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The Administration of Justice in Swabasha in Sri Lanka

L. J. M. COORAY

The article focuses on the change of the language of the law in Sri Lanka from English to the local languages (Sinhala and Tamil) and analyses the pressures which led to this change, the legal provisions which were enacted to effect the change, the problems that arose and the manner in which the change was effected.

1. Introduction

The scheme adopted in this article is to state the extent of the reference to the local languages Sinhala and Tamil in the course of judicial administration in the colonial period, trace the legislative framework enacted to effect the change to Sinhala and Tamil, discuss the pressures which are operating in favour of accelerating the process of the extent to which the switchover has been effected and the problems encountered in the process. Finally an evaluation will be attempted of the practical aspects and consequences of the switchover in the light of the arguments put forward in favour of and the hopes of those who advocated it.

I am aware of the very general nature of the facts and observations stated in this article. The data on which this paper is written was collected between 1972 and May 1977. It was based on interviews with persons involved in planning and affected by the changes. When I discuss the legal framework I am dealing with facts. When I move on to discuss the switchover as it works in practice in the courts, I am on less firm ground and am confronted with the different ways in which different courts function (and the at times divergent views expressed by lawyers on how the same courts function) and thus am in a position to make only tentative and very general statements. It is in this area of the extent to which the Swabasha courts are functioning and will function efficiently and effectively that expression of own opinion is fraught with pitfalls. Proponents and opponents of Swabasha in the courts express different views as to the manner in which a particular case was dealt with by the original court and the appeal court. Lastly, when I make comments on the working of the courts in practice in relation to the hopes and visions of those who advocated it, I am on even more controversial ground.

2. Swabasha in the Courts prior to 1961

English became the language of judicial administration in Sri Lanka during the British period. This was the practice which the judges followed, there being no specific legal provisions relating to the language of the courts. Subsequently, special clauses were enacted in the procedural and evidence legislation which obliged the courts to use English-viz. judgements had to be written in English and evidence recorded in English.[1] But an all embracing enactment or a law with reference to the language of the courts was not enacted in the colonial era.

The record was maintained in English. If a person who was conversant only with Sinhala or Tamil was giving evidence, questions were put to him in English by the counsel or judge and translated by an official of the court called the Interpreter Mudliyar into the language of the person giving evidence. The answer of the witness was translated into English. The entire record was maintained in English. In appeal the court did not go beyond the record.

The Interpreter Mudliyar was a court official who had a limited education and no special legal training His translation of evidence from Swabasha to Engiish tended to very literally follow the language of the speaker and there are many jokes which pass through the courts about the howlers perpetrated by this official. However he performed his work reasonably satisfactorily. He was engaged primarily in soliciting the facts from witnesses. But in the process he had to express certain legal notions and consents such as deed, bond, ownership, occupation and possession. Thus he made a very limited contribution to the development of a legal Sinhala. But his contribution is significant because it was the Interpreter Mudliyar along with the notary who pioneered the expression of English legal concepts in Swabasha.

The notary like the Interpreter Mudliyar was another pioneer in the field of expression of English legal principles in the Swabasha. With a more limited education than the latter and only a very elementary kind of legal instruction, the Sinhala notary was nonetheless responsible for about 56% of the deeds which had been written in Sri Lanka. (About 32% of deeds are in English and 12% are in Tamil)[2]. The Sinhala notary

1. Section 57 of the Evidence Ordinance 14 of 1895, Sections 298 (1), 299, 321 and 331 of the Criminal Procedure Code, Sections 40, 75, 169, 186, 374 of the Civil Procedure Code of 1889.

2. The figures are from the *Civil Administration Reports of the Registrar - General.*

in the Sinhala speaking areas performed an important function in relation to agreements and conveyances relating to land which were written in Swabasha.

Since the great majority of the litigants were non-English speaking persons, the legal implications of problems had to be explained to them in their own language. This was sometimes done by a lawyer if he were fluent in Swabasha or else by the lawyer's clerk, a person without legal training who had to make use of the limited knowledge he had gathered in the course of waiting on lawyers in order to explain to the litigants the legal aspects of his case.[3]

The proceedings of Rural Courts according to Section 20 of the Rural Courts Ordinance of 1945 which replaced a provision of similar effect in the Village Tribunals Ordinance of 1871 could be conducted in such language as may be determined in each area by the District Judge having appellate jurisdiction over the Rural Court. Most Rural Courts in the country were even in the colonial period functioning to a certain extent in the laguage of the majority of the people in the area (Sinhala or Tamil). But the record was maintained in English. Legal arguments and submissions were made in English and judgments were delivered in English.

In the above ways Sinhala and Tamil were used in a limited way in the courts and in legal work during the time when English was the official language. The pressures were building up in the 1940s for the use of the local languages. Swabasha was made the compulsory medium of education in the lower classes in the schools in 1945. In the 1950s because there was nothing in the law to prohibit it, lawyers in a few of the lower courts began to examine, cross-examine and re-examine the witnesses in Swabasha. This was of course only possible where counsel and judges were conversant with Swabasha. Thus the elaborate and highly artificial method of witnesses communicating with counsel and judge through the Interpreter Mudliyar was avoided. But translation was still necessary because the final record had to be maintained in English.

In the 1940s again since there was no specific legal provision which made it necessary for counsel to submit their arguments in English or for a judge in the Assize Courts to address the jury in English, a start was made by counsel addressing the jury in Sinhala and the judge following up by making his address in Sinhala.

