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DIGEST

ADMISSION – Enrolment as an Attorney-at-Law by a Buddhist Priest- Administration of Justice Law (AJL) No. 44 of 1973-Section 15(1)(e), Section 33 –Is there a rule of Vinaya Pitaka prohibiting a Bhikku from practicing the profession? – Are these rules purely of ecclesiastical nature?– Constitution –Section 6, 18(1)(d) - Is there incompatibility of the two vocations? - Is it morally reprehensible? - Does Section 6 override the effect of Section 33 (AJL) ?

(Continued in Part 15)

IN THE MATTER OF AN APPLICATION BY REV. SUMANA THERO TO BE ADMITTED AND ENROLLED AS AN ATTORNEY-AT-LAW

Supreme Court.
Samarakoon CJ.
Samarawickrama, J.
Walpita, J.
Gunasekera, J.
Wanasundara, J.
Enrolment Application No. A 6851.
March 17, 20, 21, 1978.

Admission-Enrolment as an Attorney-at-Law by a Buddhist Priest-Administration of Justice Law (AJL) No. 44 of 1973-Section 15(1)(e), Section 33 –Is there a rule of Vinaya Pitaka prohibiting a Bhikku from practicing the profession? – Are these rules purely of ecclesiastical nature?– Constitution –Section 6, 18(1)(d) - Is there incompatibility of the two vocations? - Is it morally reprehensible? - Does Section 6 override the effect of Section 33 (AJL) ?

Reverend Sumana Thero who had obtained the necessary qualifications to be admitted to the Bar made an application to be admitted and enrolled as an Attorney-at-Law to the Supreme Court. The question arose, whether he could be admitted and enrolled.

HELD : Samarakoon CJ, with Samarawickrama. J, Walpita. J. and Gunasekera, J. agreeing -

(1) The Vinaya Pitaka containing the rules and conduct of Bhikkus are of a purely ecclesiastical nature. This Court has constantly held that, such matters are outside the pale of the civil law and cannot be entertained as legal disputes in Civil Courts.

(2) Even if the Vinaya Rules have become and now have the force of customary law of the land and therefore enforceable, the

statements of the two Mahanayakas which is the only reliable evidence state that there is no such rule in the Vinaya. For a Rule to have a force of law by custom there must be certainty and on the material before Court such certainty is not shown.

Per Neville Samarakoon, CJ.

"To say that the rules laid down by the Buddha for the discipline and personal conduct of his disciples, is enforceable through Civil Courts by laymen as customary law, is abhorrent and should not rightly be entertained in any Court".

Per Neville Samarakoon, CJ.

"We must in no way be understood to condone the proposed action of the applicant. We in the civil Courts are only concerned with the civil rights and duties and I can see nothing in the civil law which disentitles the applicant to be admitted and enrolled as an Attorney of this Court and we are powerless to prevent it.

(3) Section 15(1)(e) of the AJL permits the Supreme Court with the concurrence of the Minister to make rules for the admission, enrolment, supervision and removal of Attorneys-at-Law. No Rule has been made under this section debarring a monk from applying to be enrolled as an Attorney-at-Law.

(4) How much protection should be afforded under Section 6 of the Constitution (1972) is a matter of policy for the State acting through the National State Assembly. In what manner and when are matters within the power of the State exercised through the enactment of legislation. Courts neither lay down policy or make Law. Courts function is only to interpret and administer laws made by the legislature not to make Law.

Wanasundara, J. (dissenting)

HELD:

1. That a monks life, as ordained by the Buddha, in its pure form, is incompatible with lay life would be apparent to anyone even having a little acquaintance with the Dhamma. The institution of the Sangha was established by the Buddha as a haven for those who wish to get away from lay life and who need the optimum conditions for pursuing the arduos life of virtuous meditation and wisdom demanded by the teaching. A person who enters the order should be mindful of the change of status and recall this difference as often as possible.

2. The application of Section 6 (1972 Constitution) arises this way, the State is enjoined to protect and foster Buddhism. When a monk is enrolled by us as an attorney, this determination by us as judges places a seal of approval on an act which is said to be violative of the Dhamma Vinaya. It is not necessary that some specific tenet of the Vinaya should be transgressed; even a significant deviation from the spirit of the religion may suffice if it could be said to endanger the teaching.

Per Wanasundara, J.

"In so far as the legal position is concerned it is my view that any determination or worsening of the prevailing state of affairs of any significance would attract the protective provisions of Section 6 of the Constitution.

3. The application must be refused on one or more of the following grounds :

   i. Ground of incompatibility of the two vocations

   ii. Monk has disturbed the moral sense of a section of the public

iii. Violating of the Vinaya Rules

iv. He has not satisfied Court that his confirming to lead the life of a Monk would be no impediment to his practicing as a lawyer.

v. Application of Section 6 of the Constitution (1972)

Cases Referred to :-

1. *Ratnapala Unnanse vs Appuhamy* 4 NLR 167 at 169
2. *Saranankara Unnanse vs. Ratnajothi Unnanse* 20 N.L.R. 383 at 401
3. *Sumanagatta Unnanse vs. Sobitha Unnanse* 3 SCC 253
4. *Marshall's Judgments* pages 657 and 658
5. *Aysa Umma vs. Sago Abdul Lebbe* 1863 and 240
6. *Perera v. Moonasinghe* 27 NLR 76 and 79
7. *In re S* 1969(2) W.L.R. 708
8. *A-G of Gambia v. N'Jie* (1961) 2 AER 504
9. *By petition from Antigua* 12 E.R. 504
10. *Julius vs. Bishop of Oxford* (1880) 5AC 214
11. *Ex Parte Inahoro* 1963 2 QB 455
12. *In Re Shuters* 1960 4 C.W.R. 370
13. *In re Moonasinghe* 1917 4 CWR 370
14. *In the Matter of an Application of Seneviratne to be admitted an advocate* 30 NLR 299
15. *In re Brito* 43 NLR 529
16. *In re Weare* (1893) 2 Q.B. 439
17. *Dharmavisudithi vs. Dhammadassi Thero* 57 NLR 469
18. *Dammaratna Unnanse vs. Sumangala Unnanse* 14 NLR 409
19. *Shelly vs. Kraemer* 334 U.S. 1

