and procedure on which the Act was silent and thereby, without legal authority, further limited the leeway available to conciliators to define their own procedures.

Firstly, he directed the panel not to inquire into the following class of cases: (*a*) tenancy disputes involving the Rent Restriction Act; (*b*) agricultural disputes under the Paddy Lands Act; (*c*) all disputes in which the state is a party or could otherwise be the subject of inquiry; and (*d*) all divorce cases, except where its efforts are directed towards the restoration of the matrimonial home. He also enjoined conciliators to refrain from accepting any money in trust for the disputants. Survey fees, for instance, should not be channelled through the Board, but be paid directly to the surveyor. Secondly, he directed the conciliation panel to use printed "forms" released by the Ministry for the purposes of issuing summons, recording settlements and Section 14 certificates, and maintaining a register of the work of the panel. The use of these forms requires compliance with many procedures which go beyond the dictates of the statute. The forms on the summons, for instance, are directed towards formalizing the procedures of the panel to such an extent that they would in this

respect be analogous to that of the courts of law. The register maintained in duplicate, also serves as a monthly return which enables the Conciliation Boards Unit to monitor the progress of each panel and thereby compute its annual statistics. The Unit also indirectly compels each panel to file its monthly return, by insisting that the payment of the clerical allowance would be contingent on the receipt of returns.

Thirdly, the administrative secretary directed the panels to conduct their proceedings in public places, such as schools, temples, and rural development society halls. All headmasters of schools had been directed to make their facilities available for such proceedings. The panels were also requested to hold these inquiries on government holidays, Saturdays and Sundays. The chairmen were informed that they should abide by the government policy against the conduct of any public business on monthly *poya* days (days of religious observance for the Buddhists). The panels were further advised to permit the public to be present during the proceedings so that they may cooperate in holding the inquiries.

In addition to these specific directives, the administrative secretary also addressed the panel on how it should generally approach the task of conciliation. He said: "Inquiries should not be conducted in the way disputes are processed by a court of law, but should be undertaken with patience and kindness." He warned the panel not to coerce parties into accepting a settlement dictated by the Board, but to persuade them, through discussion, to reach a reconciliation of their differences. He reminded the panel that it had no power to impose fines.

He finally set out certain ethical principles which should guide the work of conciliators: "Conciliators should confine the discussion of complaints filed before them to the proceedings of the panels. No disputant should be encouraged to visit the chairmen or any member of the panel in their homes for the purpose of discussing the case. Conciliators, while visiting the scene of a dispute or undertaking the partition of a land, should not accept any travel or other expenses from the parties."

Although the more general observations of the administrative secretary would seem to distinguish the task of conciliators from that of judges, the thrust of his talk was directed towards introducing much greater formalism, procedural regularity, and central regulation in the workings of the panel.

The ethical postulates in turn were designed to require conciliators to adopt a posture of judicial detachment and adhere to the values of even-handedness and impartiality which are believed to characterize the formal adjudicatory processes.

The administrative secretary also directed a few remarks to the general public on some of the benefits of statutory conciliation. He deplored the delays and the expenses that litigants are subjected to in the regular courts of law. The statutory Conciliation Boards would, on the other hand, provide a cheap and expeditious forum for the resolution of local conflict, and yet avoid the enmity and bitterness which are engendered by litigation. The Boards, he concluded, would restore amity in the area and reconcile feuding factions in the community so that, united, they may confront the developmental problems of the area.

Besides educating the panel and the public, the orientation meeting also serves a "symbolic" purpose. It symbolizes, in the ceremonies associated with the formal award of letters of appointment to members, the dual sources from which the Conciliation Board draws its authority. The award of formal letters of appointment by the administrative secretary had the effect of reminding the conciliators that they derived these powers from the state, and that they were the officers of the state in the discharge of their statutory responsibilities. The law enforcement agencies, the state courts, would enforce their settlements and punish anyone who acted in contempt of their powers. The conduct of the appointment ceremonies in a social gathering of the people of the area in which the Boards were to operate also reminded the conciliators that their ultimate authority and effectiveness rested on the consensus of the community. The administrative secretary impressed upon the panel members that the powers rested in them were to be held in trust for the welfare of the people in the area. He advised the members that they should from now on "lead exemplary lives to maintain the respect and the confidence of the community". This statement was quickly followed by a strong appeal for public support by the new chairman of the panel. The expression of community support signified by the presence of the chairmen of local authorities, public officials, Grama Sevakas, and village elders during the proceedings, was more explicitly reaffirmed when each of these persons delivered a statement expressing their

approbation of the constitution of a conciliation panel in their local area.

After the speeches of the chairman, the leaders of the community and the public officials, the orientation meeting reached a climax with the address of the Member of Parliament. The thrust of his remarks were directed towards an emphasis of the policy underlying the Conciliation Boards Act, and its relationship to the political ideology and the socio-economic programme of the socialist coalition. One of the objectives of this legislation, he argued, was to conserve the essential unity and integrity of the villages. He therefore urged the panel to eliminate dissension, factionalism, and strife arising from the clash of conflicting economic and social interests in the community. To do so, the panel must approach its tasks without any racial, religious, caste, or party bias. The government attached high importance to the ideal of national unity, and also recognized that a consolidation of the feuding social groups in the country was vital to its development programme. He reminded the panel that its efforts to reconcile inter-personal differences had an important bearing on the implementation of the Five Year Plan and the government's efforts to "liberate the nation from the economic domination of foreign countries". He concluded his talk by calling upon the panel "to eliminate misery and to let justice prevail".

At the conclusion of the proceedings, the public officials, panel members, and community leaders retired to an anteroom to consume some soft drinks and light snacks contributed by the residents in the area. The chairman of the panel then invited the Member of Parliament, public officials, and village dignitaries to join him in a feast at his residence. A sumptuous meal with several courses was consumed by this group. The feast was concluded by the Member of Parliament thanking the chairman for this gracious hospitality and complimenting the women in the household on their culinary skills.

It is important to note that the sociological significance of the "orientation meeting" was not limited to the pedagogic, symbolic and political purposes that we outlined above. The meeting was also a social gathering of the people in the adjoining villages, conducted in an atmosphere of festivity and gaiety, with traditional decorations, music, songs, and feasting. In this sense it was reminiscent of the proceedings of the Rata

Sabhava. Its atmosphere also sharply contrasts with that of the ceremonial opening of the criminal sessions of the Supreme Court.[32] The proceedings of the latter were characterized by the solemnity and gravity of a formal state ceremony, with the government fiscal handing over a list of prisoners to a judge garbed in scarlet robes and a powdered wig, with black-robed advocates and rows of prisoners assembled before him. The imposing ceremony is concluded with a fanfare of trumpets and the firing of guns by a cavalry of policemen. This spectacle was intended to impress the public with the majesty of the law and to instil reverence for the processes of the courts of justice. It recalled the symbols of a colonial past and the forms and ceremonies of an alien legal order. On the other hand, the "orientation meeting" was directed towards the demystification of the "law" and inculcating in the public a sense of participation in the administration of justice. Its symbols were "indigenous" and it reaffirmed the folk-ways and traditional practices of the villages.

IV

Unlike many similar statutes, the Conciliation Boards Act made no provision for the review or co-ordination of the work of individual Boards. The Conciliation Boards Unit, however, soon evolved into an "appellate tribunal" exercising many of these supervisory functions. There are two types of situations in which the Unit is called upon to supervise conciliation panels. The first relates to requests for information or guidance from the chairmen of panels or other public officials associated with the work of such panels. The second refers to complaints or petitions for redress from discontented disputants. We may now turn to each of these situations to examine the types of problems that come before the Unit and the nature of its response.

Firstly, we have noticed that the only guidance chairmen of panels receive on how they should organize their Boards or approach the task of conciliation is contained in the statute and the oral instructions that they receive from the administrative secretary at orientation meetings. Although this orientation is quite detailed and specific, there are many areas in which no

[32] See section 28 of the Courts Ordinance no. 1 of 1889.

guidance is provided, and the board is left to define its own procedures. And again, unless the chairman has taken care to keep notes of the secretary's instructions, he may need re-clarification of some of these points. A manual compiled by a former administrative secretary detailing the problems normally encountered by chairmen of panels, was never publicly released by the Ministry.[33] Ministry officials expressed concern that doubts about the legal status of the manual could lead to further disputation and litigation against conciliation panels for failure to comply with its provisions.[34] Even in areas where Ministry policy encourages chairmen of panels to determine their own procedures, some chairmen have been most hesitant to innovate on these matters. They have correspondingly tended to lean heavily on the Unit for guidance on almost every phase of their conciliatory work. This has resulted in the Conciliation Boards Unit becoming the focus of an incessant demand for advice on a wide range of questions.

Often the request is for a clarification of the jurisdiction on the Boards, "Can the tribunal inquire into a dispute arising outside the limits of the local authority area?" a chairman of a rural panel inquired. The Unit advised him in the negative drawing his attention to the relevant statutory provision. Sometimes the issue was less clear-cut. A chairman wrote that while both the disputants resided within the village council area, the land which was the subject matter of the dispute was located outside its limits. The Unit interpreted Section 6(a) to exclude the jurisdiction of the Board in this case. The frequent applications for divorce, judicial separation, alimony, and other forms of matrimonial relief caused considerable confusion amongst chairmen of panels. Most chairmen were disposed to inquire into these applications, but were doubtful as to whether they had the authority to sever the matrimonial bond, to fix the amount payable as alimony, or pronounce on questions of custody. Strict interpretation of Section 6(b) would include matrimonial disputes as being within the competence of Conciliation Boards, provided whatever determination the panel reaches is based upon the consent of the disputants.

[33] See manual compiled by T.G. Siriwardena, on file with the Ministry of Justice.

[34] See interview with Nihal Jayewickrema, Permanent Secretary, Ministry of Justice, on file with the author.

Ministry policy, however, favoured the exclusion of this class of cases from Conciliation Boards, and the directives to chairmen on matrimonial jurisdiction invariably reflected this policy.

There were also many requests for clarifications of the precise functions of the police and the Grama Sevakas in the work of the Conciliation Boards, and the relationship of the Board to these public officers. Some of these inquiries were initiated by the police or government agents and raised important questions of policy. One government agent inquired whether the Grama Sevaka was obliged to disclose to the Board his confidential notes on inquiries conducted by him. This matter was referred by the Unit to the Ministry of Home Affairs for a policy directive to be issued in consultation with the senior officials of the Ministry of Justice. A chairman of a panel, on a query initiated by him, was advised to inform the police on the disposition of criminal complaints filed by them. Detailed guidelines were also provided at the request of a panel, on how Grama Sevakas should execute and return summons.

A number of procedural difficulties proved intractable to some of the chairmen. It became common practice for a plaintiff in a dispute to obtain a Section 14 certificate but take no further steps to file a plaint before a court of law. Such a strategy was aimed at wearing down the defendant, since the latter could not, of his own, have the dispute disposed of by a court. This was clearly a loop-hole in the statute, and the Unit formulated a pragmatic solution to the problem by directing the Conciliation Board to issue a Section 14 certificate to the defendant. Non-compliance with summons was another issue which troubled conciliators. Although they were willing to institute contempt proceedings against a defendant who fails to answer a summon,they were unclear as to how they should proceed against a complainant who had failed to attend the proceedings of the Board. The Conciliation Boards Unit advised the Board in such instances, to strike the complaint out of its roll.

The second technique for invoking the intervention of the Conciliation Boards Unit was through the petitions of discontented disputants. They were usually addressed to the Unit. Sometimes a villager who seeks immediate redress from some injustice that he has suffered from a Board would direct the petition to the Prime Minister, who would refer the matter to the

Unit.[35] It was also common to channel such petitions through the local branch of one of the socialist political parties, or through some other local organization. The petitions were often handwritten and presumably drafted by the disputant himself or some other literate villager. Sometimes they were typed, and conformed to the form and language of an appeal petition to a court of law. Such petitions were probably drafted by a professional petition-writer, court clerk, or scribe who frequently handled such matters in the precincts of the provincial courts.

Most of the petitions contain some specific or general charge of impropriety against some or all of the panel members. The charges range from "personal enmity," "conflict of interest" arising from one of the members being a party to the dispute or having some other proprietary interest in its outcome, or "political bias", to a more general allegation of "immorality" which deprives the conciliator of any capacity to hold an objective inquiry. The petitions further charged that as a result of the above prejudices and moral infirmities, the chairmen adopted a variety of tactics to harass the parties, and thereby denied them the benefits of statutory conciliation. The tactics included deliberate efforts to postpone and delay the holding of an inquiry, attempts to coerce parties to accept settlements which were blatantly prejudicial to their interests, and persistent refusals to issue a Section 14 certificate. Sometimes the complaint was that the Board, due to either indifference or hostility to one or more of the parties, failed to make a serious and conscientious effort to inquire into the merits of the dispute and bring about an acceptable settlement.