3. See R. K. W. Goonesekera, *Law in Sinhala and Language Switchover in Sri Lanka* (unpublished monograph.)

English was replaced as the language of education commencing from the 1940s. The Official Language Act. No. 31 of 1956 declared that Sinhala was to be the one official language. The latter Act was very gradually implemented in the field of public administration. Lawyers for a variety of reasons fought a rearguard battle against the use of Swabasha in the courts.

The Language of the Courts Act. No. 3 of 1961, which was repealed by the Constitution of 1972 was enacted in response to nationalist pressures that Sinhala be made the language of judicial administration. Pressure in the opposite direction in favour of the status quo from the legal profession was also operating. Therefore this Act represented a compromise. Sinhala was not made the language of judicial administration but it was provided that the Minister of Justice could make provision for the use of Sinhala in Courts.

The Constitution of 1972 made Sinhala the official language of legislation and record, but made possible the use of English and Tamil.

It is proposed to discuss separately the provisions of the Language of the Courts Act of 1961 and the Constitution of 1972 and the practice thereunder.

3. Swabasha in the Courts during the period between the Language of the Courts Act of 1961 and the Constitution of 1972

The Language of the Courts Act No. 3 of 1961 (repealed by the Constitution of 1972) provided for the use of Sinhala for recording the proceedings and pleadings filed on record in courts of justice. The Act was not intended to be of immediate application to all courts but applied only to such courts as the Minister of Justice would determine in consultation with the Prime Minister. The only factor which could influence the Minister's decision that a court should work in Sinhala was whether there were facilities (staff and equipment) for recording in Sinhala the proceedings of the court. The ability of proctors to file pleadings in Sinhala or of a judge to understand such pleadings was not a relevant consideration. But Section 3(1) permitted a judge who was not proficient in Sinhala to use English translations of the pleadings and record.

If a directive was issued to a lower court to work in Sinhala, evidence would have to be recorded in Sinhala, whether the case is civil or criminal. As regards the writing of judgements or orders the judge was given a discretion to use English provided a Sinhala translation were also given. Express provision to this effect was made in the case of Courts of Requests

and District Courts exercising civil jurisdiction. In the case of the Magistrates Courts and District Courts exercising criminal jurisdiction, in the absence of a definite requirement in the Criminal Procedure Code that the judgement should be in English, no special provisions were considered necessary to ensure that judgments be written in Sinhala.

In the lower courts therefore the application of the Act would mean that pleadings must be filed by the proctor in Sinhala, evidence would be recorded in Sinhala, and the judgement could be delivered in Sinhala. It did not require that submissions to court must be in Sinhala. It did not even mean that examination of witnesses should be in Sinhala. The only change for the lawyers was that they should file pleadings in Sinhala. The other changes concerned the judge and the court officials. The filing of pleadings in Sinhala was not a change beyond the capability of a proctor who even prior to 1961 was required to serve on a defendant a Sinhala or Tamil translation of the plaint. But if the Act had been brought into operation it could be foreseen that pressures for a more complete break with the past would probably follow and in time the framing of issues, examination of witnesses and the making of oral submissions would all be done in Sinhala.

In the case of the Supreme Court the provisions were less clear. The Act could have been made applicable to the Supreme Court in which case judgements and decrees would either have to be written in Sinhala or translated into Sinhala. In the hearing of appeals from a court which was functioning in Sinhala there was implied provision for a judge who was able to read and understand the pleadings and record in Sinhala to proceed with the hearing of the appeal without an English translation of the proceedings. An appellant would not know in advance before which judge(s) his appeal would come up for hearing. Therefore an appellant would have difficulties in deciding on counsel to be retained. Because of the possibility that the appeal judge(s) may be prepared to hear the appeal in Sinhala counsel may have to be retained who would be in a position at least to read the lower court proceedings in Sinhala. But there was nothing in the Act requiring that oral submissions should be made in Sinhala or to deny counsel the right to use an English translation of the proceedings.

The Act was made applicable to Rural Courts, the lowest courts in the judicial hierarchy the proceedings of which courts were already to an extent as stated above being conducted in Swabasha. The status quo was not to any degree undermined. But it was not until November 1970 that the Act was made applicable in a few other original courts. The Magistrates

Courts of Gampaha, Kurunegala, Maho, Ratnapura, Rakwana, Balangoda, Kalawana, Morawake, Deniyaya, Deiyandara, Matara, Panadura, Horana; the Court of Requests of Gampaha and the District Court of Gampaha were the only courts, other than Rural Courts to which directives were issued under the Language of the Courts Act.

Thus with these few exceptions, judicial administration under the Language of the Courts Act between 1961 and 1972 continued as before.

4. Swabasha in the Courts under the Constitution of 1972

The Constituent Assembly of Sri Lanka in the course of drafting the present Constitution issued a set of Basic Resolutions dealing with the basic assumptions and principles on which it intended to proceed. The Bar Council of Ceylon made the following comments on the Basic Resolutions dealing with the language of the courts and legislation:

> We suggest that the resolutions relating to the language of courts, the language of legislation, and the publication of laws, be deleted, and that these matters be left to be dealt with under the ordinary laws. Our reasons are as follows:—
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> (a) These are not matters that need be set out in a Constitution. It is all the more undesirable to do so at a time when the transition is taking place and when numerous practical problems both foreseen and unforeseen are bound to occur. In these circumstances a rigid Consititutional provision can hamper the smoothness of the change-over and the efficient administration of justice. Ministerial regulations which can be made and modified as and when circumstances require, are far more satisfactory·····
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> (b) In cases involving technical matters, engineering, science, forensic medicine, – expert evidence will often still have to be in English, and standard works of reference in English will have to be used.
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> (c) In view of the above considerations a rigid constitutional provision for the use of Sinhala or Tamil may create difficulties. The judge should have a discretion in this matter. He must be able to hear a partition case in Sinhala or Tamil and a case involving an international commercial transaction in English. He may well hear a case partly in one and partly in the other language. The facts may be dealt with in Sinhala or Tamil and when it comes to expert technical evidence, proceedings may continue in English. If complicated questions of Roman Dutch Law arise in a land case, counsel may, after leading evidence in Sinhala or Tamil, make their legal submissions and cite their authorities in English.

