WALKER SONS & CO. (U.K.) LTD.

v.

GUNATILAKE AND OTHERS

SUPREME COURT
THAMOTHERAM, J., ISMAIL, J., WEERARATNE, J.,
SHARVANANDA, J. AND WANASUNDERA, J.
S.C. REFERENCE NO. 1/79
C. A. (S.C.) APPLICATION NO. 375/76
AN APPLICATION FOR A WRIT OF CERTIORARI
INDUSTRIAL COURT CASE NO. 1358
OCTOBER 23, 24, 25, AND 29, 1979

Stare Decisis — Application of principle of Stare Decisis — The effect of the coming into operation of a new Constitution and a new system of Courts on precedents laid down by the Supreme Court constituted under the provisions of the Administration of Justice Law No. 44 of 1973 — The binding effect of Supreme Court decisions on Courts constituted by the 1978 Constitution.

Interpretation — "Unwritten Laws" in Article 168(1) of the Constitution — Articles 127(1), 128, 132(3), 141, 168(1), 169(4) and 170 of the 1978 Constitution — Administration of Justice Law No. 44 of 1973, Sections 12, 414(3) and 14(5).

Jurisprudence — Kelsen's Pure Theory of Law.

The 2nd Respondent, Minister of Labour referred a dispute between the Petitioner Company and the 3rd Respondent Union for arbitration by the 1st Respondent. Does a writ of Certiorari lie to quash the order of the 1st Respondent, Arbitrator on the ground that the reference was invalid as the Minister had referred earlier the same dispute to a different Arbitrator which reference was revoked by the Minister? Has the Minister who has referred an Industrial Dispute to an Arbitrator for settlement, the power to revoke the reference and re-refer the same to another Arbitrator?

The Supreme Court established under the Administration of Justice Law had already decided that the Minister had no such power in *Nadarajah v. Krishnadasa* — 78 N.L.R. 255(1) and in *S.C. Application No. 460/75 S.C. Minutes of 7.7.76.*

The question was whether after the Constitution of 1978 came into operation, this law as laid down by the then Supreme Court continued in force or only the bare Industrial Disputes Act continued in force.

The Court of Appeal under the provisions of Articles 125 of the Constitution referred the matter to the Supreme Court for a decision in the form of 2 questions.

1. Do the above decisions of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belong to the category of unwritten law within the meaning of Article 168(i) of the Constitution? Article 168 (i) of the Constitution is as follows:

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, *mutatis mutandis* and except as otherwise expressly provided in the Constitution, continue in force."

2. Is the Court of Appeal constituted under the present Constitution a Court of subordinate jurisdiction or a Court of Co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law 44 of 1973 for the purpose of the application of the principle of Stare Decisis?

Held:

(1) In answer to question (1) the *ratio decidendi* of the two decisions of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belongs to the category of unwritten laws within the meaning of Articles 168(1).

(2) In answer to question 2 — the Court of Appeal constituted under the present Constitution is neither a Court of subordinate jurisdiction nor a Court of co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law No. 44 of 1973. Such a comparison is not possible nor necessary to determine the 1st question. What is important in order to decide whether the two cases are binding on the Court of Appeal, is the question whether the Court of Appeal is a Court of subordinate jurisdiction under the present system of Courts. The *ratio decidendi* of the two cases is binding on the Court of Appeal.

(3) All laws whether written or unwritten which were in force before the 1978 Constitution except as otherwise provided for in the Constitution continue in force and therefore the *ratio decidendi* in the 2 cases under reference are binding on all Courts of subordinate jurisdiction among which is the Court of Appeal.

Cases referred to :

(1) *Nadaraja Ltd. (in voluntary liquidation) v. N. Krishnadasa* 78 NLR 255
(2) *Carl-Zeiss Stiftung v. Rayner* [1966] 2 All ER 536 at 557.
(3) *Bandahamy v. Senanayake* 62 NLR 313, 322, 337-8.
(4) *Madzimbamuto v. Lardner Burke* [1968] 2 SALR — 284
(5) *Ibra Lebbe v. the Queen* 65 NLR 433
(6) *Costa v. Jayatilleke SC* 265/74—D.C. Mt. Lavinia 47641/A
(7) *Baby Nona v. Kahunagala* 66 NLR 361
(8) *Felner v. the Minister of Interior* [1954] 1 SALR 522 at 538
(9) *Liyanage v. the Queen* 68 NLR 265
(10) *Young v. Bristol Aeroplane Co.* [1944] KB 718
(11) *London Street Tramways v. LCLR 41*
(12) *Moosajee v. Carolis Silva* 70NLR 217
(13) *Mohideen v. State of UP* — AIR 1960 (Allahabad) 484
(14) *King v. Barger* 6CLR 41
(15) *Attorney-General for Ontario v. the Attorney-General for the Dominion* [1896] AC 348.
(16) *Gallie v. Lee* [1969] 1 All ER 1062, 1082
(17) *Bengal Immunity Co. Ltd. v. Bihar* AIR 1955 SC 661
(18) *Punjabai v. Shanrao* AIR 1955 Nagpur 293

(19) *State of Bombay v. Gajanam Mahadev* AIR 1954 Bombay 351
(20) *Abdul Kader v. The State* AIR 1951 Mysore 284
(21) *Punjab State v. Bhagat Singha* AIR 1955 Punjab 118

REFERENCE to the Supreme Court under Article 125 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

H. W. Jayewardene Q.C. with *H. L. de Silva, L. Perera* and *R. Perera* for the Petitioner.

Dr. Colvin R. de Silva with *T. B. Dillimunu* and *M. B. de Silva* for the 3rd Respondent.

Cur. adv. vult

November 11, 1979
THAMOTHERAM, J.

This matter relates to an application for a writ of certiorari made by Walker Sons & Co. (UK) Ltd. seeking to have an order made under the Industrial Disputes Act (Chapter 131), by W. P. Gunatilake the 1st Respondent, quashed.

The application was originally made to the then Supreme Court of Sri Lanka as established under the Administration of Justice Law No. 44 of 1973. This application was allowed.

The question of Law involved was whether a Minister, who has duly made an order under Section 4(1) of the Industrial Disputes Act referring an industrial dispute for settlement by arbitration, has power to revoke the said order of reference.

The Supreme Court established under the Administration of Justice Law had already in two cases taken the view that the Minister had no such power and therefore the purported revocation of the original reference and the re-reference were invalid in the law as being in excess of the powers of the Minister.

The first of these cases was *Nadaraja Ltd. (in voluntary liquidation) v. N. Krishnadasa* (1) where Sharvananda J. with Walgampaya J. and Sirimane J. agreeing, expressed this view. The second was an unreported judgment delivered on 7.7.76 (S.C. Application No. 460/75) in which I with Wanasundera J. and Collin Thome J. agreeing took the same view.

It is not unreasonable to assume that this Bench was aware of the two earlier decisions when it allowed the Application to quash the order of the 1st Respondent.

The third Respondent was not represented at the hearing and of consent the order of the Supreme Court was later vacated and the matter relisted for hearing. All this happened before the Supreme

Court under the Administration of Justice Law when it was the Court of final authority at the apex of the then judicial structure. If the question is asked what was the law on the point at this time, the answer must be that the Minister cannot revoke his reference once made and a second reference is invalid. This was the law in force at the time when the 1978 Constitution came into operation and the then Supreme Court ceased to exist. When we say this was the law it means it had a "binding force" or a "coercive force" for the future.

Article 169(4) of the Constitution of the Democratic Socialist Republic of Sri Lanka states "All original proceedings by way of application for the issue of high prerogative writs and applications for any other relief pending in the Supreme Court . . . . . established under the Administration of Justice Law No. 44 of 1973 on the date immediately preceding the commencement of the Constitution shall stand removed to the Court of Appeal and such Court shall have jurisdiction to take cognizance of, hear and determine or to continue and complete same . . . . ."

It was under this provision that this application which was before the former Supreme Court and ordered to be relisted came up for hearing before the Court of Appeal.

Article 140 of the present Constitution gives the Court of Appeal the power to issue writs other than writs of Habeas Corpus while Article 141 gives it the power to issue writs of Habeas Corpus.

The jurisdiction of the Court of Appeal in respect of judgments and orders of all Courts of 1st instance other than High Courts and Tribunals and other institutions shall be exercised by at least two judges of the Court. In the event of any differences of opinion between two judges constituting the bench, the decision of the Court shall be suspended until three judges shall be present to review such matter. In my view the words "at least two" are used to permit a third sitting in the case of differences of opinion when only two are sitting. There is no provision for more than two being specially constituted to overrule the decision of two judges — An appeal lies to the Supreme Court from a decision of the Court of Appeal even in writ matters.

The Supreme Court had power to issue writs under Section 12 of the Administration of Justice Law. The jurisdiction of the then Supreme Court was required to be exercised in respect of judgments and orders of Magistrates Courts by at least two judges, and its jurisdiction in respect of judgments and orders of

District Courts and High Courts was required to be exercised by at least three judges.

There is a special proviso to Section 14 which is applicable to the power to issue writs under Section 12 which states that "The Supreme Court's jurisdiction in respect of writs under Section 12 shall be exercised at all times by not less than three judges in such manner as may be prescribed by rules of Court.

Section 14(5) states that the judgment of the Supreme Court shall in all cases be final and conclusive.

Section 14(3) of the Administration of Justice Law states "The Chief Justice may ;

(a) of his own motion

(b) at the request of two or more judges hearing an appeal or

(c) on the application of a party to the proceedings on the ground of general or public importance of the matter in dispute, direct that any case pending before the Supreme Court be heard by a bench of five or more judges.

Two features of the Supeme Court under the Administration of Justice Law must now be noted.

Under Section 14(5) the judgment of the Supreme Court was in all cases, final and conclusive. In other words the then Supreme Court was the final authority to tell us, or declare what the law was on any particular matter. Because of this there was special provision in 14(3) for the constitution of a bench of five or more judges whose judgment or order was vested with the highest authority. But it was still the judgment or order of the same Supreme Court. It was binding authority even for the Supreme Court composed of less number of judges. These two features are absent in the case of the Court of Appeal because it is not the Court with the highest authority under the system of Courts laid down in the Constitution of the Democratic Socialist Republic of Sri Lanka which came into operation in 1978.

Article 105(1) of the present Constitution lays down the heirarchy of Courts as follows :

Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the people shall be —

(a) The Supreme Court of the Republic of Sri Lanka.