The response of the Conciliation Boards Unit was to give the most serious consideration to each of the petitions so received. The area specialist took immediate steps to communicate the substance of the charge to the chairmen of the panel, and directed him to furnish a report. If any specific charges of criminal misconduct or acts of immorality were contained in the petition, the local police or the district revenue officer were directed to investigate such charges. On receipt of the chairmen's report the facts of the dispute and the complaint were

[35] See *Petition by S. Hapuratchi*, regarding a boundary dispute before the Gandahya South Counciliation Board, on file with the Ministry of Justice.

carefully reviewed by the area specialist and the administrative secretary. If additional information were required, or if some difficult questions of policy were involved, the chairmen and the contending parties were summoned to attend a formal inquiry in Colombo. At the end of the inquiry the administrative secretary issued an order, which invariably affirmed the position taken by the panel. But sometimes he would direct the Board to hold a fresh inquiry, or to take some procedural step which the Board seemed reluctant to perform. The following representative cases are illustrative of this process. The first case refers to an order from the Unit compelling the Chairman to hold a re-hearing:[36]

> The plaintiff Menika, and the defendant Premadasa were the co-owners of an undivided plot of land. The plaintiff complained to the Conciliation Board that the defendant had unlawfully and illegally entered into his land and cut trees to the value of Rupees 360. Menika claimed damages for this amount from the defendant. The defendant conceded that he had cut the trees, but claimed he had a legal right to the land since he had obtained half the property from his parents by way of inheritance. Besides, he had cut the trees since they were in imminent danger of collapsing on his house, and he was therefore not liable to pay any damages. The Board, having inquired into the dispute, issued a Section 14 certificate to the plaintiff.
>
> Menika petitioned the Conciliation Boards Unit that a proper inquiry had not been conducted and that the Board had deliberately refused to settle the case. He alleged that the defendant Premadasa was an inveterate enemy of his, and had participated in the deliberations of the Board. He further charged that the Board had not been properly constituted since it did not have the quorum stipulated by the statute.
>
> Meanwhile, the Conciliation Boards Unit received a further petition from one Nandasena alleging that Premadasa was unfit to serve on the Conciliation Board. Premadasa was a strong supporter of the right-wing political party and misused his statutory powers to harass his political opponents. He was a person of bad character who publicly

[36] See Petition by E.J. Menika regarding a land dispute before the Meda Dumbara Palispattu Conciliation Board, on file with the Ministry of Justice.

maintains a "mistress" and instigates false complaints against his enemies before the Conciliation Board.

The Conciliation Boards Unit called for a report from the Chairman of the panel and directed the DRO to investigate the charges against Premadasa. The Chairman denied that no proper inquiry had been conducted and furnished the Unit with a transcript of the proceedings. The DRO reported that while it was rumoured in the village that Premadasa had a mistress, no further details could be obtained. Premadasa, meanwhile, addressed a memorandum to the Unit denying any impropriety or misconduct on his part. He insisted that he was one of the original members of Sri Lanka Freedom Party's Youth League (a constituent of the socialist coalition) and that he had performed exemplary services to the Conciliation panel and to several Community organizations.

The Administrative Secretary, having carefully reviewed the above facts, directed the Board to hold a fresh inquiry into the dispute. The Chairman was told to exclude Premadasa from the Board when the inquiry was conducted.

In the second case, the Conciliation Boards Unit proposed a formula for the settlement of the dispute:[37]

Leelaratna filed a complaint against the defendant for damages before the Devinuwera Town Council Board. He claimed that a coconut tree belonging to the defendant had fallen on his house and caused extensive damages. The Devinuwera Board, having failed to reach a settlement, issued a Section 14 certificate.

The complainant petitioned that the Board being composed of the relatives of the defendant, had not afforded him a fair hearing and had imposed an "unjust decision". He further complained that he continued to suffer damages since no steps had been taken by the defendant to remove the coconut tree from his premises. On the receipt of the Chairman's report, the Unit ordered a new inquiry into the dispute and urged the Chairman to propose that the defendant undertake to cut the tree from the premises of the plaintiff in lieu of the payment of damages. The Unit also wrote a letter to the

[37] See Petition by C.W. Leelaratna regarding a claim for damages before the Devinuwera Town Council Conciliation Board.

complainant urging him to co-operate with the panel in reaching a settlement.

The Chairman reported back to the Unit that the new efforts to reach a settlement had proved abortive.

The next case refers to a directive by the Unit to issue a Section 14 certificate, while an inquiry was pending before the Board.[38]

Agnes Nona had filed a complaint before the Village Council Conciliation Board, claiming damages caused to her property by the negligence of the defendant. The plaintiff had leased her land and the buildings on it to the defendant for a period of ten years. As a result of the negligence of the lessee a tea factory on the premises was destroyed by fire causing her a loss of two hundred thousand rupees. She petitioned that the Chairman of the Board had repeatedly rejected on various pretexts her pleas for a Section 14 certificate. The inquiry had been pending for several months as a result of the dilatory tactics of the defendant and the connivance of the Chairman. The Unit directed the Chairman to immediately issue a Section 14 certificate.

We may end this chapter by drawing the following conclusions on the relative domains of centralized regulation and local control in the organization of the statutory conciliation scheme in Sri Lanka. We began our analysis against a statutory framework which strictly circumscribed the role of the central legal apparatus to well-defined spheres of constitution and recruitment, and conceded to the conciliation panels almost complete autonomy in the definition of their own procedures or in the application of normative standards to dispute. Our review of the operation of the scheme, however, revealed a fundamental shift in the delicate balance between central control and local management worked out by the framers of the statute. In the domain of recruitment, the concept of community consultation had been completely undermined by a total abdication of the selection of conciliators to the Member of Parliament or the party representative. The spheres of central control became multiplied in the employment by the Conciliation Boards Unit

[38] See Petition by Agnes Nona regarding a claim for damages before the Moravaka Village Council Conciliation Board, on file with the Ministry of Justice.

of a variety of techniques to regulate conciliation panels. Such techniques included the issuance of general and specific directives on the processing of disputes at "orientation meetings," the distribution of "printed forms" on the summons, and settlements, and the monitoring of monthly returns. We also noted that in its function as an "appeliate tribunal", the Conciliation Boards Unit supervised the processing of disputes by Boards and reviewed specific dispositions at the insistence of aggrieved parties. The erosion of the procedural autonomy of conciliation panels was compounded by the imposition (without statutory authority) of limitations on their substantive jurisdictions.

In examining the scope and mechanics of central regulation we are also sensitive to some of the contradictions and tensions in the implementation of the Conciliation Boards scheme. Firstly, although the ideologists of the socialist conciliation rationalize the Conciliation Boards Act in national policy statements as an expression of the state's participatory ideology, the revivalist perspective continues to influence the public statements of the lower echelons of the Justice Ministry and the officials of the Conciliation Boards Unit. Secondly, the Conciliation Boards Unit adopts the public posture that there is a fundamental difference between the courts of law and the Conciliation Boards in their procedure, style, the norms they apply, and their approach to conflict. Such a distinction is vividly conveyed by the gaiety, festivity, and elements of community participation that characterize the inauguration of a conciliation panel, in contrast to the imposing solemnity of a ceremonial opening of the Criminal Sessions of the Supreme Court. But despite such a public posture, the effect of the "printed forms," procedural directives, and ethical guidelines issued by the Conciliation Boards Unit is to blurr these distinctions. They appear to be directed towards formalizing the procedures of these panels, and judicializing their approach to conflict.

Thirdly, although high Justice Ministry officials have advanced the position that good character should be the critical and perhaps the only relevant differential in the appointment of conciliators, a statistical analysis of the socio-economic background of conciliation panels leads us to conclude that conciliators are, in fact, socially and culturally differentiated from

the remainder of the population. Such differentiations point to the reluctance of even Members of Parliament to defy deeply-rooted traditional conceptions of authority, and "colonial" ideas about judicial capacity in the recruitment of conciliators.

VI The Process of Statutory Conciliation

"He abused me, he beat me, he defeated me, he robbed me — in those who harbour such thoughts hatred will never cease."

— *The Dhammapada*, verse 3.

"Where is your cause of action? You must have a cause of action!"—Chairman of Conciliation Board in Panadura to litigant making oral complaint.

I

In Chapter V we drew attention to certain tensions in the implementation of the statutory Conciliation Boards scheme. We pointed out that although the authors of the Conciliation Boards Act had hoped to set up a model of conflict resolution which was fundamentally different (in form, procedures, and powers) from that of the courts of law, the overt acts and directives of the Conciliation Boards Unit (despite official rhetoric to the contrary) had the effect of narrowing down the differences between the two institutions. Our concern in this chapter would be to consider the degree to which such tensions persist in the processing of disputes by specific Conciliation Boards. With this objective in view we shall examine the procedures, the rules of evidence, the different techniques of argumentation adopted by conciliators, the various types of social pressure applied by them in the reconciliation of disputants and the types of normative standards deemed to be relevant to the disposition of disputes by these Boards. Such an inquiry would also illuminate one of the central themes in our study, namely, the continuities and discontinuities between the traditional Gamsabhavas and the statutory Conciliation Boards. This chapter is primarily based on an observational study of the Palispattu East (Meda Dumbara) Rural Conciliation Panel in the Teldeniya district in the Central Provinces.

II

The Palispattu East Conciliation Board was located in the Central Highlands, about twenty miles from Kandy, the principal city in the Central Provinces. It served a local

authority area encompassing about twenty square miles and including ten Grama Sevaka divisions. The population was about twenty-five thousand, and was predominantly Sinhalese and Buddhist. There were large pockets of Indian Tamil estate labourers in most of the Grama Sevaka divisions who were employed in the tea and rubber estates in the area. There were some Ceylon Moors concentrated in a village adjoining Teldeniya town. The Sinhalese population was multicaste, with the Govigama and the Paddu as the dominant castes in the area. The occupations of the residents were predominantly agricultural, with most of the villagers engaged in paddy cultivation. There were some tobacco crops in the area. The literacy level was generally high, although slightly lower than the national average. Teldeniya town, located in the outskirts of the local authority area, was the commercial centre for the area, where the villagers congregated once a week to sell their products at the "fair" and to purchase some of their household needs. It was also the seat of the central government offices, the high school, government hospital, and a few shops and eating houses. A rural court president and a district court judge would conduct a circuit court each week on successive days. A police station headed by an inspector of police was responsible for the maintenance of law and order in the district.

Palispattu East was probably one of the *korala* divisions in the Dumbara Province in the Kandyan kingdom, and it persisted as an important administrative unit under British rule. In the post-independence period the application of somewhat different principles of territorial devolution reduced the significance of Palispattu East as an administrative unit. The *korala* division was abolished and each province was divided into different revenue districts, which were in turn sub-divided into Grama Sevaka divisions. A different principle of sub-division was applied for electoral purposes. Each province was divided into different "electorates" for parliamentary elections and into various "local authority areas" for local government elections. Palispattu East became transformed from an administrative unit into an electoral unit for local government elections under the new system. Although the "Palispattu East Village Community" had been vested with statutory powers to levy certain taxes and to undertake construction or perform public services for the benefit of the villages, for most villages the focal point of

power and administrative authority remained with the Grama Sevaka. He was the government functionary responsible for the distribution of the ration books through which they received their social benefits, for issuing identity cards and performing numerous other administrative tasks on behalf of the government in rural areas. He was also responsible for the policing of the villages and for the resolution of rural conflict. The Grama Sevaka division and not the local authority area was the primary unit of administrative organization in the district. It is also important to note that the local authority area had a diverse social composition and encompassed a fairly large territory. Some of the villages were separated by almost ten miles of mountainous terrain, and their inhabitants rarely interacted with each other. The disenfranchised estate labourers segregated from the remainder of the population in estate lines constituted a distinct social and cultural entity. Absent the cementing forces of close caste and kinship bonds or the co-ordination of a hereditary overlord or powerful administrative authority, Palispattu East clearly lacked the social cohesiveness that characterized the *gama* of the Central Highlands or the *rata* of the Nuwerakelaviya district in traditional Ceylon.

The conciliation panel had nineteen members, who represented most of the villages in the area. It derived its personality, however, from its very articulate and energetic chairman, an elderly Govigama Sinhalese. The chairman had a long career as an educationalist, the last ten years of which were served by him in the Teldeniya district. He was now active in the co-operative movement and in other social organizations, and continued to enjoy the confidence and esteem of the villagers who respectfully addressed him as the "school master". Although he was extremely conscientious in his attention to the details of his statutory responsibilities and had a remarkable sense of civic consciousness, he was an authoritarian figure who clearly enjoyed the exercise of power. His fiery temper and intolerance of any person who may seem to question his authority antagonized some, who complained to the Conciliation Boards Unit about the manner in which he conducted his inquiries.

We shall now turn to the different stages in the processing of disputes by the conciliation panels so that we may be attentive to the various roles that are contained in the dispute process, the

different actors who assume these roles, and the degrees of formalism in their performance.

The first stage in activating an inquiry by a conciliation panel involves the filing of a complaint. Often, however, such complaints are initially screened by other local remedy agents such as the Grama Sevaka, the police, the cultivation committee, and the rural development society (if one was effective). Disputants were directed to the conciliation panel only if such remedy agents were unable to reach an amicable settlement. In the case of criminal cases the Conciliation Boards Unit directed the panel to inquire into only those complaints which had been referred to the chairman by the police or the Grama Sevaka, thereby mandating a preliminary inquiry by these remedy agents. The complaints received by the chairman of the panel then fell into four different categories: (*a*) criminal complaints on referral from the police; (*b*) criminal and civil complaints on referral from the Grama Sevaka; (*c*) complaints filed directly by disputants; and (*d*) complaints filed by Goda-perakadora (village proctors) representing themselves or others.

No printed forms were issued by the Unit for the recording of complaints. As a result the complaints in each of these categories varied substantially from each other, in format, in language, and in styles of draftsmanship. The police complaints conformed to a format issued by police headquarters and resembled the indictments issued in the magistrate courts. They succinctly noted the name and address of the complainant, the names and addresses of the respondents and witnesses, the particulars of the offence, and the name of the Grama Sevaka through which process should be served. There are two sets of circumstances in which the Grama Sevaka tends to refer complaints to the panel. The first situation refers to those criminal cases which he has failed to resolve amicably and which he is obliged under administrative directive "to prosecute" before the conciliation panel. The second situation refers to those civil cases in which one of the disputants solicit his assistance in the drafting of the written complaint. The Grama Sevaka's complaints also tend to be precise and terse providing very few details other than the names and addresses of the parties and the subject of their dispute. The quality of the complaints received directly from disputants varied with their levels of literacy and education. They generally take the form of

an informal letter addressed to the chairman, which is often scrawled in pencil on a piece of paper torn out of an exercise-book.

