LST REVIEW
Volume 10 Issue 145 November 1999

Language Rights in Sri Lanka

LAW & SOCIETY TRUST

LST REVIEW

(This is a continuation of the Law & Society Trust Fortnightly Review)

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Editor's note.....

In this issue we publish an article on language rights in Sri Lanka. The author discusses the provisions in the Constitution, the Official Languages Commission Act and the relevant international instruments relating to language rights. She discusses these provisions with regard to education, the judiciary and the public administration. The main argument put forward by the author is that, while Sri Lanka's national law is more or less in conformity with international law, in practice problems have arisen due to lack of commitment, trained teachers, interpreters, and equipment such as typewriters etc. This article is published with a view to provoking a discussion and raising issues and we urge our readers to send in your comments on this article so that we could take up the issues with the relevant authorities.

The Trust conducted a legal literacy programme in Tissamaharama in November. The "Friends of Nations", a community based organisation in Tissamaharama requested the Trust to conduct this programme. We publish a report of the programme compiled by Madhuranga Ratnayake, an intern of the Trust. The Trust hopes to conduct similar programmes in association with community based organisations and we would like those who are interested to contact us.

Language Rights: Rhetoric and Reality
Sri Lanka and International Law

Catherine Wood[*]

Examining the state of language rights in Sri Lanka strikes most observers as a futile exercise. A violated language right may appear trivial next to claims of torture, mysterious disappearances, and the plight of the internally displaced. Certainly, there are far more urgent issues in the human rights discourse in Sri Lanka.

The issue of language rights, however, cannot be dismissed as incidental to the ethnic conflict. Despite constitutional recognition of Sinhala and Tamil as equally official languages (Article 18), discrimination on the basis of language is a daily reality for the Tamil population of Sri Lanka. To many, language is the cause of serious personal difficulties. A Tamil man related of being asked twice to sign an agreement with the Sri Lankan government which was written in Sinhala. Each time he was refused translations and even though he did not understand its contents, he was forced to sign in the blank space. Because of this signature, he has since been denied visas to developed countries.[1]

Going further, it has been noted that "[c]learly language remains a 'root' cause of the ethnic conflict and will be an issue in any peace settlement which recognises the autonomy of the provinces."[2] Indeed, language was cited by a Tamil youth as the source of the ethnic conflict. In his own words:

> *[U]ntil 1995, to get a job you had to be fluent in Sinhala as that was the official language. Naturally, Sinhalese were fluent in Sinhala but Tamils just lost the opportunity. The only hope*

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* Intern from the McGill Law School, Canada. Edited for publication. The views expressed in this article are of the author's and do not represent in anyway the views or the official position of the Trust.

1 Interview with a Tamil man, N.S., in the Dambulla district, July 1997.

2 Darini Rajasinghe-Senanayake, "The Sinhala *Kaduwa*: Language as a Double Edged Sword and Ethnic Conflict" (1997) 5:2 *Pravada* 15 at p 18.

was to get into universities. Doctors, engineers, accountants and scientists were always able to get jobs without being fluent in Sinhala because of shortage and brain drain. Tamils became the strong majority in universities. The scared government responded by introducing a quota system based on district population, not merit. Out of 22 districts, only 3 or 4 were Tamil so once the quota for these districts were filled, no more Tamils were allowed. This resulted in Sinhalese getting admission with lower marks while Tamils who got very high scores were rejected. So the jobless and futureless youth ended up in revolution and armed struggle.[3]

It is well established that a government's language policy in favour of the linguistic majority may adversely affect the minority's right to and the need for, state attention, recognition and authoritative allocation of resources. On the other hand, language also offers unusual salience in asserting and representing minority group interests. By analysing the way the successive Sri Lankan governments have wielded the instrument of language, this paper discusses the negative impact the language policy of the Sinhalese majority government now has, and long has had, on the lives of the Tamil minority.[4]

The main objective of this paper is to study the state of language rights in Sri Lanka and Sri Lanka's obligations under international law and ascertain whether Sri Lankan law is in conformity with its international obligations.

The paper begins by recounting the role language has played in Sri Lanka's recent history, and sets the stage for the current context. Section A will explore language rights in Sri Lanka as they are protected and addressed in the current policy and legislative context. A review of general constitutional

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[3] Interview over the Internet, Sri Lankan Newsgroup, with "J" on 7 October 1997.

[4] It should be noted that there are issues in the current discourse on language rights that this paper does not intend to address. The ongoing theoretical debates as to whether language rights are collective or individual rights and whether language rights imply the right to language security or to language survival will not be discussed herein. Further, this paper is not overly concerned with the debate over the correct terminology in this area of law. The terms fundamental right, freedom of expression, minority right, and the right to equality will all be used in relation to language rights when it seems appropriate. For a discussion of these issues see Joseph Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville: Les Editions Yvon Blais, 1995).

provisions on language will precede a closer look at state policy and legislation in three key areas of tension: the justice system, public administration, and education.

Section B will, by surveying relevant international instruments, review the state of language rights in international law. Sri Lanka's record in relation to language rights, both its policy and legislation, and its practical application, will be surveyed in the light of its international obligations.

In conclusion, Section C will propose ways in which Sri Lanka could improve its record on language rights and the situation of Tamil speaking people on the island.

Background

History

The politics of language has long dominated the Sri Lanka public agenda. Language was brought to the forefront when the Sri Lankan Freedom Party [SLFP] won by a landslide in the 1956 national election and introduced the Official Languages Act No.33 of 1956[5] instituting a 'Sinhala Only' policy to replace the existing use of both Tamil and Sinhala as official languages and English as the language of administration. The riots that broke out over this Bill "underlined the combustible nature of linguistic nationalism in Sri Lanka's plural society."[6] As the Opposition's warnings of "two torn and bleeding little states,"[7] and "one language, two countries; two languages, one country"[8] went unheeded, scholars acknowledge that the "failure to resolve

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[5] Hereinafter *Sinhala Only Act*. For information on this *Act*, see K.M. de Silva, "Ethnicity, Language and Politics: The Making of Sri Lanka's *Official Language Act No.33 of 1956*" (1993) XI:1 *Ethnic Studies Report* p 1.

[6] K.M. de Silva, "Coming Full Circle: The Politics of Language in Sri Lanka, 1943-1996" (1996) XIV:1 *Ethnic Studies Report, Special Issue: Language Policy in South Asia* p 11 at p 29.

[7] Ranjith Chandrasekera, *Some Reflections on the Language Question (1931 - 1956)* (Colombo: Nawinne Printers, 1995) at p 5.

[8] Dr. Jayampathy Wickremaratne, Attorney-at-Law and Visiting Scholar, "Sri Lanka's Ethnic Crisis: Towards a Political Solution" (Lecture delivered at the Faculty of Law, McGill University, Fall 1996) [unpublished].

this language question in its infancy paved the way for a separatist movement in the North."[9]

The Sinhala Only Act, passed in 1956, declared Sinhala to be "the one official language of Ceylon."[10] All official language matters, including the Official Languages Department [OLD], were placed directly under Prime Minister S.W.R.D. Bandaranaike and changes were instituted to ensure the use of Sinhala.

The reaction by the Tamil population was hostile. A policy of opposition began through strikes, boycotting of Sinhalese shops, getting Tamil officers to indulge in acts of sabotage, cutting telephone wires between Colombo and Tamil areas, derailing trains, and bringing the matter before the Queen and the United Nations.[11]

The Prime Minister, under pressure from right-wing Sinhalese nationalists, was unable to correct the situation until 1958. The *Tamil Language (Special Provision) Act No. 28 of 1958,*[12] known as the *Reasonable Use of Tamil Act*, was introduced to provide safeguards for the use of Tamil, including the right of Tamils to use their language in corresponding with the government and to continue educating their children in Tamil. Unfortunately, the Prime Minister was assassinated in 1959 and the Regulations needed to give effect to the *Reasonable Use of Tamil Act* were not presented to Parliament. Even his widow, succeeding him as Prime Minister, did not carry through with this. Only with the defeat of the SLFP by the United National Party [UNP] in the parliamentary elections of 1965 were the *Tamil Language (Special Provisions) Regulations of 1966*[13] passed.

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[9] Chandarasekera, *supra* n 7 at p 5. It has also been said that "the bloody conflict in Sri Lanka largely found its original catalyst and was fanned because of...the Sinhala Only policy" Fernand de Varennes, "*Language, Minorities and Human Rights* (The Hague: Kluwer Law International, 1996) at p 275.

[10] R.G.G. Olcott Gunasekera, "The Implementation of the Official Language Policy, 1956-1970" in K.N.O. Dharamadasa (ed), *National Language Policy in Sri Lanka 1956 to 1996, Three Studies in its Implementation* (Kandy: ICES, 1996) p 17 at p 25.

[11] *Ibid*, at p 24.

[12] Hereinafter *Reasonable Use of Tamil Act*.

[13] Hereinafter *Tamil Regulations*.

This was the state of affairs until 1972 when a newly elected SLFP-led coalition government set out to enact a new constitution. With their pleas for devolution rejected, Tamil Members walked out of Parliament and the 1972 Constitution was conceived without Tamil participation. The framing process was thus "done within the limits of politics of the time and the politics of the coalition, which meant primarily the politics of the SLFP."[14] As a result, the new constitution provided that the *Reasonable Use of Tamil Act* and the *Tamil Regulations* remain effective but were not to be "interpreted as being a provision of the Constitution but shall be deemed to be subordinate legislation."[15] There was also the significant absence of a clause guaranteeing the protection of minority rights. This "unequivocally consolidated the 'Sinhala Only' policy of the 1950s and emphasised the essentially subordinate role of the Tamil language."[16]

Furious, the Tamil parties joined forces as the Tamil United Liberation Front (TULF), with the adoption of a separatist platform, swept the Tamil areas in the 1977 elections. The UNP, returning to power, enacted a second constitution in 1978, again without the participation of the elected representatives of the Tamils.

There were some positive aspects to the 1978 Constitution. Sinhala maintained its 'official language' status, while Tamil was finally raised to the level of a 'national language'. The rights enjoyed by Tamil-speaking people under the *Reasonable Use of Tamil Act* and the *Tamil Regulations* were incorporated into the Constitution and, therefore, only open to change by a constitutional amendment. Further, the state's languages branch, the OLD, was revived to implement the changes.

However, as positive as these steps may have seemed, the status of Tamil was undermined through non-implementation by the state over the next decade.[17]

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[14] Dr. Colvin R. de Silva, "Safeguards for the Minorities in the 1972 Constitution." Lecture delivered at the Marga Institute, 20 November, 1986, (Colombo: Young Socialists Publication, 1987) at p 20.

[15] Theva A. Rajan, *Tamil as Official Language: Retrospect and Prospect* (Colombo: ICES, 1995) at p 48.

[16] *Supra* n 6 at p 36.

[17] *Supra* n 15 at pp 52 - 64.

Critics contend that under this arrangement Tamil was "still on a second footing" and that until the two were "made equal in law and in their status, there [was] a wrong done to the Tamil community."[18]

A decade or so later, the 13th (1987) and 16th (1988) Amendments to the 1978 Constitution raised Tamil to the level of an official language and made it a language of administration. The UNP-led government, under President R. Premadasa, also appointed an Official Languages Commission [OLC] in December of 1991. Based on the Canadian model, the OLC was endowed with wide powers to monitor compliance with the official languages policy and was given punitive powers to deal with willful violations of the language provisions of the Constitution. The OLD was also reorganised and strengthened in 1992 to implement the new policy of bilingualism. The 1990s thus, appeared to begin on a positive note for Tamil-speakers.