(b) The Court of Appeal of the Republic of Sri Lanka.

(c) The High Court of the Republic of Sri Lanka and such other Courts of first instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

Article 118 states : The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior court of record in the Republic and shall subject to the provisions of the Constitution exercise —

(a) Jurisdiction in respect of Constitutional matters

(b) Jurisdiction for the protection of fundamental rights

(c) Final Appellate jurisdiction

(d) Consultative Jurisdiction

(e) Jurisdiction in election petitions

(f) Jurisdiction in respect of any breach of the privileges of Parliament and

(g) Jurisdiction in respect of such other matters which Parliament may by law vest or ordain.

The jurisdiction of the Court of Appeal is set out in Article 138(1); The Court of Appeal shall have and exercise — an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of first instance, Tribunal or other institution and take sole and exclusive cognizance by way of appeal, revision and *restitutio in integrum* of all causes, suits, etc. of which such Court of first instance, tribunal or other institution may have taken cognizance.

Under Article 127(1) of the Constitution the Supreme Court shall subject to the Constitution be the final Court of civil and criminal appellate jurisdiction ..... for the correction of all errors

which shall be committed by the Court of Appeal or any Court of first instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters. It is to be noted that the present application is for an order quashing the judgment of the 1st Respondent and therefore the Court of Appeal was exercising an original jurisdiction given to it by Article 128(1).

It was readily conceded by Dr. de Silva that under the judicial structure established by the Constitution of the Democratic Socialist Republic of Sri Lanka the Supreme Court is at the very apex exercising final and conclusive authority and that the Court of Appeal is subordinate to it.

It was also agreed that the Supreme Court as established by the Administration of Justice Law was the Court of the highest authority under the judicial structure established by that Law.

The third matter on which there is no dispute is that it is not possible to compare the Supreme Court under the Administration of Justice Law and the Court of Appeal under the present Constitution. Mr. Jayewardene said it would be like comparing the incomparable.

The second question which is referred to us was formulated by the Court of Appeal as follows :

> "Is the Court of Appeal constituted under the present Constitution a Court of subordinate jurisdiction or a Court of co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law No. 44 of 1973 for the purpose of the application of the principle of *stare decisis*."

The answer to this is not difficult. The Court of Appeal is neither a Court of subordinate jurisdiction nor a Court of co-ordinate jurisdiction or for that matter it is not a Court of superior jurisdiction to that of the Supreme Court established by the Administration of Justice Law. Dr. de Silva's contention was that the doctrine of *stare decisis* can only apply within the same system and a Court of subordinate jurisdiction is bound by the decisions of the Court of the highest authority within the same system.

Mr. Jayewardene's argument was that at any given time the interpretation or declaration by a Court of the highest authority is

the Law on the point unless the Law as interpreted is altered by the Legislature or by a Court at the time enjoying a position of being the Court of last resort.

If I may revert to the point of Law involved in the present case it is as follows :

> In the two cases which came up before the Supreme Court under the Administration of Justice Law the view was taken that where the Minister has duly made an order under section 4(1) of the Industrial Disputes Act referring an industrial dispute for settlement by arbitration he has no power to revoke the said order of reference. The subsequent reference to arbitration of the same dispute was therefore one made in excess of jurisdiction and the award made on such subsequent reference was null and void and of no effect in Law.

This was on a reading of the relevant provisions of the Act by the highest authority at the time and could have been altered either by the Legislature or by a bench of five or more judges constituted by the Chief Justice under Section 14(3) of the Administration of Justice Law. The question is whether after the present Constitution came into operation this law as it had been declared by the Court then vested with the highest authority continued in force or only the bare Industrial Disputes Act continued in force?

The main question referred to us by the Court of Appeal for our authoritative determination reads as follows :

> "Article 168(1) of the Constitution enacts that unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall *mutatis mutandis*, and except as expressly provided in the Constitution continue in force. The first question we refer may be formulated thus ; Do the above decisions of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belong to the category of "unwritten laws" within the meaning of Article 168(1) ?"

Before we consider the meaning and effect of Article 168(1) of the present Constitution we must consider the argument of Mr. Jayewardene that without having recourse to that Article, on a consideration of the general principles of law, the pronouncement

of the Court of the highest authority as to what the law is on a particular point is part and parcel of the law in force. A change of Constitution did not affect its binding force. Its binding force or coercive force continued. Article 168(1) was a statement of an existing position in the law to place the matter beyond doubt. It was also open to the present Court of last resort possessed with final authority to take a different view. The legislature too could do the same. In this connection we must note that according to Article 132(3) the Chief Justice may (1) of his own motion or (2) at the request of two or more judges hearing any matter or (3) on the application of a party to any appeal, proceeding or matter, if the question involved is in the opinion of the Chief Justice one of general and public importance, direct that such appeal, proceeding or matter be heard by a bench comprising five or more judges of the Supreme Court. This is identical with Section 14(3) of the Administration of Justice Law. The only difference is that one is found in the Constitution itself. The other is in the Administration of Justice Law and not in the Constitution of that time, and in both cases they refer to the highest Court. As pointed out earlier there is no such provision relating to the Court of Appeal for the good reason that it is a Court of subordinate jurisdiction in the hierarchy of Courts under the present Constitution and it is not open to the Court of Appeal as a Court of subordinate jurisdiction to do what only the present Supreme Court or Parliament can do.

At this point we must discuss the doctrine of *stare decisis* and the creative role if any, of the Court of Law of last resort. Dr. de Silva emphasised the word "doctrine" and asserted that the function of a Court is only to declare what the law is. To my mind the important question is whether the *ratio decidendi* of a case decided by the highest Court or the court of last resort has binding force as a rule for the future.

We need not go into the relative merits of the deductive and inductive process of judicial reasoning as Sri Lanka has inherited the English Law of precedent. The House of Lords is the final interpreter of the law for the United Kingdom and its decisions are absolutely binding on all lower Courts. So in Sri Lanka, the decisions of the Supreme Court under the Administration of Justice Law and the Supreme Court under the present Constitution are similarly binding. Dr. de Silva did not dispute the binding force of their authority. His contention was that such binding force was only over Courts of subordinate jurisdiction within the particular system.

"Certain well-recognised principles of interpretation apply throughout —

(1) Any relevant judgment of any Court is a strong argument entitled to careful consideration.

(2) Any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi,* which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree which is called upon to consider the precedent to determine what the true *ratio decidendi* was". Allen *Law in the making,* 6th Edition page 247.

"The proposition that every principle embodied in a judicial decision has for the future the force of law is not merely a statement of historical fact as to the growth of English law, it is itself a rule of law". (referred to by Allen at page 259 of his book (supra). Allen remarks at page 347 of his book (supra) "The judge's function is to interpret, not to legislate, but in the process of interpretation he inevitably affects the development of the law. He "makes law" only in a derivative sense, but the formative effect of his interpretation on all the most essential principles of law is of the highest and most lasting importance".

Rupert Cross — in *Precedent in English Law* remarks "Legal theory is mainly concerned with the nature and definition of law, **the sources of law are Parliament and Judges of the Supreme Courts.** If an English lawyer wants to know what the law is, his first inquiry will be whether the point is governed by statute in which case he will wish to consult the relevant enactments, since the judges are bound to give effect to Acts of Parliament under the doctrine of the sovereignty of Parliament. According to this doctrine, it is, in legal theory, possible for Parliament to make or unmake any law although its powers are subject to a number of practical limitations. The English lawyer's second inquiry would relate to the activity of the judges. He would want to know whether there were any reported cases on the point, because under the doctrine of precedent much English law is derived from the decisions and observations of Judges". "The expression "doctrine of precedent" therefore sometimes refers to the rule that judicial decisions have the force of law in addition to the practices by which effect is given to that rule." (page 3 supra). "The peculiar feature of the English doctrine of precedents is its strongly coercive nature". "We start therefore with a general

definition of sources of law as those from which the content of the law is derived. "Legal sources" are those which are recognised as such by the law itself — Precedent, legislation, and custom are legal sources of English law because it is itself a principle of English Law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended to the law producing effect of statutes and immemorial custom. Rules such as these establish the sources of law". Salmond page 136 (9th Ed.).

Kelsen's works on jurisprudence was relied on by Mr. Jayewardene. Dr. de Silva's reply was also on the basis of the acceptance of Kelsen's views. I think the reliance on Kelsen was appropriate especially as we have a written Constitution.

Kelsen's first postulate is that law exists solely in the world of "shall be" and that every legal principle is therefore that kind of rule which continental jurisprudence has long known as "norm". Kelsen finds the distinguishing mark of law in the element of compulsion. All law must possess an "apparatus of compulsion". Kelsen holds that in all civilized states it is possible to trace one's way back to a basic norm, the Grundnorm, a ground, indispensable postulate to which all the roads of the law lead by however devious routes. In many modern states this Grundnorm is to be found in a written Constitution. Kelsen speaks of the law as a hierarchic structure descending from the supreme positive norm to the smallest manifestation of it. Each one of these acts of deduction and application is a creative act and the whole judicial order is thus a coherent system of progressive delegation and by this process the law is rendered perpetually self-creative.

Hans Kelsen in his book on "The Pure Theory of Law" says at page 250 under subtitle "Creation of general legal norms by the Courts ; Flexibility of the law and legal security",

> "A Court especially one of the highest instances, may be authorised to create by its judgment not only an individual norm binding for the present case, but a general norm. This happens when the judicial decision becomes a so-called precedent, that is when the decision of the case is giving direction to the decision of similar cases.
>
> A judicial decision may have the character of a precedent when the individual norm created by the decision is not in its

content predetermined by a general norm of statutory or customary law or is ambiguously worded and therefore permits different interpretations. In the former case the Courts precedential decision creates new law, in the second case the interpretation implicit in the decision assumes the character of a general norm. In both cases, the Court that creates the precedent functions in a manner of a legislator precisely like the organ authorised by the Constitution to legislate. The judicial decision of a concrete case gives direction to the decision of similar cases in that the individual norm which the judicial decision represents is generalised".

Kelsen refers to the *ratio decidendi* of a case in this way at page 250.

"Since the precedential decision can give direction only to the decision of similar cases, the question whether a case is similar to the precedential case is of decisive importance. Since no case is similar to another in every respect, the "similarity" of the two cases in question here can consist only in that they correspond to each other in certain essential points, just as two sets of facts which constitute the same delict are not similar in all points. But the question on which points they have to correspond in order to be considered 'similar' can be answered only on the basis of a general norm that defines the fact by determining its essential elements. Whether two cases are similar can therefore be decided only on the basis of the general norm created by the precedential decision. The formulation of this general norm is the supposition under which the precedential decision can give direction to the decision of 'similar' cases."