20. *Barrows vs. Jackson* 346 U.S. 249
21. *Aysa Oemma vs. Sago Abdul Lebbe* (1863-68)
22. *Davarakkita vs. Dharmaratana* 21 NLR 255
23. *Neisaemmah vs. Sinnathamby* 36 NLR 375
24. *Ceylon Workers' Congress vs. Superintendent Beragala Estate* 76 NLR 1
25. *Solicitor General vs. Jayawickrama* 53 NLR 320

Prince Gunasekera with *L.V.R. Fernando, S.S. Wijeratne, Parakrama Ranasinghe* and *Sarath Wijesinghe* for the appellant.

H.W. Jayawardane QC with *Nimal Senanayake, Desmond Fernando, Miss S.M. Senaratne* and N. *Jayamanne* for the Bar Association of Sri Lanka (on notice)

Eric Amerasinghe with *C.D.S. Siriwardane, N.S.A. Gunatilleke, M.B. Peramune* and *Miss. K.D. Meddagoda* for the Colombo YMBA.

Dr. K.D.P. Wickremasinghe with *D.H. Balachandra* and *Jayatissa Herath* for the ACBC and Buddhist Theosophical Society.

Shiva Pasupathi Hon. Attorney General with *K.M.M.B. Kulatunga Additional SC* and *D.C. Jayasuriya* SC for the State.

P.R. Wickremasinghe – Member Buddhist Advisory Board, Ministry of Cultural Affairs.

D.S.R. Rajapakse with *K.M.P. Rajaratna* and *Stanley Rajapakse* for 7th party noticed.

WANASUNDARA, J. *(dissenting)*

12th July, 1978

SAMARAKOON, C. J.

Reverend Nakulugamuwa Sumana Thero, a member of the Sri Kalyanawansa Maha Nikaya has made an application to this Court to be admitted and enrolled as an Attorney-at-Law of the Supreme Court, an unprecedented event in the history of Sri Lanka. In doing so he has roused a store of protests. Lay Buddhists have lodged objection, an unprecedented event in this court. Reverend Sumana's application was received by the Registrar of this Court on 23-02-1978. The papers submitted by him disclose that he is a graduate of the University of Sri Lanka being a Bachelor of Laws. He has obtained the necessary academic qualifications to be admitted to the Bar. To his application are annexed two certificates from Senior Attorneys-at-Law testifying to the fact that he is a person of good character. He therefore claims that he has satisfied the provisions of section 33 of the Administration of Justice Law No. 44 of 1973 which reads as follows: -

"The Supreme Court may admit and enrol as attorneys-at-law persons of good repute and of competent knowledge and ability."

In view of the importance of the matter, the spate of protests both within and without this Court, and the fact that this was the first of its kind in the annals of our Courts, I referred this for decision by a Bench comprising five Judges of the Supreme Court. I also caused notice to issue to all who filed objections, to the Bar Association of Sri Lanka and to the Attorney-General. The Bar Association and the Attorney-General very kindly appeared and assisted this court. At the commencement of the hearing on 17th March, Counsel for the Colombo Young Men's Buddhist Association (hereinafter referred to as the Colombo Y.M.B.A.) Counsel for the All Ceylon Buddhist Congress (hereinafter referred to as the A.C.B.C.) and the Buddhist Theosophical Society (hereinafter referred to as the B.T.S.) and P.B. Wickramasuriya (objector) all stated that they do not contest the facts set out in documents filed for the purposes of section

33 of the Administration of Justice Law, No. 44 of 1973 and accepted the fact that the applicant was competent, qualified and that he was of good repute. On the second day of hearing one D.M. Guneratne, another objector, presented himself in Court and Counsel appearing for him maintained *inter alia* that the applicant was not of good repute for reasons which I shall refer to later. The applicant filed an affidavit together with other documents three of which were affidavits – one sworn to by the Reverend Rangoda Dhammasena Maha Nayaka Thero Mahanayaka of the Amarapura Nikaya, another sworn to by the Reverend Devinuwara Amarasiri Mahanayaka of the Sri Kalyanawansa Maha Nikaya (the Nikaya to which the applicant belongs) and a third sworn to by Dr. W. S. Karunaratne Professor of Buddhist Philosophy of the University of Sri Lanka. All three of them testify to the fact that a Bikkhu who is admitted, enrolled, and who practices the profession of an Attorney-at-Law does not contravene any of the Disciplinary Codes of the Vinaya Pitaka. The objections were of a four fold nature and are as follows : -

1. That the applicant was not a person of good repute and therefore not a fit and proper person to be admitted and enrolled.

2. That the applicant was acting in contravention of the Vinaya Pitaka and therefore, in the larger interests of Buddhism, this court in the exercise of its discretion, should refuse to admit and enrol him.

3. That the rules of the Vinaya Pitaka had acquired the force of customary law and therefore this court could not admit and enrol the applicant.

4. That by reason of the fact that by section 6 of the Constitution of Sri Lanka the Republic had undertaken to protect and foster Buddhism this court cannot admit and enrol the applicant .