Current Context

At present it appears that the state of language law in Sri Lanka is stable. The People's Alliance [PA], led by Chandrika Bandaranaike Kumaratunga (daughter of the late S.W.R.D. Bandaranaike), has not instituted any major changes to the language laws since coming to power in 1994 and has been concentrating on the issue of devolution of power. Consequently, the status of Sinhala and Tamil, as provided for in Chapter IV of the 1978 Constitution[19] remains unchanged since the Amendments of 1987-1988. In other positive developments, the PA government introduced a new OLC which continues to protect and promote language rights. Finally, the creation of the Human Rights Commission of Sri Lanka [SLHRC] in early March 1997 is lauded as a positive development in the protection of minority rights.

However, despite the apparent stability, the issue of language rights in Sri Lanka is far from settled. For example, one rarely sees buses bearing the destination written in Tamil. In 1991, the Minister of Transport and Highways issued a statement ordering all bus destinations to be in Sinhala and Tamil, but to this day there is no sign that this has been carried into effect.[20]

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[18] *Supra* n 14 at p 21.

[19] Hereinafter the Constitution, as amended.

[20] *Supra* n 15 at p 82. The Sinhala and Tamil languages use different alphabets.

In my own experience, the making of a trilingual banner for a high-profile media event proved to be near impossible as the Tamil was mis-spelt twice at the printers and was returned with the printers' refusal to correct it. Further, a recent directive issued by the President again ordered that all offices, missions and trade missions, make available regulations, legal provisions and other information in Tamil, Sinhala and English, and that all replies should be in Tamil if the communication was received in Tamil.[21] This directive received a significant amount of media coverage, an indication that the issue of language is far from resolved.

In a multi-ethnic and multi-lingual society, language rights is a complex issue. The demographics of Sri Lanka are such that they add to the complexity. The Sinhala-speaking people are a majority in every part of the island except the north and the east. In the north and east Tamils predominate, but the Sinhalese are a significant minority. In addition, most Muslims, who do not consider themselves to be ethnic Tamil, speak the Tamil language. These Tamil-speaking Muslims live all over the island and are concentrated in certain regions. Then there are Indian Tamils - from the Indian state of Tamil Nadu brought over by the British to work on the tea plantations. Also Tamil-speaking, the Indian Tamils are concentrated in the Central and Upcountry provinces and are thinly spread in the Western and Southern Provinces. Thus, the Tamil population amounts to about 18% (12.7% Sri Lankan Tamils and 5.5% Indian Tamils) of the total population, with Muslims at 7% and the Sinhalese at 74 per cent.[22]

It may be evident from the general constitutional provisions on language[23] but the significance of language in Sri Lankan society is made ever more clear from the inherent tension surrounding state decisions on and implementation of language policy in three key areas: the justice system, public

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[21] As discussed at www.lanka.net/Directory/lankaupdate/01 Aug. 97.

[22] V. Vamadevan, "Tamil in Public Administration" in Dharmadasa, *supra* n 10 at p 113; statistics are from www.lanka.net/Directory/lankaupdate/26 March 97.

[23] It should be noted that in March 1997 a draft of the proposed Constitution of Sri Lanka [hereinafter Draft Constitution] was released by the Ministry of Justice and Constitutional Affairs. A draft has also been released regarding the devolution of power. [hereinafter Devolution Package]. As the proposed legislative changes may be relevant to a discussion on language rights, they will be referred to where it is necessary. This will allow for speculation as to the future of language rights in Sri Lanka.

administration, and education. Examining these three areas in the legislative context helps define the government's current language policy. Once defined, a review of the legislation's practical applications should demonstrate how the rhetoric of language policy in Sri Lanka does not conform to the living reality.

A. Policy Framework, Legislative Context and their Practical Application

The rights of Tamil-speakers in the justice system, the public administration and the education system, are addressed in various statutes. This section will outline the overall policy framework and the legislative context of language rights, along with the effects of their application, in both broad terms and in the three specific areas identified above. With this analysis, it becomes clear that, while most of Sri Lanka's policy and legislation on language rights appear equitable on paper, others have missed the mark. Both the general constitutional provisions and the legislation in these three areas of tension are amiss in their attempts to improve the state of language rights in Sri Lanka.

General

The primary definition and source of language rights is in Chapter IV of the Constitution. Article 18(1) of Chapter IV of the Constitution states that "The Official Language of Sri Lanka shall be Sinhala. Tamil shall also be an official language." Article 18(3) reads "English shall be the link language" while Article 19 states that reads "The National Languages of Sri Lanka shall be Sinhala and Tamil."

The equally "official" status of Tamil and Sinhala in Article 18(1) of the Constitution is articulated in a very odd manner. While the legislative approval of Tamil as 'official' is legitimate and both languages are judiciously equated, this is a unique example of two official languages being recognized in separate constitutional phrases in Article 18(1). The construction of Article 18(1) indirectly suggests the subordinate status of Tamil as Tamil is relegated to the second and weaker sentence. Compare the use of the capitals and decisiveness in "The Official Language of Sri Lanka shall be Sinhala" to the statement that "Tamil shall also be an official language". The official status of Tamil is presented in Article 18(1) as an afterthought, which indeed, it was. This was brought into effect by the 13th Amendment to the Constitution.

The terms describing English as the "link language" in Article 18(3) and Sinhala and Tamil as "National Languages" in Article 19, have been criticised as lacking precision.[24] The new concepts of 'link' and 'national' languages create confusion and ambiguity in the law. Also, recognition of English as a 'link' goes only half way in addressing the *de facto* situation that English is generally used in the country as a third official language.

Regarding the drafting of legislation, Article 23(1) provides that "all laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil together with a translation thereof in English." In the event of inconsistency, the original text shall prevail, and in the case of new legislation, Parliament shall indicate during enactment, which text shall prevail.

The reality is, however, that most of the laws, if not all, were and continue to be, drafted in English.[25] As such, the Parliament will direct the Sinhala text to prevail as it would be unacceptable to allow the 'link' language to prevail. Old traditions die hard; prior to the 16th Amendment this article held that in the event of any inconsistency the text in the "Official Language shall prevail." Even the final article of the OLC Act of 1991, an Act to promote linguistic equality, reads "[i]n the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail." These disclaimers will almost always allow the Sinhala or perhaps, the English text, to overrule the Tamil.

Chapter III of the Constitution embodies Fundamental Rights and Freedoms. It provides in Article 12(2) that "no citizen shall be discriminated against on the grounds, *inter alia,* of race or ...language..." Article 12(3) elaborates that "no person shall [on grounds stated above] be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment, and places of public worship of his own religion." Article 14(1) states that "every citizen is entitled to (a) freedom of speech and expression; and (f) the freedom by

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[24] *Supra* n 6 at p 38.

[25] Snsanka Perera, "The Structure and Content of Education: Policy Choices and Problems of Implementation in the Context of Devolution Proposals" in Regie Siriwardena (ed.) *Sri Lanka: The Devolution Debate* (ICES, Colombo 1996) p 87 at p 90.

himself or in association with others to enjoy and promote his own culture and to use his own language."

This inclusion of 'language' in the list of discriminatory grounds against which citizens are protected under Article 12(2) of the Chapter of Fundamental Rights and Freedoms, and the freedom of a citizen to use his own language in Article 14(1)(f), is heartening. Both Articles 12 and 14 of the Constitution, however, encompass only 'citizens' and not all 'persons'. This difference is significant for the Indian Tamils who have worked on the tea plantations since British rule but are still denied Sri Lankan citizenship.

Also of significance is the derogation clause in Article 15(7) of the Constitution. This provides that the exercise and operation of all the fundamental rights in Articles 12 and 14 are "subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health and morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society."

Article 15(7) raises a serious problem as it presents an inordinate aberration in the State's alleged policy of protecting, *inter alia*, language rights. The vagueness of this clause leaves it to the discretion of the State to declare 'the interests' or 'just requirements' under which all fundamental rights and freedoms may be justifiably restricted. Removal of language rights from constitutional protection in the enumerated circumstances is particularly distressing as Sri Lanka has been under Emergency Rule almost continuously since 1983.[26]

An improvement in the area of language rights is apparent in the Draft Constitution of October 1997. The protection of fundamental rights, including language rights, in times of public emergency is provided in draft Article 27(1). However, the term 'citizens' rather than 'persons' remains.

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[26] The Emergency Rule takes place in Sri Lanka under the Public Security Ordinance and has been modified over the years by documents including many versions of Miscellaneous Provisions and Powers Regulations. The State of Emergency Rule has been renewed by Parliament, virtually without debate, each time the issue arose. For a succinct update on the Emergency Rule see *"Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995), Chapter III and *"Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996), Chapter III.

Article 126(2) provides that every person is entitled to apply to the Supreme Court in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right, or language right relating to such person.

The legal recourse, however, afforded by Articles 17 and 126 to every person whose fundamental right or language right has been infringed by executive or administrative action, makes no reference to recourse against infringements by State law generally, nor does it specify recourse for infringements arising from judicial action by courts exercising original criminal jurisdiction.[27]

Further, while an application to the Supreme Court is uncomplicated and is open to all persons, the Supreme Court of Sri Lanka is located in Colombo. This, to persons in the Northern and Eastern Provinces, is an obstacle to accessing the Court. Even Tamils in Provinces close to the capital find that when bringing a complaint against the State, the frustrating obstacles of the justice system and public administration often preempt any attempts. These will be discussed in the sections below.

One further statute, the *Official Languages Commission Act, No.18 of 1991*[28] is generally relevant, as the OLC acts as an internal mechanism to address language rights in all areas of tension. The general objectives of the OLC, provided in section 6 of the *OLC Act*, are to: (a) recommend principles of policy, to monitor and supervise compliance with the provisions contained in Chapter IV of the Constitution; (b) take all actions and measures to ensure the use [of Sinhala and Tamil] in accordance with the spirit and intent of Chapter IV; (c) promote the appreciation of the Official Languages and the acceptance, maintenance and continuance of their status, equality and right of use; (d) conduct investigations on its own initiative or in response to every complaint received and to take remedial action.

It is the duty of the OLC, under Article 18 of the OLC Act, to investigate every complaint submitted to it and under Articles 23 and 24, to take remedial action if it finds the complaint to be justified. The OLC has the power to ask the state authority concerned to redress the grievance, and if the authority fails to comply, it can ask the Courts to issue a directive. However, it appears that

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[27] The latter is rectified in the Draft Coinstitution (October 1977 version).

[28] Hereinafter *OLC Act*.

the OLC is falling short of its objectives and is not exercising its powers to their fullest.[29] Admittedly, the OLC faces complications in implementing what amounts to a policy of tri-lingualism (with three languages of very different scripts) but it has been suggested that the OLC's failure is due to lack of political will, lack of financial resources, and general insensitivity and inflexibility on the part of the bureaucracy.[30]

(I) The Justice System

Like the *Reasonable Use of Tamil Act* and the *Tamil Regulations*, the *Language of the Courts (Special Provisions) Law No.14 of 1973* was incorporated in 1978 into the Constitution as Article 24. It has since been amended by the 16th Amendment.

Article 24(1) of the Constitution states that "Sinhala and Tamil shall be the languages of the courts throughout Sri Lanka and Sinhala shall be used as the language of the court situated in all areas of Sri Lanka except those in any area where Tamil is the language of administration."[31]

While this statement begins clearly, it contains the confusing qualification that Sinhala shall be used as the language of the courts in all Provinces except the Northern and Eastern Provinces where Tamil shall be used. Thus, establishing court languages by Province ensures the violation of the rights of a minority in the Province. Two Tamil parties instituting proceedings in Colombo must comply with the court's language being Sinhala and obtain interpreters, unless the Minister directs the court to proceed in Tamil.