"The law creating function of the Courts becomes particularly visible when a Court is authorised to create a general norm by establishing a precedent. To give such an authorisation to a Court especially to a Court of last instance is particularly commendable. When the Court is authorised to decide a case under certain circumstances not by applying a general norm of an already existing law but according to its own discretion, in other words if the Court is authorised to create an individual legal norm whose content is not predetermined by a general norm of positive law, to bestow the character of a precedent upon such a decision is only a consistent enlargement of the Court's law creating function."

Kelsen states in his book "The Pure Theory of Law" at page 237 & 238, "A judicial decision does not have a merely declaratory

character as is sometimes assumed. The Court does not merely "find the law" whose creation had been previously entirely completed, the Court's function is not only juris "dictio" the pronouncement of law in the declaratory sense". "Only the lack of insight into the normative function of the judicial decision, only the prejudice that the law consists merely of general norms, only the ignoring of the existence of individual legal norms obscured the fact that the judicial decisions is a continuation of the law creating process, and has led to the error to see it in as a merely declaratory function."

The moment we concede the binding force of precedent we are conceding that the *ratio decidendi* of a case has the force of law. This cannot be so in respect of the decisions of every Court but only in respect of the decisions of the highest Court, the Court of last instance or resort. That is why in England the House of Lords is the final interpreter of the law and only the legislature can overrule it. Once the highest Court of the land has interpreted the law it becomes part and parcel of the law in force. The reason why other Courts have to follow the *ratio decidendi* of cases of the highest Court is because it is the law of the land and does not lie in the fact that these Courts are of subordinate jurisdiction but in the fact that they are pronouncements of the highest Courts.

This view is illustrated by the fact that in the field of international law it is the judgment of the highest Court of a state which is recognised as a judgment declaratory of the law of that State. The subordinate status of the Court bound by the decision of the highest Court has no relevance to the point being considered now. What matters is that it is the declaration of the highest Court.

In *Carl-Zeiss Stiftung v Rayner* (2) Lord Sumner's dicta in an earlier case was quoted with approval. Lord Sumner said :

> "Evidence of the opinion of the highest Court of the foreign State whose law happens to be the subject matter of proof in this country is obviously for an English Court the best available evidence upon the question and is such that, if it is clearly directed to the point in dispute and is insusceptible of any but one interpretation, other evidence of that law could hardly be set against it."

Mr. Jayewardene in his written submissions quotes Salmond on Jurisprudence as follows :

> "We must admit openly that precedent makes law as well as declares it ..... we must recognise a distinct law creating

power vested in them (Judges) and openly and lawfully exercised."

He then continues, "The rule of precedent or *stare decisis* has been fully discussed by Basnayake C.J. in *Bandahamy v. Senanayake* (3). It is clear that the rigid English system of precedent has become part of our law as stated by Basnayake C.J. in the above case (vide pages 337-338). Though the decision is authority for the proposition that a judgment of a collective Court is binding on a bench constituted of judges who do not constitute all the judges of the Supreme Court and that a numerically superior bench can overrule, though in exceptional circumstances, a decision of a Court of a lesser number of judges, the several judgments all recognise the existence in this country of the Law of precedent or *stare decisis*".

A careful reading of this case can leave no one in doubt that the above is an accurate statement and that the case is clear authority for the proposition that the doctrine of precedent as defined and accepted in English law is part of the law of Sri Lanka.

Bandahamy v. Senanayake was heard by seven judges all of whom accepted the theory of precedent as part of our law. I wish to refer to some of the statements of Basnayake C.J. to establish this point.

"The decision of an ultimate or Appellate Court has a dual aspect. The decision of the dispute between the parties and the principles of law which the Court lays down in deciding that dispute. The actual decision of the dispute binds the parties. About that there is no question. The principles of law guide the Court in deciding similar disputes and most Courts of Appeal and of ultimate jurisdiction regard themselves as bound by the principles enunciated by them in their decisions". Page 322.

"I now come to consider the doctrine as applied in our country. From what has been said above it would appear that the practice is not the same even in the Commonwealth countries. England represents the rigid school of *stare decisis* and South Africa the flexible school. The other countries referred to above appear to be more inclined towards the flexible school than the rigid. We in Ceylon are under the influence of the English legal system by reason of the fact that almost all our judges in the pre-independence era were those trained and versed in the English system. In the result the flexibility of the Roman Dutch system did not have an opportunity of asserting itself. Pages 337-83.

"It would appear from the decisions both here and abroad cited above that the doctrine of *stare decisis* is not a rigid doctrine and that the practices vary from country to country and that the attitude of judges to the doctrine is not uniform and varies according to the class of case which comes for consideration . . . .

We have in this country over the years developed a *cursus curiae* of our own which may be summarised thus :

a) One judge sitting alone as a rule follows a decision of another sitting alone. Where a judge sitting alone finds himself unable to follow the decision of another sitting alone the practice is to reserve the matter for the decision of more than one judge.

b) A judge sitting alone regards himself as bound by the decision of two or more judges.

c) Two judges sitting together also as a rule follow the decision of two judges. Where two judges sitting together find themselves unable to follow a decision of two judges, the practice in such cases is also to reserve the case for the decision of a fuller bench although the Courts Ordinance does not make express provision in that behalf as in the case of a single judge.

d) Two judges sitting together regard themselves as bound by a decision of three or more judges.

e) Three judges as a rule follow a unanimous decision of three judges, but if three judges sitting together find themselves unable to follow a unanimous decision of three judges a fuller bench would be constituted for the purpose of deciding the question involved.

f) Four judges when unanimous are regarded as binding on all benches consisting of less than four. In other words a bench numerically inferior regards itself as bounded by the unanimous decision of a bench numerically superior.

g) The unanimous decision of a collective Court i.e ; a bench consisting of all the judges for the time being constituting the Court is regarded as binding on a

bench not consisting of all the judges for the time being constituting the Court even though that bench is numerically superior to the collective court owing to the increase in the number of judges for the time being constituting the Court."

I think I have quoted enough of this part of this judgment of Basnayake C.J. to show :

1) That in Sri Lanka we have over the years developed a *cursus curiae* of our own in regard to the highest Court in the country.

2) This *cursus curiae* is based on the acceptance of the principle of the binding force of precedents.

3) In *Bandahamy v. Senanayake* the main matter discussed was the binding effect of previous decisions on the same highest Court in the Island and the relevance of the number of judges constituting the bench as well as the authority of a decision of a special bench constituted by the C.J. under a statutory provision viz. Section 51 of the Courts Ordinance.

I have cited the various authorities to establish my view that the *ratio decidendi* in the two cases referred to were laws in force immediately before the commencement of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Starting now from the proposition that the *ratio decidendi* of cases decided by the Supreme Court established under the Administration of Justice Law was part and parcel of the law in force immediately before the coming into operation of the 1978 Constitution we have now to address our minds to the effect of the New Constitution on the law existing at the time the new Constitution replaced the 1972 Constitution.

Mr. Jayewardene stated his argument as follows :

"Any change of Constitution by legal means cannot change in any way the sovereignty of the people and even a *coup d' etat* or revolution which results in a constitutional change cannot affect in any respect the continuity of the law if International Law and International community recognises a

victorious revolution or a successful *coup d'etat*". He relied on Kelsen General Theory of Law and State.

Mr. Jayewardene further said, "In the present context though the Constitution of 1972 was changed and replaced in 1978 it **was changed according to the provisions of the 1972** Constitution. It has been accepted by the judges of the present judicature of the country. It is submitted that the continuity of the law as laid down by the judges of the previous Supreme Court has not in any way been altered by the constitutional changes nor can they be changed by changes in the judicature or its structure". He also referred us to *Madzimbamuto v. Lardner-Burke* (4).

According to Kelsen (The Pure Theory of Law—page 195) "Such a presupposed highest norm is referred to in this book as basic norm. All norms whose validity can be traced back to one and the same basic norm constitute a system of norms, normative order. The basic norm is the common source for the validity of all norms that belong to the same order — it is their common reason of validity. The fact that a certain norm belongs to a certain order is based on the circumstance that its last reason of validity is the basic norm of this order. It is the basic norm that constitutes the unity in the multitude of norms by representing the reasons for the validity of all norms that belong to this order".

In our country the basic norm is the Constitution. Dr. de Silva at the very end of the argument after Mr. Jayewardene's reply stated his position as follows :

> "The repeal of the Constitution terminated the legal order it embodied. The new Constitution which takes the previous Constitution's place begins or starts a new legal order. The mode of effecting the change of the Constitution did not affect those propositions."

Kelsen's theory does not support these propositions as formulated by Dr. de Silva. Kelsen states in his book *General Theory of Law and State* at page 117, "The validity of legal norms may be limited in time, and the end as well as the beginning of the validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy".

This principle however holds under certain conditions. It fails to hold in the case of a revolution, this word is understood in the

most general sense, so that it also covers the so-called *coup d'etat*. A revolution in this wide sense occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a movement emanating from the mass of people or through action from those in Government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated."

Dr. de Silva argued in his reply that a revolution was effected by the 1978 Constitution. He invited us to a close comparison of the 1972 Constitution with the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka and argued that there were fundamental changes in regard to the judicature, legislature, the position of the Prime Minister, the position of the President and in many other matters. These changes were so radical that there was in fact a revolution. I believe it is on this that he based his three propositions referred to earlier.

Article 44 of the 1972 Constitution reads :

"The legislative power of the National State Assembly is supreme and includes the power—

a) To repeal or amend the Constitution in whole or in part and

b) To enact a new Constitution to replace the Constitution,

provided that such power shall not include the power —

1) To suspend the operation of the Constitution or any part thereof ; and

2) To repeal the Constitution as a whole without enacting a new Constitution to replace it".

The main object of this Article was that at no time should the country be without a Constitution in operation. There must always be a Constitution or basic norm. There was no other restriction on a new Constitution replacing the old.