The last category of complaints differ substantially from the others in language and style. They replicate the format of civil pleadings in their organization, in the use of formal modes of addressing the panel, in their detailed statement of the distinct causes of actions, and the types of and form in which relief is claimed. A list of witnesses and details of documents such as deeds, supportive of the complaint, were also appended to it. Such complaints are drafted by a class of persons who are popularly referred to as Goda-perakadoras. The village proctor does not have a formal training in the law but is one who performs or has performed some role in the processes of the courts of law as either a court clerk, bailiff, proctor's clerk, petition-drafter, or even as an "experienced litigant". Through such exposure to the courts of law, they quickly mastered its procedures and forms and acquired some familiarity with legal principles and rules. In the village they were reputed to be persons knowledgeable in the law and were frequently consulted by villagers on their legal problems. Some of them served as "touts" and introduced potential litigants to the proctors in Teldeniya or Kandy, and received a "fee" for their services. Others liberally dispensed "legal" advice or drafted pleadings and other legal documents with a view to acquiring prestige and exercising influence within the community. The "village proctors" assume special significance in our study because they are what we may describe as "legal amphibians", in that they assume roles in both the processes of the courts of law and in the processes of the statutory Conciliation Boards. For this reason they are the carriers of "legal culture," from one model of conflict resolution to another, i.e., they help transmit the techniques, the role conceptions, values, and forms of the "specialized adjudicatory" system to the "popular conciliatory" system. One symptom of the involvement of village proctors as either disputants or pleaders to disputants in the work of conciliation panels, is the infusion of the formalism of court pleadings in the phraseology of some of the complaints.

All the complaints received by the chairman are carefully numbered, dated, and filed by him in separate file-covers. These particulars are simultaneously entered into a register of

complaints, and summons issued immediately to the defendants. No effort is made by the chairman to scrutinize the complaint to determine whether it relates to a dispute or crime within the panel's statutory competence. As we have noted earlier, the Conciliation Boards Unit issued printed forms and directives to supplement the statutory procedure on the service of summons. The chairman who preserved a written copy of the instructions recorded at the "orientation meeting" and other written directives by the Unit, carefully adhered to these administrative guidelines on the service of summons. The statute recognized a limited degree of functional differentiation within the dispute process by decreeing that summons should be served either through the fiscal or the Grama Sevaka. It was the latter, however, who was the effective "server of processes" in Palispattu East and other rural conciliation panels. No stamp fees were payable for the summons, or for any pleadings or other processes filed before or issued by conciliation panels.

The chairmen of conciliation panels were authorized by the Conciliation Boards Unit to appoint a secretary to attend to the clerical work associated with the issue of summons, and the maintenance of registers and other records. A small clerical allowance of fifty rupees per mensem was provided as compensation for the secretary. No such secretary was, however, appointed by the Palispattu East chairman who assumed the roles of "court clerk" and "record keeper". A small room in his house was converted into a "record room," and "case records" were carefully catalogued and neatly stacked upon a table.

We may now look at the physical environment in which the proceedings of the conciliation panel were conducted. The conciliation panel met every Sunday at 9:30 a.m., usually on the top floor of the Teldeniya Multipurpose Co-operative Society. The chairman relied on his personal contacts in the co-operative movement to arrange for the use of the large conference hall in the building for the use of panel meetings. Sometimes the arrangement would break down, and the chairman would be compelled to use a much smaller room in an adjoining building belonging to a prosperous pawn-broker. The owner of the pawn-shop was a shrewd and successful businessman who frequently appeared before the panel in debt claims, and was always anxious to oblige the chairman of the panel. The Co-operative Society building was a three-storied

structure located on the main street in Teldeniya town, on the outskirts of the Palispattu East village committee area. Although it was conveniently situated at the point of convergence of the main roads leading from all the villages in Palispattu East area, it was more than ten miles away from the remotest villages in the northern boundary. Although bus services were available from even the villages to the north, most of these villagers preferred to trek down the hills in the early hours of the morning to attend the proceedings of the panel. One of the panel members, who was a retired Grama Sevaka from Werapetiya (one of the remoter villages) frequently attended the meeting almost an hour late, complaining of the distance he had to travel. Disputants from the remoter villages also had to assume the added expense of bus fare and lunch for their witnesses.

There was an unusual mix of formality and informality in the atmosphere of the panel proceedings. The furniture arrangements were designed to emphasize the differentiations between the roles of the "dispute resolvers." and "disputants," and other "spectators". The chairmen and members of the panel were seated behind a table, with the "case files," the register, and a large monitor-exercise spread before them. A few chairs were placed against the walls at the ends of the room. Some of the spectators were huddled against the entrance to the room while others stood in front of the wall opposite the chairmen. Some stood on a corridor outside and continued to observe the proceedings through a large window. Some space was therefore left between the spectators and the panel for the parties and their witnesses. Social differences between the villagers were clearly recognized in the seating arrangements. Villagers of low caste status such as the Berawayo (tom-tom beaters) would not be seated in the room, in the presence of high-ranking Govigama Govt. officials village functionaries, and the managers of tea estates who were treated with special favour, and were provided with seats close to the panel.

The chairman also acted as the bailiff to the panel, and called out the names of parties and maintained order during the proceedings. The panel was attired in national dress, while the disputants would be dressed casually with the men in sarong and shirt, and the women in sarees or in cloth and jackets. A youth from Wegela who appeared without a belt was, however, severely reprimanded by the chairman and was told, "This is a

court! Dress properly or you will be charged by the police." The Grama Sevaka would wear his official badge, and the police officers would be dressed in uniform.

While the proceedings were going on, most of the spectators would intensely follow the testimony of witnesses, but some would sit outside, chew betel, and discuss village matters. Some others could be found quietly reading the Sunday newspaper supplements. Spectators were also free to walk in and out of the building as they pleased. No food was consumed by spectators inside the room and persons who wished to smoke would normally move outside. The chairman would also arrange for one of the local tea-stall keepers to provide tea for the members of the panel, and he would, despite the latter's protestations, insist on paying the bill. The atmosphere in the proceedings was, therefore, orderly, although relaxed and unpretentious.

In Palispattu East all members of the panel present at the inquiry were constituted into a single Board. No additional Boards were constituted even when a large number of members were present and several complaints had been fixed for inquiry. Often the Board would sit without a quorum; the chairman, however, felt that this was not a jurisdictional defect but a procedural irregularity which could be cured by the retroactive acquiescence of a third member in the determinations of the Board.

Given the physical and social setting in which disputes were processed by conciliation panels, we may now look at the procedures that are adhered to during the inquiry and the manner in which evidence is evaluated. The inquiry begins abruptly with the chairman reading out the number of the first case on the register and the names and addresses of the contending parties. Both the complainant and the defendant assemble on either side of the table with their families and witnesses standing behind them. No lawyers are permitted to appear on behalf of any of the parties. But sometimes "village proctors" would stand beside one of the parties and advise them on appropriate strategies. Very often family members or friends of disputants would place themselves in the position of "legal intermediaries" by intervening at the inquiry with pertinent comments and information, or by encouraging the parties to accept or reject a settlement. The Grama Sevaka sometimes served as the "prosecutor" in criminal complaints inquired into

by him. He was also an important witness in civil controversies arising within his jurisdiction, and in such cases he was sometimes co-opted as a member of the panel.

The complaint is read out aloud by the chairman, and the complainant asked whether he wishes to amplify it in any way. His testimony on the details of the dispute are then carefully recorded by the chairman. The chairman frequently interrupts the statement seeking clarifications on several points. Other members of the panel are attentive but intervene less frequently. At the end of the complainant's testimony the chairman reads the record, and secures the complainant's affirmation of its accuracy. He then turns to the respondent and inquires: "What have you to say?" The defendant's testimony is similarly recorded. He is subjected to constant interrogation by the chairman, who also reminds him to limit his testimony to the issues which become more clearly defined during this process. The respondent's testimony is frequently challenged by the complainant, resulting in a considerable amount of cross-talk between the parties and their families. The chairman is usually tolerant of such exchanges, but he becomes enraged if they become too boisterous or if they interfere with his recording of the testimony. At this stage he warns both parties: "This is not a fish market, but a court of law; if you do not conduct yourself in an orderly manner I will have you arrested by the police." Such threats are often effective and subdue the parties for at least a short period. The parties are then asked whether any of their witnesses are present, but the evidence of such witnesses is recorded only if there is some fundamental conflict in the testimony of the two contending parties.

The maintenance of a complete record of the proceedings of the panel was a procedural innovation instituted by the chairman. The Unit had expressly discouraged such a practice, believing that it would act as a constraint on the candour and openness which should characterize conciliatory proceedings. The chairman's obsession with maintenance of such a record sometimes assumed "ritual" proportions. In land disputes the devolution of title on each of the parties is carefully traced through land deeds, testamentary wills and partition decrees, with meticulous attention being paid to the extent of the land and its boundaries. Where several respondents appear, as is common in partition cases, the testimony of each respondent is

separately recorded with monotonous regularity even where such statements may tend to be repetitive. The authenticity of the record is enhanced by the requirement that each witness attach his signature or thumb impression at the bottom of his statement.

Once the testimony of the parties and their witnesses was completed, and the documentary evidence was examined and evaluated, the panel attempted to reach a conclusion on the facts involved in the dispute. Often this was not difficult where there was little or no variance in the testimony of parties on the relevant facts. The dispute in such cases related to the extent to which the agreed facts pointed to extenuating circumstances or was supportive of a legal defence. When, however, the dispute also related to some question of fact, the chairman relied on his familiarity with the antecedents of disputants or on his general sense of the ways of the locality to uncover an underlying source of friction or conflict which may illuminate the factual controversy. This technique clearly emerges in the case of *K. G. Baby v. L. G. Kiria*:[1]

> Baby complained to the Conciliation panel that her brother Kiria "had assaulted her with his hands." Her testimony revealed that the incident arose when she attempted to intercede on behalf of her son, Albert, while he was being beaten up by Kiria in an ambalama (resting place) close to their cottages. She claimed that Kiria had kicked her when she attempted to stop him from beating her son. Kiria, on the other hand, claimed that on the day in question Baby had rushed up to him shouting obscenities and he had merely pushed her in anger. The Chairman at this stage intervened as follows: "No one attacks another person without a cause or provocation. I know that Kiria has some unmarried daughters. Albert and his friends must have been loitering around the ambalama to tease and distract Kiria's daughters in the adjoining cottage. This must have angered Kiria who may have decided to put a stop to this behaviour. I now see the incident as clearly as I would have if been present. Is this how it took place?" Kiria nodded his assent. The Chairman claimed with noticeable pride: "I understand the psychology of all you people and I am therefore able to predict your

[1] Case no. 512, on file with author.

behaviour with greater accuracy than astrologers or horoscope-readers."

Once the panel is able to piece together the different factual components of the dispute, the conduct of each of the parties is measured against normative standards deemed to be relevant to the dispute. An implicit determination is then made of the relative "blameworthiness" of the parties, and the party deemed to be more at fault is publicly condemned by the chairman. The panel then formulates a settlement which reflects this evaluation, and urges the parties to accede to it. If one of the parties seem reluctant, the chairman employs various techniques of argumentation or different types of social pressure to induce the recalcitrant party to submit to the settlement. Small concessions are sometimes made to make the settlement more acceptable. The parties are asked to signify their assent by signing blank settlement certificates, the details of which are later filled in by the chairman. The inquiry is terminated when the parties individually pay obeisance to the panel appropriate to their social status. The chairman and other members of the panel often sermonise to each of the parties on how they should conduct themselves in the future or reaffirm ethical precepts which may have been asserted at previous stages of the proceedings. At a later stage we shall more closely examine the types of normative standards generated by conciliation panels and the process by which recalcitrant disputants are persuaded to accept settlements.

We may conclude this section with three additional observations on the procedures of the Palispattu East conciliation panel.

First, although as a general rule the proceedings of the Board are conducted at the Co-operative Society hall, there are some circumstances in which some phase of the inquiry is shifted to the locus of the dispute. In damage claims where the complainant claims that his crop has been damaged by the trespassing of the defendant's cattle, the Grama Sevaka is often directed to visit the complainant's land to assess the damage caused. In boundary disputes, the inquiry is often postponed until the panel has been able to visit the disputed lands. In partition cases, after a general determination has been made of the respective shares of the parties, the chairman and few

members of the panel sometimes personally survey the land and demarcate the boundaries of each shareholder.

Second, the procedures of the Board often recognized the social distinctions between different disputants. The language and forms of address adopted by the chairman varied with the social status and caste rank of the disputants. Disputants in turn were in their dress, demeanour, and behaviour, expected to display the deference and respect which are considered appropriate from persons of their caste rank towards the Govigama chairman. Persons of *radala* (noble) background, government officials, and upper class urban residents were treated with special favour, and their cases taken up early to relieve them of the need to remain in the building until other inquiries had been completed.

Thirdly, the involvement of "legal amphibians" in some of the disputes had the effect of injecting greater formalism in the conduct of the panel's inquiries. This is seen in the four cases instituted by Edward Pathirana:[2]

> Pathirana, a high caste low country Sinhalese, was a prominent land owner in Palispattu East. He had been educated in one of the leading private schools in Kandy, and had an exceptional command of English. He described himself as "an experienced petition-drafter" and an "experienced litigant" who had instituted cases before the courts of law since 1947. He instituted four complaints relating to paddy lands owned by him. In the first, he attempted to evict an *ande* (share-cropper) cultivator for the neglect of the paddy fields and for the low yield produced at the last cultivation season. He joined the Secretary to the Cultivation Committees to this case, and charged that he had suffered damages as a result of the latter's failure to evict the share-cropper. The next case related to the obstructions to a threshing-floor in Pathirana's land by two *durawa* (low caste) youths, Robert and Wije. In the third, a separate case was instituted against the Secretary of the Cultivation Committee for his failure to inquire into and prevent such an obstruction. The fourth case was against Wije for causing

[2] Case nos. 525, 530, 531, 532 on file with author.

damage to his paddy lands by driving cattle across it.