(d) As regards the language of legislation, similar considerations apply. If the existing law is in the English Language, additions or amendments to that law should be in the same language. A hard and fast constitutional provision that legislation must be in Sinhala with the translation in Tamil should be avoided, or at least provision for an authoritative English text as well must be made.

These submissions were not followed by the Constituent Assembly as the analysis to follow of the relevant constitutional provisions demonstrates.

The Constitution of 1972 which was proclaimed in the Sinhala Language (the authoritative and official version) with translations (not authoritative) in English and Tamil, provided in definite terms for the use of Sinhala and to a limited extent of Tamil as the language of legislation and judicial administration. Had the Language of the Courts Act been extended even in limited areas between 1961 and 1970 a groundwork for the changeover may have been prepared. But due to the combined opposition of the legal profession to the Act, it had not been implemented except in relation to Rural Courts and a few other courts. The change when it came was sudden. As in the case of legal education it was possible to delay the change for a period of about fifteen years during which period adequate preparations were not made. The consequence was that when the change came, it came suddenly. The protagonists of the switchover having become impatient and lost faith in the legal profession on its own initiative preparing for or making any changes.

Section 11 of the Constitution deals with the language of the Courts. Section 11 (1) enacts that the language of courts and tribunals shall be Sinhala throughout Sri Lanka and accordingly that records including pleadings, proceedings, judgements, orders and records of all judicial and ministerial acts shall be in Sinhala. There is a proviso to 11 (1) according to which the National State Assembly may provide for use of Tamil in the case of institutions exercising original jurisdiction and certain specified tribunals in the northern and eastern provinces.

Section 11 (3) enacts that in the northern and eastern provinces and in proceedings before Quazis under the Muslim Marriage and Divorce Act, persons involved in litigation before a court or tribunal may submit their pleadings, applications, motions and petitions in Tamil and participate in the proceedings in Tamil. In all such cases, a Sinhala translation shall be made by the court or tribunal for the purpose of the record.

Section 11 (4) provides that any person involved in litigation before a court or tribunal has the right to interpretation and to translation into Sinhala and Tamil provided by the State to enable him to understand and

participate in the proceedings. Further such a person has the right to obtain in Sinhala or Tamil, any part of the record as he may be entitled to obtain according to law.

Section 11 (5) provides that a person legally entitled to represent a party has the right to interpretation into Sinhala where Tamil is used and into Tamil where Sinhala is used during proceedings in Court. This interpretation is to be provided by the State.

Section 11 (6) provides that the Minister of Justice may with the concurrence of the Cabinet issue orders, directions and instructions permitting the use of language other than Sinhala or Tamil by a judge or person appearing before a court or tribunal.

The Constitution in response to nationalist pressures makes full provision for the use of Sinhala in the courts and also makes provision for the use of Tamil. The escape clause in section 11 (6) was delicately worded so as not to offend nationalist sentiments. The word "English", was not used and the words "other than Sinhala or Tamil" have been used.

On the day after the Constitution was proclaimed, the Minister of Justice acting under sub-section 6 signed an order to all courts and tribunals permitting the continued use of the language in which proceedings in any court, tribunal, board or any institution were conducted immediately before the commencement of the Constitution.[4]

Thus in order to satisfy nationalist (Sinhala communalist) pressures the Constitution in five subsections specifically makes provision for the use of Sinhala with resort to Tamil. But an escape clause for the use of English was contained in Section 11 (6) which was very carefully drafted omitting the word "English" so as not to make obvious the extent to which and the manner in which it could be used. Thus the effect the first five sub-sections had was qualified by a Gazette Order.

After the proclamation of the Constitution the Minister of Justice was under pressure to implement a more speedy switchover from those who claimed that the switchover was being unnecessarily delayed and criticised the use made of 11 (6).[5]

It was however impossible in the existing state of affairs to give effect to sub-sections 1, 3, 4 and 5 of section 11. There are more substantial objections than the one which is most commonly stated, namely the

4. See the Constitution of the Republic of Sri Lanka Order under Section 11, Republic of Sri Lanka, Gazette Extraordinary No. 2, Tuesday, May 23, 1972 Part I, Section I, General Government Notification.

5. *See Official Reports of the National State Assembly*, March 5, 1974, Coll. 609 – 611.

fact that the statute law and legal materials are in the English Language. The majority of judges and lawyers in appellate courts as well as some in the original courts are not fluent in and unable to carry on proceedings in Sinhala or Tamil. The most substantial objection, however, is that the facilities are not available. There are not enough Sinhala typewriters, stenographers, typists and translators to maintain the record in Sinhala, quite apart from providing translations to persons involved in litigation.

Section 11 of the Constitution confers on parties the right to claim translations from the State. The facilities for providing such translations are in fact hardly ever available. Thus a lawyer could not make a claim of this nature because it is very unlikely that it could be granted and the delays involved would be considerable. In most cases litigants in order to speed up the case get the translations done at their own expense.