I shall deal with each of these points but at the outset I desire to state that in view of the opinion I have formed on other matters it is not

necessary to consider the learned arguments addressed to us as to whether the word "May" in section 33 quoted above is indicative of a discretion or whether it is equivalent to "shall" and therefore obligatory, other things being equal, for this court to admit and enrol the applicant. Section 15(1)(e) of the Administration of Justice law permits this court with the concurrence of the Minister to make rules for "the admission, enrolment, suspension and removal of Attorneys-at-Law". They must be published in the Gazette (section 15(2)) and placed before the National State Assembly for approval. If not so approved they shall be deemed to be rescinded (section 15(3)). Some rules have been made under this section and published in Gazette No. 115/4 of 12-02-1974 and Gazette No. 95/5 of 23-01-1974. But these do not contain rules relevant to matters now under consideration. Suffice it to say that no rule has been made under this section debarring a monk from applying to be enrolled as an Attorney-at-Law.

Counsel for D. M. Gunaratne (objector) seething with indignation, submitted that the applicant was not a person of "good repute", because at the time he robed himself he represented to the Buddhists that he has renounced the world and would live "according to a certain code of ethics", but he was now deceiving the people by his conduct. Counsel went so far as to say that the Vinaya Pitaka does not permit a monk to "follow legal studies". The burden of his song was that the applicant while being a monk was seeking to have the best of both worlds and was thereby living a lie. Such a person was not of good repute within the meaning of section 33 of the Administration of Justice Law. Counsel did not refer us to any particular rule of the Vinaya which prohibited the study of law or the practice of it. Indeed those whose opinion matters, and who have the power to examine the conduct of the Bikku concerned, have said that he is doing nothing wrong in applying to be a lawyer. Further it is only if an applicant's reputation is such that he could be said to be guilty of moral turpitude, that he could be refused admission. I trust that the applicant will as a follower of the Buddha forgive counsel for the severe strictures passed on him. Being a Buddhist himself, he was carried away by his emotions. I reject the contention that the applicant is not a person of good repute.

Counsel for the Colombo Y.M.B.A. and Counsel for the A.C.B.C. and B.T.S. both contended that no Bhikkhu can practice as a lawyer without violating his religious precepts. They say that the Bhikkhu's way of life and the Code of Conduct to which he is subject are incompatible with those of an Attorney-at-Law and that the affirmation of an Attorney-at-Law violates the affirmation made by a Bhikku at the time of robing. In short, that when the applicant became a Bhikku, he disqualified himself from being a lawyer. Therefore they state this court, in the exercise of discretion it has under section33 of the Administration of Justice Law, should refuse to admit and enrol him. The Code of conduct referred to by Counsel is the Vinaya Pitaka. Counsel for the objectors further contested that the Vinaya Pitaka prohibits a Bhikku from entering the legal profession. Counsel for the Bar Association contended this fact and stated that at the time the Vinaya was framed the profession of lawyers was totally unknown. The Mahanayake of the Amarapura seat and the Mahanayake of the Sri Kalyaniwansa seat states categorically that there is no rule of Vinaya Pitaka which prohibits a Bhikku from studying law and from practicing the profession of an Attorney-at-Law. There are statements regarding discipline and conduct of a Bhikku. They are made by priests who are the final arbiters on such matters relating to the order to which the applicant belongs and to whose discipline he is subject. These opinions can hardly be questioned by this court and must be accepted by us. They cannot be lightly rejected. They are the only evidence before us. Counsel for the Y.M.B.A. challenged this opinion and stated that he could produce affidavits from Maha Nayakes of other sects to the country. He possibly could do so, but we did not think it necessary to permit such a course of action as it would only have enlarged the dispute unnecessarily. It is common knowledge that Bhikkus in this country have hitherto been employed in various secular pursuits such as Vice Chancellors of Universities, Ayurvedic Physicians and Teachers, notwithstanding the rule of absolute poverty. (Vide the evidence of Sri Sumangala Nayaka Thero in *Ratnapala Unnanse vs. Appuhamy*[1] some priests have held, and do hold even now considerable property which fact is recognized by the Buddhist Temporalities Ordinance. These and other

deviations from the strict rules are "necessary developments in the course of centuries. Doctrine and belief, are of course, immutable but discipline and administration are naturally subject to modifications. Per Sampayo, J. in *Saranankara Unnanse v Ratnajothi Unnanse*[2] (at 401). This Court has in *Sumangala Unnanse v. Sobitha Unnanse*[3] (at 255) expressed the opinion that the Buddhists of Sri Lanka have not adopted all the strict rules and regulations of the Vinaya. Therefore an exhaustive inquiry into whether or not the Vinaya prohibits a Bhikku to practice the profession of a lawyer would be a futile exercise especially when we are confronted with the fact that Bhikkus have for decades been engaged in secular employment. In the circumstances, to exercise a discretion against the Bhikku, if discretion there be, would be fraught with danger and unwise. Counsel for the Colombo Y.M.B.A. appealed to us to use our discretion because Buddhists were powerless to prevent the Bhikku's enrolment. My only reply is that the massive opinion of the Buddhist's of this country cannot be ignored by and should prevent a mere Bhikku from seeking enrolment if it is in fact so abnoxious to Buddhist public opinion. There was also the plaintive cry of counsel for the A.C.B.C. and B.T.S. – " have mercy on us. Buddhism will be ruined if a Bhikku is enrolled as a lawyer". Buddhism has been an integral part of the life of this country for well over 2,500 years and has withstood the assaults of foreign powers and foreign doctrines for over 400 years. It is preposterous to think Reverend Sumana can achieve what foreign domination in all its might has failed to do for 400 years.