The Chairman barely concealed his distaste for Pathirana and complained to him: "Your cases are too complicated; they cannot be settled here, nor can they be settled by the Supreme Court." Pathirana was, however, insistent that each case should be separately inquired into by the Board. He commenced each inquiry by reading aloud a written statement setting out the history of the dispute. He also systematically produced documentary evidence to substantiate his statement and to contradict the testimony of the respondents.

The assumption by the chairman of the panel of other roles (even for brief periods) in the processes of the courts of law or other dispute resolution mechanisms may have also contributed to the carrying-over of some of the role conceptions of these processes to the work of conciliation panels. The chairman of the panel was often subpoenaed to give evidence at execution proceedings of Board settlements before the district, magistrate, or rural courts. The chairman valued the commendations that he received from the judges in these courts for the clarity of his testimony and the great care with which he recorded terms of settlement under Section 12. The exposure to the procedures of the courts probably had an impression on the chairman, for they were often followed by efforts on his part to institute procedural innovations which had not previously been part of the Board's proceedings. One such innovation was to inquire from the parties whether they wished to cross-examine any of the witnesses. The parties were often uncertain as to how they should respond to such a query. Usually they declined the offer by saying: "Since they (the opposing parties) continue to utter blatant falsehoods, we have no questions to ask of them."

In another instance in an application by a sharecropper to restrain efforts to evict him from part of the land cultivated by him, the chairman, after hearing of testimony made an announcement that he was about to deliver his "judgement". He then proceeded to read out a written order prepared by him declaring that his jurisdiction to inquire into the dispute had been taken away by the provisions of the Paddy Lands Act and other Amending Acts. He also warned the defendants that the complaints tenancy was protected under the Act, and should

not be interfered with until a determination was received from the Commissioner of Agrarian Services. In the *sharecropper's* case the chairman's familiarity with the provisions of the Paddy Lands Act was a result of his occupancy of the role of Secretary of the Cultivation Committee. Since the occupancy of such roles outside the panel was often transitory, efforts to adopt trial-court procedures such as cross-examination were made hesitantly and invariably abandoned after one or two sessions.

III

We can now examine the principles applied by the panel in the admission and evaluation of evidence. In the case of *K.G. Baby v. L.G. Kiria* we noticed that the panel did not adhere to a strict concept of relevance, in that it attempted, of its own motion, to uncover evidence which may shed light on the source of friction between the parties. Similarly, the panel admitted evidence by the parties on a broader range of issues than those embodied in the complaint if such evidence was relevant to its understanding of the "facts" in the disputes, and to an evaluation of the "blameworthiness" of parties. But the settlement formulated by the panel was narrowly focused on the immediate issues presented by the complaint and did not address the related disputes. The application of this dual concept of relevance is illustrated by the case of *H.G. Horathala v. P.G. Sirisena*.[3]

> Horathala complained that he was assaulted by Sirisena, when he protested against Sirisena cutting arecanuts from land possessed by him. Sirisena, on the other hand, contended that the arecanuts were on a land in which he had ownership rights and produced several title deeds to support his claim. Sirisena's bona fide belief that he had a right to pick arecanuts was deemed relevant as an extenuating factor in the Board's evaluation of Sirisena's conduct. But in formulating a settlement the Board limited itself to the criminal complaint instituted by Horathala and repelled efforts by Sirisena to also have the land dispute resolved. The Panel admonished Sirisena: "You cannot convert a criminal case into a civil case. You cannot have all your disputes resolved in one day. You should settle the land dispute

[3] Case no. 491, on file with author.

separately with the priest who *claims* ownership to the land."

No effort was made to shut off evidence on the grounds of "hearsay" or some analogous doctrine.

In the evaluation of different types of evidence documentary evidence was clearly preferred to oral testimony, and was sometimes insisted upon, as seen in the following exchange in the case of *Yaso Menika v. Bandara Menika*:[4]

> The complainant claimed that land belonging to her was forcibly occupied by the defendant. The Chairman's interrogation of the complaint proceeded as follows:
>
> *Chairman:* What is your title to the land?
>
> *Complainant:* The land devolved on me by way of paternal inheritence.
>
> *Chairman:* Where is your deed?
>
> *Complainant:* I have no deed. The land belonged to my father and brother.
>
> *Chairman:* You cannot come to courts without documents, otherwise I can also claim that I have rights in the land.
>
> *Complainant:* I am a mother, why should I tell lies!
>
> *Chairman:* I am taking the position that you have no rights in the lands; now satisfy me that you own the rights that you claim!

In some cases the chairman insisted on postponing the inquiry until the parties produced land deeds, wills, or court decrees to substantiate their claims. In the case of court orders or partition decrees, a certified copy issued by the appropriate court was insisted upon. In the evaluation of oral testimony, greater weightage was attached to the testimony of official witnesses such as the Grama Sevaka or the Secretary of the Cultivation Committee. The parties, however, were quick to impugn the credibility of such "expert" witnesses if they believed that they had not conducted a proper investigation or had some personal interest in the dispute. The testimony of each party was often tested against the facts within the panel's personal knowledge

[4] Case no. 529, on file with author

and against the party's general reputation for veracity. Contradictions between the oral testimony of the parties and their written complaint or statements by them at an earlier inquiry tend to seriously weaken the credibility of their evidence. Since no oaths were administered, the parties sometimes attempted to bolster the veracity of their claims by challenging each other to swear an oath before the "Temple of the Tooth". The chairman preferred to ignore such challenges. The chairman believed that the recording of the testimony of witnesses, and the requirement that they attach their signature to the record, was as effective as an oath in deterring perjury. Although the presence of witnesses in support of the contentions of parties was recorded by the chairman, the corroboration of testimony was never insisted upon either in civil or criminal cases. In this respect the panel perceived itself to be quite different from the courts of law, and reminded the parties that if they were to go before the courts they would have to satisfy a higher burden of proof. In *H.G. Horathala v. P.G. Sirisena:*

> The panel was willing to believe the testimony of the complainant that he was, in fact, assaulted by the defendant. Horathala was, however, told by the panel that he would require corroborative evidence form witnesses if he was to satisfy a Magistrate that the attack took place. He would further require a medical certificate or a "discharge-chit" from a hospital to prove that he suffered an injury.

IV

We have mentioned earlier that the Conciliation Boards Act provided no guidelines on the norms that should be applied by conciliation panels in the disposition of disputes. Similarly, the Administrative Secretary, while suggesting that the panel should not apply the law but be guided by what is "fair and just," provided no specific directives on this issue. The failure of the Ministry to confront this question is based upon a false conception of the process of conciliation. It is assumed that the process of statutory conciliation does not involve any qualitative evaluation and determination of the competing positions of the disputants, but a general feeling out of the contending interests of the parties and an effort to harmonize such interests. Absent the need to reach a decision on "fault" or "guilt," the

normative standards on which such determinations should rest were thought to be irrelevant to this process.

Our study of the processing of disputes by the Palispattu East Conciliation Board has compelled us to conclude that an adjudication of "blameworthiness" is contained within the conciliatory settlement. This leads us to point to two important steps which precede the recording of terms of settlement by a Board. The first involves a measurement of the conduct of the disputants in the social context in which it occurred against a normative standard and a relative determination of the "fault" or "guilt" of the contending parties. Our concern in this section would be to focus on the content of these normative standards, with a view to reaching some preliminary conclusions as to whether these standards reflect "traditional" values conservationist of existing social relationships and attitudes, or "radical" values which are disruptive of such relationships and which tend to defy and challenge prevailing attitudes. A comprehensive statement of the normative framework within which conciliation panels operate must, however, await a more exhaustive and in-depth analysis of the five hundred and fifty cases processed by this panel. The second step involves the use of a series of techniques to induce disputants to accept the settlement proposed by the panel.

We shall try to explicate the normative judgements that are contained in the settlements through an analysis of some representative cases. The first case, *L.G. Kumara v. L.G. Samuel*[5] relates to an application for relief by a donor for failure to perform the condition in a conditional deed of gift.

> The complainant was a decrepit and tottering cultivator, who declared that he was seventy-five years of age. He was greeted with great solicitude by the Chairman who provided him with a chair, and referred to him as one who belonged to his old "batch" (indicating that they were playmates during his childhood). The defendant was the son of the complainant's brother, and had been adopted and taken care of by the complainant from the age of twelve. The complainant later gifted his lands to the defendant on a deed of transfer, subject to the condition that the latter would "take care of him and attend to his needs" during his old age.

[5] Case no. 543, on file with author.

The complainant alleged, however, that the defendant no longer took care of him or even provided him with a portion of the income he received from the land. When he was sick in hospital the defendant had not visited him. When he complained to the defendant about the neglect of his obligations, the latter abused him and threatened to "beat him up and kill him".

The defendant, an arrogant and confident youth of twenty-five years, protested against the demand that he attend to the personal needs of the complainant. He seemed to feel that the requirement in the deed that he should perform services to the complainant until his death was designed to degrade him to a perpetual state of feudal bondage to the complainant. He refused to perform any more services, and claimed the complainant's wife constantly abused and ill-treated him like a "serf".

The Chairman, dismissing the protests of the defendant, clearly found him to be at "fault" in the case. Such a determination was based on two alternative normative standards. Firstly, a deed of gift conditional to future assistance and support was an ancient mode of conveyance (recognized from the time of the Kandyan kingdom), which required a strict adherence to the terms of condition. Secondly, when a father supports and provides for a person in the position of a "son," there is a corresponding obligation on the son to support and provide for the father during his years of need. The panel's determination of "fault" is communicated to the defendant by a strong condemnation of his conduct. In this instance in view of the importance that is attached by the panel to this case, unusual efforts were made to emphasize and dramatize the normative basis of the determination. The Chairman spontaneously burst into a *kavi* (Sinhalese verse) which warned the defendant that "a son's obligation to repay the kindness and comfort that he has received from his parents is so strong that he cannot escape it even if he killed his parents". The Chairman also recited a folk parable; 'Simon, had his weak and feeble father live with him in his house. Every night he would serve his father a bowl of boiled rice for his meal. His father, however, disliked boiled rice and Simon would regularly beat him with a broom to force him to eat the meal. One day he found that

the broom was missing and after an intense search, asked his eight year old son whether he had seen the broom. The son replied, "Yes, father, I have hidden the broom so that I may be able to use it when you grow old."'

The Chairman proposed a settlement which would require the defendant to pay a sum of twenty rupees a month to the complainant, and then applied intense social pressure on him to accept the settlement.

A more radical tribunal would probably have approached the case somewhat differently. It would probably have frowned upon a legal arrangement, although ostensibly a deed of gift was in effect a service-tenure arrangement, whereby the donee was reduced to a status of quasi-serfdom. Such a tribunal would probably have attached little importance to the fact that such land transactions have been recognized and enforced from the time of the Kandyan kingdom. It would probably be more persuaded by the anti-feudalist and egalitarian policy considerations which prompted the abolition of some traditional land-tenure arrangements by the Service Tenures Ordinance and the Paddy Lands Act.

Although the Palispattu East conciliation panel believed that a legal arrangement sanctified by antiquity should remain enforceable, it attached greater importance to the familial relationship between the disputants and to the need to reaffirm the reciprocal obligations which the traditional value system imposed on persons placed in such a relationship. The ferocity with which the panel condemned the conduct of the defendant, and its graphic efforts to reiterate and dramatize the pedagogic concepts contained in the settlement also point to the primacy the panel attached to the reaffirmation of existing patterns of familial and social organization. The case of *K.G. Baby v. L.G. Kiria*, referred to earlier, provides further illustration of the panel's willingness to affirm traditional conceptions of parental power and sibling authority within the familial relationship:

Baby complained that her brother, Kiria, had assaulted her and caused her injury. The incident took place when she interceded on behalf of her son, Albert, when Kiria was punishing him for "teasing and distracting" his young daughters. Kiria claimed that Baby had provoked him by

abusing him with obscenities. The panel reached the conclusion that Baby was more "blameworthy" than Kiria in this case. Kiria was in the position of a "father" to Albert and was entitled to punish Albert for misbehaving in public. Besides, Kiria had an obligation to protect the morals of his own daughters. The panel believed Baby to be a "quarrelsome woman" and felt that she had by abusing her brother improperly interfered with the exercise of parental authority by him.

During the inquiry Baby broke into tears and said that even if Kiria assaulted her son, he had no right to assault her. A panel member responded: "He is your elder brother and has the right to punish you when you do wrong." The Chairman decided that the case should be settled by a compoundment of the charge. Baby was most reluctant to settle the case, but was "persuaded by the Chairman to do so". At the end of the inquiry one member of the panel told Albert: "When I was a small boy, one of my uncles hit me. It still hurts. I am not, however, angry with him because he did so to improve my character."

