Operation of Conventions in the Constitutional History of Ceylon — 1948 to 1965

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The British Constitution is said to be unique because the principles of the Constitution (in particular the rules relating to Parliament and Cabinet Government) are not to be found in a written document but are the product of convention, while all other states have a written document in which at least some of the more important constitutional laws have been collected, and in which conventions though operative are not as signficant as in Britain.[1] The Constitution Order in Council of 1946 as amended by the Constitution Orders in Council of 1947 [2] is commonly referred to as the Constitution of Ceylon. [3] The Westminster model has inspired the draftsman of these documents and British conventions (as well as a few statutory provisions) have been copied and incorporated therein. Therefore an understanding of the nature and content of British conventions is essential to a discussion of the operation of conventions in the law of Ceylon.

I. CONVENTIONS OF THE BRITISH CONSTITUTION

Constitutional conventions have been referred to as "Rules of Political Practice which are regarded as binding by those to whom they apply but which are not law as the courts would not enforce them if the matter came before them".[4]

(a) Classification of the conventions of the British Constitution

It could be said that there are four types of conventions.[5]

(i) Conventions involving the exercise of the Queen's Prerogative powers.

(ii) Conventions relating to the working of the Cabinet system.

(iii) Conventions regulating the relationship between the two Houses of Parliament.

(iv) Conventions regulating internal matters in each house.

(i) Conventions involving the exercise of the Queen's Prerogative powers: The legal powers of the sovereign of the United Kingdom have not changed very much since the time of Elizabeth I. The Queen can begin a war, she can dissolve

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1 But see J. D. B. Mitchell, *Constitutional Law*, 1st Ed. (1964) p. 7 - 8, see especially p. 8 at footnote 19.

2 See Vol. 11 Cap. 379 *Legislative Enactments* (1956)

3 See *The Bribery Commissioner v. Ranasinghe* (1964) 66 N. L. R. 73 at p. 74

4 O. Hood Phillips, *Constitutional and Administrative Law*, 3rd Ed. (1962) at p. 77

5 The following outline of British conventions is based largely on O. Hood Phillips *op. cit.* at pp. 77 - 89; See also Wade and Phillips, *Constitutional Law*, 7th Ed. (1965) pp. 77 - 94

Parliament at anytime, she could refuse to assent to bills passed by the two Houses and she can dismiss the Prime Minister and her Ministers. But the exercise of these powers is restricted by conventions. Through a process of gradual development, the near absolute monarchy of the sixteenth century has become a constitutional monarchy, and this change has been effected almost entirely by conventions.

The following are some examples of conventions falling within this category:- (a) The Queen must ask the leader of the party or group of parties who is most likely to command a majority in the House of Commons to form a Government. This person is designated the Prime Minister. But, in *law*, until very recently, the office of Prime Minister was unknown. The office of Prime Minister is referred to only *incidentally* in a relatively recent statute, the Ministers of the Crown Act of 1937, which refers to "Prime Minister" merely for the purpose of specifying the salary payable to him. But the powers and duties attached to this office are entirely the product of conventions. (b) The Queen must appoint Ministers on the advice of the Prime Minister and the Ministers must be members of one of the Houses of Parliament. The executive function by law is vested in the Queen, but by convention, she acts only on the advice of the Prime Minister or her Ministers. The government is in fact carried out by Ministers and public servants in the Queen's name. Generally the government keeps the Queen informed on important issues. (c) No bill passed by Parliament has the force of law until the Queen assents to it. But by convention she must assent to every bill that is duly enacted. (d) The most controversial power which the Queen has, is in relation to the dissolution of Parliament. The Prime Minister may advise the Queen to dissolve Parliament, but the Queen has an ultimate discretionary power to refuse to accede to the request.

(ii) Conventions relating to working of the Cabinet System: The Cabinet is entirely the product of conventions and as a concept it is virtually unknown to law. There is a single incidental reference to "Ministers" in the Ministers of the Crown Act of 1937. But here again the functions and duties of Cabinet Ministers are nowhere stated in law. The rule that the Ministers are collectively responsible for the affairs of the country is entirely conventional. The following are some other rules which rest on conventions:- Ministers are individually responsible to Parliament for the administration of their departments and a minister must therefore be prepared to answer questions from the House concerning matters for which he is administratively responsible; if a vote of censure is passed against a minister, he should resign his office; a Government defeated on a matter of major policy and which has lost the confidence of the House should resign; the Government should not advise the Queen to enter into a war or a treaty without the approval of Parliament. The relationship between the Government and the Opposition also rests on convention.