There is another reason for not embarking on such an inquiry. The Vinaya Pitaka containing the rules and conduct of Bhikku are of a purely ecclesiastia nature (Hayley page 341). Court has consistently held that such matters are outside the pale of the civil law and cannot be entertained as legal disputes in Civil Courts. Canon law is within the exclusive jurisdiction of ecclesiastical courts (Woodhouse – Sisyanu Sisya Paramparawa page 9). The history of these courts records that a dispute in the Maradana Mosque regarding irregular practices at religious festivals and the exclusive right to offerings was not entertained by the court. "The

religious privilege ..... is a question for the priests or the spiritual guardians of the Mohommedan religion. The civil right is the sole right with which we are concerned ....." To decide otherwise would be a "fearful responsibility " (Marshall's Judgments pages 657 & 658)[4] *Vide also Aysa Umma v Sago Abdul Lebbe* [5]

The contention that the Vinaya have become and now have the force of customary law of the land and therefore enforceable in the Courts needs little consideration in this matter. Even if they form customary law the statements of the two Mahanayakes which is the only reliable evidence before us state that there is no such rule in the Vinaya. Again for a rule to have the force of law by custom there must be certainty and on this material before us such certainty is not shown. Moreover to say that the rules laid down by the Buddha for the discipline and personal conduct of his disciples is enforceable through civil courts by laymen as Customary Law, is abhorrent and should not rightly be entertained in any court.

The last argument put forward is based on section 6 of the Constitution of Sri Lanka which reads as follows : -

"BUDDHISM"

The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d). How much protection is to be afforded is a matter of policy for the State acting through the National State Assembly. In what manner and when, are matters within the power of the State exercized through the enactment of legislation. The mechanics of this section have not been made known. We can neither lay down policy nor make laws. Our function is only to interpret and administer laws made by the legislature, not to make law.

Before I conclude I desire to state that we must in no way be understood to condone the proposed action of the applicant. The Civil Courts are concerned with matters mundane and the practice of the profession is in some respects a mercenary one – not one for him who has renounced the world and is seeking enlightenment. We in the Civil Courts are only concerned with civil rights and duties and I can see nothing in the civil law which disentitles the applicant to be admitted and enrolled as an Attorney of this Court and we are powerless to prevent it. For these reasons on the 21st of March, 1978 I joined with three of my brother Judges in overruling all objections. I should like to record my thanks to Counsel for their assistance, especially to Counsel for the Bar Association and the Attorney-General who appeared at my request.

SAMARAWICKREMA – *I agree*

WALPITA – *I agree*

GUNASEKARA – *I agree*

WANASUNDARA, J. (dissenting)

The applicant, an upasampada bhikku said to be a member of the Sri Kalyanawansa Maha Nikaya of the Amarapura Sect, has, in that capacity and under his monastic name of Nakulugamuwa Sumana, sought admission and enrolment as an attorney-at-law of this court.

The applicant has filed with his application the required documents for enrolment. They are the three certificates from the Law College showing that he has duly passed the Final Examination for the admission of attorneys, having been exempted from the two earlier examinations as he has graduated in law at the University. The certificates testifying to his good character are also annexed. There is also material indicating that he has served the prescribed period of apprenticeship and thereafter given public notice of his intention to apply for enrolment.

Consequent to this public notice, however, a number of institutions, organizations, and individuals have protested and objected to his proposed enrolment. Three of the leading Buddhist lay institutions – the Young Men's Buddhist Association, the Colombo Buddhist Theosophical Society Limited, and the All Ceylon Buddhist Congress were represented before us, and counsel appearing for them made submissions in support of these objections.

The matter before us is both *res integra* and the subject of a great deal of public interest, concern, and discussion in this country. It is due to this importance that the Chief Justice has thought it necessary to constitute this divisional bench of five judges, presided over by him, to decide whether or not a Buddhist monk could be enrolled as an attorney-at-law.

The Bar Association was represented before us by Mr. Jayewardena, and the Association indicated that it saw no objection to the enrolment of the applicant. We are also thankful to the learned Attorney-General, who appeared as *amicus*, for expressing his views in regard to some of the matters we are called upon to decide.

The application is supported by two important affidavits one from the Chief High Priest or Maha Nayaka of the sect to which the applicant belongs, and the other from the Maha Nayaka and President of the conglomerated group of the Sri Lanka Amarapura Maha Nikaya. This Nikaya does not claim to represent all the Buddhist monks in this country, but is only one of the three Nikayas that exist here. These two affidavits are to the effect that the admission of this monk as an attorney would not be in conflict with the Dhamma and Vinaya, and that by such admission a monk would neither commit a transgression of the monastic rules nor come under any disability as a monk. There are also other affidavits and material to the same effect from the Buddha Sravaka Dharma Bhikku University, Anuradhapura, from the Sri Lanka Bauddha Maha Sammelanaya, from the Loka Sama Maha Sangha Sammelanaya, and from two well-known scholars of Buddhism, namely, Rev. Walpola Rahula and Dr. W.S.Karunaratne.

The legal provision relating to enrolment is section 33 of the Administration of Justice Law, and Mr. Jayawardena first argued that in the exercise of the powers under section 33 this court has not been vested with a discretion in the matter. It was his submission that if the requirements mentioned in the section are satisfied, we have no option but to allow the enrolment of the applicant. He alleged that the documents submitted by the applicant, prima facie, satisfied the requirements of the section. The learned Attorney-General, however, was inclined to the view that the section should not be interpreted as being mandatory but only directory, and it left us with a discretion. This point is of some importance and I find that it is necessary to deal with it first, before coming to the other matters raised before us.

An attorney-at-law in Ceylon can be said to occupy a position practically the same as that of a Barrister in England- per Jayewardena, J., in *Perera Vs Moonesinghe* at[6] 79. We have generally looked to England for the principles and rules that should regulate the legal profession in this country. In cases of disciplinary proceedings, our courts have been guided by the decisions given in the United Kingdom on such matters. In the course of the argument, Mr. Amerasinghe, Mr. Jayewardena, and the Attorney-General freely referred to material from the United Kingdom and relied on the respective citations in support of their arguments on this point.