We may now examine the panel's approach to forms of contractual arrangements which were unfamiliar to the area, such as a contract which involved a third party. In *W.M.P. Bandara v. L.G. Punchi Banda*:[6]

The complainant was an electrician who sued the defendant, a timber contractor, for rupees thirty-five paid to him as an advance for the purchase of one hundred feet of timber, which the defendant had failed to deliver. The defendant claimed that he was engaged in the timber business, and contracted for the sale of timber to the public on payment of a fee. [It would seem that a percentage of the purchase price is retained by the defendant as a commission.] The plaintiff wished to purchase some timber, and he accordingly introduced him to a timber owner. The complainant contracted to buy one hundred feet of timber at the rate of sixty cents a foot; he gave the defendant rupees twenty-five as an advance, and agreed to collect the timber on the following day. The

[6] Case no. 520, on file with author.

plaintiff then arrived three months later with the excuse that he had been held up in Mahiyangana. He wanted to collect the timber but inquired whether he could purchase it at fifty cents a foot. The owner, however, refused to sell the timber unless the plaintiff paid at the rate of sixty cents a foot. [The plaintiff had previously sent him another sum of ten rupees through an intermediary.]

The defendant denied that he was under an obligation to repay the thirty-five rupees. The collapse of the agreement was the result of the defendant's delay in collecting the timber and his attempt to unilaterally change the purchase price. He had lost four to five days as a result of this contract, and was entitled to retain at least a portion of this sum as damages.

The panel rejected this claim by the defendant and determined that the defendant was at "fault" in this case. It based this determination on the simple principle that since the defendant received a sum of money for the purchase of timber, he was obligated to either deliver the timber or return the money. The defendant's claim for compensation, as an agent, and his argument that the owner was the real principal in the transaction was viewed with disfavour as a form of "trickery" to avoid his obligations. The Chairman condemned the defendant as a "thief" and as a "bad man" and strongly rebuked him for "intermeddling in the affairs of other people and undertaking obligations which he cannot fulfill". The Chairman proposed a "settlement" which required the defendant to return the money through the Grama Sevaka, to which terms the defendant reluctantly agreed.

In this case we find that the panel adopted a very limited and traditional concept of a contract as a strictly bilateral arrangement by which the promisor undertook to perform an obligation in payment of consideration by the promisee. Such an approach prevented the panel from recognizing that with the increasing complexity of economic life within the villages and the expansion of urban contacts, it was imperative that a person should be able to undertake a contractual obligation on behalf of another. Similarly, a strict and static adherence to the concept of the "fidelity of a promise," disabled the panel from recognizing that the exigencies of commercial life require that in certain limited

circumstances (such as a supervening event or some conduct of one of the parties) the promisor's obligation to perform the contract may either be modified or totally rescinded. The negative posture of the conciliation panel towards new contractual arrangements was clearly not conducive to private or collective entrepreneurial activity in the area, or to the development of local commerce or trade.

Similarly, the panel, in its normative approach to debt claims, displayed little sensitivity to the underlying social policy considerations which prompted the state to enact usurious laws and to propose other reforms to combat the exploitation of rural debtors by capricious moneylenders. In *D.G. Kumarihamy v. M.G. Maddu Banda*[7] (claim for one hundred rupees debt on a mortgage bond and accumulated interest almost equal to the principal); *E.M. Tikiri Banda v. R.B. Kulasekara*[8] (claim for rupees one thousand five hundred lent on a promissory note at 18 per cent interest); and *V. Siyampillai v. E. Shanmugam*[9] (claim for rupees three hundred sixty lent on the security of a cheque at 33 per cent interest, and which sum the debtor conceded was applied towards "some black-market business" and "to bribe a Grama Sevaka"); the panel in its solicitude towards the creditors and in its willingness to enforce their claims, generated a legal environment which perpetuated the social and economic dependence of helpless debtors on ruthles moneylenders.

V

Since the statute required both parties to agree to the terms of settlement, an important step in statutory conciliation was the process by which what was, in essence, an adjudicatory determination was accepted by the parties. Considerable time was devoted by the panel to this phase of the proceedings; and although the chairman exercised complete control over the process, all the other actors and role occupants in the "dispute process" were sometimes drawn into it. The chairman brought to bear his impressive skills of argumentation, linguistic capabilities, social prestige in the community, and statutory

[7] Case no. 516, on file with author.
[8] Case no. 507, on file with author.
[9] Case no. 526, on file with author.

powers on recalcitrant parties to plead with, cajole, ridicule, threaten, and shame them into accepting the terms of settlement. Although the chairman mixed different techniques of persuasion and varied them according to the circumstances of each case, it is useful to describe them separately.

First, the chairman who was an extremely intelligent and articulate person, used the technique of exposing the weaknesses in the case of the party whom he has determined to be "blameworthy" in the dispute. The written record was extremely useful to him in this respect, for it enabled him to quickly identify contradictions between the testimony of the party and previous statements by the witness. The chairman was also alert to discrepancies between the written complaint and the oral testimony of the complainant, and exploited it fully to discredit the complainant's case. In *K.G. Baby v. L.G. Kiria* the chairman told Baby that while her complaint said that Kiria "assaulted her with his hands," in her testimony she had alleged that "Kiria had kicked her". The chairman and other members of the panel also subjected the party to intensive interrogation to bring out internal inconsistencies in their statement.

Second, often the party who is deemed to be at "fault" would respond to the settlement proposed by asserting his determination to take the matter to the courts. The chairman would adopt various strategies to deal with this situation. He would initially make out that it is shameful that a person should seek vindication in a court of law of their rights against members of their families, or persons with whom they have continuing relationships. In *K.G. Baby v. L.G. Kiria*, the chairman ridiculed Baby's request that the matter be referred to a court of law and said it was a disgrace that brothers and sisters should litigate. He added cynically: "Go to courts and you will receive a medal." Similarly, in *H.G. Horathala v. P.G. Sirisena* the chairman asked the complainant contemptuously: "Why do you want to go to courts? It is because you want damages!"

The chairman would then downgrade the prospects of the party being able to secure any relief from the courts. We have earlier alluded that the panel believed that the courts require a higher burden of proof than what is expected in the Conciliation Board. The party is accordingly told that since he lacks any witnesses or proper documentary proof, his case would be

summarily dismissed by the courts.

Finally, the party is warned that he would have to expend hundreds of rupees on lawyers, loiter around the courts for days, and wait for years before the case could be disposed of. This argument is often effective, and some member of the party's family is likely to urge him to reconsider his position. In *H.G. Horathala v. P.G. Sirisena* it was Horathala's wife who was initially persuaded by the chairman's arguments. In *W.G. Selastina Hamine v. W.G. Lensuvia,*[10] a member of the complainant's family spontaneously emerged from the audience to advise the parties against going to courts.

> The complainant charged that the defendant had obstructed him from cutting trees on a land co-owned by the two parties. The Chairman suggested that the land be divided by the Grama Sevaka in accordance with the respective titles of the parties.
>
> *Complainant:* I will have the land divided only by a court of law.
> *Chairman:* (sarcastically): Do you have a lot of money to go to courts?
> *Complainant:* I have no money.
>
> A woman spontaneously emerges from the audience and moves up to the table. "The complainant is my brother's wife. This land is worth very little, the expenses of going to court would be more than the value of the land. Let the Grama Sevaka divide it."
>
> *Chairman:* (approvingly): Why did you not speak earlier? These people are fools. I know this land, it is jungle land.
> *Spontaneous Witness:* This land is useful only to cattle!

Both parties sign the terms of the settlement.

Third, where it is clear to the panel that both parties are reluctant to go to court, but refuse to settle, the chairman uses the threat of referring the case to the courts as a ploy to compel the parties to accept the settlement. In *V. Siyampillai v. E.*

[10] Case no. 503, on file with author.

Shanmugam, repeated threats by the chairman to refer the case to the courts had the effect of bringing about a settlement.

Fourth, a technique often used when there is a dispute between neighbours in the same hamlet, is for the panel to sermonize to the parties on their interdependence and on the importance of living together in harmony. The chairman once remarked, "We are the old people in the area and it is our duty to educate the younger people on how they should behave." The parties are in turn asked to lead model lives and to settle their disputes so "that their children would not shed blood over such feuds in the future".

Fifth, when the conduct of the party at "fault" has outraged the chairman, he would initially subject the party to a torrent of abuse. He would then mobilize and orchestrate the members of the panel and the spectators in the assembly to express their condemnation of the party and to pressure him until his resistance to the settlement weakens. This technique is illustrated by the case of *L.G. Kumara v. L.G. Samuel:*

> The defendant refused to abide by the terms of a conditional deed of gift which required him to take care of and support the complainant during his lifetime.
>
> The chairman recited a Sinhalese verse and a parable emphasizing the obligation of a son to provide comfort and care for his parents during their years of need.
>
> *Defendant:* I cannot look after these people, they abuse me.
>
> *Chairman* (looking very angry): You are a dog, *rodiya* (an outcast), a *paraya* (an untouchable); why can't you look after these people! It is because of a person like you that we have had no rains in this area.
>
> The defendant remains silent.
>
> *Chairman:* You must have been born under a bad star! (The Grama Sevaka of the village intervenes at this stage.)
>
> *Grama Sevaka:* You obtain an income from the land, can't you give the complainant a share?
>
> *Defendant:* I collect about one hundred rupees every two months.
>
> *Grama Sevaka:* What nonsense! You can easily pay the complainant twenty-five rupees per month.
>
> *Chairman:* Remember the complainant has a life interest in

the property, and he can prevent you from touching a single tree.

Defendant: I cannot give him anything.

(At this stage the spectators intervene in the proceedings.)

Spectator (1): Even if the complainants abuse you, or hit you, you should remember that they are your parents.

Chairman: We are telling you all this for your own good, but because you are a bad man, you don't accept our advice.

The defendant appears to yield a little at this stage.

Chairman: How much will you give the complainant?

Defendant: I will give fifteen rupees.

Spectator (2): If you cut the coconuts in the land you can get twenty-five rupees.

The defendant agrees to pay twenty rupees per month to the complainant and signs the terms of settlement.

Chairman: This case has made my stomach turn! You are a most difficult fellow and with difficulty we have settled this case.

Sixth, one of the most effective techniques employed by the chairman is to publicly reprimand the party and to urge the members of the assembly to ostracise him. This emerges clearly in the case of *W.M.P. Bardara v. L.G. Punchi Banda:*

(The defendant testified that he was not obligated to repay twenty-five rupees paid as an advance for the purchase of timber.)

Chairman (bangs his fist angrily on the table): You must have a sense of duty! It should be against your conscience to take the money and not deliver the timber.

Chairman (addressing the Spectators): Look people, this fellow is a "bad man." Having taken thirty-five rupees from someone he now says let him go to courts. I will not trust him to buy anything for me.

Defendant (reluctantly): I will pay him the money.

Chairman: When?

Defendant: In a month.

Chairman (again addressing the Spectators): The defendant is a "very bad man". A man who lives against his conscience will not be able to eat or drink.

The parties sign the terms of settlement.

VI

In reviewing our discussion of the process of statutory conciliation we find that the ambivalence that exists within the central officialdom as to the extent to which conciliation panels should resemble or differ from the courts of law, also persists in the role conceptions of the conciliation panels in Palispattu East. We find in the proceedings of conciliation panels, expressions of identification with the courts of law co-existing with efforts to denounce these judicial institutions and to proclaim the distinctiveness of Conciliation Boards. Such internal conflicts in the role conceptions of conciliators become accentuated when important functionaries in the processes of the conciliation panel also assume roles in the processes of the courts of law. These tensions tend to be reflected in turn in the performance of the different roles that are contained in the dispute processes. This clearly emerges when we spell out the similarities and dissimilarities between Conciliation Boards and the courts of law as reflected in the different phases of the dispute process.

First, one of the more striking distinctions between the Palispattu East Conciliation Board and the courts of law is the lack of functional differentiation and specialization in the performance of various roles internal to the dispute process. The chairman of the panel also assumed the roles of court clerk, record keeper, bailiff, and sometimes even that of a surveyor in partition disputes. The Grama Sevaka was an equally important functionary who was at various times called upon to occupy the roles of complaint-drafter, process-server, prosecutor, ad hoc member of the Board, and expert witness in the assessment of damages to property.

Second, the fixed location and time during which the Board meets, and the furniture arrangement within the physical setting were intended to maintain the social distance between dispute-resolver and disputants, which characterize judicial proceedings. This effect was, however, more than offset by the simple and unpretentious attire of the Board members, the freedom with which the spectators could move in and out of the building, and the relaxed atmosphere in which the proceedings were conducted.

Third, a strict adherence to procedural regularity is seen in the bureaucratization of the issue of summons, the systematization of the presentation of testimony, and the ritualization of the maintenance of a record. An even closer approximation of the procedures of the Boards to that of trial courts often follows the involvement of "legal amphibians" in the processes of the Board. The exclusion of lawyers was a crucial procedural difference which was to some extent mitigated by the involvement of the "village proctors", friends and relatives as legal intermediaries.

Fourth, the Boards differed from the courts of law, in the formulation of a dual concept of relevance, which on the one hand permitted the panel to admit evidence on a broad range of issues to uncover the underlying source of conflict, and which, on the other hand, required the panel in its settlement to limit itself to the immediate issues presented by the complaint. Similarly, in the evaluation of evidence, the Board on the one hand was willing to draw on its personal knowledge of the dispute and the disputants, while on the other hand displayed remarkable fidelity to the evidentiary rules of the courts in its preference for documentary evidence and expert testimony.

Fifth, a distinction between the Boards and the courts, often stressed, relates to the form in which the disposition of disputes is set out, i.e. a "settlement" in the case of the former as opposed to a decree in the case of the latter. But such a distinction assumes little significance in the case of the Palispattu East panel, for the "settlements" recorded by it often conceal an adjudicatory determination. Such a determination is based upon a relative evaluation of the blameworthiness of the conduct of both parties. The differences in form, therefore, obscure some similarities in the process of disposition of disputes.