Article 24(1) continues: the record and the proceedings will be in the language of the court. In the event of an appeal, records shall be provided in the language of the court hearing the appeal if different from the language of the court from which the appeal is preferred. The Minister of Justice may, with the concurrence of the Cabinet of Ministers, "direct that the record of any

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29 The state of the OLC was discussed in two interviews with past OLC members: Regie Siriwardene (early August 1997) and Charles Abeysekere (mid August 1997), in Colombo.

30 *Ibid.*

31 Tamil is the language of administration in the Northern and Eastern Provinces; this will be discussed under the heading 'public administration'.

court be maintained and the proceedings conducted in a language other than the language of the Court."

In practice, the clause granting such discretion to the Minister of Justice, with Cabinet's approval, is simply a device to allow court proceedings to be conducted in English. This bureaucratic step is unnecessary and confusing as many courts already conduct their affairs in English.

Article 24(2) of the Constitution declares that any party or representative of a party, may institute proceedings, submit to courts pleadings and documents, and may participate in the proceedings in courts in either Sinhala or Tamil. Further, Article 24(3) provides that any party who is not conversant in the language used in a court is entitled to interpretation and translation into Sinhala or Tamil provided by the State and is then entitled to obtain the record or a translation in that language.

The qualification in Article 24(3) is troubling in its requirement that a Tamil party demanding interpretation not be 'conversant' in Sinhala. The ambiguity of this condition could empower a court to deny an individual of a linguistic minority access to an interpreter by characterising the individual as 'conversant'. This could unfairly prejudice the proceedings for while the individual may be able to follow, he or she may not comprehend enough to sufficiently present and defend their case. In addition, there is a demoralising effect on an individual forced to function in a second language in such critical a matter as a court hearing.

Articles 24(2) and 24(3) of the Constitution would provide acceptable protection of the language rights of Tamils in the courtroom if it were not for the overwhelming lack of resources as Tamil typewriters. More significantly, the courts in the Southern part of the country are replete with interpreters, translators and personnel including judges, officers and stenographers, who do not understand Tamil.

A young Tamil tells of his parents in Jaffna receiving court summons written only in Sinhala. "It was hard to find anyone who can read Sinhala. Some speak, but reading and writing require proper training. My parents responded in Tamil inquiring to contents of the letter. This was ignored and they were

reprimanded for not responding and for not coming to court."[32] This situation surely arose from a lack of court personnel trained in Tamil and from a basic lack of unawareness and insensitivity on the part of the court officers.

A Tamil scholar has noted "abandonment of pluralism paradoxically often occurs in sites devoted to social justice."[33] As an example, he remarks that in upcountry areas where plaintiffs or parties to cases are often plantation-working Tamils of Indian origin, often not a single Tamil-speaking officer is appointed to the relevant Labour Tribunals. Similarly, there are practically no Tamil-speaking police officers in most places outside the North-East, especially in the Upcountry.[34] This lack of front line and support staff trained in Tamil is a problem the justice system shares with the public administration. The full extent of this problem will be discussed under the section addressing public administration.

A system of justice necessarily includes such state powers as arrest, detention, trial and imprisonment. Language can be critical in the exercise of these powers. Article 13 of the Constitution, outlines the legal rights of individuals in such circumstances. Article 13(1) provides "...any person arrested shall be informed of the reason for his arrest." While there is no reference here to the right of the individual to be informed of his rights in a language he understands, these issues are governed by the provisions in the Code of Criminal Procedure (CPC) Act of 1979.[35]

(II) Public Administration

Sinhala and Tamil, as provided in Article 22(1) of the Constitution, are the languages of administration throughout Sri Lanka. Sinhala is the language of administration and the language in which public records are maintained and in which business by public institutions is transacted in all Provinces except

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[32] Interview over the Internet, Sri Lankan Newsgroup, with "J" on 7 October 1997.

[33] *Supra* n 15 at p 84.

[34] *Ibid,* at p 83.

[35] See sections 23 and 110 of the CPC.

for the Northern and Eastern Provinces. Tamil is the language for these purposes in the Northern and Eastern Provinces. This provision also contains the proviso that Sinhala, Tamil or another language, if so declared by the President, may be used in any unit of an Assistant Government Agent (there are several such units within a Province), depending on the proportion of the Sinhala or Tamil linguistic minority *vis-à-vis* the total population of that area.

Article 22(1) is confusing in its declaration that Sinhala is the language of administration, maintenance of records and business transactions for all public institutions and Provincial Councils in all Provinces except in the Northern and Eastern Provinces where Tamil is to be used. These territorial limits ensure that the use of Tamil is restricted in areas outside the Northern and Eastern Provinces and certainly hinders the parity of Tamil and Sinhala.

The issue of registration of births, marriages and deaths is particularly volatile as the language of registration can carry severe repercussions far beyond the errors in spelling. For example, a birth certificate in Tamil can impair application to university regardless of the applicant's ethnicity.[36]

Even the proviso to Article 22(1) allowing the President to direct the use of a minority language in a unit with a large minority population, does not resolve the unequal status of Tamils in public administration. The proviso simply reads 'having regard to the proportion which the minority bears to the total population', and offers no definite measurement to guide the President's decision. This leaves it to the discretion of the President to determine the sufficiency of a linguistic minority group and on this a minority could be denied the use of their language in the administration. It is also left to the President to make the necessary declaration. No such declarations have ever been made.[37]

According to Article 22(2) of the Constitution, correspondence between the public and government institutions in **all** provinces, including the Northern and Eastern Provinces, is possible in Sinhala, Tamil or English. That is, a person, other than an official acting in his official capacity, is entitled to (a) receive communications from, to transact business and communicate with any

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[36] Apparently, applications with a Tamil birth certificate were rejected by Management Studies in Kandy, *supra* n 15 at p 85.

[37] Information of OLC, furnished by Charles Abeysekere, *supra* n 29 [unpublished].

official in Sinhala, Tamil or English; (b) inspect or obtain copies or extracts from official records, documents and translations in Sinhala, Tamil or English; and (c) have any official documents issued to him in Sinhala, Tamil or English.

In addition to the laws applicable to local authorities, Article 22(4) of the Constitution applies to the Provincial Councils. A Provincial Council or local authority which conducts its business in Sinhala or in Tamil is entitled to communicate and transact business with any official in his official capacity, in Sinhala or in Tamil as the case may be. It also provides that two Provincial Councils or local authorities functioning in different languages of administration shall be entitled to use English as their common medium of correspondence.

Certainly, Articles 22(2) and 22(4) go far in promoting the equal use of Tamil in the public administration. However, like the protection of minority languages in the courts, the implementation of Tamil as a language of public administration suffers from major difficulties in implementation.[38]

A recent survey of Directors of Planning in largely Tamil districts identified the following problems in implementing Tamil in administration: (a) inadequacy of staff; (b) shortage of typists/translators; (c) attitude of officers (lack of commitment and preference to work in English); (d) receipt of forms and circulars in English or Sinhala.[39]

The total number of Tamil-speaking staff available for public service is inadequate. Even the smallest units of administration and local councils in Tamil areas cite "too few Tamil officers" as the reason for the difficulties in instituting Tamil as a language of administration.[40] The shortage of Tamil-speaking officers at key levels, such as heads of departments, is compounded by a virtual non-availability of Tamil typists and translators, and even Tamil typewriters. The basic infrastructure facilities are inadequate.

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[38] The issues surrounding the implementation of the 16th Amendment are addressed by the Commissioner of Official Languages and ICES "Official Languages and the Administration" *Report of the Workshop* 1 July 1989 at p 4. The creation of the OLC was among its recommendations.

[39] V. Vamadevan, *supra* n 22 at p 131.

[40] *Supra* n 15 at p 74.

This alludes to the 'attitude' problem revealed in the survey: the unawareness, insensitivity and inflexibility on the part of public officers towards using the Tamil language, even if they have undergone training to do so. As a Tamil man described: "In government departments you will be served in Sinhala unless you are talking to a Tamil person and there are almost none. English is used only if the officer is confident to speak English. Otherwise you can talk in English, but they will respond in Sinhala, even at the airport. It is not that they refuse to serve Tamils, they refuse to serve Tamils in a language Tamils can understand."[41]

The right of Tamil-speaking citizens to correspond with the State may exist, but the snag is that quite often their reply will not be in Tamil. Letters being answered in a language that the recipient does not understand is unfortunately a continuing trend.[42] One scholar remarked that it is the lethargy of lower-level bureaucrats in combination with a shortage of bilingual officials that have proved to be formidable obstacles to giving the Tamil minority satisfaction on this sensitive issue.[43]

Part of the attitude problem among public officers is their preference to work in English. As Article 22(2) of the Constitution provided for equality in the use of Sinhala, Tamil and English in corresponding with public institutions, it is difficult to deny these officers their preferred language of work. The formal recognition of English has had adverse, perhaps even perverse, effects on the language rights of Tamils: for, as officials use English in place of Tamil, the need to accommodate Tamil is reduced. A further effect of this predominant use of English is the hesitation and trepidation felt by Tamils when communicating with the government at Provincial or Central levels. For fear of not being acknowledged or having their requests or inquiries denied, Tamils are forced to seek a bilingual middleman to write or translate their letters rather than write in Tamil.[44]

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[41] Interview with a Tamil man, N.S., in Dambulla district, July 1997.

[42] V. Vamadevan, *supra* n 22 at p 128.

[43] *Supra* n 6 at p 34.

[44] V. Vamadevan, *supra* n 22 at pp 128, 130-131.

Sadly, even the performance of Tamil officers has been hindered by the influence of English. Tamil officers will often use English, even in the North and East, for the prestige and convenience. If a head of a district is non-Tamil speaking, the subordinate staff will feel that speaking Tamil will brand them as communalists and may hinder promotions. Tamil officers will also choose to work in English to gain proficiency as they fear that knowing only Tamil will take them nowhere.[45]

The fourth problem identified in the survey of Directors of Planning in implementing Tamil as a language of administration was the receipt of documents in English or Sinhala. Put in broader terms, there is a basic problem with the documentation and the signs of public institutions. According to Public Administration Circular No.22/91 all existing forms were to be withdrawn and new forms were to be issued in all three languages. This, however, is frequently observed in the breach. For example, the Marga Institute conducted a survey of the Colombo Municipal Council in March 1993 and determined that out of 144 forms given out by the office, 26% were only in Sinhala, 54% only in English, 14% in Sinhala and English and 7% in all three languages.[46] Similarly, signboards inside and outside many hospitals, post offices and police stations appear only in Sinhala. If Tamil does appear it is often mispelt.[47]

To correct the dearth of Tamil speakers in the public service, Article 22(5) of the Constitution was introduced in 1988 to allow the public and judicial service examinations to be in Sinhala, Tamil or the language of choice, subject to the condition that the successful applicant must then acquire a sufficient knowledge of Tamil or Sinhala, as the case may be. However, this has hardly increased the number of Tamil-speaking applicants. Rather, it has created a desperate need for proper language training for the Sinhalese applicants and a monitoring system to ensure that these Sinhala-speakers do use Tamil while on the job.

Note that the requirement in Article 22(5) of the Constitution cannot be challenged as a discriminatory practice according to Article 12(2). Article

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[45] *Ibid.* at p 133.

[46] *Ibid.* at pp 128-129.

[47] *Supra* n 15 at p 83.