The position in England, as far as I can gather, seems to be as follows: Originally, the King himself was concerned in the training of advocates in disputes, but later this power was given to the judges. Thereafter, a part of the power came into the hands of the Inns of Court. A passage in Dugdale's Origines Juridiciales, 2nd Edn. 1671, quoted in *Inre S.* [7] traces the origin of these institutions;

"Chapter 55 of Dugoale's Origines Juridiciales, 2nd ed. (1671), is headed 'Settled places for students of the law, called Inns of Court and Chancery' and records that King Edward I in 1292, ' did especially appoint .....the Lord Chief Justices of the Court of Common Pleas and then rest of his fellow justices.....that they, according to their discretions, should provide

and ordain, from every country, certain attorneys and lawyers, of the best and most apt for their learning and skill, who might do service to his court and people; and that those so chosen only and no other, should fellow his court and transact the affairs therein; the said King and his council then deeming the number of seven score to be sufficient for that employment; but it was left to the discretion of the said justices, to add to that number or diminish as they should see fit.' Certainly from that time onwards for many years not all those who had been called to the bar of their Inns were allowed to practice in the courts at Westminster. From time to time regulations were made by the judges prescribing the period of time which must elapse after call to the bar of an Inn before the right to audience in the courts was exercised."

Another useful statement of the development of these institutions is contained in the judgment in *A.-G. of Gambia V. N'Jie*.[8] This statement is cited by Halsbury, Vol.III (4th Edn.) p.589, note 6:

" By the common law of England, the judges have the right to determine who shall be admitted to practice as barristers and solicitors, and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England, this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court; and, for a much shorter time, so far as solicitors are concerned, to the law society. In the colonies, the judges have retained the power in their own hands, at any rate, in those colonies where the profession is "fused."

That this power is of a discretionary nature, is further borne out by a statement in Halsbury, that the courts have refused to grant mandamus to the benchers to admit a person as a student, or to call a student to the bar, and that they will not also determine questions of title to Chambers which belong to any of the Inns of Court. Halsbury (ibid) 591. More than one case is cited in support of the above statement.

The practice that prevailed in the colonies can be seen from the judgment of the Privy Council in *By Petition from Antigua* [9]

" In England the Courts of Justices are relieved from the unpleasant duty of dis-barring advocates in consequence of the power of calling to the Bar and dis-barring having been in very remote times delegated to the Inns of Court. In the colonies there are no Inns of Court, but it is essential for the due administration of justices that some persons should have authority to determine, who are fit persons to practice as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practice, as in the case in England with regard to attorneys . In Antigua the characters of Advocates and Attorneys are given to one person ; the Court therefore that confers both characters may for just cause take both away. Although indeed our own Courts do not dis-bar for the reason I have mentioned, I have no doubt they might prevent a barrister, who had acted dishonestly from practicing before them. In (269) a case (in that case the Recorder's court had suspended the whole bar for six months from practice. (in the hearing, the Privy Council deferred its determination until further evidence should have been brought from Bombay, but the case has never been brought forward again), which came before us a short time ago from Bombay none of the members of this Board doubted that the Recorder's Court there had authority to prevent English barristers to practice before them. The question was whether their authority had been properly exercised."

Mr. Amerasinghe drew our attention, particularly, to a statement contained in Halsbury, Vol. II (2nd Edn.) at page 365, section 611, and to a reference in the English and Empire Digest, Vol. III, P.316. According to this, persons in holy orders or those intending to be clergymen were debarred in England from being called to the bar. This rule appears to have undergone some modification very recently and, as the learned Attorney-General submitted, it now seems to be included in a much broader regulation enacted, with a similar object in mind. At the present day, a student, before he is called to the bar, is required to sign a prescribed "call declaration". This declaration states, *inter alia,* that "he will not

engage in any other occupation whatsoever which is incompatible with the practices at the bar." (Halsbury, Vol. III (4th Edn.)

In Sri Lanka, our courts have been empowered, since the time of the Charter of 1801, to admit lawyers to practice in the courts. In the Administration of Justice Law, sections 33 to 36 deal with the legal profession. The two sections that have a bearing here, are section 33 dealing with admission and section 35 dealing with suspension and removal. They are as follows:-

" 33. The Supreme Court may admit and enrol as attorneys-at-law persons of good repute and of competent knowledge and ability". "35. Every attorney-at-law who shall be guilty of any deceit, malpractice, offence or other conduct unworthy of an attorney-at-law may be suspended from practice or removed from office by any three judges of the Supreme Court sitting together.

It will be observed that the Legislature has used the word "may" in both these sections. The word "may" in its natural meaning is used as permissive or enabling. But the courts have sometimes interpreted "may" to mean "must" or "shall", where such a meaning is warranted by the context. Mr. Jayawardene has presented his argument on this basis. It would, of course, lie on those who contend for such an interpretation to adduce convincing reasons for doing so. Craies' Statute Law (7th Edn.) 284. The word "may" has been given mandatory effect where the power reposed is coupled with a duty. *Julius v, Bishop of Oxford.*(10). The ambiguity in the use of "may" can, for example, be seen in two recent cases. In *Ex Parte Inahoro* (11) and In Re Shuters,(12) the word "may" occurring in two consecutive sections of the Fugitive Offenders Act, 1881, has been read in the two different ways, depending on the context.

On a close reading of section 35, it would be seen that it contains only three requirements – good repute and competent knowledge and ability. Mr. Prins Gunasekara drew our attention to the Sinhala version of the Administration of Justice Law and showed us that the word "ability" is

translated in the Sinhala as "dakshatawayak" and stated that this word carries the meaning, "competence or proficiency." If this is so- the Sinhala version being the authentic version – this section is circumscribed and narrowly drawn. There is nothing in it which contemplates any kind of physical disability, though it is possible to imagine some such instances when this court will be justified in refusing admission to a person physically incapacitated though otherwise qualified. There is every indication that our powers under section 35 in respect of admission are wider than stated by counsel. In this connection it is interesting to find that rule 4 of the Rules regulating the Admissions, Enrolment and Removal of Attorneys-at-Law- Gazette No.115/4 of 12th June 1974- states that on the receipt of an application for admission, the Supreme Court shall direct the Registrar "to inquire and report whether the applicant is of good repute and whether there exists any impediment or objection to his enrolment as an Attorney-at-Law." This is how the authorities concerned in this matter have understood it and it is indicative of a wider discretion being vested in this court.