In relation to carrying out the essentials of judicial administration (maintaining the record), there are facilities limited in extent for translating from English to Sinhala and English to Tamil and vice versa. But there are scarcely any available facilities for translating from Sinhala to Tamil and vice versa because there are very few persons competent in both the Swabasha languages. In some courts when evidence is given in Tamil, it is translated into English by one interpreter who understands Tamil and English and then it is translated from English to Sinhala by another interpreter for purposes of record. In the course of this translation, one does not know the extent of the distortion that may take place. In some cases, however, where facilities do not permit this elaborate translation because of lack of staff, the evidence is recorded in the language in which it is given, it being envisaged (though it may never happen) that it be subsequently translated. The Minister of Justice said "The necessary staff will be provided very soon so that even if records are maintained in Tamil for short periods of time, every one of these records can be translated into Sinhala in accordance with the imperative provisions of section 11 (1).[6]

In accordance with proviso to section 11 (1) the National State Assembly enacted the Tamil Language Special Provisions Law of 1973 which however has not yet been brought into operation.

A continuing problem is that many judges are not able to work in Swabasha. The maintenance of both an English and a Swabasha record doubles the time and expenditure. There are only a few judges who are

6. Circular of June, 9, 1972 by Minister of Justice to all District Judges and Magistrates in the Northern and Eastern Provinces.

fluent in Sinhala and interpret legal arguments and thus enable the record to be maintained in Sinhala. Lawyers too have received their legal training in English and the more senior lawyers have received their entire education in that language. Thre are many who are not capable of as competently carrying out their tasks and responsibilities in Swabasha as in English. A period of time must necessarily elapse during which they can learn and adapt and/or a new generation arises to take their place.

There is a possibility that translation from one language to another will not retain the sense of the original language used. The problems of translation are too wide to discuss in this context. Since persons without any training in translation techniques are engaged in the work it is very likely that many such problems will arise. When there is a conflict which would be regarded as authoritative? Where the record has been maintained in English or Tamil and it is translated into Sinhala the Constitution provides that the Sinhala record is the authoritative one. The effect seems to be that in this situation it is not possible to show differences between the original and the translation.

The judgements which are being delivered today will necessarily be the authority for the future. Some of these judgements are being prepared by judges in English and entrusted to translators who may be persons who are not competent or who are inexperienced in translating and not versed in translation techniques, even if they possess an adequate knowledge of the two languages and the law.

A noticeable feature is that when legal arguments are presented in Swabasha and / or when they are translated there is a tendency to simplify the concept, perhaps due to deficiencies in vocabulary.

The inquiry into and adjudication upon complicated contractual commercial and shipping matters in Sinhala presents immense problems particularly because the record has to be maintained in Sinhala. The same problem arises where evidence involving engineering, medicine, forensic medicine and other scientific and technical matters are involved.

These difficulties are explained in the following paragraphs written prior to the switchover, anticipating the problems that can arise:

> Even with regard to the recording of proceedings in Sinhala, difficulties are bound to arise until such time as our entire body of law is codified in Sinhala. To take an example, one can think of a claim under a marine insurance policy issued by the Ceylon Insurance Corporation to some ship owners in Ceylon, or from the Maldives or

from some other country. The policy of marine insurance is generally in a well recognised form in English. This form has been evolved after years of experience by marine insurers who have taken into account the English law on the subject, and this is the form that is used by Insurance concerns in India and Ceylon. There may be however slight modifications agreed upon between the insurers and the insured. When a claim running may be into more than a million rupees is preferred by the owner of a ship against the Insurance Corporation on account of the total loss of the ship at sea, various questions of fact with regard to the navigation of the ship, the equipment of the ship, the functioning of the engines, the circumstances of the accident, and questions of law relating to the abandonment of the ship, the notice of abandonment, perils of the sea etc. may arise. The witnesses in the course of their evidence in English may use well known nautical terms, the meanings of which they explain to court, or the court itself can find out the meanings by reference to a nautical dictionary. Experts may be called who give evidence with reference to the language used in the British Merchant Shipping Acts. The plaint itself which is now in English will have attached to it the policy of insurance. If a case such as this comes up today before a Court which is required to record the proceedings in Sinhala, then the plaint has to be in Sinhala, the insurance policy which contains technical terms which have been interpreted by the English courts has now to be translated by some sworn translator into Sinhala, and attached to the plaint. This is not so bad so long as the English copy of the policy is also filed, so that at some stage the court and parties may be able to see whether the sworn translator had made any mistakes. When it comes to the evidence the position will be that some interpreter who had never interpreted in a case involving nautical terms has, on the spur of the moment, to interpret the evidence given by the witnesses on questions of fact, and the expert evidence led in the case. It is this Sinhala translation which will go on the record, and not the precise English version that is given. Will it not be more satisfactory if the evidence is recorded in English and, if necessary, a translation kept in the record? If one is concerned with the due administration of justice and not with mistaken sentiment, will this not be the obvious course to adopt? In a case such as this counsel will necessarily have to make their submissions in English. These instances can be multiplied, particularly from the branches of commercial and mercantile law. In a complicated case involving commercial law which is in English, it may be very difficult to deliver a judgement in Sinhala.

If one examines the situation in the Criminal Courts one will see the unwisdom of making a constitutional provision that proceedings shall be recorded in Sinhala. In a grave case of murder by poisoning, an expert witness may give evidence involving technical language, used in books on medical jurisprudence which have not yet been translated into Sinhala, and which may not be for a long time. Experts in forensic medicine may be ranged on either side and give evidence in English, even giving quotations from books, or counsel may ask them whether they agree with a particular passage in a book on forensic medicine.