12(2), after providing that "no citizen shall be discriminated against on the grounds of, inter alia,.... language....," has these disclaimers:

> Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any national language as a qualification for employment or office in the Public Service...where such knowledge is reasonably necessary for the discharge of such employment or office; Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

To monitor the process of implementing bilingualism, the OLC Act of 1991 created the OLC to investigate complaints, conduct reviews, summon witnesses, publish reports, make recommendations, monitor compliance and to entitle the complainant to seek a judicial remedy in relation to individuals whose language rights have been infringed by a public institution.

The OLC Act provides a recourse for individuals whose language rights have been infringed by a public officer. Article 28(1) states that a public officer who is required in the performance of his official duties to transact business o receive or make any communication, or to issue any copy or extract in any particular language, and willfully fails or neglects to do so, shall be guilty of an offence. On conviction after summary trial before a Magistrate, the offending officer shall be liable to a fine not exceeding one thousand rupees or to imprisonment for a term not exceeding three months or to both.

Before it may bring a public officer to Court under Article 28(1) of the OLC Act, however, the OLC has to prove that the language right violation was deliberate. Faced with this high standard of proof, no prosecutions under this Act have yet taken place. Whatever the reasons, the OLC regulatory mechanism has yet to make its impact felt regarding the use of Tamil as a language of administration and the OLC has yet to use its punitive powers.[48]

Further, the OLC has the power, pursuant to complaints or on its own initiative, to conduct investigations or reviews of the compliance by public

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[48] *Supra* n 22 at p 133.

institutions with the provisions of Chapter IV. In conducting investigations, Section 21 of the OLC Act grants the OLC the power to summon witnesses, compel the production of documents, administer oaths, compel witnesses to give testimony and conduct investigations in the premises of any public institution as the OLC deems fit. On their findings the OLC may, within a specified period of time, make recommendations, monitor the implementation of these recommendations and issue public reports. Under Section 25(1), if a public institution fails to comply with the recommendations of the OLC within 90 days, the complainant is entitled to apply to the High Court of the Province. Further, Section 24(1) provides that the failure of the OLC to investigate a complaint results in the complainant obtaining leave to apply directly to the Supreme Court by way of petition for relief.

The formidable institution of the OLC, however, suffers from lack of political support and financial resources. Due to the government's foot-dragging and under-funding, the OLC has no structure upon which to build and no means with which to act.[49]

(III) Education

Commentators have suggested that the lack of Tamils in the public service is not a result of overt discrimination but simply due to a lack of Tamil-speaking applicants. Unquestionably, education is directly linked to the implementation of Tamil as an official language. While there has been a collapse of the education system in recent years, in part due to the ethnic conflict, and the JVP insurgency, the Tamil population appears to have suffered disproportionately. Many have conjectured that the lack of Tamil speakers and resources stems from the unevenness of educational policy preceding, and subsequent to, the 1978 Constitution.[50]

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[49] Interviews with Regie Siriwardene and Charles Abeysekere, *supra* n 29.

[50] *Supra* n 15 at p 55. See also Commissioner of Official Languages and the ICES, *Workshop Working Paper* "Implementation of Language Policy in Education" Colombo, 24 September 1990 [hereinafter Working Paper on Education] at p 4.

Updating the provisions of the Reasonable Use of Tamil Act from 1958,[51] Sinhala and Tamil were granted equal status in the education system with the 1978 Constitution. As provided for in Article 21(1) of the Constitution, "a person is entitled to be educated through the medium of either of the national languages." Thus it is the right of Sri Lanka's Tamil-speaking minorities - indigenous, of Indian origin, and Muslim - to receive their elementary and secondary school education in Tamil in whatever part of the country they live.

Striving to reflect this clause, along with the new official status of Tamil, the Ministry of Education and Higher Education adopted a new policy instituting the teaching of Tamil to Sinhala-medium students and of Sinhala to Tamil-medium students.[52] The new policy scheme allowed each school to decide in which year teaching of the 'other' language would begin, and what level of proficiency may be reached by the school-leaving stage. In fact, a move towards teaching English at all levels of education was also initiated, recognising the role of English as a "means of communication between people of different ethnic groups.[53] This remains the policy on language in education today.

Regarding higher education, any course of studies may be conducted in Sinhala or Tamil. Provision was made for the use of English in higher education in Article 21(1) which states that this paragraph shall not apply to institutions of higher education where a language other than a national language is the medium of instruction.

The equal availability of instruction in the national languages for higher 21-30 ucation is addressed in Article 21(2). It provides that where one national language is a medium of instruction in any course, department or faculty of any University directly or indirectly financed by the State, the other national language shall also be made a medium of instruction in such a course, department, or faculty, for students who, prior to their admission to such

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[51] The adopted *modus operandi* of the *Reasonable Use of Tamil Act* was as follows: "Tamil language is to be used as a medium of instruction both in primary schools and the Universities in accordance with the respective laws on education and higher education". See S.G. Samarasinghe, "Language Policy in Public Administration, 1956-1994: An Implementor's Perspective" in Dharmadasa, *supra* n 10 at p 84.

[52] *Supra* n 50, Working Paper on Education at p 3.

[53] *Ibid*, at p 6.

University, were educated through the medium of such other national language.

This requirement of equal availability of instruction in Sinhala and Tamil is qualified, however, Article 21(2) further provides that compliance with the above is not obligatory if the other national language is the medium of instruction in any like course, department, or faculty, either at any other campus or branch of the University or any other like University.

Under the existing system of Provincial Councils in Sri Lanka, however, the education, elementary, secondary and higher education, comes under the purview of provincial governments while key aspects of education, such as curriculum formulation, have been retained by the central government. For example, the authority to train teachers, curriculum formulation and the administration of institutes of higher education are all determined and monitored from the centre.[54] In fact, the central government has delegated very little of the power over education to local school systems and the powers granted to the Provinces are limited by norms laid down by the centre by way of language proficiency exams in certain school years.[55]

Thus the education system is top-heavy, resulting in a variety of problems for the rights of Tamil-speakers. First, the hierarchical nature of the system results in attention and funding being concentrated in schools in Colombo and its suburbs. Because of this indifferent and discriminatory state of affairs, Tamil-medium schools and even some Sinhala-medium out-station schools, suffer from a serious lack of resources. Tamil-medium schools are forced to conduct classes in such venues such as private homes and on temple premises, or in deteriorated buildings without basic facilities.[56] In certain provinces, despite a large minority of Tamil-speaking students, there is no Tamil-medium school and the students are forced to study in Sinhala.[57] Coupled with the absence of control over curriculum and over the hiring or training of teachers,

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[54] *Supra* n 25 at p 95.

[55] *Supra* n 50, Working Paper on Education at p 7.

[56] See *supra* n 15 at p 105 for details.

[57] *Ibid,* at p 105.

there has been an overall denigration of Tamil-medium education.[58]

Second, this decline in the quality of education in Tamil-medium schools, completing the vicious cycle, results in problems attracting competent teachers.[59] For example, according to Provincial Education Ministry sources, the Northern and Eastern Provinces in 1991 lacked an additional 4179 Tamil-speaking teachers of which 1472 teachers and 59 principals were needed in the Batticaloa district alone.[60] While this is the sad state of Tamil-medium schools around the country, the staffing situation is no better for the children in the plantation areas - in the Upcountry or in the South - or in the Muslim schools, which are usually conducted in Tamil.[61]

Third, the unfortunate reality of Sri Lanka's education system is its overt ethnic and religious bias. It is obvious that schools are largely segregated on the basis of ethnicity, language and, to a lesser extent, on the basis of religion.[62] The segregation of languages exacerbates the ethnic conflict by reinforcing the students' misperception and intolerance towards the others' language. For example, most Sinhala language textbooks are replete with heroic exploits of Sinhala heroes like King Dutugemunu, an anti-Tamil hero.[63] Simple things like textbooks are not designed to reflect the reality of society in which the school system is located.

Fourth, Sri Lanka's lack of skilled teachers has resulted in a lack of linguistically and ethnically-sensitive teachers. As training is for the most part controlled from Colombo, teachers are clearly not ready to face the challenge of a plural Sri Lanka. Most teachers are trained in segregated circumstances with separate sessions for Tamil-speakers and Sinhala-speakers, aggravating

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[58] *Ibid*, at p 103.

[59] *Supra* n 25 at p 106.

[60] *Supra* n 15 at p 103.

[61] See *ibid*, at p 107 for more details.

[62] *Supra* n 25 at p 101.

[63] *Ibid*, at p 99.

the situation and the ethnic conflict.[64] Like their Sinhalese counterparts, Tamil teachers who are also untrained to handle the challenges of multi-ethnic Sri Lanka, play a negative role in transmitting Tamil nationalist myths to their students, and in general perpetuate the inter-ethnic conflict.[65]

Current Sri Lankan policy and legislation can be seen as making legitimate attempts to protect the language rights of Tamil-speakers. Yet it is clear that the practical application of the policy and legislation in the three areas under discussion has fallen short of the goal: to improve the state of language rights in Sri Lanka.

Section B

Language Rights in International Law

1. The State of the Law

Sri Lanka's record on language rights, both its rhetoric and its reality, is now ready for consideration and commentary in the light of Sri Lanka's international obligations. Nevertheless, a review of language rights in relevant international instruments and in case law at the international level will enable a determination of the significance of Sri Lanka's international obligations.

International Instruments

The United Nations Declaration of Human Rights (UDHR) (1948) is explicit in its promotion of equality and non-discrimination (Article 2). Inclusion of a special clause for the protection of minorities met with resistance in the General Assembly of the United Nations, however. States resisted mainly because it was felt that minorities should be obliged to assimilate with the majority, and that states should not be obliged to provide special concessions to groups which may imply financial aid and institutional obligations. Rather, the General Assembly defused the debate by referring the matter to the Sub-Commission on the Prevention of Discrimination and the Protection of

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[64] *Ibid* at p 101.

[65] *Ibid* at p 100.

Minorities [the Sub-Commission] for further study.[66]

The Sub-Commission's study produced the International Covenant on Civil and Political Rights (ICCPR) (1966)[67] which does include a provision on minority rights. Article 19 provides for freedom of expression and Article 26 provides for equality under the law and non-discrimination, but it is Article 27 that addresses language rights specifically:

> *In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

As a signatory to the ICCPR, Sri Lanka is bound to implement its provisions.

Jurisprudence

The 1st Optional Protocol[68] adopted under the ICCPR enables individuals to bring a ratifying state before the United Nations Human Rights Committee [the Committee], a body that reports to the United Nations Commission for Human Rights [UNCHR]. An individual may bring a claim if he or she feels his or her rights, as protected under the ICCPR, have been violated by an action of the ratifying state. Sri Lanka acceded to the Optional Protocol in October 1997.

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[66] Universal Declaration of Human Rights U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (December 10, 1948). The Sub-Commission is an expert body subordinate to the Commission and ECOSOC established to provide analysis and advice to the former. See Asborne Eide "The Sub-Commission on the Prevention of Discrimination and Protection of Minorities" in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press: Oxford, 1992) at p 211.

[67] *International Covenant on Civil and Political Rights*, (1996) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47 [hereinafter ICCPR].

[68] *Optional Protocol to the International Covenant on Civil and Political Rights* (1966), 999 U.N.T.S. 171. (entered into force on 23 March 1976) [hereinafter Optional Protocol]. There is a Second Optional Protocol which aims at the abolition of the death penalty. Sri Lanka is a signatory to the 1st Optional Protocol.