In short the new basic norm or the new Constitution was validated or made valid in the way which the old basic norm or the old Constitution determined and therefore the replacement of the old basic norm by the new basic norm was legitimate and continued as a successor to the old without a break giving a continuing validity to all norms to which the old basic norm had given validity. It is only when the new Constitution is brought into operation in a way not provided for in the old Constitution that there occurs a break in all the norms under the old basic norm and can be kept in force by some express or implied provision in the new Constitution. In the words of Kelsen, The Pure Theory of Law, "The function of the basic norm becomes particularly apparent if the Constitution is **not changed** by constitutional means but by revolution, when the existence—that is the validity of the entire legal order directly based on the Constitution is in question."

"From a juristic point of view the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way in which the former had not itself anticipated". It is only in this eventuality can Dr. de Silva's first two propositions hold good viz :

1) The repeal of the Constitution terminated the legal order it embodied.

2) The new Constitution which takes the previous Constitution's place begins or starts a new legal order.

Mr. Jayewardene quotes Kelsen in his written submissions ; "State and its legal order remains the same only as long as a Constitution is intact or changed according to its own provision."

I am of the view that the legal order under any Constitution does not change so long as the Constitution is changed or replaced by a new Constitution in accordance with the provisions of the old Constitution. Therefore all laws existing at the time of replacement continues in force without a break but derives its validity from the new Constitution.

As the hierarchy of the Courts at any given time is important in order to find out which Court is the Court of final resort, or Court with ultimate authority I give below a brief statement of the position in Sri Lanka from the time the Supreme Court was established by the Charter of 1833.

Prior to 1971, the Privy Council was the highest Court that exercised jurisdiction in Sri Lanka or Ceylon as it was then known. The Supreme Court as established by the Charter of 1833 and continued thereafter by subsequent legislation came next, and thereafter the Court of Criminal Appeal and the original Courts, the former being really a part of the Supreme Court. In 1971 with the abolition of the right of appeal to the Privy Council and the establishment of the Court of Appeal, this latter Court as then constituted became the highest Court in the land. This Court was in turn abolished in 1974 by the Administration of Justice Law and a new system of Courts was established by this law.

In 1974, therefore the new Supreme Court as established under the Administration of Justice Law became the highest Court in the country. This position continued till 7th Sept. 1978 when the new Constitution of the Democratic Socialist Republic of Sri Lanka abolished the Supreme Court established under the Administration of Justice Law and much of its jurisdiction was conferred on the Court of Appeal under the present Constitution. This Court of Appeal, however, had a lower status in that it was made a Court of subordinate jurisdiction by the creation of the present Supreme Court with supreme power in all matters of law. The Supreme Court is at the very peak of the judicial structure and is the Court of last resort.

The highest Court or the Court of last resort between 1833 to 1971 was the Privy Council. The Supreme Court under the Administration of Justice Law fell within the same description during the period between 1974 and 1978. I shall now refer to two cases, one decided by the Privy Council and the other by the Supreme Court under the Administration of Justice Law. These cases have a relevance to the matter under discussion. The first is *Ibralebbe v. the Queen* (5). The Privy Council held that the jurisdiction to entertain appeals from Ceylon before the Judicial Committee of the Privy Council in criminal matters still existed and had not been abrogated by Ceylon's attainment of Independence. The structure of Courts for dealing with legal matters and the system of appeals existing at the time of Ceylon's attainment of Independence had not been affected by any of the instruments that conferred that status. While the legislative competence of the Parliament of Ceylon included the power at any time if it thought right to modify or terminate the Privy Council appeal from its Courts, true independence was not in any way compromised by the continuance of that appeal, unless and until the sovereign legislative body of Sri Lanka decided to end it.

The following dicta of Viscount Radcliffe who gave the judgment of the Board, is apposite. Dealing with statutes in existence before the new Constitution he said "It would not be possible to ignore the significance of these statutory provisions which form part of the law of Ceylon, on the ground that they are mere relics of pre-independence days, which have been left stranded by time on the shores of the statute book" page 438.

He said again at page 442, "It remains now to inquire whether there was anything in the establishment of Independence for Ceylon that expressly or impliedly, brought about that amendment. The instruments employed were the Ceylon Independence Act 1947 of the Parliament of the United Kingdom (11 and 12 Geo V1C 7) and several Orders in Council setting up the Ceylon Constitution, of which the Ceylon (Constitution) Order in Council 1946 (hereinafter referred to as the 1946 Order) is the substantive enactment. It can be said at once that nowhere is there to be found in these instruments any reference to the Privy Council appeal, its continuance or its extinguishment. **Independence as such did not, of course alter the existing corpus of law in Ceylon."**

Ceylon obtained her Independence in 1947 without a revolution — To quote Kelsen again "From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated." The basic norm before the grant of independence and the basic norm after it was granted is, in their very essence different and yet the independence was obtained in a legitimate way. Kelsen's principle of legitimacy applied. The existing corpus of law continued without a break.

The other case is *Costa v. Jayatilleke* (6). This was a decision of the Supreme Court under the Administration of Justice Law. The question arose whether it was bound by the decision in *Baby Nona v. Kahunagala* (7). After considering many cases decided here and abroad Vythialingam J. held that the Supreme Court under the Administration of Justice Law being the highest Court under that system was not bound by a decision of the Supreme Court which preceded it as the latter was a Court subordinate to the Privy Council. Justice Vythialingam said "No question of numerical superiority arises because it is a question of the authority of the deciding tribunal. For as Greenbert J. A. observed in *Felner v. Minister of Interior* (8), "It seems clear that the authority of a decision rests on the status of the Court and not on a counting of heads".

If I may state my view once again in slightly different terms, it is fallacious to compare courts belonging to different systems of courts and say one is higher, or subordinate or coordinate with the other. The relevant question is which is the court vested with final authority in any system. The *ratio decidendi* of cases decided by the Court becomes a rule for the future binding all courts which are not the courts of last resort whether it be under the same system or under a different system. It is always open to the legislature to alter the rule as declared.

Mr. Jayewardene also argued for the binding force of the *ratio decidendi* of the highest court and its continuing force without a break, from the viewpoint of judicial power.

Prior to 1972 the Courts of this country recognised separation of powers as being part of the Constitution and that the judicial power of the state was exercised by the Judicature. *Liyanage v. Queen* (9).

The 1972 Constitution declared that sovereignty is in the people and ordained that the National State Assembly exercises the judicial power of the people through the Courts (vide Articles 3, 4 and 5 of the 1972 Constitution). Till such time as the National State Assembly declared otherwise, the highest Court of the land declared the law and in exercising the judicial power of the people was giving expression to the law of the country which it was its duty to do. Judicial power being a concomitant of sovereignty a decision of the highest Court must therefore be given recognition as the highest expression of the will and sovereignty of the people unless the National State Assembly expresses itself differently. Any change of Constitution by legal means cannot change in any way the sovereignty of the people. This is an argument which commends itself to me.

Under Article 5 (c) of the 1972 Constitution ; "The National State Assembly is the supreme instrument of State powers of the Republic. The National State Assembly exercises the judicial powers of the people through the Courts and the other institutions created by law..."

It is to be noted that it is the judicial power of the people which is exercised ultimately by the highest Court of the land.

According to Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka the sovereignty is still in the people and under Article 4 (c) "the sovereignty of the people shall be exercised and enjoyed in the following manner — " The judicial

power of the people shall be exercised by Parliament through Courts etc". A declaration by the highest Court under the Administration of Justice Law passed in terms of the 1972 Constitution is really the voice of the people exercising their judicial power and since the sovereignty continued to be in them even under the 1978 Constitution the binding force of the declaration of the highest Court continued until altered by the legislature or the Court of last resort under the new Constitution.

I therefore hold that all laws, whether written or unwritten which were in force before the commencement of the Constitution except as otherwise provided in the Constitution continue in force and therefore the *ratio decidendi* in the two cases under reference are binding on all Courts of subordinate jurisdiction among which is the Court of Appeal.

I have arrived at the above conclusion without seeking to interpret Article 168 (1) of the Constitution of the Republic of Sri Lanka. By implication I have held that this Article is nothing more than a provision declaratory of the existing legal position and provided out of an abundance of caution to ensure the continuing binding force of all rules which had the force of law immediately prior to the new Constitution coming into force.

Dr. de Silva's argument, however, if accepted would result in confusion in the legal sphere. It was such confusion which the new Constitution sought to avoid in express terms, and I think this is a relevant consideration for this Court when seeking to interpret a provision of a Constitution.

Before I refer to Dr. de Silva's argument a few preliminary points must be made.

Article 12(1) of the 1972 Constitution reads :

> "Unless the National State Assembly otherwise provides, **all** laws written and unwritten, in force immediately before the commencement except such as are specified in schedule A shall *mutatis mutandis* and except as otherwise expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as "existing laws". The terms law and unwritten law are nowhere defined in the 1972 Constitution. It speaks of "all laws written or unwritten".

Article 168 (1) reads :

> "Unless Parliament, otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall *mutatis mutandis,* and except as otherwise expressly provided in the Constitution continue in force".

Under Aticle 170 :

> "Existing law" and "existing written law" mean any law and written law respectively in force immediately before the commencement of the Constitution which under the Constitution continue in force".

It will be noticed therefore where under the 1972 Constitution "all laws written and unwritten" are to be kept in force, under the 1978 Constitution "all laws, written laws and unwritten laws" are to be kept in force. I cannot see any difference in substance between the two terminology.

Dr. de Silva however sought to write off the words "unwritten laws" and in the process all customary laws and other unwritten laws from Article 168 (1) merely on the ground that the word "law" is defined in Article 170 as "any act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order-in-Council".

He wanted us to apply this definition which only refers to written law to wherever the word "law" or "laws" appeared. His whole argument was built on this single slender foundation.

If we agree with Dr. de Silva's interpretation then the words "laws" written and unwritten laws only mean "any act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order-in-Council". Surely such an argument is fallacious.

The answer to Dr. de Silva's argument is that the words "all laws, written laws and unwritten laws" are clear enough. The description is meant to catch up all laws whether written or unwritten or to use Viscount Radcliffe's description "The existing corpus of law".

Article 168 of our Constitution and Article 12 of the 1972 Constitution are provisions which are derived from other Constitutions in the Commonwealth and meant to meet similar situations.

Article 372 of the Indian Constitution brings out the real meaning of Article 12 and 168 (1) of our two respective Constitutions.

"Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the Territory of India immediately before the commencement to this Constitution shall continue in force, therein until altered or replaced or amended by a competent legislature or other competent authority". I see no difference in the meaning of;

1) "All laws written or unwritten" in Article 12 in our 1972 Constitution ; and

2) "All laws, written laws and unwritten laws" in Article 168 (1) of our 1978 Constitution ; and

3) "All the laws in force in the Territory of India" in Article 372 of the Indian Constitution. They all carry the same meaning.