There are, however, important differences in the types and content of the norms that are deemed relevant to each process. The normative standards applied by the conciliation panels in their generality and lack of specificity differ significantly from, say, the statutes which are applicable to judicial proceedings. The content of the norms issued by the former tend also to be different from those that are applied by the latter, since they reflect traditional values conservationist of existing social relationships; which values are often inconsistent with or lag

behind social policies underlying many social welfare laws, and the more consciously socialistic legislation of the post-independence period.

Sixth, a phase of the proceedings of the Board which has no equivalent in court proceedings relates to the process by which an adjudicatory determination is transformed into a conciliatory settlement. This is the least structured phase of the Board's proceedings where the participation of village functionaries, family members, spontaneous witnesses, and other spectators is often encouraged. Its flexibility facilitates the expression of moral outrage which the panel and the spectators sometimes share at the conduct of one of the parties, the issue of a public reprimand and a threat of ostracism on persons who defy local values and attitudes, and the articulation of the ethical precepts which the panel wishes to instil in the parties and the public.

Our examination of the operative workings of conciliation panels suggests that the tensions within the central officialdom, as to whether the panels should attract or reject the procedures and forms of specialized adjudicatory models of conflict resolution as characterized by the courts of law, become internalized within the conciliation panel, generating competing forces which tend to pull the tribunal towards the bipolar models of conflict resolution. Although the pull of specialized adjudicatory model sometimes appears to be stronger, the contending forces appear to have reached a mutual accommodation, and the composite picture of the panel which emerges from our study is of an institution which has, effectively and creatively, combined elements from both models of conflict resolution.

VII. Conclusion

Time present and time past
Are both perhaps present in time future
And time future contained in time past.

— T.S. ELIOT, *Burnt Norton.*

In this concluding section we shall place our specific empirical study of the statutory Conciliation Boards of Sri Lanka within a broader framework of ideas on the institutionalization of popular tribunals in traditional societies which have recently emerged from a western colonial experience. In this category of societies, popular tribunals appear at least to partially revive traditional legal forms, and to this extent appear to respond to a set of social imperatives which are different from those in other socialist countries. In Chapter I we drew attention to these competing social imperatives in India, Burma, and Tanzania, and examined the manner in which these imperatives shaped the form and function of popular tribunals in these societies. This discussion was further illuminated by our review in Chapter III of the socialist, revivalist, and reformist forces which vied with each other for dominance over Justice Ministry policies on the statutory Conciliation Boards of Sri Lanka. We noticed that despite the fundamental ideological shifts which accompanied the post-independence political developments in Sri Lanka, the revivalist perspective received continued emphasis, particularly amongst the lower echelons of the Ministry of Justice. The demands generated by the revivalist forces were, however, in conflict with the conscious efforts of the post-1970 socialist ideologists to reinterpret the statutory Conciliation Boards as one of the principal planks of the government programme of deprofessionalization. This confrontation compels us to focus on one of the central problems of the institutionalization of popular tribunals in post-traditional societies: to what extent does the persistence of traditional features in contemporary institutional forms impede the realization of socialist goals and aspirations through these tribunals? We may begin to address this problem in the context of our case study through a diachronic comparison of the similarities and

dissimilarities between the traditional Gamsabhavas and the statutory Conciliation Boards.

First, there are many structural similarities between the Gamsabhavas and the Conciliation Boards as pertaining to composition and jurisdiction. The Gamsabhavas and the rural conciliation panels were drawn from the traditional rural leadership, i.e., the village elders who enjoyed power and prestige within the community by reason of their age, learning, caste rank and affluence. The village functionaries such as the headmen (now Grama Sevaka) who assumed a dominant role within the Gamsabhavas continued to be prominent in the processes of the Conciliation Boards, although they were co-opted as ad hoc members of the Board only when important controversies within their administrative jurisdiction were inquired into. Both tribunals assumed an extensive civil jurisdiction and a more limited criminal jurisdiction over disputes and crimes arising within their territorial limits.

Second, both the Gamsabhava and the conciliation panels had ambivalent relationships, with the elaborate legal and administrative organizations of the Kandyan kingdom, and in contemporary Sri Lanka, respectively. The Gamsabhava was technically a part of the hierarchical Kandyan judicial structure, subject to the review powers of the state officials, but in effect it was able to operate outside this framework, deriving its authority from the consensus of the village community. It successfully resisted the interventions of state officials in village matters and autonomously defined the procedures it would follow at inquiries. The statute which structured the conciliation panel also endeavoured to place these tribunals outside the judicial framework, and to confer on them a great deal of discretion in determining the procedures and the forms they would follow in the processing of disputes. The conciliation panels have, however, been less successful in resisting the central administrative apparatus from intruding into its processes, and the issuance of general and specific directives by the Conciliation Boards Unit has largely contributed towards an erosion of its procedural autonomy, and a reduction in its substantive jurisdiction. The influence of the courts of law in shaping the procedures of these tribunals was accentuated by "legal amphibians" who helped transmit the forms, the role

conceptions, and techniques of the courts to the conciliation panels.

The result is that there is a fundamental divergence between the procedures of the Gamsabhavas and those of the conciliation panels. The Gamsabhava, despite its adherence to some special forms and procedures in the presentation of testimony and the issue and execution of decrees, was in essence a relatively informal and flexible tribunal which was constituted ad hoc on the occurrence of a dispute. It adopted a broad concept of relevance, and did not adhere to any rigid rules regarding the evaluation of evidence. In contrast, the proceedings of the conciliation panel were characterized by the bureaucratization of the service of process, procedural regularity in the presentation of testimony, and the formalisation of the maintenance of a record. The panel adhered to a strict concept of relevance in the formation of a settlement and conformed to certain preferential rules in the evaluation of evidence.

Third, the Gamsabhava was primarily an adjudicatory body which enjoyed the power to impose a binding settlement on parties and to impose a fine in certain limited circumstances. Sometimes its efforts were directed towards compromise and conciliation. Although limited by statute to the reconciliation of disputants, the conciliation panel often reached an adjudicatory determination, which it was often able to impose on disputants through various techniques of argumentation and persuasion. Public reprimand, threat of ostracism and abuse that was directed against the party at "fault" was probably as effective a sanction as the fine imposed by the Gamsabhava.

Fourth, we find strong similarities between the Gamsabhavas and the statutory conciliation panels in the normative standards they applied and, correspondingly, in the conception of their role towards the maintenance of existing social arrangements. The Gamsabhavas were more attentive to local custom and usage than the doctrines and principles of Kandyan law, which were more scrupulously applied by the Maha Naduwa (the Great Court). These norms in turn, reflect values of a highly differentiated feudalist social order. Its efforts were correspondingly directed towards the maintenance of the integrity of the *gama* as a distinct sociological and territorial

entity and to conserving feudal and caste arrangements contained within them. The conciliation panel likewise was guided by local norms and values; and chose to ignore the statutory prescriptions and legal principles which constitute the central normative order and the social and economic policies which underlie some of them. Although the "local authority area" which constituted the limits of the Board's authority had no independent sociological significance, the panel directed its energies towards conserving the social and familial units within its boundaries.

It is clear, therefore, that while the procedures and forms of the conciliation panel no longer resemble those of the Gamsabhavas, there are significant continuities between the two institutions with respect to composition, powers, jurisdiction, and function.

We may now examine the extent to which the persistence of these features are consistent with the efforts of the socialists to utilise these tribunals to advance their programme of popular participation in all aspects of government. As we have emphasized earlier, the broad participatory ideology of the socialist coalition was based upon the belief that a traditional society embarking on a programme of planned socialist development, must raise the "social consciousness" of the people to enable it to undertake the fundamental social and economic transformations which it desired. The need to raise the "consciousness" of the people on the basis of a coherent socialist ideology, assumes critical significance in a society like Sri Lanka which had not emerged out of a protracted revolutionary struggle. The socialist coalition therefore perceived that an intensive programme of popular participation in the organization and management of society, would serve as the alternative to a "revolutionary struggle" in the process of popular "consciousness" building. The accommodation of the statutory Conciliation Boards within this participatory ideology had therefore two related objectives. First, to facilitate the involvement of the working classes and the rural peasantry in the processes of conciliation panels so that they may thereby sharpen their awareness of the socialist policies and developmental programmes of the government, and recognize how such policies may be applied towards the resolution of the social and

interpersonal problems of the area. Second, through the articulation of these policies and goals in the processes of these panels to further reshape the prevailing values and attitudes of the disputants and other members to the needs of a socialist society.

Our review of the structure and processes of the conciliation panel in Palispattu East demonstrate that neither of these expectations have been realized. The members of the conciliation panels are socially and culturally differentiated from other members of the society in both rural and urban areas. The working classes and the rural peasantry are disproportionately represented in these tribunals. Sporadic efforts to increase the participation in these panels of persons at the lowest levels of the social order and the class structure has met with stiff resistance. Correspondingly, the participation of the traditional rural elite in these panels has resulted in the Boards reaffirming traditional attitudes, prejudices and values which are inconsistent with the equalitarian ideals and the development policies of the socialist coalition. The continuities in structure and function between the Gamsabhava and the statutory conciliation panels, effectively frustrated the efforts of the socialist coalition to raise the "social consciousness" of the people through these institutions.

Socialist ideologists in post-traditional societies have increasingly looked upon popular tribunals as instruments through which the political socialization of societal members could be most effectively realized. In view, however of the competing social imperatives to which these tribunals tend to respond, these institutions tend to recapture many of the features of the traditional mechanisms of social control. These features in turn presuppose a social and economic order which has been long repudiated by the socialist ideologies. The attempt to replant these "traditional" forms in a social milieu in which many hierarchical and feudal social arrangements continue to be significant, leads to a rekindling amongst conflict managers and disputants of attitudes, role conceptions and values which are incompatible with the new conception of these institutions. The result is that these tribunals, instead of challenging prevailing social attitudes and values, and disrupting existing social arrangements, tend to confirm and

consolidate them. Although popular tribunals may assume their greatest importance in post-traditional societies, they also face here their most difficult challenges, and thereby often tend to retard rather than accelerate the pace of socialist transformation.

[Tables 1-3 are extracted from A.L. Wood, *Crime and Aggression in Changing Ceylon*, 58 Transactions of the American Philosophical Society Part 8 (1961).]

TABLE 1

TRENDS IN HOMICIDE AND SUICIDE — CEYLON, 1889-1957
(Three-year average rates per 100,000 population)

Mid-year of 3-yr. period	*3-year averages*		*Mid-year of 3-yr. period*	*3-year averages*	
	Homicide[a]	*Suicide*		*Homicide*	*Suicide*
1881	1.1	2.8	1920	4.9	5.4
1884	1.7	3.0	1923	4.7	4.8
1887	2.0	3.6	1926	4.6	5.1
1890	2.2	2.9	1929	5.2	5.2
1893	2.6	3.2	1932	6.4	6.3
1896	3.7	3.2	1935	6.1	6.6
1899	3.5	3.6	1938	5.8	6.9
1902	3.7	4.1	1941	6.0	6.5
1905	4.3	4.1	1944	7.0	6.2
1908	4.4	5.5	1947	5.5	6.0
1911	4.4	5.1	1950	4.0	7.0
1914	5.8	5.0	1953	4.4	7.3
1917	4.1	5.1	1956	4.2	7.0

Source: Ceylon Department of the Registrar-General (annual reports).

[a] Beginning with 1938, the homicide rates include a few legal executions; without these, the rates would be about two-tenths lower. Average rate for 1956 is based on two years, 1955-1956.

TABLE 2

Date	*Suicide*	*Total grave crime*	*Crime against persons*[a]		*Crimes against property*		
			Homicide	*Assault*[b]	*Robbery*	*Burglary*	*Total*[c]
1	2	3	4	5	6	7	8
1939	6.6	281	6.1	80	22	61	176
1940	6.3	285	7.4	79	21	64	182
1941	6.9	294	6.3	78	21	72	194
1942	6.2	343	7.7	82	23	80	236
1943	6.6	464	8.5	93	29	106	345
1944	6.3	539	9.8	98	36	124	412
1945	5.8	481	9.1	90	34	112	363
1946	5.9	487	8.1	83	33	113	379
1947	5.8	410	8.1	92	35	92	291

1	2	3	4	5	6	7	8
1948	6.3	347	6.5	78	28	77	247
1949	6.7	294	5.5	70	22	63	205
1950	6.9	267	5.0	65	18	59	184
1951	7.4	234	4.9	66	15	48	151
1952	6.9	226	5.2	62	12	43	147
1953	7.0	221	5.3	68	12	41	137
1954	8.0	235	5.9	69	13	45	150
1955	7.0	211	5.4	65	11	41	131
1956	7.8	243	3.7	66	14	55	157
1957	8.0	213	5.9	67	13	39	129

Sources: Adapted from Ceylon Police Service (annual reports), 1956; app. 2; *ibid.*, 1957; app. 2; Ceylon Department of the Registrar-General (annual reports), for appropriate years. Rates based on estimates of mid-year population by the Department of Census and Statistics.

[a] Includes all 15 officially designated grave crimes.

[b] Includes attempted homicide, hurt by knife, grievous hurt.

[c] Includes robbery, burglary, theft of property over Rs. 20, theft of bicycles, and cattle theft.