The Committee first considered the relationship between language and the freedom of expression in 1990 when it heard the first of a series of cases from France.[69] In this case a Breton, charged with defacing road signs, argued, *inter alia*, that his freedom of expression was violated by the French courts' refusal to allow him to testify in Breton. This was rejected by the Committee as the individual was bilingual and chose not to speak French. Two other claims of violations under Article 19 of the ICCPR, by Bretons defacing road signs, were dismissed as the activities were not deemed by the Committee to be the kinds of expression that were guaranteed under that article.[70] Two further "Breton cases" addressed the question of an individuals right to communicate with state authorities in the minority language of Breton.[71] In both cases the Committee dismissed the allegation that Article 19 had been violated, and refused to look at the substantive issues until the individual had exhausted all domestic remedies, even if he must do so in French.

It is worth noting that France declared Article 27 of the ICCPR inapplicable when it signed the Optional Protocol and that the Committee has held, to the dismay of some members, that this must be treated as a reservation and France is accordingly not bound by Article 27.[72]

The Committee finally handed down a decision in 1993 that addressed the issue of language rights under Article 27, and clarified the relationship between language and freedom of expression (Article19). In *Ballantine, Davidson and McIntyre* v. *Canada* [hereinafter *McIntyre*][73] members of the English-speaking minority of Quebec brought a claim challenging a provincial

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[69] *Dominique Guesdon* v. *France*, U.N. GAOR, 45th Sess., U.N. Doc. A/45/40 (1990) App. X at p 61.

[70] *S.G.* v. *France*, U.N. Doc. AA/47/70, Annex X.F; and *G.B.* v. *France*, *supra*, Annex X.G. as discussed in Nigel S. Rodley "Conceptual Problems in the Protection of Minorities: International Legal Developments" (1995) 17 *Human Rights Quarterly* 48 at p 57.

[71] *T.K.*v. *France*, U.N. GAOR, 45th Sess., U.N. Doc.A/45/40 (1990) App X at p 118 and *M.K.* v. *France*, U.N. GAOR, 45th Sess., U.N. Doc.A/45/40 (1990) App X at p 127.

[72] *Supra* n 71 at p 56.

[73] Communications Nos.359/1989 and 385/1989, March 31, 1993 (UNHRC). See discussion in *supra* n 66 at 176; and in de Varennes *supra* n 9 at p 9.

law that prohibited the use of any language other than French on outdoor commercial signs. They claimed that it violated their rights under Articles 19, 26 and 27 of the ICCPR. The Committee dismissed the claimants' arguments regarding Article 26 because the prohibition applied to both French and non-French vendors and in this sense was not discriminatory. The Committee would also not consider the complaint as a potential violation of Article 27 on the ground that Article 27 did not apply to a language group that was the majority group in the country (Canada) as a whole, despite its being a minority in the jurisdiction (Quebec) in question.[74]

The 'minority' covered by Article 27 was thus understood to be an objective, numerical minority: less than 50% of the entire population, be they nationals or non-nationals. The content of the right was interpreted as requiring no interference from the state in the use of a minority language. It does not impose upon the state the positive duty to create institutions and programmes to ensure the minority's survival and development but rather the state may not inhibit the private and community use of the language, nor permit others to do so.[75] The state machinery is, therefore, still "perfectly entitled to operate within the language of its choice in its activities, and is within its competence to require individuals to submit to this choice if they are able to do so" as minorities are still free to express themselves in any manner outside of state activities.[76]

The Committee in its *McIntyre* decision did accept that commercial expression in a language other than an officially established one, falls within the protection of Article 19[77] of the ICCPR. The Committee held that the article applies not only to ideas and subjective opinions but also to any news or

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[74] For a critique of the decision see Irit Weiser, "United Nations Norms Relating to Language" in Sylvie Leger (ed.), *Towards a Language Agenda: Futurist Outlook on the United Nations* (Canadian Centre for Linguistic Rights: Ottawa, 1996) p 241 at p 249.

[75] See de Varennes *Supra* n 9 at pp 172-173.

[76] *Ibid* at 47.

[77] Though the ICCPR does not contain a free-standing right to speak one's own language, and there have been no direct cases on this point, the conclusion that any interference with such speech would likely offend the freedom of expression in Article 19 is said to "flow inexorably" from the decision in *McIntyre*. See *supra* n 73 at p 56.

information, any expression, any publicity or signs and to any work of art. The only restrictions permitted were those "provided by law and necessary to respect the reputations of others or to protect national security, public order, health or morals." The restrictions in this case were unnecessary, according to the Committee, as they protected neither the rights of individuals, nor the public order, health or morals. Following the decision, the Quebec government amended its legislation to permit the use of other languages on commercial signs as long as the French text is predominant.[78]

In the case of regional bodies, cases heard by the European Commission on Human Rights[79] may not always give a clear idea as to how the UN Committee would rule if faced with a similar issue. For example, when asked in *X.* v. *Ireland* about a person's right to receive administrative documents in a particular language, the European Commission held that the requirement, to complete a form in the Irish language did not interfere with the applicants freedom of expression. One scholar has suggested that this case would be treated very differently under the ICCPR and by the Committee, as the issue was discrimination on the basis of language and Article 26 of the ICCPR protects the right not to be discriminated against in all areas, including in state services.[80]

Non-Binding Instruments

Non-binding United Nations instruments are often respected and observed by states for they offer clear principles and guidelines upon which states can conduct their affairs. The Universal Declaration of Human Rights (1948) is a good example although it is now considered as reflecting customary

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[78] *Supra* n 9 at pp 42-44. See also *Charte de la langue francaise R.S.Q., c. C-11,* as amended S.Q., 1993 c.40, Article 18.

[79] The European Commission on Human Rights is the European regional equivalent of the UN Human Rights Committee. It hears and decides claims of violated rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms. For more information see M. Janis, R. Kay, A. Bradley, *European Human Rights Law: Text and Materials* (Oxford: Clarendon Press, 1995). For language see pp 253 *et seq.*

[80] See footnote at *supra* n 68 at pp 174-175. See also de Varennes, *supra* n 9 at pp 41-42.

international law.[81] The Universal Declaration is often cited as an instrument that has crystallised into binding law, and so does impose certain obligations.

The other non-binding instrument most relevant to language rights is the recent Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[82] The Declaration on Minorities was adopted by the General Assembly on 18 December 1992 after lengthy studies and reports by the Sub-Commission, the creation of an open-ended Working Group, and much discussion within the UNCHR.[83] Inspired by the provisions of Article 27 of the ICCPR, the Declaration on Minorities prescribes both positive and negative obligations for states to protect and promote linguistic rights.[84] Its adoption has been said to suggest a growing awareness of the fundamental nature of linguistic rights.[85]

Prior to the Declaration on Minorities no single human rights instrument focused exclusively on the definition, delineation and the declaration of international linguistic rights. A seminar of international scholars in Brazil in 1987 produced an important document called the Declaration of Recife. This document enunciated a novel framework for the international protection of linguistic rights.[86] Recently, as a follow up to the Declaration of Recife, the Universal Declaration of Linguistic Rights was introduced by institutions and

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81 Mark W. Janis, "An Introduction to International Law" (Little, Brown & Company Ltd., Toronto, 1993) at p 249.

82 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res. 47/135, adopted 18 December 1992 [hereinafter Declaration on Minorities].

83 The Third Committee, of which Sri Lanka was a member, was charged with the drafting of the Declaration on Minorities. For a comprehensive review of the history of the Declaration on Minorities' see Joseph P. Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" 32 *Virginia Journal of International Law* p 515.

84 See *supra* n 77 at p 254 where it notes the Declaration on Minorities as a "notable development."

85 *Supra* n 84 at p 517.

86 *Declaration of Recife* is reprinted in 10 Human Rights Quarterly (1988) pp 306-307. See also ibid at p 571 for more information.

non-governmental organizations [NGOs] present in Barcelona in June 1996.[87] Confirming its commitment to Article 27 of the ICCPR and the Declaration on Minorities, this document contains two clear proposals: (a) that a Council of Languages be created within the UN with a view to protecting language communities, and that (b) a World Commission on Linguistic Rights, a non-official, consultative body be created.

2. Sri Lanka's International Obligations

Ascertaining Sri Lanka's obligations under international language law requires a checklist of international instruments Sri Lanka has ratified. The list is fairly short. Then, for background purposes only, it is also interesting to examine the non-binding declarations which Sri Lanka has supported.

Resolutions and declarations of international organisations are regarded as a form of 'soft' international law - "rules which are neither strictly binding nor completely void of any legal significance[88] but which in time may harden into customary international law. These may be considered as international documents in an 'aspirational' mode, setting goals for international society and outlining general standards of conduct.[89] These declarations of international law are not regarded as 'binding' states to distinct obligations and do not entail the action or ratification that international covenants do.

Treaties

Sri Lanka has ratified the ICCPR and is, therefore, accountable for its actions that may be in contravention of the document. Sri Lanka has also explicitly recorded its compliance with Article 41 of the ICCPR, recognizing the right of States to bring claims of other State violations before the Committee.[90]

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[87] More background information and the text of the *Universal Declaration of Linguistic Rights* is available on the Internet at http://www.indigo.ie./egt/udhr/udlr-en.html.

[88] *Supra* n 84 at p 51.

[89] *Ibid*, at p 14.

[90] UN Doc. CCPR/C/2/Rev.4 at p 121.

States Parties are expected to submit periodic reports to the Human Rights Committee on their compliance with the terms of the ICCPR. Sri Lanka has filed only four such reports since the 1978 Constitution, indicating a less-than-onerous demand on states to report.[91] The reports submitted by Sri Lanka reiterate the clauses of the Sri Lankan Constitution and restate the government policies but go no further in explaining the treatment of minorities. For example, regarding its compliance with Article 27 of the ICCPR (the language rights provision), Sri Lanka pointed out in its most recent periodic report in 1994 that Article 10 of the Sri Lankan Constitution grants the freedom of thought, conscience, and religion.[92] This meets the minimum requirement for the periodic reports and the Committee has never asked Sri Lanka for further explanation.

Therefore, Sri Lanka's international obligations are restricted to upholding the provisions of the ICCPR and to reporting periodically to the Human Rights Committee. Its track record may be occasionally criticised by the Committee, and it has to endure comments and criticisms by NGOs and other states.[93] While Sri Lanka's ratification of the ICCPR increases the tools available to domestic advocates, it does nothing to require action or explanation if Sri Lanka does not wish to act or explain. With the accession to the Optional Protocol, it is now possible that its policy on language rights be brought forward for further scrutiny.

Non-Binding Instruments

The principles set out in the Declaration on Minorities, as a non-binding instrument, may be regarded as an indication of international views on linguistic rights but the significance of its provisions is negligible for a state who chooses to ignore it.

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[91] Sri Lanka's reports to the Committee can be found at CCPR/C/14/Add.4 (1981), CCPR/C/14/Add.6 (1983), CCPR/C/44/Add.9 (1989) and CCPR/C/70/Add.6 (1994) with supplement CCPR/C/70/Add.8.

[92] UN Doc. CCPR/C/70/Add.6.

[93] Sri Lanka's human rights record has been the subject of numerous presentations by NGOs to the Committee: E/CN.4/Sub.2/1995/NGO/35; E/CN.4/Sub.2/1995/17; E/CN.4/Sub.2/1994/NGO/32; and commentary by other states: for example, A/46/270 comments by European states.