It is to be noted that we have first to give the words "all laws" a meaning. It will be ridiculous to seek to understand them by giving the word "laws" the meaning given to "law" in Article 170. "All laws" mean the whole body of laws. The words "written laws and unwritten laws" only emphasise the comprehensive nature of the words "all laws". The first question referred to us by the Court of Appeal is "Do the above decisions of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belong to the category of "unwritten laws" within the meaning of Article 168 (1)".

Dr. de Silva's arguments as indicated above are,

1) Precedent does not make law as the judge's function is only to declare or interpret the law ; and

2) We must forget or ignore the words "Unwritten laws" because if we are to give the meaning of "law" in Article 170 then the words "unwritten laws" become meaningless. It would mean unwritten laws which are written.

I have given above the views of Jurists and Judges to support my view that the *ratio decidendi* of a decision of the highest Court has a "binding force" or "coercive force" on all Courts of subordinate jurisdiction. Kelsen points out at page 150 in his book "The General Theory of Law and State","We have spoken here of general norms which originate in a single decision of Court. This kind of law creation must be clearly distinguished from the creation of general norms through **permanent practice of the Courts, i.e. custom**".

At page 246 of his book on Precedent in English Law, Rupert Cross has a subtitle "Can the rules of Precedent be based on Precedents"? Under this title he discusses the problem peculiar to the highest Court in the land. Do their earlier decisions have a binding force on them so that once a point is decided they cannot change it ? Here we find the need for certainty clash with the need for flexibility so that the law can keep pace with changes in society.

It is in regard to this problem that Basnayake C.J. said in *Bandahamy V. Senanayake* (supra) "I am in favour of adopting the South African view that the ultimate tribunal of a country should like the Privy Council be free to reverse its own decision if it finds that it is wrong. There is no danger in such a rule, seeing how rarely ultimate Courts that recognise such a right reverse their own decisions. The policy of the Privy Council seems to me to be more enlightened than that of the House of Lords. Law, like other things is not static and rigid adherence to previous views even when they are out of place and cannot be reconciled with modern legal concepts does not foster development of legal thought. I am in entire agreement with Prof. Goodhart and other Jurists in England and other parts of the Commonwealth who favour a less rigid approach to the doctrine than that adopted by the House of Lords or the Court of Appeal since the *Bristol Aeroplane case* (10). It is difficult to reconcile the "perpetual process of change" in the common law with a rigid *stare decisis*".

Rupert Cross under the subtitle mentioned discusses the very problem to which Basnayake C.J. makes reference in *Bandahamy V. Senanayake.*

He reminds us that the phrase "rules of precedent" has been used to include *the rule that judicial decisions have the force of law* as well as *the practices by which effect is given to the rule*". He then states the problem as follows :

> "The authority of all the rules of precedent to rank as binding rules of law cannot be based on precedent. A time must come in the process of derivation when at least one of them has to be treated as ultimate unless it can be traced to a more authoritative source. In the case of the English system of precedent the rule that a court is bound to follow a case decided by a Court above it in the hierarchy and the rule that the House of Lords is bound by its past decisions are ultimate. **The rest of the rules of precedent could, however, be derived from the above rules**".

The first rule referred to by him is that judicial decisions have the force of law. According to Cross, therefore there can be no doubt of the fact that the decisions of the highest Court is binding on all Courts of subordinate jurisdiction. The problem really arises in the case of the court of highest instance in respect of its past decisions. This is the reason, I think, that among the rules the Supreme Court of Sri Lanka is empowered to make under Article 136(1) of the present Constitution is one which relates to the "binding effect on the decisions of the Supreme Court".

Cross continues in his book at page 247 :

"This brings us to a sense in which all the rules of precedent may most emphatically be said to be based on precedent. They are all dependent on the practice of the Courts. No decision of the House of Lords that the House shall be in future bound by precedent could rank as a precedent imposing that principle on the House, but it may be evidence that the House has adopted that principle or **an announcement of a resolution to adopt it when it is supplemented by later evidence that the House consistently accepts this principle we are in a position to say with confidence that this is the established rule.** The same is true of all the rules of precedent. All that is meant by the assertion that one of those rules is uncertain or unsettled is that it has not been followed with a high degree of uniformity".

Cross continues at page 249, "This brings us to the question whether legislation would be necessary in order to free the House of Lords from the fetters imposed by the House upon itself in *London Street Tramways v. L. C. C.* (11). Many may think it unlikely that the House of Lords will change its practice of its own motion, but, so far as legal theory is concerned, what would the position be if it were to do so? **No superior rule of precedent would be infringed because the rule in** *London Street Tramways v. L.C.C.* is ultimate so far as precedent is concerned. No statutory provision would have been infringed because there is no relevant statutory provision. The House of Lords would therefore appear to have done no more than announce a change of practice. But it may be argued that the change would be one for which no provision is made in our legal system and which is unprecedented

in the sense that there does not appear to have been a previous instance in which *stare decisis* has been formally repudiated by an Appellate Court once that Court has fully accepted the doctrine".

Rupert Cross then comments on the view that legislation is the only means by which the effect of *London Street Tramways v. L.C.C.* can be reversed under the English system as follows :

> "The foregoing argument assumes that the rule that judicial decisions have the force of law does not entail a power on the part of the judges to vary the practices by which that rule is carried into effect once they are fully settled, notwithstanding the tendency towards rigidity in our doctrine of precedent, it is doubtful whether the assumption is well founded. **The better view seems to be that the rule that the House of Lords is bound by its past decisions is not part of a basic rule or ultimate principle of the English system but a practice controlled by that rule".**

Rupert Cross concludes "When rules depend upon the practice of those who observe them and are in **no sense laid down by any one else,** it is pointless to inquire whether they can be changed by practice. The only answer is "wait and see". In the case of the rules of precedent that means "wait and see what Parliament and the judges do".

This discussion by Rupert Cross as to whether the rules of precedent can be based on precedent is very illuminating and brings out the relative importance and relevance of,

1) The rule that judicial decisions of the highest Court have the force of law ; and

2) The practices by which effect is given to the rule. In the case of the highest Court there being no higher authority in the judicial system it is the practice that matters. A practice that the previous decisions of the House of Lords is binding on the House of Lords was based on practice.

Since the publishing of Rupert Cross's book the House of Lords has resolved that they are not bound by their previous decisions. No doubt they will only change an earlier decision in rare cases when they find compelling reasons for doing so. In fact all that has happened is that the House of Lords has announced a change of practice. The first part of the rule whether decisions

of the highest Courts are binding on Court which are not the highest remains unaffected.

The question we have to decide concerns the first part of the Rule i.e., whether immediately before the commencement of the new Constitution the *ratio decidendi* of the two decisions of the highest Court had a 'binding force' or 'coercive force' on the subordinate Courts. If the answer is in the affirmative they came within the description of the law existing immediately before the new Constitution came into operation.

To ask whether the practice by which the Rule of precedent was given effect in this country was itself law is to pose the wrong question. It is not the question referred to us for our determination under Article 125 of the present Constitution.

Dr. de Silva strongly contended that it will be wrong to compare the rules of precedent in the Indian Law with the rules of precedent in Sri Lanka. We are referred to Section 212 of the Government of India Act 1935, which gave binding force to the decisions of the Privy Council and Article 141 of the Indian Constitution which gives binding force to the decisions of the Supreme Court after the Appeals to Privy Council were abolished. The argument is that in India the Law of precedent is established by statute while in Sri Lanka we do not have corresponding statutory provisions.

The answer to this argument is twofold. First, it is wrong to say that in India the Law of Precedent is based on statutory provisions. Secondly, if the binding force of precedents have been accepted by our Courts consistently it matters not whether its acceptance is based on statute or on practice.

Basnayake C.J. said in *Bandahamy v. Senanayake* page 330, "India, being a country in which the influence of the English legal system has prevailed for well over a century, regards judicial precedents with the same veneration as England. Before the establishment of the Federal Supreme Court the pre-independence period appeals from the various High Courts considered themselves as absolutely bound by the decisions of the Privy Council. The Federal Supreme Court was absolutely bound by the decisions of the Privy Council". "The establishment of the Supreme Court of India in the post-independence period and the abolition of appeals to the Privy Council have caused no change except that the decisions of the Supreme Court now bind the High

Courts absolutely. The Supreme Court regards itself as bound by its own decisions subject to their being overruled by greater numerical strength".

Seervai says in his book on "Constitutional Law of India" at page 1020, "Even independently of Article 141 **the same result would have followed from the Theory of Precedents which had become a part of Indian law.** But Article 141 removes even a theoretical doubt about the binding force of precedent".

In India appeals lay from the different states to the Court of last resort which was the Privy Council, and after appeals to the Privy Council were abolished, the Supreme Court of India. It was therefore necessary to lay down that the decisions of the Court of last resort was binding on all the states irrespective of from which state the appeal was made. We do not have such a problem in Sri Lanka. Our acceptance of the theory of precedent is based on the consistent practice of our Courts.

Up to the time of the coming into operation of the 1978 Constitution it was the practice for the Courts of subordinate jurisdiction in Sri Lanka to accept the binding effect of the *ratio decidendi* of cases decided by the Court of last resort. They recognised its coercive force on them. The principles relating to the theory of precedent accepted by the seven judges as applicable to our country in 1960 in *Bandahamy v. Senanayake* have been acted on without a break up to the commencement of the new Constitution. In 1960 we had a sovereign Legislature. We had travelled a long way from the "Colonial Era". Changes in the structure of the Courts did not affect this practice.

In 1967 in *Moosajee v. Carolis Silva* (12) a bench of five judges similarly had acted on the basis that the doctrine of *stare decisis* was part of our law and reference was made to *Bandahamy v. Senanayake.*

Even after the 1972 Constitution our Courts accepted the principle that the *ratio decidendi* of the highest Court was binding on the subordinate Courts. The legislature after the 1972 Constitution did not alter the binding force of precedents nor did the Supreme Court — The highest Court — seek to make rules under Section 15 of the Administration of Justice Law.

On the contrary the Supreme Court in 1972 in the case of *Costa v. Jayatilleke* (6) **acted on the basis of the Theory of Precedent which had prevailed in this country now for well over a century.**

We have also to note that neither in the proceedings before the Court of Appeal nor before us, was the position taken that these two decisions which gave the occasion for the reference did not have a binding or coercive force on Courts of subordinate jurisdiction immediately before the present Constitution came into operation.