TABLE 3

CROSS-CULTURAL COMPARISONS OF HOMICIDE AND SUICIDE
(Rates per 100,000 population)[a]

High Homicide Rate[b]		*Moderate Homicide Rate*[b]		*Low Homicide Rate*[b]	
Country	*Suicide rate*	*Country*	*Suicide rate*	*Country*	*Suicide rate*
Egypt (3.5)	.3	Poland (1.2)	5.6	Ireland (.4)	2.3
Mexico (39.1)	1.1	Italy (1.9)	6.5	North Ireland (.5)	3.4
Colombia (32.7)	1.3	Portugal (1.4)	9.7	Spain (1.1)	5.9
Taiwan (23.0)	2.0	Australia (1.5)	10.4	Scotland (.7)	6.0
Costa Rica (4.1)	2.8	Singapore (1.9)	11.4	Netherlands (.6)	6.2
Gautemala (6.7)	2.8	Finland (3.1)	17.9	Canada (1.1)	7.2
Dominican Rep. (4.9)	3.5	Hungary (2.1)	19.3	Norway (.4)	7.2
Chile (9.1)	4.5	Japan (2.2)	21.2	England, Wales (.7)	10.7
Ceylon (4.3)	7.3	Switzerland (1.2)	21.7	Belgium (.8)	13.5
U.S.A. (4.8)	10.1	Austria (1.2)	23.1	France (.7)	15.6
				Sweden (.7)	17.5
Uruguay (4.7)	11.2			West Germany (1.0)	18.6
Puerto Rico (7.3)	12.4			Denmark (.9)	23.4

Median rates for 36 countries: homicide, 1.7; suicide, 8.5.

Source: Compiled from United Nations, *Demographic Yearbook*, 3-9 issues, New York, 1951-1957.

[a] Rates are based on average rates for two to five years as available between 1951 and 1956, eliminating years with gross internal disturbances, i.e., Hungary, 1956, and war conditions.

[b] Average homicide rates appear within parentheses. Those countries within the middle 25th percentile rate of the array of average homicide rates are classed as having a "moderate" homicide rate; "high" and "low" categories include countries on either side of this range, respectively. Countries are ranked by suicide average rates within each homicide category.

TABLE 4

A COMPARISON OF THE SOCIO-ECONOMIC BACKGROUND OF TOTAL POPULATION, PANEL MEMBERS AND CHAIRMEN OF PANELS

Age	*National sample*[a]	*Conciliation panel members*[b]	*Chairmen of panels*
Up to 25	59.6	8.1 (up to 30)	4.3 (up to 30)
25-34	12.2	24.3 (30-39)	15.2 (30-39)
35-44	10.0	27.4 (40-49)	28.3 (40-49)
45 and above	17.3	35.5 (50, above)	52.2 (50, above)
Education			
No schooling	11.6	0.9	—
Primary	47.9	8.8	2.2
Up to S.S.C.	32.4	48.0	45.7
Passed S.S.C.	7.1	21.9	21.7
Passed H.S.C. and above	1.0	15.1	30.4
Occupation			
Professional, Technical Trades	4.8	17.9	28.2
Admin., Managerial Trades, Businessmen[c]	1.2	26.6	39.1
Clerical, Sales Workers, Police Allied Services	11.2	13.3	13.0
Workers in Agriculture	50.8	26.0	13.0
Skilled, Unskilled Labourers	31.8	8.1	2.2
Income			
Below 1200	18.4	8.5 (below 1000)	— (below 1000)
1200-2399	25.0	30.9 (1000-2499)	15.2 (1000-2499)
2400-4799	34.3	35.5 (2500-4999)	45.7 (2500-4999)
4800-7199	11.1	13.1 (5000-7499)	23.9 (5000-7499)
7200-9599	4.5	3.3 (7500-9999)	6.5 (7500-9999)

TABLE 4 (*Contd.*)

9600 and above	6.7	3.1 (10,000 and above)	8.7 (10,000 and above)

[a] Figures based on an island-wide household survey undertaken by the Department of Census and Statistics in 1969/1970. See *Preliminary Report on the Socio-Economic Survey of Ceylon, 1969-1970* (see Table 5 for more complete data).

[b] Figures based on an analysis in 1972 of data in the Conciliation Boards Unit drawn from a random sample of forty-six Conciliation Boards (see Tables 6 and 7 for more complete data).

[c] There is no comparable category for traders and businessmen in the national survey conducted by the Department of Census and Statistics.

[d] The income figures are less reliable than the other indices, in view of the general tendency to underestimate one's income, based upon the fear that the statement of real income would result in the imposition of higher taxes, or in the case of low income groups in the withdrawal of existing social benefits.

TABLE 5

SOCIO-ECONOMIC DATA ON TOTAL POPULATION[a]

	Total	*Urban*	*Rural*	*Estate*[b]
Age/years		%		
Up to 25	60.5	60.5	60.7	59.4
25-35	12.2	12.3	11.8	14.6
35-45	10.0	10.3	9.8	10.4
45-55	7.9	7.9	7.8	8.4
55 and above	9.4	9.0	9.9	7.3
Education				
No schooling	11.6	11.4	21.2	38.9
Primary	47.9	37.8	52.4	51.0
Up to S.S.C.	32.4	37.9	29.4	8.8
Passed S.S.C.	7.1	110	6.2	1.3
Passed H.S.C. and above	1.0	1.9	0.8	0.0
Occupation of employed population				
Professional, Technical and Related Workers	4.8	9.4	4.9	0.5
Administrative, Executive, Managerial and Related Workers	1.2	2.9	1.0	0.3
Clerical Workers	4.1	11.5	3.2	0.9
Sales Workers	7.1	15.0	6.9	0.8
Workers in Agriculture	50.8	8.7	49.7	92.7
Miners and Quarrymen and Related Workers	0.5	0.2	0.7	
Service, Sports and Recreational Workers	3.7	7.1	3.8	0.4

TABLE 5 (*Contd.*)

Craftsmen, Production Process	7.4	14.1	7.0	2.6
Workers and Labourers	22.22	30.9	22.6	1.7
Unspecified, Unemployed	0.2	0.2	0.2	0.1
Distribution of annual income				
Below 1200	18.4	4.4	16.9	72.4
1200-2399	25.0	16.7	30.3	13.8
2400-4799	34.3	34.4	37.9	8.4
4800-7199	11.1	17.1	9.7	2.3
7200-9599	4.5	8.5	3.3	1.2
9600-1199	2.1	4.6	1.3	0.6
1200 and above	4.6	14.3	0.6	1.3

[a] Figures based on an island-wide household survey undertaken by the Department of Census and Statistics in 1969/1970. See *Preliminary Report on the Socio-Economic Survey of Ceylon 1969-1970.*

[b] No breakdown for the estate sector is available with respect to the data on panels of conciliators and chairmen of panels.

TABLE 6

THE SOCIO-ECONOMIC BACKGROUND OF CONCILIATION PANEL MEMBERS[a]

	Total %	*Urban*	*Rural*
Age/years			
20-29	8.1	5.1	9.7
30-39	24.3	19.1	27.1
40-49	27.4	26.9	27.8
50 and above	35.5	42.1	31.8
Unspecified	4.8	6.8	3.7
Education			
No schooling	0.9	0.9	1.1
Primary	8.8	5.6	10.6
Up to S.S.C.	48.0	45.0	49.6
Passed S.S.C.	21.9	24.5	20.4
Passed H.S.C.	1.3	1.9	0.9
Holders of Diplomas or Certificates	11.7	10.9	12.2
Graduates and above	2.1	3.6	1.3
Unspecified	5.2	7.7	3.8
Occupation			
Professional, Technical Workers	6.2	9.2	4.5
Teaching Profession	11.7	10.7	12.1
Admin., Exec., Mgr. Workers	4.4	6.1	3.4
Police, Allied Services	2.1	1.0	2.8
Clerical, Sales Workers	11.2	18.4	7.3
Traders, Businessmen	22.2	30.8	17.5
Workers in Agricultural Fishing	26.0	4.8	36.3

TABLE 6 (*Contd.*)

	Total	*Urban*	*Rural*
Skilled Labourers	6.0	4.8	6.6
Unskilled Labourers	2.1	1.5	2.4
Unspecified	4.4	5.6	3.7
Unemployed	4.6	7.0	3.3
Annual Income			
Less than 1000	8.5	3.4	11.3
1000-2499	30.9	16.5	38.9
2500-4999	35.5	41.2	32.4
5000-7499	13.1	19.9	9.4
7500-9999	3.3	4.8	2.5
10,000-24,999	2.9	5.8	1.3
25,000 and above	0.2	0.7	—
Unspecified	0.9	0.7	0.9
No income	4.6	7.0	3.3
Worth			
Less than 1000	1.4	0.5	1.9
1000-4999	17.2	6.8	22.9
5000-9999	14.1	7.3	17.8
10,000-24,999	24.1	24.7	23.7
25,000-49,999	14.7	19.4	12.0
50,000-99,999	9.5	16.5	5.7
100,000 and above	2.7	5.8	0.9
Unspecified	6.7	7.5	6.3
No worth	9.8	11.6	8.8

[a] These figures are based on data maintained at the Conciliation Boards Unit and drawn from a random sample of forty-six Conciliation Boards.

TABLE 7

SOCIO-ECONOMIC BACKGROUND OF CHAIRMEN OF CONCILIATION PANELS[a]

Age	*Total*	*Urban*	*Rural*
20-29	4.3	5.9	3.4
30-39	15.2	17.6	13.8
40-49	28.3	29.4	27.6
50 and above	52.2	47.1	55.2
Education			
No schooling	—	—	—
Primary	2.2	5.9	—
Up to S.S.C.	45.7	41.1	48.3
Passed S.S.C.	21.7	35.3	13.8
Passed H.S.C.	2.2	5.9	—
Holders of Diplomas and Certificates	21.7	11.8	27.6

TABLE 7 (*Contd.*)

	Total	*Urban*	*Rural*
Graduates and above	6.5	—	10.3
Unspecified	—	—	—
Occupation			
Professional and Technical Workers	4.3	—	6.9
Teaching Profession	23.9	11.8	31.0
Administrative, Executive and Managerial Workers	8.7	17.6	3.4
Police and Allied Services	6.5	5.9	6.9
Clerical and Sales Workers	6.5	11.8	3.4
Traders and Businessmen	30.4	41.1	24.1
Workers in Agriculture and Fishing	13.0	—	20.7
Skilled Labourers	2.2	5.9	—
Unskilled Labourers	—	—	—
Unspecified and Unemployed	4.3	5.9	3.4
Annual Income			
Less than 1,000	—	—	—
1,000-2,499	15.2	5.9	20.7
2,500-4,999	45.7	35.3	51.7
5,000-7,499	23.9	41.1	13.8
7,500-9,999	6.5	—	10.3
10,000-24,999	8.7	17.6	3.4
25,000 and above	—	—	—
Unspecified	—	—	—
Worth			
Less than 1,000	—	—	—
1,000-4,999	13.0	5.9	17.2
5,000-9,999	8.7	—	13.8
10,000-24,999	21.7	23.5	20.7
25,000-49,999	32.6	41.1	27.6
50,000-99,999	13.0	5.9	17.2
100,000 and above	8.7	23.5	—
No worth	—	—	—
Unspecified	2.2	—	3.4

[a] Figures are based on data maintained at the Conciliation Boards Unit and drawn from a random sample of forty-six Conciliation Boards.

Appendix 1

GAMSABHAVA

[The following account of the proceedings of the Gamsabhava in a lower caste (paddu) village in the Central Province is provided by the Chief Priest of the Asgiriya Temple before the District Court of Kurunegalla in *Kiria v. Poola*, 3 Lorenz's Reports 143 (1859). It should be remembered that the account pertains to the processing of a dispute by a Gamsabhava in 1851, about four decades after the establishment of a new judicial structure in the Central Provinces by the Proclamation of November 21, 1818.]

About eight years ago, a dispute between the plaintiff and the defendant's father, came before me, into which I made investigation; on which a Gamsabe was formed—was convened. I ordered the Vidhane, who is our temple-officer, and also Government Arachy, to convene a Gamsabe. I verbally ordered him. It accordingly met at Korosa-Temple . . . The President of the Gamsabe was myself. (It would appear that normally the President of the Gamsabhava would have been the incumbent of the village temple, who was in this instance because of his immaturity and youth replaced by a Superior Priest in the monastic order.) The other members were 10 or 15 in number, and consisted of Headmen and late Headmen of that village, such as durayas (lower caste headmen). The only vellala was Udatpola Arachy. Both parties were present. (The dispute was between K. Kiria and D. Appua over the forcible possession of certain lands which were subject to rajakaria duties (services) to the Korosa-vihare and which the plaintiff claimed had devolved on him by intestate succession from his father

Wattua.) We made investigation according to custom, and heard evidence on both sides. The decision was that the plaintiff was the owner of the land. A written decision was made which was given to the plaintiff. The evidence was taken in writing; and the decision in the form of a Sittu, was handed to the plaintiff. (The Sittu provided that the plaintiff was entitled to the lands in question as the hereditary tenant but should retain half while leaving the other half to the defendant's father to possess and which half on the death of the latter went to the plaintiff.) I did not sign the Sittu, as I was not the incumbent of the temple, but Owitipara Unnanse, the incumbent signed it after I had written the body of the Sittu. I have been president of many Gamsabes, and this was conducted according to due form of Kandyan custom. The record of the evidence before the Gamsabe was taken by me to Kandy . . . . Making a written record of Gamsabe proceedings is not an old custom, but an improvement which I always observe. The lowest number of a Gamsabe could be four or five pesons. Owitipana was not a member, but was there, and I acted for him (another witness said that Owitipana was the President, but as he was young, Pelpola officiated for him as President). The Gamsabe sat in a circle on mats.

Appendix 2

THE RATA SABHAVA

[The following account is excerpted from K.A. Kapuruhami, Rata Sabhava, 38 *Journal of the Royal Asiatic Society* 42 (1948). Kapuruhami was the Madukande Rate Mahathmaya of Vavuniya in 1921, and his account relates to the Rata Sabhava system in Nuwaragam Palata during 1909-1910.]