> Or perhaps counsel will not be premitted to ask such a question because he will have to conduct the proceedings in Sinhala? Will he have to translate the text into Sinhala, and then put the question to an english speaking witness? Presuming, however, that the passage is put to him in English, the witness may say that he agrees with it. Then presumably a lay interpreter will interpret the expert witness's testimony into Sinhala, and it is this Sinhala translation which will appear in the record, not the English version. which will have disappeared into thin air unrecorded. Is it not far more satisfactory that the evidence should be recorded in English as well as in Sinhala, so that any discrepancies may be discovered and rectified, in a case which affects the life or liberty of an individual? [7]

Section 11 implies that only in the northern and eastern provinces can parties and applicants submit their pleadings in Tamil and participate in the proceedings in Tamil. This of course means that Tamil speaking citizens outside the northern and eastern provinces cannot file in Court their pleadings in Tamil.

The following is a brief summary of the extent to which English is being used (at time of writing in May 1977) and the extent to which the switchover has been effected in the various courts.

Appeal Courts and Original courts other than those in the Northern and Eastern Provinces

In the appeal court, English continues to be used to a very great extent. Most of the lawyers as well as the judges are more conversant with English and it is only a minority who are competent to conduct the proceedings in Sinhala. Pleadings are generally made in Sinhala. All *orders* made at any stage of the proceedings are made in or translated into Sinhala. Notwithstanding the fact that the constitutional provisions require that the entire record should be maintained in Sinhala; while the orders made by the Judge are maintained in Sinhala, the rest of the record, if facilities for translation are not available, is maintained in the language in which the evidence is given or the documents tendered.

There is a great deal of variation in the procedure adopted in the various original courts. In a few courts proceedings are carried on entirely in Sinhala. This is more true of the courts outside Colombo. Some of the courts, notably the courts (named above) which were directed in 1970 to conduct proceedings in Sinhala, under the language of the Courts Act of 1961, function satisfactorily. In selecting a court to make a directive,

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7. S. Nadesan, (1971) *Some Comments on the Constituent Assembly and the Draft Basic Resolutions*, pp 107—108.

the Minister of Justice took into consideration the facilities available for the court to function in Sinhala, including the ability of the judge and the profession to do so. These courts were carefully selected on this basis and have functioned satisfactorily. But the same cannot be said of other courts where facilities are not available or the judges are not conversant with the language. As regards the District Courts it appears that most courts attempt to function in Sinhala. But even in courts which function in Sinhala, lawyers are permitted to present their arguments in English. In some cases where the judge is fluent in Sinhala he translates the argument of counsel into Sinhala which is taken down for purposes of record. In other courts where the judge is not competent the translation of legal arguments has to be made by the court interpreter. This is not very satisfactory because the court interpreter does not have a knowledge sufficient to be able to understand and translate legal arguments. In other courts the record is maintained in the language in which evidence is given.

Original courts in Northern and Eastern Provinces

What has been stated above regarding the original courts does not apply to the northern and eastern provinces which function in English and Tamil. The record is generally kept in English with a Tamil translation. The circular of 7th June, 1973 of the Minister of Justice to judges and magistrates in the northern and eastern provinces envisages that in the future facilities will be made available for translating these records into Sinhala which is the language in which according to the Constitution the record should be maintained.

Pleadings are generally made in English in the District Courts and in Tamil in the Magistrates Courts.

It may be mentioned that Tamil litigants are known to have expressed their disapproval of lawyers speaking in Tamil in courts. They prefer that the lawyers address court in English. This apparently is not true of the Sinhala areas.

5. Pressure for a more speedy switchover

Governments are under pressure for a more speedy switchover from extreme elements. When education was being imparted in the secondary schools in Swabasha it was natural that pressure would build up for the use of Swabasha in legal education. However, unlike in legal education, in the case of judicial administration, there was no corresponding interest group. The litigant who is the party primarily affected has not pressed for the law to be administered in Swabasha. Of course it may be that litigants who

come to court (especially in relation to land disputes) and the accused in criminal trials, may have preferred the language of the law to be their own language. This is particularly so in civil cases when the issues revolve around the determination of factual issues when the litigant would find it beneficial if proceedings are conducted in his own language. But a litigant comes before a court for a period and then goes away. Once the case is ended he has no further interest in it. The litigants who come before the courts at the time the proceedings were in English were perhaps unconscious of the case that could be made on their behalf for proceedings to be conducted in their own language. They would perhaps be more aggrieved by the decision if it went againt them, rather than by the fact that proceedings were conducted in English. It can be said that litigants (because there is no stable and continuing class of litigants) did not exercise "pressure" for the switchover. In the Tamil areas individual litigants have expressed a preference for the proceedings to be conducted in English and prefer that their lawyers present their case in English instead of Tamil. Perhaps they feel that the lawyers can conduct the case more competently in the English Language.

The pressure for the change from within the legal profession has come from younger lawyers educated in English but fluent in Sinhala having been educated in school in Sinhala, even though their legal education was in English. The lawyers who have followed their legal education in Sinhala are as yet an insignificant section of the legal profession. The Sinhala competent lawyers may well feel that they will receive more work if proceedings are carried out in Sinhala. The senior lawyers not being competent in Sinhala, would not be able to carry on, or if they did, would not be in a position to take up as much work as formerly, because they would have to spend much more time working on Sinhala briefs and preparing legal arguments in Sinhala. For a variety of reasons there are many who would wish to see the old guard who have dominated and are dominating the legal profession fade away.

The demand for a speedier implementation of Sinhala in the courts also comes from a band of Sinhala language enthusiasts who have over a long period campaigned for the dethronement of English from its special position.

There is a point beyond which the speed of the switchover cannot be increased without the entire system breaking down. The legal materials are in English but the courts may be able to muddle through, if they cannot efficiently carry on. When there is an absence of Sinhala typists and Sinhala typewriters and above all of translators and translation facilities,

it is doubiful how the switchover can be carried on faster. Above all there is a generation of judges (most of the judges in the island fall within this category) and lawyers who are not competent to carry on the proceedings in Sinhala. There must needs be a period of time during which these persons can become competent in Sinhala and/or the younger generation educated in Swabasha can obtain experience and come up to take their place.