The position under the Courts Ordinance was substantially the same as that now obtaining under the Administration of Justice Law, and it could be interesting to see how our courts had interpreted the corresponding provisions in the past. Let us first look at the cases dealing with re-enrolment. There is no special action dealing with re-enrolment in either law and applications for re-enrolment are in effect determined under the section dealing with admission. In dealing with such matters, our courts have always stressed the discretionary element vested in the court. Three distinguished judges of our court- Wood Renten C.J., Ennis J., and Sampayo J., *In re Moonesinghe* [13] said that' a court which has the right to remove the name of a solicitor from the Rolls had also an inherent discretionary power to re-admit him where he has subsequently expiated the offence of which he may have been guilty and redeemed his character.".

In another case of re-admission, *In the matter of Application of Seneviratne to be admitted an Advocate,*[14] Schneider, A.C.J., quoting from an Indian judgment , said;

" These cases amply establish the position that in so far as the English and American Courts are concerned though the name of a legal practitioner may have been removed from the Rolls by reason of professional misconduct or criminal conviction, the court may in its discretion readmit him, if satisfied that during the interval which has elapsed, since the order of removal was made, he has borne an unimpeachable character and may with propriety be allowed to return to the practice of an honourable profession."

An examination of the power of suspension and removal may also throw some light on the extent of our powers as regards section 33. There are numerous cases where our courts, acting under the corresponding provisions, have indicated that the power contained there is of a discretionary nature. For example, Howard C.J., *In in re Brito* [15] at 531, quoted with approval the following passage from the judgment of Esber.N.R. in *re Weare* [16]: " It was there contended that where a solicitor had been convicted of a crime it followed as a matter of course that he must be struck off, but Barron Bollock and Hanistry J. held that, although his being convicted of a crime *prima facie* made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the court may punish him to a less extent than if he had not been punished in the criminal proceeding. As to striking off the roll, I have no doubt that the court might in some cases say, "under these circumstances we shall do no more than admonish him"; or the court might say, "we shall do no more than admonish him and make him pay the costs of the application" ; or the Court might suspend him, or the court might strike him off the roll. The discretion of the court in each particular case is absolute. I think the law as to the power of the Court is quite clear".

Coming back to section 33, a close analysis of it shows that the conditions set out in section 33 are of a limited nature. In effect it comes down to just one requirement, i.e. of good repute, because the other two requirements- knowledge and ability- will be presumed once a person

has successfully qualified in the law examinations. Having regard to the background to these provisions referred to by me, I find it difficult to accept a limited view of these sections as advocated by Mr. Jayawardena. The language used and the context, the nature of the power, the persons in whom it is reposed, the manner in which it has been interpreted and exercised by the courts, and the limited nature of the requirement contained therein, all impel me to form a wider concept of our powers. I am therefore inclined to agree with the learned Attorney-General that these sections vest in us a discretion when we deal with such applications. It would now be legitimate for us, upon this conclusion, to proceed to the consideration of the various objections that have been taken to the applicant's admission and to find out whether they constitute a sufficient ground for refusing him admission to the bar.

Turning to the main case, I think it desirable for a proper appreciation of the issues before us that some reference be made to the matters set out in the affidavits, namely, the sangha the monastic rules, and their place in society. For this purpose I propose taking the liberty of referring to matters of common knowledge, to the texts and authorities brought to our notice at the hearing by counsel on both sides and to certain matters of public history of which this court can legitimately take judicial notice. It may be specifically mentioned that the Vinaya and the Sutras were freely referred to by counsel at the hearing, and we were informed that the Pali texts constituting these pitakas along with their Sinhala translations, prepared under the auspices of the Government and published by the Government are publicly available. These texts have also been translated and are available in English.

There is the further fact that the Constitution enjoins the State to protect and foster Buddhism. The constitutional provisions contain a solemn assurance, worded in categorical terms, as follows : -

"The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d)."

Since it binds the State, it must be taken cognizance of by all State functionaries, including Judges, as I shall show later in the course of this judgment.

Anyway, a majority of the persons in this country are Buddhists by religion. This is, I believe, reflected also in the composition of the State Services. The main principles and tenets of the Teaching are well known to practically all practicing Buddhists, and there are many such persons in this country occupying places both high and low in all walks of life. They, of course, cannot disown that knowledge whatever the circumstances may be. I am sure that it would be a matter of surprise and perplexity to most of these Buddhists, if they are told that there is nothing in the Teaching that would make it objectionable for a Buddhist monk to don court attire and begin practicing in the Courts while still remaining a monk. This would undoubtedly appear to them as a novel and startling interpretation of the Buddha's Teaching. Though this may be the immediate and instinctive reaction, yet those of them who are fortunate to be acquainted even cursorily with the Suttas would have the satisfaction of knowing that there is ample reasons for their disagreement. And yet, we have the spectacle of persons who profess a knowledge of the Dhamma speaking in a different voice. I have in mind the affidavits filed before us by the applicant. But that material is unconvincing and even contradictory. To give one example, the applicant relies on a statement of Dr. Walpola Rahula, which includes the following passage :-

"Professions such as practicing medicine, chanting and the preparation of talismans were against both the dhamma and vinaya. Monks who had taken up these professions had acquired a place in present day society in spite of the fact that these types of professions were not in keeping with the disciplinary code for monks."

Would it be unreasonable to say that what has been said of medicine would apply with greater force in the case of the practice of the law?