The President of the Court of Appeal in his reference said, "Learned Counsel for the 3rd Respondent contended that this Court being a Court not subordinate to the Supreme Court established under the Administration of Justice Law is not bound by the decisions of that Court."

In my opinion the binding effect of the decisions of the highest Court or the Court of last resort on Courts exercising subordinate jurisdiction has been recognised and accepted long enough by our Courts even to acquire the force of custom. It has been so recognised for more than a century.

It remains for me now to state formally our determination under Article 125 of the Constitution of the two questions referred to us.

The *ratio decidendi* of the two decisions of the Supreme Court constituted under the Administration of Justice Law, No. 44 of 1973 belongs to the category of "Unwritten laws" within the meaning of Article 168(1).

2) The Court of Appeal constituted under the present Constitution is neither a Court of subordinate jurisdiction nor a Court of co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law No. 44 of 1973, because such a comparison is not possible nor necessary to determine the first question referred to us. What is important in order to decide whether the *ratio decidendi* of the two cases is binding on the Court of Appeal, is the question whether the Court of Appeal is a Court of subordinate jurisdiction under the present system of Courts. There can be no doubt on this point. The *ratio decidendi* of the two cases is binding on the Court of Appeal.

We direct that this determination be communicated to the Court of Appeal.

ISMAIL, J. — I agree.
WEERARATNE, J. — I agree.
SHARVANANDA, J. — I agree.

WANASUNDERA, J.

This is a Reference under Article 125 of the Constitution by the Court of Appeal to this Court for the determination of two questions relating to the interpretation of the Constitution. It arises from an application for a writ of certiorari by Messrs Walker Sons & Co. (U.K.) Ltd., the petitioner, to quash the award made by the 1st Respondent to the application, Mr. W. P. Gunatilleke, who was an arbitrator appointed by the Minister of Labour in terms of section 4(1), Industrial Disputes Act (Cap. 131). For the purpose of this opinion it would be unnecessary to refer in any detail to the facts or to certain matters of a procedural nature relating to the course taken by this application from the time it was filed in the previous Supreme Court, to the time this Reference to us was made by the Court of Appeal. Briefly, it related to a dispute between the petitioner and the 3rd Respondent — a union of employees. After a stoppage of work by the members of the 3rd Respondent union, there had been certain incidents in which some union members were alleged to have been involved. The Commissioner of Labour, acting under powers given to him by the Emergency (Miscellaneous) Provisions and Powers Regulation No. 5 of 1974 and the Essential Services Order, had made an interim order regarding the employment of such workmen, pending the settlement of the dispute by arbitration. Thereafter, the Minister, acting in terms of section 4(1) of the Industrial Disputes Act, referred the dispute for arbitration to Mr. J. G. L. Swaris. Mr. Swaris had commenced proceedings by sending out notices to the parties. At that stage, the reference to Mr. Swaris was revoked by the Minister and a second reference was made to the 1st Respondent, Mr. Gunatilleke. Mr. Gunatilleke, after due inquiry, has made an award. The petitioner seeks to have this award quashed on the ground of lack of jurisdiction.

The Petitioner has based his application on two decisions of the Supreme Court established under the Administration of Justice Law, No. 44 of 1973. They are *Nadaraja Ltd. (in voluntary liquidation) v. N. Krishnadasan* (1) and an unreported decision —S.C. Application No. 460/75 delivered on 7.7.76, in which I myself participated. The *ratio decidendi* of these two decisions is that, once a reference is made, the Minister has no power to revoke that reference and refer the dispute again to another arbitrator. Counsel for the Petitioner has sought to argue that those decisions have a binding effect on the Court of Appeal and consequently would determine the outcome of the application. The Court of Appeal while dealing with this submission found that certain auxiliary matters had arisen for consideration, which involved the interpretation of the Constitution. In terms of Article

125, the interpretation of the Constitution is left solely to the Supreme Court, and the Court of Appeal has accordingly referred those matters to us for decision.

The two questions referred to us are —

> "(1) Do the above decisions of the Supreme Court constituted under the Administration of Justice Law, No. 44 of 1973, belong to the category of 'unwritten law' within the meaning of Article 168(1) ?
>
> (2) Is the Court of Appeal constituted under the present Constitution a court of subordinate jurisdiction or a Court of co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law, No. 44 of 1973, for the purpose of the application of the principle of *stare decisis* ?"

It would be apparent that though these questions have been formulated in this manner, the question before the Court of Appeal was the binding effect of the two decisions referred to on the Court of Appeal as *stare decisis.*

Mr. Jayewardene for the petitioner has submitted that *stare decisis* has admittedly been a part of our law since British times and that both the 1972 Republican Constitution and the present Constitution of 1978, by appropriate provisions, have provided for the continuation of this doctrine. It is his contention that it subsists today and that it should be applied in the matter before the Court of Appeal. In reply, Dr. Colvin R. de Silva has raised certain fundamental questions of a constitutional nature and has contended that the doctrine of *stare decisis*, as understood in the earlier law, no longer forms part of the present law of this country. It is necessary to address ourselves first to these important constitutional questions before we deal with the less important matters.

Our constitutional development is well known and does not require any detailed recital. This country was administered as a colony during the early period of British occupation. Since the turn of the century, agitation for self-government resulted in progressive constitutional developments leading finally to independence in 1948. Though independent, this country continued both in law and theory to regard the person who was the monarch in the U.K. as the lawfully constituted monarch of

this country. In *Ibralebbe v. The Queen* (5) the Privy Council, overruling the view of our Supreme Court, held that the Privy Council was not a pre-independence relic but had the right to continue as our highest Court notwithstanding our attaining independence. It was only in 1972 that we severed these links with the U.K. and adopted a Republican form of Government.

The 1972 Republican Constitution had many radical or revolutionary features. The most significant was the change from a monarchy to a Republican form of Government. This change involved a complete break with the previous constitutional connections we had with the U.K. and was effected by procedures not only outside the procedures contemplated by those constitutional documents but also in spite of them. The Constitution was of pure indigenous growth "deriving its power and authority solely from the People", as stated in the *exordium* and repudiated any continuity or connection with the previous Soulbury Constitution. It was Dr. de Silva's contention that these revolutionary features had the effect of sweeping away all rules and practices that were inconsistent with the new *grundnorm* — namely this Republican Constitution with its new power base.

Mr. Jayewardene referred us to a passage in Kelsen, "The Pure Theory of Law" at page 209, where the author deals with the function and effect of the basic norm when it is changed by revolution. Kelsen uses the term "revolution" in the broad sense to include even a *coup d'etat*. He states :—

> "Usually a revolution abolishes only the old Constitution and certain politically important statutes. A large part of the statutes created under the old constitution remains valid as the saying goes: but this expression does not fit. If these statutes are to be regarded as being valid under the new Constitution, then this is possible only because they have been validated expressly or tacitly by the new Constitution. We are confronted here not with a creation of new law but with the reception of norms of one legal order by another, such as the reception of the Roman Law by the German Law. But such reception too is law creation, because the direct reason for the validity of the legal norms taken over by the new revolutionary established Constitution can only be the new Constitution. The content of these norms remain unchanged, but the reason for their validity, in fact the reason for the validity of the entire legal order has been changed. As the new Constitution becomes valid, so simultaneously changes the basic norm, that is, the

presupposition according to which are interpreted as norm creating and norm applying facts the Constitution creating fact and the facts established according to the Constitution.

Suppose the old Constitution had the character of an absolute monarchy and the new one of a parliamentary democracy. Then the basic norm no longer reads ; 'Coercive acts ought to be carried out under the conditions and in the manner as determined by the old, no longer valid constitution' and hence by the general and individual norms created and applied by the constitutionally functioning monarch and the organs delegated by him ; instead, the basic norm reads : 'Coercive acts ought to be carried out under the conditions and in the manner determined by the new Constitution' and hence by the general and individual norms created and applied by the Parliament elected according to that Constitution and by the organs delegated in these norms. The new basic norm does not make it possible — like the old one — to regard a certain individual as the absolute monarch but makes it possible to regard a properly elected parliament as a legal authority. According to the basic norm of a national legal order, the government which creates effective general and individual norms based on an effective Constitution is the legitimate government of the state."

As I understand this, it means that if the basic norm of a State is changed, then the entire legal order of that State from top to bottom would be affected. The previous laws of the State cannot continue in force unless the Constitution expressly provides for it, but those laws which are in conformity with the basic norm would survive deriving their validity and reason from the new basic norm.

The effect of the constitutional changes on the court structure needs some comment. Just prior to the adoption of the Republican Constitution, the then Government, by Act No. 44 of 1971, abolished appeals to the Privy Council and substituted in its place a Court of Appeal established in this country and manned by citizens of this country. This was a fore-runner to the sweeping constitutional and structural changes the Government was then contemplating. The Republican Constitution, when it was brought into effect soon after, allowed the old Court structure to continue for the time being, until the National State Assembly could devote its attention to it. But the Constitution made it plain that henceforth even the old Court structure would function under the Constitution and derive its jurisdiction and powers solely from the

Constitution, thereby severing it from its historical moorings — Article 121(2).

Soon after, in 1974, the existing Court structure was almost totally replaced by a new one, by the Administration of Justice Law, No. 44 of 1973, thus completing the process of change. By the repeal of the relevant legislation, the main Courts including the then Supreme Court were swept away and there was substituted an entirely new, two-tier court structure with the High Court and the other original courts forming the first tier and a new Supreme Court with appellate powers as the final and ultimate court in the hierarchy. It would be observed that the previous right of a litigant to go successively by way of appeal from the original court to the Supreme Court and from there to the Privy Council (or its substitute, the Court of Appeal) was cut down to a single appeal to the Supreme Court.