(iii) Conventions regulating the relationship between the two Houses of Parliament: The convention that in cases of conflict the Lords should ultimately

yield to the Commons caused much controversy, but the Parliament Acts of 1911 and 1949 by curbing the powers over legislation of the Lords, rendered this convention unnecessary. By convention, proposals involving expenditure of public money may only be introduced by a Minister in the House of Commons, and money bills may only be introduced in the Commons.

(iv) Conventions regulating internal matters in each House: Examples falling within this category are: that the business of the House of Commons is arranged informally behind the Speaker's chair; that it is the duty of the Speaker to protect minority interests in debate; that the political parties are represented in Parliamentary Committees in proportion to their represention in the House; that when the House of Lords considers judicial matters, only peers, who have held or hold high judicial office participate.

(b) The Relationship between Convention and Law

Certain statutes assume the existence of conventions, e.g. The ministers of the Crown Act of 1937.[6] But this Act is meaningless, except in the light of convention. The Statute of Westminster of 1931 is cited as an example of a statute which restated existing convention. Generally, convention presupposes the existence of law. The law of the British Constitution could conceivably stand alone, though what it would amount to would be the type of absolute monarchy which existed in the fifteenth century. But generally, conventions would be meaningless, except in the context of law. Every British constitutional convention is related to law or laws, which it supplements.

(c) The Distinction between law and convention.

Dicey found the distinction between law and convention in that law unlike convention can be enforced in the courts.[7] Jennings makes the point that the emphasis upon the courts is misplaced because much modern law is created by statute and enforced by administrative authority.[8] Dicey's approach is reflected in Hood Phillips' definition which has been quoted above.[9] But yet not all law in the realm of constitutional law is capable of being enforced in the courts. Section 3 of the Parliament Act of 1911 makes the Speaker's certificate as to what is a money bill conclusive and unchallengeable in the courts for the purpose of the Act. Ultimately perhaps the question revolves around what is meant by "law" and whether enforcement is a necessary ingredient in a definition of law.

It must be noted that though the courts do not enforce constitutional conventions, it does not necessarily mean that they do not recognise their existence. Thus the conventional responsibility of the Home Secretary to Parliament

6 See example cited above at p. 1; also O. Hood Phillips, *op. cit.* at p. 85
7 A. V. Dicey, *Law of the Constitution*, 9th Ed. p. 23
8 W. I. Jennings, *The Law and the Constitution*. 5th Ed. (1952) Chap. III, Section 2
9 At p. 1

was *one* of the reasons for the decision of the House of Lords in *Liversidge* v. *Anderson*.[10] The Home Secretary acting under a war-time regulation to intern any person whom he had reasonable cause to believe was a threat to the safety of the state, had detained Liversidge. The court held that he had an absolute discretionary power and therefore the unreasonableness of his decision could not be canvassed in a court of law. In *British Coal Corporation* v. *The King*,[11] the Judicial Committee of the Privy Council mentioned the conventions regulating what was then called Dominion Status, and also the convention that the Crown invariably accepts the advice of the Judicial Committee. Mitchell[12] says:

> .....it is clear that between the two sets of rules there can be found no fundamental distinction in origin, scope, or nature, which is universally valid..... if the place of the ordinary courts in the definition of law are not given the emphasis which Dicey gave it then there remains no real difficulty in regarding 'law' and 'convention' as names for groups of rules which are essentially similar.

He goes on to say that this does not mean that there is no point in preserving the names. "There are good reasons for so doing".[13]

(d) The purpose served by conventions

The function of conventions is to ensure the smooth working of the constitution in changing conditions. Conventions enable constitutional change to to take place without resort to the formal method by which the constitution may be altered. Thus in Britain under the legal system of 1688 a strong monarchy became a parliamentary system, with a hereditary head of state not possessed of actual power.