But, yet counsel who supported this application attempted to show that there was nothing in the Buddha's teaching which prohibited a monk from practicing as an attorney-at-law. It was suggested that this kind of pre-occupation could be regarded as a sort of public service to the community which, he said, the Buddha had actually enjoined on the monks. This view is unfortunately shared by many, especially by some well-meaning persons who give undue emphasis to "social service". Undoubtedly there is an aspect of Buddhism which shows a concern for the material well being of man, since the Dhamma was preached for layman too and not solely for monks. But Buddhism so far as a Bhikku is concerned is essentially a path of individual self development, entailing the regulation of mundane matters and the leading of a life of purity. Mr. Prins Gunasekera relied on the well known exhortation by the Buddha to his first sixty disciples to wander forth among the people and preach the Dhamma, out of compassion for them. Let it be noted that the exhortation was to proclaim the Dhamma and the brahma chariya – the holy life, and not anything else. What we are now dealing with here is a case of a very worldly profession and even Rev. Walpola Rahula seems to suggest that this vocation would be contrary to the Vinaya. The exhortation was also addressed to (arahats) persons who had reached the pinnacle of holiness – "They had done what had to be done and brought to an end the Brahma faring – the holy life". It is only they who could grasp the Teaching in its fullness. I think, it could be truly said that unless a person has gained what is called "right view" (samma ditti), he cannot be said to be in a position to rightly understand this profound Teaching. It is undoubtedly a noble service for anyone to preach the Dhamma, which he can do only to the extent of his knowledge and capacity, but even so, one should not neglect one's own progress in the Teaching. The effort to obtain competence and mastering in the chosen field must take priority over public service. When the Teaching is so deep and profound, requiring sustained exertion of almost a superhuman level, one may well ask, where could a monk find the spare time and energy to lavish on a very exacting vocation like the law ?

Since the material filed by the applicant is contradictory and somewhat confusing in many respects, it would be necessary for us to ascertain the

correct position in regard to them. For this purpose it would be best to follow the salutary rule – so often mentioned by the courts – that is, to go to the original source and try to ascertain what the Buddha has actually said on these topics. Chief Justice Anton Bertram had, on a number of occasions, delved exhaustively into the original Vinaya texts. Chief Justice Basnayake himself advocated a return to the fundamental principles of those texts. He said in *Dhammavisudithi Thero V. Dhammadassi Thero*[17] (at 480).

"But when we are dealing with ecclesiastical property, a region in which we are enforcing simply the ecclesiastical law based upon the original authoritative texts developed by religious customs, we ought not to recognize claims and transactions which are in their terms or in their nature inconsistent with the fundamental principles of those texts and those customs".

Although a little search in the Suttanta will show any number of passages indicating that it is no part of the training for a monk to occupy himself in worldly matters once he has renounced the world I shall select a few of those passages which come immediately to the mind of any Buddhist for this purpose. In the Sanyutta Nikaya the Buddha declared –

"Formerly and now also Anuruddha, it is just suffering (dukka) and the cessation of suffering that I proclaim". .Aryaketha Samyutta Sutta No. 02, Sayuttta IV)

Again,

Just as Paharada, the great ocean, Paharada has but one taste, the taste of salt, even so Paharada this Dhamma and Discipline has but one taste, the taste of Deliverance." (Attaka Nipata Maha Wagga Sutta No. 09, Anguttara iv)

The Buddhist concept of suffering dukka goes to the very roots of existence,. in fact it touches existence itself – the existential being.

Even in the first sermon the Buddha summed up the Noble Truth of suffering (dukkha) in the following words: "In short, the Five Grasping Groups (pansa upadana skanda) are suffering."

In Buddhism, these Five Grasping Groups constitute the self or being. The way of the world and all wordly affairs are based on this foundation of the self, but the Buddha's Teaching is a way leading to the destructions of the self which is founded on ignorance (avijja) and desire (thanna). The graduated scheme of training consisting the Teaching has been devised for this purpose and anyone who takes to the doctrine with any seriousness must progressively give up worldly affairs and pursue a life of renunciation This is precisely the effect of the monastic rules of training and for a monk there could be no compromise. In the case of the layman, it is a different matter. He must necessarily follow the Teaching within the contents of his day life.

Accordingly, a bhikku or monk is one who has voluntarily chosen to renounce the pleasures and unhappiness of the world in the active search of a higher ideal. He has sought refuge in the Sangha. Today, ordination is given by the Sangha. Upasampada is never forced on an unwilling person. It is the tradition that the aspirant must utter words requesting the going forth (pahajja) indicating that he renounces the lay life and enters the order to seek an escape from suffering. A Bhikku is however at liberty at any time to leave the Sangha and revert to lay life. It is the duty of a monk to strive earnestly and by learning, practice, and meditation, develop those virtues, qualities, and attainments that bring about a true understanding of the Dhamma. The greatest effort is called for to realize the Deliverance spoken of by the Buddha. It is needless to state that such a life of exertion would be a full time occupation, leaving no time for any other activity. In fact, any worldly activity would, by it's very nature, be inimical and an obstacle to one who wishes to follow in the footsteps of the Buddha.

That a monk's life, as ordained by the Buddha, in its pure form, is incompatible with lay life would be apparent to anyone even having a little

acquaintance with the Dhamma. The institution of the Sangha was established by the Buddha as a haven for those who wish to get away from lay life and who need the optimum conditions for pursuing the arduous life of virtue, meditation and wisdom demanded by the Teaching. A person who enters the Order should be mindful of this change of status and recall this difference as often as possible. In the Anguttara v page 87, the Buddha refers to ten Dhamma which a bhikku should often contemplate. They are :

(i) A bhikku should often reflect that: How my status is different from that of a lay person and my actions and behaviour must accord with those of a samana

(ii) A bhikku should often reflect that : "My necessities of life depend upon others and I should act in such a way as to be one who is easy to supply with these necessities.

(iii) A bhikku should often reflect that : "There are other kinds of bodily action and speech which I shall have to do that are better than these (which I do at present). There is still more to do and what I have done is not yet enough.