The changes that took place in 1971, 1972 and 1973 were undoubtedly changes of a radical nature both in the structure of the Courts and in what Hans Kelsen has called the basic norm. Did *stare decisis,* as then operating with an essentially English background and having a strong English common law flavour, survive these upheavals to continue in that same form in a new hierarchy of Courts ? It may be mentioned that until 1971 the Privy Council occupied the apex of our judicial structure and dominated the legal scene. The whole doctrine of *stare decisis* hinged on this exalted tribunal. The Court of Appeal of 1971 was clearly a temporary feature. Without any disrespect to the Privy Council and notwithstanding the respect we have for the excellence of its work, it would not be unfair to say that the Privy Council occupied a position in the U.K. close to the centres of power. It is therefore to be expected that however much they may have desired, it was natural for them to look at these problems with English eyes and with a U.K. point of view. If the main objects of *stare decisis* is to ensure the certainty and predictability of the law, in the present context it could be argued that this may mean the continued and rigorous application of the old law with the likelihood that we may be tied to a past in too great a measure. I have, in passing, referred to the Privy Council only to indicate the full dimensions of *stare decisis* as it operated in the past, its implications for the future, and to indicate how closely it was connected to that court structure and basic norm and was expressive and affirmative of them. The continuation of *stare decisis* in the manner suggested to us would not merely be the survival of a principle, but also carry

the weight of its past application and the validity of that application subject only to future modification which may be permissible under that principle.

In the face of these facts, it is difficult to say that the changes of the 1972 period have not been of a radical nature, and I am inclined to the view that the doctrine of *stare decisis*, in the form it had operated till then, could not have survived this change. Further reasons for this view will emerge later in this opinion. For Mr. Jayewardene to succeed, he must establish the continuation of the doctrine of *stare decisis* not only with the constitutional change of 1972 but also of 1978. If, as I have held, the doctrine was not carried over in 1972, the fact that during the intervening period 1972-78 the Courts followed precedents or adopted their own practice of *stare decisis* within that hierarchy of Courts would be of little avail to the petitioner. Similarly, even if the provisions in the Democratic Socialist Republican Constitution of 1978 support Mr. Jayewardene's arguments, it cannot help him to tide over the initial obstacle referred to above.

I shall however proceed to deal with his arguments, because this discussion will bring to light the real issue in this case and will also help to understand the conclusion I have come to on this Reference. Mr. Jayewardene submitted that *stare decisis*, which he implied was unwritten law, was carried forward by Article 12 of the Republican Constitution of 1972 and Article 168 of the Democratic Socialist Republican Constitution of 1978. I need only deal now with Article 168 of the present Constitution. Article 168(1) of the present Constitution is to the following effect :

> "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force".

The petitioner has contended that the practice of *stare decisis* falls within the expression "unwritten laws". It would appear that it is on this basis that the Court of Appeal has also formulated the first question of this Reference. Dr. de Silva has however referred us to the definitions contained in Chapter XXII, which relates to "Interpretation", and has argued that in view of the specific meaning given to the term "law", the reference to unwritten law in Article 168(1) is thereby rendered *otiose* and of no value. The effect of his argument is that unwritten laws have not been carried over by the new Constitution and a provision which sought to do this is nullified by another provision.

There would be some substance in Dr. de Silva's argument if we were to look at the matter in the narrow and pedantic way we have been asked to approach this matter. But we must remind ourselves that we are dealing with a Constitution. He has invited the Court to declare that an important provision in the Constitution is *otiose* and rendered nugatory because of a subsequent inconsistent provision. It is a well-known principle that, in interpreting a Constitution, mere technical rules should not be allowed to stand in the way if their application would result in the impairment of the Constitution or lead to administrative difficulties. The effect of Dr. de Silva's submission is that in the apparent conflict between two provisions, the more significant one should be rendered void. It is our duty to see that every provision of the Constitution is, as far as possible, given effect to. An analysis of the relevant provisions indicates that these provisions are capable of an alternative construction which would ensure the validity of every part and provision of the Constitution.

According to the arrangement of the words — and both counsel conceded this — the "laws" continued in force under Article 168(1) are laws, both written and unwritten. This, to my mind, is the totality of the law of this country. So that "existing laws" — in so far as the arrangement in the Constitution goes — consist of the "existing law" in the form of "existing written law" and the "existing law" in the form of "existing unwritten law", together making up the entire *corpus* of law. In my view, the fourth item in Article 170 merely seeks to define "existing law" in the form of "existing written law". That is why the two expressions are used together in this definition as if they have been equated and the definition covers both of them at the same time. Its wording gives no indication that it refers to "unwritten law". It deals only with written law. What the last item and the sixth item in Article 170 seek to do is to break down the expression "existing written law" into two successive components, viz., first into "written law" and then into "law" in that expression "written law". It is clear that these two latter expressions deal only with "written law" and is obviously referable to the earlier expression "existing written law". This construction is consistent with Article 168(1), where the framers of the Constitution have clearly provided for the continuance of unwritten laws. The contrary view contended for by counsel renders nugatory this express provision of the Constitution and would result in taking away the application of the whole of the unwritten law of this country which governs such a large sphere of the day to day life of our people. When two provisions of the Constitution are in apparent conflict, the court

should lean towards a construction that would reconcile the conflict. In my view, to give a limited and particular meaning to the word "law", which is a word of indefinite meaning, will make it inconsistent with the express provisions of Article 168 and should therefore be rejected. I know of no principle of constitutional interpretation that would allow the writing off of an important provision in the main body of the Constitution merely because a definition in the Interpretation Article indicates one of two meanings. If two constructions are possible, we should adopt the one that does not lead to absurdity and practical inconvenience ; nor should we proceed on the assumption that a conflict or repugnancy between different parts of the Constitution was intended by the framers of the Constitution. *Mohideen v. State of U. P.,* (13) ; *King vs. Barger,* (14) ; *Attorney General for Ontario v. Attorney-General for the Dominion,* (15). In this connection I am constrained to remark that these definitions fall short of that precision and accuracy which one expects to find in a Constitution, and it is not surprising that Dr. de Silva was able to take advantage of these provisions. The Government would be well advised to consider a satisfactory amendment of these definitions to put its intentions beyond any doubt.

While agreeing with Mr. Jayewardene that unwritten laws are carried over by the present Constitution, he must meet yet another issue raised by Dr. de Silva. It was Dr. de Silva's contention that *stare decisis* was not law, but a mere rule of practice of the Courts and that that practice would disappear with the disappearance of the particular court structure to which it was wedded. If this contention is correct, Article 168 would be of no avail to the Petitioner, as the term "law" would not include a mere practice of the Courts. To answer this question, an analysis and examination of the concept embodied in this expression *stare decisis* is now necessary.

Stare decisis is the special mode in which legal precedents are employed by the English common law. Precedents are made use of by Judges in practically all systems of law. A precedent may be defined as a previous instance or case which is or may be taken as an example or rule for subsequent cases. The peculiarity of the English common law is that a precedent is regarded as creating a legal principle — or *ratio decidendi* — and that legal principle is held, by the practice obtaining in the Courts, to be absolute and binding on all Courts in a given hierarchy. This water-tight application of this doctrine is its principal feature. It is a relatively modern doctrine and took the present form and shape only in the last century. It is more or less peculiar to the English common law

system. It must be conceded that this principle or doctrine of *stare decisis* has been received and adopted in this country, with modifications, during the colonial period — *Bandahamy v. Senanayake* (3).

It will be observed that the principle of *stare decisis* embodies two features. First, that the principle on which the case was decided — called the *ratio decidendi* — constitutes "law", and second, the practice in a system of courts to regard such a decision as authoritative and binding on all the subordinate courts in that system. It would be apparent that this second factor is extraneous to the actual *inter partes* decision (Rupert Cross, "Precedents in English Law", p. 247; Dias, Jurisprudence", 3rd Edn., p 45). Most of the texts and decisions characterise *stare decisis* as a doctrine, principle, practice, maxim or policy. The stress here, no doubt, is on the second feature referred to above. Chief Justice Basnayake in *Bandahamy v. Senanayake* (supra) was inclined to call it a doctrine. At one place in the judgment, he describes it as "... this doctrine or principle as some choose to call it in England", and he concludes by stating that : "We have in this country over the years developed a *cursus curiae* of our own", and proceeds to summarise those principles.

There is considerable discussion of this subject among text writers, but most of them feel that the doctrine was the outcome of historical factors and it would not be profitable, in so far as their purposes are concerned, to subject it to rigorous analysis in juridical terms. In this connection I may mention Simpson, "Oxford Essays on Jurisprudence 50"; Salmond, "Jurisprudence", 12th Edn., p.159; Dias, "Jurisprudence", 3rd Edn. pp.46, 62. Rupert Cross in his work, "Precedent in English Law" in a section titled, "Can the rules of precedent be based on precedent?", concludes as follows :—

> "This brings us to a sense in which all the rules of precedent may most emphatically be said to be based on precedent. They are all dependent on the practice of the Courts."

Stare decisis, as stated earlier, operates outside and is extraneous to the particular judicial determination which is sought to be applied. A judicial decision would be binding on the parties. The reason for the decision — the *ratio decidendi* — is regarded as the declaration of a legal principle. But the binding effect of that principle in future cases is a further element which undoubtedly has some relation to that particular decision, but is operative in virtue of some other principle or doctrine.

The Practice Statement of the House of Lords read by Lord Gardiner L. C. was a pronouncement to the effect that the House was changing its previous practice of being bound by its own decisions — 1966 (3) A.E.R.77. It provides an insight into and gives the clearest indication of the nature and basis of this doctrine. Considering the tight hierarchical basis on which this doctrine operates in England, this doctrine can be said to be pegged to and sustained by the practice obtaining in the House of Lords, which constitutes the apex of that court structure. In this context, it must be conceded that the pronouncement of the House of Lords is a most authoritative one and is of fundamental importance for the matter we are now considering.

It will be observed that this pronouncement was not made in the course of or as part of the decision in a case the House was considering. It was a general pronouncement in the nature of a policy statement. The words used in the statement are: "They propose therefore to modify their present practice . . .". One would expect the expression "practice" was used advisedly in preference to the word "law", which would have been inappropriate and inadmissible in this context.

There are certain other implications of this statement. Can a Practice Statement alter the law or a legal rule? If *stare decisis* was law, must there not be legislation or at least a judgment to overrule it ? This pronouncement implies other limitations as regards *stare decisis.* See the last sentence to the effect that this announcement is not intended to affect the use of precedent elsewhere than in the House. In this connection see also Lord Justice Salmon's dicta in *Gallie v. Lee,* (16) when referring to precedent in the Court of Appeal, he said :—

> "The point about the authority of this Court has never been decided by the House of Lords. In the nature of things it is not a point that could ever come before the House for decision."

If then, *stare decisis* is to be regarded as a practice and not law, it would be difficult in any event to include it within the expression "unwritten law". Ordinarily, unwritten law would mean the law of the land which is not written law. But, it must be law in the first instance. It is possible to include in this term, custom recognised and applied by the Courts, but this is insufficient to catch up a mere court practice.