The Minister of Justice in reply to the arguments of those who wished to more speedily proceed with the changeover stated as follows :–[8]

> ..... Now, I do understand the argument of my Hon. Friend the Member for Habaraduwa (Mr. Prins Gunasekera) who seems to think that the Administration of Justice Law carries with it an implied promise that the entire administration will transform itself overnight into Sinhala. Now, I am sorry that that is not possible. I wish it were, but it is not possible as of now. I think it will come. I think the work will be done in the Sinhala language, and I can see it happening right now. More and more courts are functioning entirely in the Sinhala language, without translators, without interpreters and this is happening in fact over the entire range. But to say that this should be done when it is really impracticable in a given situation is to expect the impossible.
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> Let me put it this way. There is not a single lawyer, who wants to address a court in Sinhala, who is prohibited from doing so. There is not a single litigant who is not entitled to receive a transalation in the language which he understands. Those rights are there. A Sinhalese man living in Jaffna is still entitled to those rights. A Sinhalese advocate appearing in Colombo would still be entitled to that same right. But this is the point I am making: In practical terms if you ask me whether I am going to restrict myself to judges whose knowledge of the language is the criterion more than their record as judges or as lawyers, I have no other answer to give except that in the field of transition we have to adopt expedients to make it possible to work the system.
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> The Hon. Member for Habaraduwa carried that argument to absurd limits and said that it must be interpreted to mean that I am therefore asking that we should get back to English in all the courts. I have never done so and I never shall. The Constitution lays down what this House has approved; and what this House has approved constitutes the guiding lines within which we have got to work the entire administration.

8. Official Reports of the National State Assembly of Sri Lanka March 5, 1974, coll 628 – 30.

6. Evalution of practical aspects and consequences of switchover in the light of arguments and hopes of those who advocated it

It is proposed to examine one by one the reasons adduced by those who advocated the switchover of the language of litigation from English to Sinhala, with particular reference to how valid such reasons are when viewed in relation to actual practice.

The first argument for the language change and perhaps the strongest is that thereby litigants, the accused and other persons involved in the legal process would have a greater understanding of what happens in the courts. It is argued that this would lead to greater faith in the administration of justice. In the case of criminal trials this has certainly been achieved to a very great extent and this is acknowledged by all. The accused who formerly had little idea of what was going on in court now is able to follow the proceedings. Prior to the switchover there is an example in a magistrates court case where the accused had pleaded guilty to the charge due to the Interpreter Mudliyar ordering him to do so. "Are you innocent or guilty? Say you are guilty" the interpreter says. The accused complies.

Likewise in civil cases, particularly land cases which are common in Sri Lanka where issues of fact have to be sorted out, the litigant will undoubtedly have more faith in the system now that he is able to understand what is being said. He of course will not be able to follow legal arguments but he will be able to grasp what is happening and it will give him more confidence to come to Court.

One of the very serious deficiencies in the legal system is that lawyers obtain postponements on very trivial grounds and the client has to pay the fees for the day. When proceedings were carried on in English, the client often did not know the grounds on which postponements were made. Now when he can follow the proceedings it will become more difficult for lawyers to obtain postponements on trivial grounds.

The above benefits must be seen in the context of two factors. First, it must not be forgotten that the law consists of a body of technical knowledge which after the facts have been ascertained has to be applied. The fact that the law is being administered in Swabasha will not necessarily make intelligible to litigants what is happening when legal arguments are being presented. There are many persons who have been educated and are fluent in English, but who can listen to a legal argument and judgement delivered on legal issues affecting their rights, and have no more than a hazy idea of the basis on which judgement was given. It must not be forgotten that a switchover in language cannot make a technical subject

like law intelligible to the layman, just as it is not possible to make a technical subject be it engineering or medicine intelligible to a layman, unless the layman has studied these subjects in theory or practice. Language has little to do with it.

Second, the period of transition has involved a dislocation of the entire judicial process and it is the litigant who has been most seriously affected.

Two of the consequences of the switchover are the increase in costs for the litigant and delay in judicial administration. Section 11 (4) and 11 (5) of the Constitution (quoted above) confer on an individual a right in certain situations to translation at the expense of the state. But the facilities are often just not available and the burden and expense falls on the litigant to prepare a translation for the convenience of the counsel who may demand it. The litigant does not ask for his constitutional rights as he is aware that the facilities for providing them are not available. The constitutional guarantee is therefore, to a great extent in practice, nugatory.

It was very rare even prior to the language switchover to find a court which worked expeditiously. The legal process is by nature slow except in situations where there is an urgent application for an injunction or a writ. In the present with two sets of documents having to be filed and recorded, journal entries having to be made in Swabasha the process takes much longer and is less efficient.

All judges and most lawyers have received their legal education in English and most of them are more competent to conduct proceedings in English. It is the litigant who suffers from this, as it is the litigant who suffers from the many other problems that have arisen under the new order.

The conclusion is that in the original courts (whether civil or criminal) where issues of fact are involved, the litigant who is conversant with only Sinhala or Tamil would be in a better position to understand the proceedings if they are conducted in his own language. But he would still not be able to follow legal arguments and judgements on points of law in the original courts and appeal courts (issues of fact are not very relevant in appeal) and he must bear the burden of the increased expenditure and delays. If this is not borne in mind the significance and benefits accruing to the litigant from the switchover can be over emphasised.