Sri Lanka, as a member of the Third Committee, did not participate in the discussions leading up to the draft of the Declaration. When the draft was introduced by the representatives of most of the other countries on 3 December 1992, Sri Lanka hesitated in joining in sponsoring the draft.[94] This hesitancy on the part of Sri Lanka may imply a realization that the document and its principles, while not binding, do carry weight among states and observers and that sponsorship may open its record to criticism. Yet in the end, for whatever reason, Sri Lanka *did* sponsor the draft resolution. This does offer a tool for NGOs monitoring Sri Lanka's treatment of minorities. However, Sri Lanka's sponsorship is irrelevant for the Declaration on Minorities cannot help the linguistic minorities of Sri Lanka, if Sri Lanka does not wish it to.

Despite the recently renewed commitment of the UNCHR to adopt the Declaration, no concrete international standard of norms has yet emerged. The Declaration remains a controversial document and the treatment of linguistic minorities is hardly uniform among states. As the various examples of international "practice" (i.e. Declarations) have not hardened into custom, it appears that there are no applicable customary norms regulating or protecting the treatment of the Tamil-speaking minority.

3. Sri Lanka's Violations of its International Obligations

Evaluating Sri Lanka's record in the light of international law, it is clear that as the international regime on language rights demands so little with regard to minority protection, Sri Lanka actually has very little to violate. The only real obligations against which Sri Lanka's record can be held are those set out in the ICCPR.

The following analysis of Sri Lanka's record shall be grounded in the model of the ICCPR and the Committee's interpretation of its clauses, and will occasionally draw upon the principles in the Declaration on Minorities.

General

A preliminary glance at the interpretation by the Committee of general

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[94] This is clear from *Report of the Third committee*, 55th Mtg. U.N. Doc. A/47/678/Add.2 (1992). The draft resolution cxan be found at A/C.3/47/L.66.

concepts is important. Recall the numerical definition set out by the Committee in *McIntyre* of a linguistic 'minority'. Tamils do qualify as a minority as they represent less than 50% of the population within the greater jurisdiction.[95] It may be recalled also that *McIntyre* established that narrowing the definition of expressive activity to include only political, cultural or artistic expression was unacceptable. This leaves Sri Lanka liable for violations, of possibly larger, and as yet undetermined, range of forms of expression.

Sri Lanka's general constitutional language provisions and their application are, for the most part, acceptable. First, the peculiar articulation of the equally "official" status of Tamil and Sinhala in Article 18(1) of the Constitution is not problematic in relation to the ICCPR. Despite the indirect suggestion of the subordinate status of Tamil, there is nothing in the ICCPR that requires states to recognize a minority language as official. Similarly, the confusion created by the terms "link" and "national" languages does not disturb any terms of the ICCPR.

The ICCPR requires that Sri Lanka not hinder the private and community use of language and not allow others to hinder it. Further, according to the UNCHR, Sri Lanka is under no obligation to ensure the linguistic minority's survival or development. Rather, the State of Sri Lanka is entitled to use one language in the public sphere, and may require individuals to submit to this language. Therefore, even if Sinhala is retained as the only official language, it would be irreproachable.

The Declaration on Minorities offers guidance on the topic of language in legislation. Article 1(1) states that "States shall protect the existence and, *inter alia*, the language identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity." Article 1(2) then provides: "States shall adopt appropriate legislative and other measures to achieve those ends." Undoubtedly this is a broad provision that captures the state's duty to legislate with consideration and respect for the needs of their linguistic minorities.

Both the non-discrimination clause in Article 12(2) of the Sri Lankan

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[95] Like the Quebecois English minority in *McIntyre*, this prevents a Sinhalese from bringing a claim, even if discriminated against in the North or East.

Constitution, and the freedom of a citizen to use his own language in Article 14(1)(f), in principle, conform with ICCPR standards. However, there are two serious concerns raised in conjunction with these provisions.

First, it is very worrisome that Article 15(7) of the Sri Lankan Constitution permits the subordination of language rights to restrictions prescribed by law when it is "in the interest of national security, public order...and the general welfare of a democratic society." The ICCPR does, in Article 4, allow state parties to take measures derogating from their obligations under the ICCPR in times of public emergency, provided that such measures do not involve discrimination solely on the ground of, *inter alia,* language. The provisions of Article 4 of the ICCPR are not reflected fully in the Sri Lankan Constitution.

Second, the fact that Articles 12(2) and 14 of the Sri Lankan Constitution extend protection only to 'citizens' is objectionable. The ICCPR, in Article 26, guarantees to all *persons* equal and effective protection against discrimination. Going further, Article 2 of the ICCPR provides that each state party to the ICCPR undertakes to respect and to ensure the rights recognized in the ICCPR to *all individuals within its territory.* Thus the protection of 'citizens' in the Sri Lankan Constitution presents a clear departure from obligations outlined in the ICCPR.

The ICCPR does not require that States provide a channel of legal recourse for linguistic minorities. Rather, it is inherent in the ICCPR that minorities have equal and easy access to judicial appeal. Article 17 of the Sri Lankan Constitution states that, as provided in Article 126 of the Constitution, a person is entitled to apply to the Supreme Court as recourse against infringements by executive and administration. The existence and services of the OLC also provides similar recourse. This is sufficient under ICCPR terms. The actual worth of the judicial recourse under Article 126 and under the OLC shall be dealt with in detail below, under the headings of Justice and Public Administration.

(I) <u>The Justice System</u>

Determining state obligations regarding language in specific areas such as the justice system, reveals an interesting dilemma. The ICCPR, in its text and as interpreted by the Committee, does not impose upon states the creation of laws or programmes to ensure the minority's survival and development. A

state is entitled to elect one language in its activities and may require individuals to submit to this choice if they are able to do so. A single state language is permitted, for minorities are free to express themselves in any language they choose when outside of state activities. The paradox exists in that the ICCPR is resolute that the state not discriminate against linguistic minorities. Sri Lanka, thus, is under no obligation to include Tamil in its activities, but may not exclude it to the point that it is discriminatory.

In this light, the constitutional declaration of Sinhala and Tamil as the languages of the courts, followed by the qualification that the use of Tamil shall be restricted to the Northern and Eastern Provinces while Sinhala shall be used in all other Provinces, appears adequate to comply with the terms of the ICCPR. The clause enabling the Minister to direct proceedings to be in the minority language or in English and Article 24(2) entitling Tamils to participate fully in all courts in their own language attest to the non-discriminatory practices of the courts. As long as the state provides services of translation of testimony, records and decisions for those Tamils who are unable to submit to the choice of Sinhala as the language of the court, then there has been no violation. There are, however, two problems with the current protection of Tamil-speakers in Sri Lanka's courts.

First, Article 24(3) of the Sri Lankan Constitution is troubling in its requirement that a Tamil party demanding interpretation not be 'conversant' in Sinhala. This power of a court to deny a minority access to an interpreter by characterising the individual as 'conversant' is unfair, if not outright discrimination. However, recall that the Breton Cases highlighted the refusal of the Committee to hear cases where claimants could speak the language of the court, but chose not to do so. This means that if a Tamil complained to the UNCHR of being refused an interpreter because he/she was 'conversant' in Sinhala, the Committee would dismiss the claim leaving the Tamil without recourse. Claimants are also required to exhaust all domestic remedies before bringing a claim, even if the complaint addresses the very issue of language violations within the domestic remedies and the judicial system.

Another problem with the apparent 'adequate' protection of language rights in Sri Lanka's courts is the overwhelming lack of Tamil resources and personnel. Under Article 14(3)(f) of the ICCPR everyone is entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in the court. This reality of language use in the courts may require a serious explanation from Sri Lanka if it was ever charged with

failing to provide basic services in Tamil. Note, however, that the jurisprudence of the Committee indicates that the Committee tends to shrink from deciding issues of effects-based discrimination and prefers to judge state compliance by evaluating only the legislation.

(II) Public Administration

As in the justice system, Sri Lanka is under no obligation to create laws or programmes to ensure the minority's survival and development and is entitled to use the language of its choice in public administration. This, however, is subject to Sri Lanka's obligation under the ICCPR to ensure that persons are not discriminated against on linguistic grounds in public administration.

Article 22(1) of the Constitution names both Sinhala and Tamil as Sri Lanka's languages of administration. The same clause also declares Sinhala to be the language of administration in all Provinces except in the Northern and Eastern Provinces. In the North and East the language of administration is to be Tamil. These territorial limits restrict the use of Tamil in areas outside the Northern and Eastern Provinces. Further, this situation is not corrected by the proviso empowering the President to direct the use of a minority language in a unit with a large minority population. As the proviso is vague, dangerously discretionary and has never been used, it is evident that it does not save Article 22(1) from its discriminatory effect.

However, as long as services are available in the minority language, Sri Lanka is in compliance with the ICCPR, or at least on paper. Certainly, NGOs can forward evidence and information on the state practices when it is Sri Lanka's turn to report before the Committee.

The ICCPR endorses clauses like Article 22(2) of the Constitution. This article provides for all correspondence with and all records issued from public and state institutions in all provinces be possible in Sinhala, Tamil or English. Unfortunately, the value of this article is lost next to the scarcity of resources (facilities, forms, signs and personnel), lack of political will, the anti-Tamil attitude of the public service officers, and the overuse of English by both Tamil and Sinhalese public officers. Thus the reality of the Tamils' secondary status in the public administration may violate the non-discrimination clause in the ICCPR.

Articles 12(2) and 22(5) of the Constitution require that new entrants to the public service acquire a sufficient knowledge of their second language. Even this requirement is in line with ICCPR conditions and does not violate the non-discrimination clause in Article 19.

The recent creation of the OLC reinforces the sincerity and non-discriminatory nature of the public administration in Sri Lanka. Indeed, the powers granted to the OLC to investigate and seek remedial action for language rights violated by the state fall perfectly in line with the principles outlined in the Declaration on Minorities. The existence of the OLC is more than sufficient for the state to claim it has mechanisms to protect the linguistic identity of minorities and to encourage conditions for the promotion of that identity.[96] The existence of the OLC is a 'bonus' - regardless of the sad state of its resources, finances, and lack of supporting political will.

(III) Education

Education, in many ways, is the most volatile issue in a language rights debate. To Tamils, the lack of leverage they have over Tamil-medium education is representative of the majority's dominance and control over the Tamil language and their people.

However, the Colombo-centred power over the policies, planning, recruitment of teachers, curriculum setting, and financing of the education system is acceptable under the ICCPR. Indeed, the ICCPR has no clauses on point, although a general principle may be inferred from the prohibition of discrimination against on the basis of language in Article 26 of the ICCPR and how "minorities shall not be denied the right, in community or with the other members of their group, to...use their own language" in Article 27 of the ICCPR. Thus Sri Lanka's system at the elementary, secondary and higher education levels, complies as the state is under no obligation to provide or to fund Tamil-medium schools as long as the minority's use of their language amongst themselves is not hindered.

This right of minorities to positive protection and not action was outlined in by the Permanent Court of International Justice when it held that the right of minorities to operate private schools is consistent with the principle of

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[96] These are the requirements outlined in Article 1(1) of the Declaration on Minorities.

assisting minorities who may suffer some disadvantage because of their status.[97] This is reflected in the UN Convention Against Discrimination in Education[98] which recognizes the right of minorities to carry on their own educational activities, including the maintenance of schools and the use or teaching of their own language. As Sri Lanka does permit private schools in the Tamil-medium to operate and does require that courses in higher education be available in both languages somewhere on the island, these clauses are not violated. Note, however, that the rights in the Convention on Education are dependent on "the educational policy of the each State" and the right to minority education is not to prevent minorities "from understanding the culture and language of the community as a whole and from participating in its activities" nor to "...prejudice national sovereignty."[99] This means that even the private education of Tamils may be subjected to state policy.