(e) How conventions become established

Conventions have been compared to custom. The most important difference is that before a custom is recognised it must be proved that it has existed for a very long time. Conventions too, are based on usage, but not necessarily of long standing. Jennings[14] suggests two requirements for the creation of a convention: (i) general acceptance as obligatory; (ii) a reason or purpose referable to the existing requirements of constitutional Government. Thus one precedent might create a convention, a whole series of precedents might not. Thus it is sometimes difficult to determine at a particular time whether a convention exists or not. The fact that a convention is not precisely formulated means that it can be adapted to suit changing circumstances. But this absence of precise formulation has its disadvantages. Where the existence of a convention or the precise limit of a convention is not certain, controversy naturally

10 (1942) A. C. 206
11 (1935) A. C. 500
12. J. D. B. Mitchell, *op. cit.* at p. 28.
13. *Ibid.* at p. 20.
14. W. I. Jennings, *Cabinet Government*, 3rd Ed. (1959) at p. 5 - 13.

follows. Thus the manner in which the Governor-General of Ceylon in 1960 exercised his power of granting a dissolution at the request of a Prime Minister defeated in Parliament give rise to much heated controversy. [15]

II. CONVENTIONS IN THE CONSTITUTIONAL LAW OF CEYLON

(a) The reception in Ceylon of the conventions of the British Constitution

The conventions of the British constitution have entered the Ceylon system by (i) specific incorporation in the Ceylon Constitutional documents, (ii) incorporation by reference in the above documents, (iii) implication from the terminology used in the Constitution Orders in Council of 1946 and 1947.

(*i*) *Specific incorporation:* British conventions have been incorporated in sections 15, 31 (1) and 69 of the Ceylon Constitution Order in Council and Section 1 (2) of the Ceylon Independence Act, 1947. [16] Section 15 deals with the summoning, prorogation and dissolution of Parliament. Section 1 (1) of the Independence Act incorporates the convention that the Parliament of the United Kingdom will not legislate for the Dominion of Ceylon except with the consent of Ceylon.

(*ii*) *Incorporation by reference*: Section 4 (2) of the Constitution Orders in Council enacts:

> All powers, authorities and functions vested in Her Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty:
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> Provided that no act or omission on the part of the Governor-General shall be called in question in any court of law or otherwise on the ground that the foregoing provisions of this subsection have not been compiled with.

The phrase "incorporation by reference" may be used to describe this method of attracting British conventions, because unlike in the case of specific incorporation, the substance of the rule is not spelled out, but must be ascertained by reference to British practices and precedents.[17]

Section 4 (2) has the effect that the powers vested in the Queen or the Governor-General under the Constitution or by statute law must be exercised on advice, because the sovereign of the United Kingdom is a constitutional monarch

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15. Discussed below at pp. 19 - 30
16. 11. Geo. 6, Chap. 7
17. See S. A. de Smith, *The New Commonwealth and its Constitutions*, 1st Ed. 1964 at p. 80.

who by convention no longer acts on her own initiative.[18] Section 45 enacts that the executive power is vested in the Queen and the Governor-General, but this is exercised in fact by the Ministers of the Crown. Section (36) 1 enacts that "No Bill shall become an Act of Parliament until Her Majesty has assented thereto," but such assent is granted in respect of Bills duly enacted by the two Chambers of Parliament. The Governor-General is empowered by a constitutional provision to appoint six persons to be members of the House of Representatives (Section 11), and a Cabinet of Ministers (Section 46); but he acts on the advice of the Prime Minister. A statute[19] may unambiguosly vest powers in the Governor-General, but it is understood that such powers will be exercised on the advice of the Prime Minister or Ministers.

(iii) Extension of British conventions by implication. Section 46 enacts that the Cabinet shall be "collectively responsible to Parliament". It is significant that British conventions governing collective responsibility are not specifically stated to be applicable. But they have been assumed to be applicable and Section 46 would be meaningless if not so interpreted. There is no provision which even by implication extends British conventions regarding the conduct of the Prime Minister (e.g. that where a Government is defeated in the House the Prime Minister should advise a dissolution or resign, or that when the governing party loses its majority at the polls the Prime Minister should resign). But in this area too, British conventions are essential for the covering of the skeletal framework erected by the constitutional documents, and it is not doubted that they are an integral part of our constitutional jurisprudence.