Punchirala publicly accuses a woman Ranmenika whose husband is living with her, that she had illicit connection with a low caste man. Ranmenika's relations at once go to the Chief or to a Rata Sabhawa officer—Mohottala or Badderala—and state their grievance. Very often the accuser Punchirala or any one of his relations makes a complaint to the Chief or the officers. At any rate the offence is very soon brought to the notice of the authorities by some one or other. It cannot be hushed up, because to associate with Ranmenika or her blood relations in funerals and marriages also constitutes an offence. If the complaint is made to a Mohottala or Badderala he at once goes to the Chief and states the facts to him. The latter then orders him to go to the village, hold a formal inquiry and take what steps are necessary in the matter. The officer then goes to the village of Ranmenika and after making some inquiries from the elders of the village if he finds any reason (which he usually does) to support the commission of the offence complained of, he calls the dhoby, Ranmenika and her relations and others of the village to his presence and bans Ranmenika and her family by prohibiting (*a*) the varigakkarayo from associating with Ranmenika and her blood relations, i.e. her children and their children, her father and mother, brothers and sisters and their

children and her husband (if the husband was living separately at the time when the offence was committed or left her immediately after, he willl not be banned) and (*b*) the dhoby from doing the usual services to the members of Ranmenika's family thus banned. If the officer has also reason to believe that the accusation is groundless and malicious he bans the accuser Punchirala alone with the same restrictions.

These restrictions are given usually in the following manner:

(I) As Punchirala of the village .... has publicly accused Ranmenika of the same village of an immoral conduct Ranmenika and her kinsfolk namely... are not to attend funerals, weddings and religious ceremonies until a County Assembly declares her innocent. Nobody should from this day keep company with these people. This has been declared by the command of the Sinhalese king, Governor of Colombo, Kumarasinha Mudiyanse of Nuvaravava, and the Disave who made this command.

(II) Moreover, as Punchirala has accused Ranmenika of some unbecoming immoral conduct, he too is prohibited from attending funerals, weddings and religious ceremonies until a County Assembly inquires about the matter. From this day no one should associate with him.

Due notice of this is given by this officer in the villages where the parties banned have dealings.

Now it is for Ranmenika and the members of her family already banned to take steps to convene a Rata Sabhawa. Someone of them goes to the Chief with a dekuma and asks him to fix a date and give an order to a Mohottala to convene and conduct the Sabhawa. A date is fixed and an order is issued to a Mohottala (usually the one who lives at a short distance from Ranmenika's villages) to conduct the Sabhawa with other officers whom he might find convenient to take with him. The Mohottala then sends a letter to the resident Mohottala, Badderala or Lekama, if there are any, or to the Gamarala or Vel Vidane of Ranmenika's village informing him of the date when the Sabhawa is to be held and asking him to give due notice of it in the village and have everything ready for the occasion. He also sends information to such of the villages as the first notice was given requiring the elderly persons of these villages also to attend the Sabhawa.

The resident officer, Gamarala or Vel Vidane, informs all the

inhabitants of the village of this in good time so that they may procure the necessary things for the occasion, i.e. rice, vegetables, ripe plantains, cakes, betel, arecanut, etc. The banned persons also procure what things are necessary for a goodly meal or two. The bill of the banned persons is much bigger than that of the other villagers who act jointly. None of the villagers can act indifferently, as, invariably, a heavy fine will be the result.

Early on the day appointed the villagers hold a conference, select a good maduwa, preferably that of the resident officer, or Gamarala, put up a shady pandal in front of the maduwa, get the dhoby to tie up white cloths both in the maduwa and pandal, and before the close of the day, hav everything ready — raw provisions, betel, arecanut, and other necessary things are collected in a given proportion from each house to one place, they then await the arrival of the Rata Sabhawa officers and party. The banned persons are not to join in any of these preparations.

The Mohottala who has been deputed with the management of the Sabhawa by the Chief collects other officers, Mohottalas, Badderalas, Lekamas and others and with Vidanapediya starts for the village where the party usually arrives a little after sunset. By this time people from other villages also begin to come in.

When the approach of the officers is made known a few of the elderly persons go a little distance from the house, salute each of the officers and other important persons as is customary by joining hands and lead them to the maduwa made ready for the occasion.

A. Rata Sabha maduwa:
   - *a*. Presiding Mohottala (not a separate seat).
   - *a1*. Other officers (including Koralas and Aratchies).
   - *b*. Minor headmen, Gamaralas, and other elderly persons.
   - *c*. Ordinary villagers.
   - *d*. Vidana Henaya.
   - *e*. Lights.

B. Pandal.

Seats are arranged usually as shown above.

Soon as the assembly take seats some young men of the

village neatly dressed and head cloth on, enter the maduwa and walking slowly up to the officers offer water in neat brass pots (*sembu*) covered with white cloth first to the leading Mohottala and then to other officers and others.

This is called *waturanambu karanawa* when the people having washed their faces, hands, and feet sit down again, another youth with a brass tray full of betel and arecanuts covering it with a white cloth enters the maduwa and offers it to the leading Mohottala who passes it to some one close by to be distributed among all those present. All the people then indulge themselves in chewing betel and inquiring after the health of each other and the news of the different villages.

After the assembly have conversed together freely and rested for some time the Chief Mohottala calls silence and standing up recites the rules that are to be observed by those present while the Sabhawa is sitting and in the name of the King, Governor, etc., as stated before strictly enjoins the assembly to observe those rules on pain of being punished with fines. These rules shortly are as follows:

(1) No one should enter the Sabhawa without first obtaining its permission.
(2) No one should leave it without obtaining like permission.
(3) No one should partake of any food in the house of his friends or relations without permission (this permission is very seldom granted).
(4) No one while sitting in the Sabhawa should speak without obtaining first the permission of the presiding Mohottala and out of his turn.
(5) No one should sleep in the maduwa while the proceedings are going on.
(6) No one should utter unbecoming or rude words while talking.
(7) No one should make signs or gestures with the hands while talking.
(8) No one should misbehave in the Sabhawa.
(9) One should abide by the decision of the majority; and similar other minor details. Of the fines imposed for breach of these rules mention has been made in paragraph 21 above.

These preliminaries ended, the proceedings begin.

The parties are then summoned before the Sabhawa. Ranmenika will be represented by her husband or some one of her family. Her presence before the Sabhawa is not wanted—whenever it is found necessary to put a question or two to her, she will be called in and questioned. Standing at the further end of the maduwa she will answer the questions bashfully, timidly, and in a low voice and then withdraw. The parties to the inquiry stand in front of and at a little distance from the officers, with their hands folded over their breasts. They or their witnesses are not to take any oath before making their statements. The inquiry is purely oral and the proceedings are never taken down in writing. The witnesses are not sent away while the inquiry is going on unless such a step is found to be very necessary.

The complainant, Punchirala, is then called upon to state his case. He is warned beforehand by the Mohottala of the consequences if his accusation is found to be false. He is questioned at great length and in detail. All the officers put questions they like to ask, one after the other. Objections are taken by the officers and other leading members to certain questions put and long discussions ensue. Everybody of any consequence freely joins these discussions, keeping of course, to the rule that each should speak with the permission of the Mohottala and one after the other. In the course of these discussions, which become heated at times, several side issues arise. Precedents are quoted, decisions of former Sabhawas pointed out, status, lineage, respectability or otherwise of different families are described, disputed, criticised or commended. Disputed points are referred to the Mohottala whose decision is final and ought to be abided by. Each party has its supporters among the officers. This fact naturally renders the proceedings to be very protracted and tedious. No doubt the members do not confine their discussions to the subject matter of the inquiry and go very much astray. These proceedings in almost every case last for a whole night—the shortest sitting of the Sabhawa, and in important matters they last for two or three days, both day and night except at short intervals for meals and rest.

[By this time, about midnight, the meals will be ready and this fact is whispered into the ears of the Mohottala by some one. If the leading members are disposed to adjourn the Sabhawa for meals they do so; but if the discussion be of a spirited nature

they sit up till late next morning with empty stomachs.

Meals are taken in the same maduwa. If the assembly be a large one some are accommodated under the pandal. Every fit person who came to attend the Sabhawa has to partake.]

After finishing the complainant, the accused Ranmenika's representative is called upon to state what he has to say. He then comes out with a long rigmarole. It will be something like this: What Punchirala accuses Ranmenika with is utterly false. He is a born enemy of her family from several births past. Ranmenika is a well-conducted woman. Leaving aside her doing such a mean thing she has never dreamt of it. To the truth of what he says the Gods and Buddha are witnesses. If Ranmenika has done such a thing let her children and cattle be destroyed in seven days and let herself be killed by a thunderbolt striking her head. If she is found guilty he and others of her family are prepared to pay 550 *ridi* by selling their lands and cattle and go out begging taking in their hands coconut shells and the stalk of the arecanut palm leaf. The charge is a false one, etc. etc. Then questions are put to him and Ranmenika also, wherever necessary . . . .

Then the necessary witnesses are heard. Their list will not be a long one—one or two for each side and sometimes none. The officers of the Sabhawa by this time are convinced of the real facts of the case and very often, before they assembled. Their decision need not be and very often is not based on the evidence given. It is given on actual facts and sometimes quite to the contrary, of course, with good motives, though perhaps exceptions are not wanting.

The inquiry is practically over now. While it is in progress the officers discuss among themselves the pros and cons of the case. They go out two or three at a time and hold private consultations. Some argue for and some against each of the party. The Mohottala also joins them now. This consultation goes on for some time. After they have decided the thing among themselves the Mohottala declares the finding of the Sabhawa publicly and the amount of the fine to be paid by the guilty party. If Ranmenika is found guilty, Punchirala escapes, but if the former is adjudged innocent Punchirala is convicted for attempting to disgrace Ranmenika in the eyes of society.

The amount of the fine, if large, the party fined, supported by some of the officers, urge on the Sabhawa reasons such as

poverty, ignorance, etc., and implore for a reduction of the fine. The Sabhawa usually gives a willing ear to the appeal, but it depends much on the attitude of the leading Mohottala and his supporters take in this matter. After much discussion the amount is finally fixed. The dhoby is asked if he is satisfied with the decision of the Sabhawa and whether the fine is sufficient. He always answers in the affirmative.

If Ranmenika was guilty, she will have to pay a big fine, 550 *ridi* or so according to the nature of the offence complained of, and her position and wealth, and her blood relations 7-1/2 *ridi* each. If Punchirala was the guilty person, he has to pay an equal amount as Ranmenika would have had to pay if convicted, but his blood relations are not liable to pay the *vattandada* as no act or deed disgraceful to the family was committed in Punchirala accusing Ranmenika.

All those who have been fined, if males, are made to take off their head cloths until the payment of the fine.

When the fine is paid in full, the guilty persons who have been made to take off the head cloths jointly pay 2-1/2 *ridi* to get the permission of the Sabhawa to put on the head cloths again.

After this, both parties concerned in the case, whether found guilty or not prepare each a *tahanan wattiya.* Forty betel leaves are placed in a neat tray made of plaited pan grass and over them 5 *ridi* in silver coins. This is covered with a white cloth and handed over to the Mohottala. The *tahanan wattiya* of each party is prepared separately having the indispensable 5 *ridi.*

The leading Mohottala having summoned before the Sabhawa all the inhabitants of the village both males, females and children, calls silence and taking the *tahanan wattiya* given by Ranmenika's party in one hand and his official staff in the other, stands up, and the whole assembly also standing, solemnly and in a clear loud voice utters the *tahanan arime wakkiya* which is somewhat as follows:

> This day the officials, presided by the Mohottala inquired into the immoral conduct of which Punchirala had accused Ranmenika publicly, and after taking all fines and levies they found that it was a false accusation. Therefore the prohibition made on Ranmenika and her kinsfolk is removed. Until the golden pinnacled Pattirippuva of Senakadagalapura lasts

this prohibition is removed. It is prohibited from this day that this accusation should be made publicly by any man, woman or a boy (or girl) in a quarrel over firewood, water, any other quarrel or in a playing field. This prohibition is made in the name of the golden sword and golden crown of the Sinhalese King and the Governor of Colombo. The prohibition is also made in the name of the Government Agent, Assistant Government Agent, also in the name of Kumarasimha Mudiyanse of Nuvaravava. This rule should be obeyed because of the order of the Disava. The prohibition is thrice valid.

After this all the people assembled for the Sabhawa sit to the meals got ready by the banned persons. The latter must necessarily join them in partaking of the feed. This is the token that the banned persons have been released of the ban, and admitted into the *varige*.

If the Rata Sabhawa officers are satisfied with the quantity and quality of the meals provided, a certain amount of the fine (100 *ridi* being the highest) in proportion to the sum imposed is remitted as consideration for the meals.

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POLITICAL DEVELOPMENT AND CONSTITUTIONAL CHANGE

Amal Ray, S.K. Chatterjee, Vanita Venkatasubbiah

This study seeks to understand the political dynamics of constitutional amendments in India. The authors extend their study beyond the narrow, formal view of constitutional amendments to an area where constitutional change and political development are studied in their linkages. The book finally discusses the current debate on constitutional reform and seeks to analyse its irrelevance to the critical social and economic issues confronting the country.

THE CRISIS OF THE INDIAN LEGAL SYSTEM

Upendra Baxi

This study, based on government documents and empirical research, is the first serious attempt to assess how ineffective and insufficient are the provisions as well as the practical working of our legal system. The book makes a scholarly appraisal of contemporary research in the areas of society, justice and inequality, and studies in historical perspective the inherent crisis in the Indian legal system.

SRI LANKA: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society

This critical study of the Sri Lankan political tradition analyses the nature of the tradition which was transferred on the eve of Independence, and the nature of its transformation in response to problems of underdevelopment and cultural nationalism. It attempts to extract emerging transformative values which may, in fact, inspire a different type of political process. The themes analysed in the text, with regard to the three Sri Lanka Constitutions, provide general insights into the failure of the Anglo-American legal-political traditions in a developing society.

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