The Declaration on Minorities does go further in addressing education. Article 4(3) declares that states should take appropriate measures so that, wherever possible, minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue. Sri Lanka has complied with this by providing state-funded Tamil-medium schools and requiring Sinhalese students to learn Tamil.

Rather, the infringement of language rights in Sri Lanka results from discriminatory funding, planning and policies imposed by Colombo. However, the linguistic segregation of the schools and the lack of ethnically-sensitive textbooks and teachers will remain the state of affairs until the State decides to improve the situation.

Section C

Improving the Record

Although an international regime for the protection of language rights with

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[97] *Advisory Opinion on Minority Schools in Albania*, (1935) P.C.I.J. Ser. A/B, No.64 at 3. As commented on in de Varennes *supra* n 9 at p 158.

[98] *Convention Against Discrimination in Education* (1960), 429 U.N.T.S. 93 (entered into force 22 May 1962) [hereinafter Convention on Education].

[99] *Supra* n 75 at p 253.

clear and enforceable standards has not yet emerged, this should not keep Sri Lanka from improving its record. In the light of Sri Lanka's recent accession to the Optional Protocol, the following recommendations aim to put Sri Lanka's state of language in order. These suggestions endeavour to better the plight of Tamil-speakers on the island.

1. International

Accession to the Optional Protocol allows for greater advocacy from the Sri Lankan NGO community and other concerned parties as the transparency that comes with the Optional Protocol opens the government's laws and practices to challenge, criticism and debate at an International forum.

Sri Lanka should also be strong and vocal in its support for the Declaration on Minorities. Although the document is non-binding, it offers greater weight to the arguments of language rights activists. Ideally, Sri Lanka should reflect the spirit of the Declaration on Minorities in its legislation and policies, as well as in practice.

2. National

At the national level, Sri Lanka has much change and reorganisation to undergo in order to improve its language rights record. Many of the suggestions stem from the importance of making the provisions in Sri Lanka's Constitution in conformity with international instruments,[100] although some suggestions go beyond the international standards.

General

The general constitutional language provisions should be corrected, even if for purely aesthetic or logical reasons, by including Tamil in the first sentence of Article 18(1) so that it reads "Sinhala and Tamil are the Official Languages." It has also been suggested that English is *de facto* a third official language and should be recognized as such. To clarify the law and remove the ambiguity

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[100] The importance of Sri Lanka conforming to with international instruments, particularly the ICCPR, was a recurring theme in the discussions at the Consultation on the Draft Constitution. See Patricia Hyndman, *Report to the Parliamentary Select Committee on the Constitution* Colombo, (Consultation on the Draft Constitution of Sri Lanka, August 9-11, 1997), Law & Society Trust (unpublished report).

of the status of 'link' language, the provision should read "Sinhala, Tamil and English are the Official Languages.[101]

The current discriminatory practice regarding the interpretation of translated texts of legislation, that of the *de facto* situation of English and Sinhala texts overruling the Tamil, could be ameliorated with the implementation of a policy based on the Canadian model. In Canada legislation must be enacted or adopted in both English and French and both versions of a bilingual statute are official, original and authoritative expressions of the law. Neither version has the status of a copy or translation; neither enjoys priority or paramouncy over the other - in fact, each is written as if it were the original text. This corollary is known as the equal authenticity rule.[102]

The concerns surrounding the derogation section on the subordination of language rights in times of emergency can be alleviated, to a certain extent, by enacting the provision proposed in the Draft Constitution. The relevant article of the Draft reads:

> *In time of public emergency the existence of which has been duly proclaimed, measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognized in this chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society,* ***provided that such measures do not involve discrimination solely on the grounds of, inter alia, language (emphasis added).***

Even this proposal has been criticised as being too open to interpretation. It has been suggested that the words "which threatens the life of the nation" be inserted after 'public emergency' thereby bringing the clause in line with Article 4 of the ICCPR.[103]

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[101] *Supra* n 15 at p 69.

[102] This rule was established in the Supreme Court of Canada decision of *Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 553 at 618. See also Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) 215 at p 243.

[103] See Law & Society Trust "Draft Fundamental Rights Chapter - Recommendations (1997) VII:113 *Fortnightly Review* 12 at p 21.

The use of the word 'citizens' in the Constitution, particularly in the non-discrimination clause, can be easily rectified. Bringing it in line with the ICCPR standards, the Constitution should guarantee to all *persons* equal and effective protection against discrimination.[104] This leaves the clause open-ended, making its protection more complete.[105]

The possible misinterpretation of Article 14(1)(f) of the Constitution as encouraging one group's language over another can be prevented with a simple addition. Adding the provision: "subject to the rights recognized in this Chapter" at the end of the clause would prevent the imposition on, or the violation of, the fundamental rights of other persons under the guise of promoting one's culture and language.

In terms of legal recourse for linguistic minorities, Sri Lanka does provide in Article 17 of the Constitution for recourse against infringements by executive and administration. Striving for completeness, the Draft Constitution also includes protection against infringements "by State action" and "arising from judicial action by courts exercising original criminal jurisdiction of a fundamental right to which such person is entitled under Article 10" (the equivalent of Article 13 in the current Constitution). A suggestion to further improve the wording of the Draft recommends extending the protection to include judicial action that infringed on human rights generally, rather than where it impacted on those rights in [Article 13].[106] Other suggestions will be discussed under 'Justice' below.

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[104] *Ibid*, at 16. See also Law & Society Trust "Constitutional Reform and Fundamental Rights: Some Comments" (1995) VI:94 *Fortnightly Review* at p 12.

[105] Just prior to the commencement of the August 1997 Consultation on the Draft Constitution of Sri Lanka, Dr. Jayampathy Wickremaratne, informed the participants of unofficial changes to the Draft. Among these changes was the introduction of a new Article 32 in the Fundamental Rights and Freedoms Chapter providing that "all rights available to citizens in this chapter also be available to persons who are not citizens of any other country and have been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continue to be so resident." See *supra* n 100 at Schedule II.

[106] This suggestion was made by Justice Bhagwati of the Indian Supreme Court at the Consultation on the Draft Constitution. He commented that a leading Indian Supreme Court case had decided that all judicial action should be subject to the fundamental rights provisions. See *ibid* at pp 4 and 7.

To improve its language rights record, Sri Lanka should enact a National Languages Charter by which it could guide its policies and practice. The Official Language Department should be upgraded as an effective arm of the OLC and the OLC should be given more money, facilities and political support.[107] Perhaps this is an area where foreign attention and aid could be directed.

(I) Justice

In the area of justice, changes should begin with a simplification of the legislation so that it provides "Tamil and Sinhala are the languages of the Courts throughout Sri Lanka and may be used in as such." Further, as the law is complicated by the need for permission to use 'another language', English should be included as a language of the Courts, thereby recognising the *de facto* situation. Note, however, that this raises issues regarding the overuse of English and the subsequent under-use and disregard for Tamil.

Article 24(3) of the Constitution should remove the requirement that a minority must not be "conversant" in the language of the court before he/she may receive an interpreter. Although it would appear to change very little, this clause could be brought in line with Article 14(1)(f) of the ICCPR which grants an interpreter's assistance to persons who "cannot understand or speak the language used in court." Ideally, Sri Lanka could go even further and grant interpretation services for all who request it - this would ensure against language discrimination in the courts.

Unfortunately, regardless of the legislation's wording, the supply of interpreters is dependent on the availability of Tamil personnel and resources. Undoubtedly the training of Tamil interpreters needs to be improved and better funded. Critical in this task is also an improved system to monitor the Tamil-speaking officers and court personnel to ensure that they do use Tamil when called upon and use it properly. This issue will be addressed again under 'public administration' with regard to the OLC.

Sri Lanka's current infringement of the ICCPR regarding an individual's rights during the process of arrest can be easily rectified. It appears that the Draft Constitution has attempted to meet ICCPR standards by providing in

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[107] *Supra* n 22 at p 107.

Draft Article 10(3) that a person shall be informed of the reason for his arrest and his rights "in a language he appears to understand." However, even this is problematic. This clause may be interpreted against an accused whom the police claimed did not 'appear to understand'. Rather, to bring Article 13 of the Constitution in line with the ICCPR it should read: "A person under arrest is entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

The language rights record in the justice system would improve with the implementation of a suggestion regarding the Regional Police Commissions, as they have been proposed under the Devolution package. It was advised that Regional Police Commissions be required to reflect the particular ethnic diversity of the Region - this, in the process would naturally reflect the linguistic diversity.[108] The Regional High Courts as proposed under the Devolution proposals offer a further solution. Article 17 should be altered to permit persons to bring claims (in first instance) before the Regional High Courts rather than having to go straight to Colombo. An appeal from such a decision would then lie to the Supreme Court. This would afford practical convenience to the litigant, would ensure access to justice in their own language and, therefore, increase the likelihood that they will use it. These Suggestions would benefit the linguistic minority while enhancing and easing the process of devolution of power.

(II) Public Administration

To improve the language rights record of the public administration, Article 22(1) of the Constitution should clarify the confusion as to how, when and where Sinhala and Tamil are the languages of administration and where this is restricted. Further, the power to permit the use of a minority language in administration should not lie with the President. To resolve both these issues, it has been suggested that Article 22(1) stipulate that both Sinhala and Tamil be the mandatory languages of record and administration in those administrative areas which have more than 25% speakers of the other language.[109] Ideally, Sinhala and Tamil should be the languages of

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[108] Lakshman Marasinghe, "Some Thoughts on the Devolution Package" in Siriwardena (ed.), *supra* n 25 at p 15.

[109] Information of OLC, furnished by Charles Abeysekere, *supra* n 29 [unpublished].

administration, without restrictions, throughout the island.

When bilingual services are provided upon demand, demand is easily suppressed as most minorities are often bilingual and it takes real crusaders to insist on service in their language. In fact, most will not. Yet, in the Canadian experience, when bilingual services are available, demand suddenly appears.[110] The OLC recommendation that federal institutions should actively offer services in both official languages rather than waiting for demand to surface should be supported by the government in both reality and its rhetoric. Unfortunately, even if the state supports this policy, its implementation continues to be undermined by the lack of resources and personnel.[111]

Certainly, having staff capable of working in both official languages in the regional sectors of the administration, and in the administration in general, is a "crucially important requirement" for any bilingual and anti-discrimination policies to work in the public administration.[112] Towards this end, a national empirical base-line study should be done to assess the personnel and the resources in the current administration. Once the weaknesses in the system are assessed, there should be improved recruitment standards, (i.e. requiring new entrants to be conversant in both official languages from the outset), better training facilities, better equipment and better monitoring of the officers and the bureaucracy. All of these demand financial and political support to succeed.

A partial answer to these issues may be found in a policy from the early 1950s. Prior to the 'Sinhala Only' policy, the Commissioner of Languages was consulted by the government in the deployment of staff (the annual transfers). This practice should be resumed and used as a model to extend and enhance the role of the Commissioner of Languages to include advising the government in other areas. This is positive as it ensures that language issues are taken into account.

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[110] *Supra* n 4 at p 118.

[111] Official Languages Commission, *Report to Parliament*, 8/7/81.

[112] *Supra* n 22 at p 107.

To advance the language policy in the public administration, the *OLC Act* provides for compliance with language laws, for facilities required and the motivation needed for such compliance (Article 6). A comprehensive legal framework is provided to monitor and supervise the implementation of the law (Articles 7, 20, 21 and 25). However, it has been observed that non-compliance resulting in penal action may create a situation of 'cart before horse' if there has not first been language planning and motivation.[113] That is, unless the population is aware of the language policy and is motivated to comply and promote it, there is little sense in distributing penalties.