In this connection it may be interesting to find that India, which had a background somewhat similar to ours, on attaining

independence, made certain express provisions to deal with a similar situation. When considering the Indian experience, we must however remind ourselves that those constitutional provisions belong to another era — 1935 and 1950 — that is to say, to the early days of Indian constitutional advancement, and is not equivalent to the constitutional developments of 1970-74 in this country.

India, of course, cannot show any change as radical as that of our 1972 Constitution. The Indian constitutional changes were smooth and done strictly in terms of procedures that were authorised by the then existing laws. It is therefore permissible to argue that even express provision was unnecessary for the continuance of *stare decisis* in India, since its constitutional development does not show a radical break with the past unlike us.

Article 212 of the Government of India Act 1935 made the law declared by the Federal Court and the Privy Council binding on all Courts in British India. It is to this constitutional provision that lawyers look when they rely on *stare decisis* in India *Bengal Immunity Co. Ltd. v. Bihar,* (17).

There were also other buttressing provisions in the Indian Constitution, such as Articles 292, 293 and 223 by which the law existing immediately prior to the enactment of the Constitution was continued in force. Under the present Indian Constitution, the corresponding provisions are Articles 141, 372, 372A, 225 and 395 read with the Abolition of Privy Council Jurisdiction Act, 1949. Incidentally, even the term "law" is defined in Article 13(3) in a very extensive sense as to include custom and usage. The conjoint effect of these provisions in the Indian Constitution is to recognise and continue the rule of *stare decisis* in India. But they contain only the basic outlines of the doctrine. In spite of these provisions, however, questions have arisen regarding the binding effect of decisions of the Privy Council and Federal Court respectively and their order of precedence in proceedings before the subordinate courts now operating in India *Punjabai v. Shamrao,* (18) ; *1960 A. I. R. (S.C. 1355; 1964 A.I.R.(S.C.) 1043).* It will thus be seen that there is ample constitutional basis, including express provisions, in India providing for the continuance of the doctrine of *stare decisis* consequent upon the successive constitutional changes in India. In a marked contrast, we are in an entirely different situation; neither do we have express provision equivalent to what is found in India. Our Constitution, more than the Indian Constitution, called for a

pronouncement on this matter. But, unlike the Indian Constitution, our Constitution does not mention *stare decisis.* The question may well be asked whether this was an oversight or was it a deliberate omission.

The Administration of Justice Law of 1973 contained provision for the making of rules for regulating the practice and procedure relating to courts, and it was generally known that the authorities at that time did contemplate bringing in legislation or rules regarding *stare decisis* and the binding effect of precedents. If we look at the present Constitution, we see this even more clearly expressed. Article 136 empowers the Chief Justice and Judges of the present Supreme Court to make rules regarding the binding effect of the decisions of the Supreme Court and for matters of practice and procedure in all Courts. In my view such a provision was an absolute necessity in the present context, as we are faced with at least two, if not three, separate and successive hierarchies of Courts and the only solution to the present problem is to avail ourselves of this rule-making power.

In view of the foregoing, I am inclined to the view that the doctrine of *stare decisis,* as known to the English common law and which obtained during the colonial era, has not been continued under the constitutional changes and no longer obtains in that form and manner today. More specifically I would, for the reasons given earlier, answer the first question referred to us in the negative. On my analysis, I find that this question is wrongly formulated and is misconceived.

I will now turn to the second question. Dr. de Silva submitted that we are dealing with not only two separate hierarchies of Courts, but also with two successive hierarchies, and hence *stare decisis* is inapplicable and more particularly that it would be impossible to relate these two courts to a relationship of superior and subordinate court in that context. Mr. Jayewardene, citing Kelsen, argued that the successive changes in the Constitution did not bring about a change in the legal order as the 1978 Constitution was enacted in the manner prescribed by the earlier Constitution, and the only issue is whether or not the decision of a Court of final and last instance in that legal order is binding on all subordinate Courts in that legal order. The real issue was the binding effect of a decision of the highest court in that legal order and the fact that a court is subordinate to another, he said, was incidental to that matter. The second question referred to us therefore appears to be misconceived, and it is also doubtful whether it strictly involves an interpretation of the Constitution.

In view of my ruling that *stare decisis,* as understood in the old law, can no longer apply to the present situation, and that this is a matter requiring the urgent attention of the Supreme Court under its rule-making power, the question posed to us does not arise for my consideration. I however take the liberty of making the following observations in regard to the consequent position.

The present Court of Appeal, while it is in many respects substantially similar to the Supreme Court under the Administration of Justice Law, is nevertheless lacking in certain important features with which that Court was invested. Both counsel agreed that an attempt to compare the two Courts in a search to ascertain their precise level of relationship to each other would be futile. I am in agreement with them, but I think that the problem should be solved on the basis of some other principle. I have already adverted to the need for rules to govern this matter. My holding that the former practice of *stare decisis* has not been carried over should not be understood to mean that courts are now free to ignore case law. Courts follow precedent whether or not *stare decisis* applies and within the hierarchy of courts there can be no question that decisions of higher courts must be followed by subordinate courts in that same hierarchy. No problem can arise on this score. If problems do arise, it would in all probability be in another area, namely, the binding effect of the decisions of past Courts of other hierarchies such as the Privy Council, the former Appeal Court, and the former Supreme Court, especially when their decisions are in conflict with one another.

These are matters, in my opinion, best dealt with by rules rather than by Court decision. Since four of my brothers are now of the view that the Court of Appeal should be bound by decisions of the past Supreme Court, this immediate issue seems to be foreclosed, as this view will in all probability be adopted in the event of a rule being enacted. With all deference to my brothers, I am however not persuaded that this matter should be disposed of in the manner proposed by them. It seems to me that it is singularly inappropriate for the issue before us to be dealt with in piece-meal fashion by way of decision in a Reference, without availing ourselves of the rule-making power vested in us.

An examination will reveal that the matter before us is only a small segment of a much larger problem. There is now the need to consider and review a whole range of such questions including the binding effect of decisions of all the different systems of Courts of the past. What is the position of this Court in relation to

the decisions of such other courts? What should be our practice in regard to our own decisions? What should be the binding effect of past decisions of the two previous Supreme Courts, the previous Court of Appeal, the Privy Council, and the present Court of Appeal on the subordinate courts? What should be the position when there are competing decisions of such courts? What practice should the Court of Appeal adopt in respect of its own decisions? Is it competent for us to decide that matter?

In the present state of uncertainty, and until these matters are comprehensively settled, these problems can be a source of interminable litigation. Judging by the authorities, any Court decision will be founded on the shifting sands of practice as against a proposed set of rules which would be firmly anchored to the rule-making power in the Constitution. Incidentally it is interesting to observe that Kelsen has characterised the power exercised by judges to lay down the binding effect of a decision, as legislative in nature. This is how it ought to be. It would be apparent from the authorities that most of the issues that would arise for solution concerning *stare decisis* would not be susceptible of judicial decision and I find it difficult to understand how, by answering the first question referred to us — the second question is irrelevant — we can lay down all the governing principles concerning the varied aspects of this complex doctrine for the guidance of all the courts in this country.

There is one last argument of Dr. de Silva's to be dealt with. Relying on the provisions of Article 169(2), (3) and (4), he argued that these provisions indicate that the Court of Appeal and the previous Supreme Court have been given a parity of status. These provisions are to the effect —

> "169. (2) The Supreme Court established by the Administration of Justice Law, No. 44 of 1973, shall, on the commencement of the Constitution, cease to exist, and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, shall be deemed to have been repealed. Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal ;
>
> (3) All appellate proceedings including proceedings by way of revision, case stated and *restitution in integrum* pending in the Supreme Court established under the Administration of Justice Law, No. 44 of 1973, on the day preceding the commencement of the Constitution, shall stand removed to the Court of Appeal and the Court of Appeal shall have

jurisdiction to take cognizance of and to hear and determine the same ; and the judgments and orders of the Supreme Court aforesaid delivered or made before the commencement of the Constitution in appellate proceedings shall have the same force and effect as if they had been delivered or made by the Court of Appeal ;

(4) all original proceedings by way of applications for the issue of high prerogative Writs and applications for any other relief pending in the Supreme Court as well as all applications for injunctions pending in the High Court established under the Administration of Justice Law, No. 44 of 1973, on the date immediately preceding the commencement of the Constitution shall stand removed to the Court of Appeal and such Court shall have jurisdiction to take cognizance of, hear and determine or to continue and complete the same, and the judgments and Orders of the Supreme Court established under the Administration of Justice Law, No. 44 of 1973, delivered or made before the commencement of the Constitution in original proceedings shall have the same force and effect as if they had been delivered or made by the Court of Appeal :

Provided that any proceedings in relation to any alleged breach of privileges of Parliament pending in the Supreme Court shall stand removed to the Supreme Court created and established by the Constitution ;".

The Administration of Justice Law also contained similar provisions in section 53. The last sentence in sub-Article (2) is, no doubt, of some significance to this matter. But, Dr. de Silva has not referred us to any other written law from which we can infer that these two Courts would be identical in all respects. He also referred us to the last sentence in sub-Articles (3) and (4). I do not find it possible to agree with him that these provisions are adequate to establish some kind of parity between the two Courts. The Indian Constitution has somewhat similar provisions (*vide* Article 374), and as far as I know, the Indian Courts have not interpreted it in the way suggesed by Dr. de Silva (vide *State of Bombay v. Gajanan Mahadev.* (19) ; *Abdul Kader v. State,* (20) ; *Punjab State v. Bhagat Singh,* (21).) Admittedly these provisions establish some sort of relationship between the two institutions for the purpose of disposal of pending cases. I do not think that they can be given a wider meaning than that. It is interesting to see that by section 53 of the Administration of Justice Law, which

was a similar provision, the previous Supreme Court was in identical terms given not only the work of the earlier Supreme Court, but also the work of the former Court of Appeal, which was the court of second appeal. Dr. de Silva's argument in this context could be used for the opposite of what he has contended for.

On a consideration of the whole matter, it appears to me that the questions referred to us have been done under a misconception. This is a case requiring the exercise of the rule-making power under Article 136 rather than being one of the mere interpretation of the Constitution. For the above reasons, I would propose that the matter be resolved in the manner suggested by me in this judgment.

Case sent back to Court of Appeal
with Determination of the Supreme Court.