The latter two catagories differ from the first in that in (i) the substance of the rule is incorporated, while in (ii) and (iii) it must be ascertained by reference to British practice. But (ii) and (iii) are distinguishable because in (ii) a constitutional provision specifically makes British conventions applicable, while in (iii) it is implied. This distinction is not without significance to the lawyer and an important consequence of this distinction is discussed below.[20]

(b) The distinction between law and convention

The distinction between law and convention which is difficult to draw in England,[21] is even more complicated in Ceylon. A conclusion that merely because certain rules are stated in the constitution, they are laws, is an over

18. But there are exceptional situations in which the British sovereign exercises residuary discretionary powers, e. g. in appointing a Prime Minister where there is a vacancy or in calling upon a Prime Minister to form a government after a General Election, or in accepting or rejecting a Prime Ministers advice to dissolve Parliament. See O. Hood Phillips, op. cit. pp. 108-12, 289-93.
19. See for e. g. s. 25, Public Security Ordinance (Cap.) 40, 1956, Leg. En.); s. 3-11, 1620-21, 34, Navy Act, (Cap. 358, 1956 Leg. En.); s. 2-5, 8, Commission of Inquiry Act, (Cap. 393, 1956 Leg. En.).
20. See discussion below of (d) *The effect of Ceylon conventions.*
21. See discussion above.

simplification.[22] Section (4) 2 specifically states that the acts of the Governor General are not justiciable. It is not conceivable that a breach of Section 46 (which refers to collective responsibility) will give rise to a remedy recognised by the courts. It is an intriguing question whether a breach of 15 (2) (Parliament shall meet atleast once a year) may be enforced in the Courts.

In relation to the four-fold classification of British Conventions outlined above[23] it is seen that conventions involving the exercise of the Queen's prerogative powers are incorporated by reference under section 4 (2); the convention relating to the Cabinet system are not specifically incorporated, but unless they are referred to, the constitution would be meaningless; some of the conventions falling within the third and fourth heads in the classification are dealt with by specific provisions in the Constitution,[24] and others are stated in the Standing Orders of Parliament,[25] and some are inapplicable in Ceylon.[26]

(c) Section 4 (2) of the Constitution

Section 4 (2)[27] places an obligation on the Governor-General to follow British conventions, but specifically enacts that no act or ommission shall be questioned in any court of law. The Governor-General is thus legally bound to follow British conventions, but he is the ultimate authority in a particular situation of what the convention is, and the manner of its application.[28]

The extent of the discretion conferred by the words "as far as may be" is far from clear. These words may be interpreted in two ways. (i) The words merely have the effect that British conventions apply with changes in terminology required by the difference in name of corresponding institutions in Ceylon and Britain (e. g. in the application in Ceylon of the British convention that a Prime Minister must be a member of the House of Commons and not of the House of Lords, "House of Representatives" and "Senate" are substituted for "House of Commons" and House of Lords"). (ii) These words may be given a wider interpretation so that, in addition to (i), British conventions could be adapted to suit exceptional and unforeseen circumstances that emerge in the course of the working of the constitution or peculiar circumstances that may arise as a consequence of the inter action of foreign institutions on Ceylonese life and conditions.

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22. See J. D. B. Mitchell, *op. cit.* at p. 27 fn. 78; Wade and Phillips, *op. cit.* p. 92, fn. 2; W. I. Jennings, *Constitution of Ceylon* (1953) p. 79; W. I. Jennings and H. W. Tambiah, *The Dominion of Ceylon, The Development of its Laws and Constitutions* (1952), p. 19.
23. See at pp. 1-3
24. e.g.s. 7, 15, 18, 19, 27, 33-34, 58, 69. Constitution Order in Council, 1946 (Cap. 379, 1956, Leg. En.)
25. e.g.s. 89, 96, 97, 130. Standing Orders of the House of Representatives of Ceylon.
26. When the House of Lords considers judicial matters only the Law Lords participate.
27. Quoted above.
28. The inconvenient and near disastrous consequences which can flow from making the decisions of the Governor-General justiciable in the Courts are discussed by S. A. de Smith *op. cit.* pp. 88-90 in the light of the Nigerian experience.