Language planning and motivation should obviously be the priorities of the present OLC. Indeed, good management of an official language policy requires a clear vision of the overarching purposes of the policy, including its symbolic overtones. This presupposes the existence of an intelligible network of principles and doctrine.[114]

With these goals in mind, the OLC should establish a reasonable time frame and set out clear guidelines with which the government institutions can prepare themselves for the implementation of the language policy. Setting an example for other government branches, the OLC should display name boards in all three languages, and plan, conduct and record inter-departmental meetings in all three languages.[115] Also key in this process is an-all island public awareness campaign involving the distribution of literature and posters, sensitivity training for all officers (old and new) and complemented by an awareness campaign in the schools.

While these suggestions are well-intentioned, their viability depends largely on the attention and funding from the state. It has been suggested that the government branch, the OLD, should be given a higher status and should be equipped with specialist personnel and personnel as are needed to meet challenges. Further, the OLC has already been granted wide and useful powers in the *OLC Act* - it is the 'teeth' in financial resources and political clout or will that it is required to finally be effective. This may be an area where international aid could and should be directed.

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[113] *Ibid.* at p 106.

[114] *Supra* n 4 at p 74.

[115] *Supra* n 22 at p 107.

Other suggestions stem from the Devolution package. If it is implemented, it should be viewed as an opportunity to grant greater autonomy to each Region in respect of language policy. Indeed, it has been noted that international law and norms regarding the protection of minorities "pay high regard to administrative autonomy as a means of guaranteeing the security and collective well-being of minority groups."[116] With devolution of power to the Regions, the languages of administration of each province could then be 'custom fit'. For example, as in India, each new Region could have Official Language Acts, providing for the publication of state legislation in the majority and minority languages of that area.[117] Further, it has been suggested that the proposed Regional offices need to be staffed by regional civil servants if devolution is to mean much in practice. This would work to correct the problems of language in the process.

(III) Education

The main problem with the education system is that all the power is concentrated in Colombo. If this central system is to remain, changes are needed to even out the playing field.

First, after an assessment of the experiences of teachers teaching in both languages and its practical implications, there should be two handbooks prepared, one in each language, with the aims of the programme, information on the pitfalls that learners encounter, the best modes with which one can accustom the learner and guidance regarding interesting methods of drawing children into learning the language.[118]

Second, where schools of different language streams exist, steps should be taken to promote mixing and interaction by children of these different streams by bringing them together for certain subjects, sports and in common religious activities which can also cut across denominational distinctions. The Parent-Teacher Associations and community groups can be utilised to explain to

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[116] Supra n 4 at p 285.

[117] Ishwara Bhat "A Comparative Study of the Language Provisions in the Constitutions of Canada and India from the Perspective of Equal Liberty of All" (1994) 2:1 *Canadian Centre for Linguistic Rights Bulletin* at p 9.

[118] *Supra* n 50, Working Paper on Education at p 8.

parents the objectives and the advantages of the programme from the national point of view and for their own children.[119]

Third, English should be taught island-wide. It should be taught competently at all levels (i.e. all types of schools, including adult night classes) to dispel the perception of English being the language of the well-off and well-educated. This will work to weaken the hierarchy of the schools and will make the rest of the island level with Colombo which functions for a large part in English. This, however, raises issues regarding the predominance of English and the resulting displacement of Tamil as an official language.

Fourth, it is imperative that the development of school curriculum, whether it is executed from Colombo or not, promote multi-ethnic understanding. Education is a particularly useful and powerful means of constructing cross-cultural understanding in plural societies. This requires sensitivity training for all teachers and a reassessment of the texts and tools used in the schools.

Finally, the Devolution proposals envision a move away from the current Colombo-centred system. The proposals provide for a National Education Commission to be formed with representatives of all regions as well as the Centre. This Commission will be required to set "minimum standards with regards to training, examination, curriculum and employment of teachers." This body should work with the OLC in establishing these standards and should also be empowered to ensure the maintenance of these standards. A further suggestion recommended that teacher training be carried out by the Regional governments under strict rules and formats agreed upon as in both the Regional and Centre interests.[120]

Education can ideally play a constructive role in controlling the spiraling problem of ethnic tension. In a society divided on the basis of language, the school system is one of the best ways of achieving some degree of integration.

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[119] Ibid at pp 8-10. The viability of this suggestion was questioned since among 10,000 schools there are only a few dozen which have more than one language stream. A high degree of this linguistic segregation is inherent in this distribution of population as Tamils are concentrated in the north and east.

[120] *Supra* n 25 at p 106.

Conclusion

Members of the Tamil-speaking minority of Sri Lanka are afforded limited protection under Sri Lanka's current policy and legislation. And, in practical application, the few policies and mechanisms that exist have little or no impact in protecting and promoting language rights. Indeed, the reality of Sri Lanka's language rights record does not match its rhetoric. Nor, however, does the international language rights law match the reality of its application. The international regime on language rights affords limited protection for linguistic minorities. And its mechanisms, like the appeal to the Committee, currently fall short in the protection and promotion of language rights.

It appears that while Sri Lanka could, and should, improve its language rights record, there is perhaps room for improvement in the international regime as well. Only when both have improved will groups such as Sri Lanka's Tamil-speaking community be able to find justice.

Legal Awareness Programme at Tissamaharama

Madhuranga Rathnayake[*]

Introduction

An effective legal system based on a participatory and democratic framework is one of the essential dimensions of governance. However, this effectiveness can only result from a knowledge of rights and access to the legal system by the people. Even the presence of an effective legal system does not necessarily mean that the people, particularly the disadvantaged, know of their rights and how to access the legal system. Lack of knowledge can be one of the root causes for the delays in seeking justice, duplication of action, and the failure to observe the time limit stipulated by law.

In recognition of the fact that that there is a lack of awareness of the law in the community,[1] The Law & Society Trust [LST] considered the possibility of conducting a series of awareness programmes in selected areas of the country. The main objective of the project was to raise the awareness of the law in general and of human rights in particular.

The LST firmly believes that in raising awareness of the law and human rights issues, organisations of the grassroots level can play a vital role. Such organisations have access to the people in their locality and it was decided to co-operate and liaise with such organisations in organising legal literacy rogrammes.

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* Intern, Law & Society Trust.

1 In 1996/7, the Trust carried out a baseline survey on the Access to the Legal System called "the Citizens Participation in Democracy" (CIPART) with International Centre for Etnhic Studies, Kandy. This survey revealed that while people were aware of the legal system in a general manner, they were not aware of their rights, how to access the legal system, or whom to go to in the event of a legal problem.

The LST received a request in October from a community-based organisation in Tissamaharama to conduct a legal awareness programme. The organisation "Friends of Nations" has been working on environmental issues in and around Tissamaharama.[2] The Friends of Nations requested a seminar on law in general.

It was decided that the LST would conduct a Legal Awareness Programme in Tissamaharama as a pilot project, so that the proposed series of programmes could be planned on an evaluation of this pilot project.

The Legal Literacy Programme

The progamme was held on the 12th of November at the Divisional Secretariat at Debarawewa. Fifty people were invited for the programme and were selected so as to represent people engaged in various professional and social activities. Among the participants were teachers, members of mediation Boards, media personalities, Grama Niladharis, members of other organisations working in the area and farmers.

The Divisional Secretary of Debarawewa, Mr. A.P Jayawardana, was the chief guest. Mr. Indrasena Jayasinghe, the president of the "Friends of Nations" welcomed the gathering and explained the objectives of the prgramme. The Chief Guest pointed out that a programme of this nature was timely. He said that Tissamaharama was an underprivileged area and although the people were quite intelligent, they did not have sufficient means of getting themselves updated on topical issues. He stressed the importance of making people aware of their rights and appreciated LST's effort. He pledged his fullest support to any future programmes of this kind.

Two practising lawyers from the area were invited by LST to deliver lectures. Mr. Piyarathna Bandara, a practising lawyer in Tissamaharama, delivered the lecture on family law. He dealt with various important areas of family law, including the concept of marriage, registration of marriage, divorce procedure, maintenance, and the adoption and custody of children were discussed in detail.

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[2] Tissamaharam is located in the district of Hambantota in the Southern Province of Sri Lanka. It is 264 km away from Colombo. Ceylon Tourist Board Guide 1999.

Mr.Rukshana Nanayakkara, visiting lecturer, Faculty of Law, University of Colombo, spoke on environmental law and related issues. Environmental protection seemed to be an issue close to the heart of the participants. They were very concerned about certain groups destroying forest in the area under political patronage. The major difficulty in bringing the perpetrators before the law, they pointed out, has been a blind and disabled police. The participants were of the opinion that had the authorities been allowed to carry out their duties without political intervention, this problem would never have escalated to such an extent.

The afternoon session began with the lecture on criminal procedure by Mr. Sunil R de Silva, who is a leading practising lawyer in Hambantota. He pointed out that the crime rate has shot up dramatically and the blame is on the police. He was of the view that politicisation of law enforcement bodies was the cause of all evil.

In his lecture, Mr.Silva touched on many significant areas of criminal procedure. He explained state prosecution and the reason for a crime to be regarded as an offence against the public. Charge, arrest, emergency regulations, bail procedure, and the Bail Act were discussed in detail.

A discussion was held thereafter. The participants raised interesting issues relating to various aspects of law. They participants alleged that various government bodies that are important to the people are not co-ordinating sufficiently with each other thus creating chaos. People are often sent back and forth to various institutions if the matter does not come under a particular body. People, most of the time, become helpless not knowing where to go. It was observed that there was a huge structural defect in the administrative bodies of the country.

Several documents and material including the Fundamental Rights chapter of the Constitution, Mediation Boards Act, the Human Rights Commission Act and the Sinhala translation of the *Sri Lanka: State of Human Rights 1995* were distributed among the participants.

The feedback from the participants:

A questionnaire was given to each participant with the request to return it at the end of the day. With these, LST hopes to get a basic understanding of the type of problems the people in the area face. In addition, the LST believes

that a questionnaire of this nature would provide important material for their work, particularly first hand information for the annual SHR reports. Question no: 6 of the questionnaire requests the participant to identify any issues relating to human rights, environment, health, education, children's and women's rights in their area.

Almost every participant had mentioned rapid deforestation due to illegal logging as the major environmental catastrophe in the area. According to them, the rate of tree loss is very high. Polllution and illegal constructions had been mentioned as other major environmental issues.

With regard to education, lack of library facilities and the difficulty in obtaining knowledge on legal issues had been highlighted. The number of children not attending schools due to various reasons, the main reason being poverty, is on the increase, according to some participants. Incidents of child abuse in some schools had also been reported.

Scarcity of clean drinking water had been identified as the main health issue of the locality. In addition, lack of facilities in the hospital and the non-availability of medical specialists have been identified as a serious problem.

With regard to human rights issues, most of the participants had identified the necessity of educating people on human rights and related issues. Illegal arrests and harassment by the police had been identified as a problem requiring attention.

However, strikingly, no one seemed to have at least an idea about children's or women's rights. Although, the participants were concerned about child labour and child abuse, they were unaware of the legal protection that exists for women and children.

The participants expressed their appreciation of the programme and said the programme should have been for two days. Mr. Ananda Ranasinghe, secretary of the "Friends of Nations" giving the vote of thanks said that his organization would like to have a few more awareness programmes of this kind in the future.

The programme was co-ordinated by Madhuranga Rathnayake and Rukshana Nanayakkara of the Trust.

The Trust hopes to conduct similar programmes in the future. Those interested please write to:

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