(iv) A bhikku should often reflect whether, as far as sila is concerned he can criticize himself or not.

(v) A bhikku should often reflect whether, as far as sila is concerned, sameera who is in a position to know could, after due consideration, criticize him or not.

(vi) A bhikku should often reflect that: "We are bound to become separated from all things that we love and that give us pleasure

(vii) A bhikku should often reflect that: 'One's kamma is one's own. If one does good one receives good, if one does evil one receives evil.'

(viii) A bhikku should often reflect that: 'Right now time is passing by and what am I doing ?'

(ix) A bhikku should often reflect upon whether he is glad to live in solitary places or not

(x) A bhikku should often reflect that: 'Have I or have I not developed any extraordinary qualities so that I shall not became embarrassed when questioned by my fellow bhikkus in the future time.'

This theme of exertion and renunciation runs through all the Suttas. The Dhamma Dayada Sutta in Hajjihima NIkaya I Sutta No. 3 gives one instance of the extreme nature of this demand. Here the Buddha enjoins the monks to be heirs of His Dhamma and not heirs of material things. He himself illustrates this by giving the example of two monks who come to him worn out with exhaustion and hunger just after the Buddha has finished his meal and some alms food is remaining in the bowl to be thrown away. The Buddha tells them to eat it if they so desire. But one monk mindful of the Buddha's teaching not to hanker after material things, forgoes it, while the other seeing no harm in eating eats it. The second monk did what everyone, by worldly standards, might do. The Buddha himself does not blame him, but he said that the first monk is for Him the more to be honoured and praised. What is the reason for it ? He said that it will conduce for a long time to that monk's desirelessness to his contentment, the expunging of evil, to his being easily supported, and to his putting forth energy. Therefore, He exhorted His monks, to be His heirs of Dhamma and not heirs of material things.

The life of a monk, as laid down by the Buddha, is thus at complete variance with that of lay life. The spirit and flavour of the Dhamma is one of renunciation of giving up worldly affairs, and strenuous exertion for the development of virtue and mental development. And it is in the secluded and monastic life as a monk that the Dhamma can be practised to the full. The Vinaya reflects the Dhamma and in order of sequence it takes its place after the Dhamma. The Patimokkha Vinaya actually came into

being about 20 years after the Sasana was established. During the long period before the Vinaya came to be laid down, there was no lack of arahats even though there was no Vinaya Patinakkha In fact it is said that during this period the sangha existed in complete purity and every monk was an arahat or well on the way to becoming one. The Vinaya rules came to be laid down by the Budda with the beginings of a corruption in the Sangha. The rules were formulated for specific transgressions and were laid down as and when the occasion arose. For example the first parajika rule was laid down when Rev. Saddinna referred to by Mr. Prins Gunasekara at the hearing, trangressed the practice of celibacy. The Buddha rebuked him in these words which if one examines them carefully seem to embody the essence of the Teaching :

"How can you foolish man, while Dhamma is taught by me in various ways, for the sake of passionlessness, strive after passion how can you while Dhamma is taught by me for being without fetters, strive after being bound; how can you, while the Dhamma is being taught by me for the sake of non-grasping, strive after grasping? Foolish man, is not Dhamma taught by me for the subduing of conceit, for the restraint of desire, for the abolition of clinging, for the annihilation of the round of becoming, for the destruction of craving, for passionlessness?..... foolish man, you are the first doer of many wrongful things.....

The Vinaya rules themselves are most exhaustive in nature and contain the training rules, prohibitions, allowances, and regulations, governing the life of a bhikku. They do not constitute penances or mortification, but are intended to hedge in a monk to a life of seclusion and purity which will facilitate his mental development. They deal inter alia, with such minute matters as of dress deportment and propriety of conduct of eating, wearing the robe and even aganst causing harm to seeds and plants. It is not necessary here to refer to them in any detail as even a cursory perusal of the 227 rules will reveal this. These rules will give a fair idea of the great degree of restraint and control over the faculties demanded from a monk and how incompatible such conduct is with the life of a layman By no stretch of imagination could it be said that the

profession of the law with this pre occupation with criminal and civil matters and its atmosphere of debate and contention heat and tension can be reconciled with the calm and detached life expected of a monk as indicated by the Vinaya.

To the average Buddhist of this country , it may thus appear that there is sufficient material in the suttanka and these Buddhist texts were relied on by counsel - to justify the putting forward of a view counter to that contained in the affidavits. I do not say that this court should import its own knowledge on such matters into the record of the case, but there are ample procedures is our law where expert opinion can be obtained when a court likes to be informed on some complex or unfamiliar subject, Since the material placed before court was as stated earlier, both contradictory and confusing this undoubtedly was the procedure the court should have adopted in this matter. In fact that practice has been followed by this court on several occasions, especially when difficult questions relating to the Vinaya itself , as in this case arose for consideration vide *Dhammaratana Unnase V Sumangala Unnanse* and the Appendix in. This was the least the Court could have done in this case but unfortunately my brothers did not choose to adopt this procedure.

Such a course was obviously indicated having regard also to the references in the affidavits to the practice called granthadura which clearly needed some clarification. It is a historical fact that, in the course of the many centuries since the passing away of the Buddha, the Sangha has fallen into decline. One of the most important factors that brought about this deterioration was the evaluation of the two vocations named granthadura (vocation of books i.e. scholarship) and vipassana dura (vocation of meditation and insight). This arose at a certain point in our history when monks decided to give precedence to scholarship as against the earnest practice of the Dhamma, with a view to realizing here andnow the states of holiness. Rev. Walpola Rahula a scholar on whom the applicant relies, in his book, "The History of Buddhism in Ceylon" states that we all know that according to the original teaching of the Buddha the practice of Dhamma (Pattipatti) is of greater importance than mere learning (pariyatti)" (page 158), and he continues (page 161) -