The second argument is that law in the mother tongue will become more comprehensible to the masses and will therefore have the effect of making them more law abiding and lead to a greater respect for law. This

view is open to criticism. The protaganists of this point of view have to prove first, that when the language of the law was English fewer offences were committed by the English educated (which is not established) and second, that this was due to their knowledge of English and their understanding of law through the english medium, rather than to their wider educational opportunities and better social and economic position in life. (The English educated may also commit different types of offences to those committed by the Swabasha language group, e.g. false income tax returns.)

A third argument in favour of the switchover is that the use of the national language results in the development of a national law and reliance placed on foreign elements will be reduced or eliminated. It is questionable whether a national law in the sense of the volksgeist as suggested by Savingly is desirable. The last experience of a conscious attempt to create a purely national law, as distinct from reception or translation of a foreign law or a national law which has developed over a period of time, was in Nazi Germany. It can be said that no legal system can develop and provide solutions to the complex problems of human affairs unless it draws from the experience and the precedents of other legal systems. Whether in the long term the switchover will have the effect of bringing into existence a living national law capable of dispute-solving depends on the development of Swabasha legal literature and the continued use of the English language in order to communicate with the outside world. Doubts may be expressed as to whether either of these is likely to occur in the present context.

The protagonists of the switchover especially those who believe that the switchover can be effected speedily take the view: "Well let's get down to working in Sinhala and things will work out alright; let the judges and lawyers who cannot understand Sinhala step down". Quite apart from the human angle of creating a class of unemployed who have been accustomed to a certain social and economic position, there is the question whether those who take their place will be competent to administer justice and create a new body of law. The answer to this leads on to the fourth argument – which is that a necessary consequence of the switchover will be that lawyers will not be able to refer to written authorities and weave complicated arguments and that there will be less sophistry and reliance on technicalities – and that this is all for the better.

There is no reason why when the law is in Sinhala lawyers will cease to rely on technical and procedural points which may enable them to win a case against the merits. But the switchover seems destined to have the effect that legal arguments based on the citing of relevant precedents and

discussion of legal principles and analysis of the issues involved, will not take place. The development of the law, in the way we know it, based on principles will be affected. A case may often be lost (or won) as a consequence of the failure to cite relevant authorities. It cannot be denied that lawyers at times do indulge in long drawn out arguments and raise abstruse or technical issues. This is necessarily an aspect of any system which is based on rules of law and in which procedure occupies a prominent position. One cannot combine a system of rules with rough and ready justice. There are advantages in any system which one cannot enjoy, without being willing to pay a price in certain inconveniences. No system is perfect.

A system of rules and procedure carries the inevitable consequence that there are situations in which their application may lead to injustice. A draughtsman or a judge making law cannot frame rules which provide justice in all the situations which may arise. The modern developed legal system provides only limited scope for the operation of equity to mitigate the rigour of formulated law. The reasons which preclude the operation of equity in a modern legal system cannot be discussed here. Legal argument and reference to precedents from many sources and countries is a method of reducing the inequities which can flow from formulated law. There may at times be abuses – but abuses there will be in any system. If there is a drastic limitation of the citation of authorities and argument, *in a situation where rules continue to operate,* it can be asserted that it is likely to cause more injustice. If a system of justice based on laws is believed to be fundamentally unsound, the method of reform is not to change the language and in the process reduce legal argument, but rather to evolve a new system (as in communist China) which does away with legal rules, courts and lawyers and substitutes a system of popular ad hoc justice. This is a question completely different from the changeover of the language of the law and it is a confusion of thought to believe that one will flow from the other.

The question however must be considered whether in the process of change, the law will become simpler and (this is important) at the same time be comprehensible to future generations and capable of confronting the problems of of litigation.

What has happened in Sri Lanka to date is an attempt to transfer the existing legal concepts and law from English to Sinhala. An effort was made in glossary-making and translation of books and articles to faithfully reproduce and transfer existing legal ideas and concepts. In the courts when translation of the spoken word has to be more speedily effected, this

has at times been done by a process of simplification of rules and concepts. But only time can provide an answer to the question whether the courts are in effect making the law simpler or in the process, destroying the effect of the rule or concept which is being translated in such a way that it will not be comprehensible in the future to those who read the record. If the rules and concepts are being comprehensibly translated, the question arises whether after being simplified they will be capable of providing an answer to the many different problems which arise in litigation.

One may have expected when legislation was enacted in Sinhala, (after proclamation of the Constitution in May 1972) that a break with the old style of lawmaking, drafting and phraseology would take place. But this has not happened. The Administration of Justice Law of 1974 and the Administration of Justice (Amendment) Law of 1975 were prepared and drafted in English. Comments were directed to the English draft. This was translated and tabled in the National State Assembly and enacted in Sinhala and it is a substantial reenactment of the existing law with modifications. These enactments have effected changes which however are not radical. However to the conservative lawyers whose accustomed pattern was affected, some of the changes appeared to be radical. The system of rules continues to operate with changes which themselves were contained in the English draft and which were motivated by the socialist orientation of the government which wished to make an effort to reduce the expenses involved in litigation. Thus whatever changes which took place did not result as a consequence of the language changeover. Therefore it may be said that a switchover of the language of the law has not as yet affected in any fundamental way legislation, particularly the new consolidating laws relating to the administration of justice and procedure. Fundamental changes are more likely to take place as a result of a politically oriented reappraisal of the working of the system, rather than as a consequence of a switchover of the language of administration. Changes can take place without a change in language, and notwithstanding a change in language the system may remain substantially the same.

The fifth argument is that a consequence of the switchover of the language of judicial administration would be that a knowledge of the law would be placed within the reach of a larger proportion of the population without the necessity of lawyer services. Whether this will happen as a consequence of the change in Sri Lanka is doubtful. The law is not accessible to the people. One of the consequences of the expansion of executive power in the modern state is the increase of delegated legislation. In Sri Lanka delegated legislation is prolific in scope and content as a consequence

of the policies of successive governments which include: nationalisation and consequent state ownership in many areas; state regulation of the economy in an age of scarcities caused by exchange control and import restrictions, and the socialist policies involving the expansion of state power. Therefore a vast body of law exists in the form of delegated legislation. Delegated legisation prior to 1956 is collected in seven edited volumes. The only sources of the post–1956 delegated legislation are the Government Gazettes in which they are published. Past copies of these gazettes are not easily accessible to lawyers. The laymen would find them even more inaccessible. It is very unlikely that the layman could be able to refer this maze of delegated legislation, if he had access to all of it (which is unlikely) and find the provisions relevant to a particular situation.

The final argument, and perhaps the emotionally operative factor for change, is discussed in the first paragraph of the succeeding section.

Conclusions

In the ultimate analysis it may be said that the emotionally operative factor in the language change was the assertion of the independence and sovereignty of the local language and the displacement of a foreign language associated with a former imperial power. Related to this is the argument that as long as English was the official language, the doors of opportunity to enter the professions and public administration were closed to all except a small minority and select circle of the English educated. These may appear to be valid arguments. But if they are viewed in the context of the tremendous problems and costs of change, as well as the tragic conflicts between Sinhalese and Tamils which have been caused by it, then the entire issue takes on a different dimension. Had the human effort and financial expenditure used up in effecting the language change, been directed to economic development and the fighting of the causes and problems of poverty, and had the Sinhala language been used merely as a mode of communication in social life, would Sri Lanka today be a better place to live in for its people? I would not venture an answer. I was at one time convinced of the need to assert the independence and sovereignty of the national languages, but now I am not so sure. Was the language issue a convenient red herring for politicians and social reformers to avoid or cloak their inability to confront more pressing economic issues?

The language change in Sri Lanka is an accepted event which is irreversible. But the question may still be asked, whether the change was carried through at too rapid a pace.

It is true that if not for political and other preesures from outside the legal profession and the judicial system, no change would have taken place. But once the legal system had as a consequence of specific constitutional provisions been committed to the change, a degree of flexibility would have been a great advantage. While enacting that the litigant would have the right to have issues of fact investigated and determined in his own language, a provision could with advantage have been inserted conferring on a judge a discretion to use English or English and Sinhala in specified situations: legal arguments to be conducted in English where the parties agreed; documents and evidence in relation to subjects such as shipping, commerce, medicine, forensic medicine, engineering and other techincal and scientific subjects to be tendered in English which would be the language of record.

A change in the language of judicial administration which is not accompanied by the growth of a Swabasha legal literature and reduces or virtually brings to an end reference to foreign authorities and local authorities which are in the English language, in my view can only lead to an unbalanced and less efficient system of justice. This may not happen. But the writing is on the wall.

The real benefit which may be said to have occurred from the switchover of judicial administration is that the litigant or the accused is in a position to understand and participate in the determination of questions of fact as distinct from questions of law which arise in the original courts. Many of the other arguments which are put forward to justify the switchover and relate to benefits which accrue therefrom are to my mind illusory. It could be said that a change in the language of judicial administration was an inevitable consequence of the switchover of the language of education and public administration. As against this however must be weighed the financial costs involved as well as the decline in the quality of judicial administration. The quality of judicial administration in the short run has fallen, but whether in the long run benefits will accrue cannot be gauged at present. The benefits which accrue will have to be substantial if they are to counterbalance the cost and inconvenience which the entire operation has caused thus far. Ultimately it may be that national (or Sinhala communal) pride was the motivating factor; is this a justification for the switchover?

It is too early to say whether the switchover has had any significant effects on litigation. The incidence of litigation appears to be decreasing in the context of an expanding population. But this may have been due to

the presence of Conciliation Boards (which were abolished in 1977) and above all the increasing cost of litigation accompanied by a spiralling cost of living, which has the result that people cannot afford to litigate.

There has not yet been a complete switchover in judicial administration. All orders of a judge in the Appeal Court and original courts other than in the northern and eastern provinces are either delivered in or translated into Swabasha. In the original courts in the northern and eastern province, English and Tamil are used - but it is the expressed intention of the Minister of Justice, that where the record is maintained in English or Tamil it will be translated into Sinhala. English continues to be used in the Appeal Courts and to a lesser extent in the original courts. Among the problems which face the courts are: that there are judges and senior lawyers who are more conversant with English than the Swabasha language and there is a chronic shortage of Swabasha typists, stenographers typewriters and translators.

In Sri Lanka a change in the language of the law was seriously suggested in the 1940s; legislation on the subject was first passed in 1961 and now in 1978 the change is well under way. By comparison it is instructive to reflect that it took several centuries for English to replace Norman-French as the language of law reports and textbooks and Latin as the language of court records, and how much more slow and cautious has been the attitude of our nearest neighbours, India and Pakistan, to the problem under discussion. Should there have been more careful forethought and planning before introducing a fundamental change in such a vital field of human relations as law? Professor Sir Carleton Allen has remarked that the law is too great and complicated an instrument for blundering improvisation. But lawyers who tried to delay the change fought a losing battle-a battle made more difficult by their attitude to change being identified with self interest amounting to obstructionism. Ultimately, they took the line of least resistance and stopped pointing out to lay policy makers (some of whom were well aware of the fact) that unless the preparation for the changeover from English to the national languages in the sphere of law is as complete and detailed as possible, a serious dislocation in the administration of justice will inevitably result.