The *dicta* of Alles J. in *Peiris v. Perera* [29] are relevant in this context.

> In the task of constitutional interpretation, special considerations have to be applied. The Constitution is not an ordinary enactment of the legislature; in the words of Chief Justice Marshall in *M'Culloch v. The State of Maryland* (U. S. Reports 4 Low Ed. 597 at 602) we must never forget that it is a constitution we are expounding. The Constitution of Ceylon is contained in a written document given to the people of this country by Her Majesty the Queen and contains provisions which no doubt have been framed in the light of existing legislation and the constitutional development of the country as it existed in 1947. The constitution was intended not only as a document that was to be efficacious in 1947 but was intended to serve future generations of the subjects of the country under changing conditions. Law is never static and must develop with changing times and it should be the endeavour of all persons interested in the progress of the country to ensure that changing legislation is always in conformity with the provisions of the Constitution.
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> Having regard to these general principles it will now be useful to consider the special considerations that have to be adopted in dealing with the task of constitutional interpretation.
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> Firstly, in dealing with an enactment the constitutional validity of which is in issue, there is a presumption in favour of validity and the Court will not rule an enactment to be ultra vires unles the invalidity is clear beyond doubt.
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> Secondly, the Court must have regard to its special character as organic law and note that constitutional provisions are usually contained in terms of a general nature. Most constitutions deal with the framework of government. They do not contain provisions which are found in statutes passed in the normal exercise of legislative powers. Therefore when the question arises whether a term in the Constitution should be used in a narrow sense or given a broader interpretation, the Court should be inclined to use it in the latter sense unless there is something in the context or the rest of the Constitution which militates against such view.
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> In *Barter v. Commissions of Taxation (N. S. W.)* (1907) Vol. 4, Pt. 2 C. L. R. 1087 at 1105 Griffith, C. J. quoted with approval of the observations of Story J. in *Martin v. Hunter's lessee*.
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> "The Constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task.
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> This instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable

29. (1968) 71 N. L. R. 481 at 488 to 492.

> to effectuate the general objects of the charter; and restrictions and specification, which, at the present, might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.
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> Thirdly, being organic law, cast in broad and general terms, it has always to be borne in mind that the framers of the Constitution intended to apply it to varying conditions brought about by later developments. This does not mean that the meaning of the legal expression changes, but having regard to its generic form it is capable of being adapted to new situations. The rule of generic interpretation is one that is commonly used not only to ordinary enactments, but also to constitutional documents.
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> Finally, the Courts should give due effect to the declared intention of the legislature in seeking to interpret a document such as the Constitution. In the words of the present Chief Justice in *Ranasinghe v. The Bribery Commissioners* (1962) 64 N. L. R. 449 at 450, in examining an enactment with reference to any alleged Constitutional invalidity, a Court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible".

If the approach of Alles J. is adopted in this context the words "as far as may be" must be given a wide interpretation so as to permit adaptation of British conventions. It must be emphasised that such adaptation must take place not arbitrarily, but would be legitimate only in exceptional circumstances or due to the pressure of local conditions. The analysis to follow of the working of conventions in the constitutional history of Ceylon illustrates that such a wide interpretation is both desirable and necessary.[30]

(d) The effect of Ceylon conventions

As a constitution grows it develops its own conventions.[31] Thus it is permissible for a series of local precedents to modify British conventions regarding Cabinet government and the conduct of the Prime Minister, so that in course of time we would look not only to British conventions, but also to local conventions. But it must be emphasised that this is legitimate *because* British conventions governing these subjects have not been specifically incorporated, but arise by implication.[32] It is specifically enacted in section 4 (2),[33] that the Governor-General must follow British conventions "as far as may be". Therefore local precedents, except where British conventions have legitimately been adapted within the meaning of the words "as far as may be" would not be very relevant in future circumstances. Thus if the Governor-General *wrongly*

30 See particularly the analysis of problems which arose when Mrs. Bandaranaike was appointed Prime Minister, below at p. 12

31 See *dicta* of Alles J. in *Peiris v. Perera*, *op. cit.* quoted above

32 See analysis above

33 Quoted above

applies a British convention, as it is submitted he may have done in 1960,[34] which cannot be regarded as an adaptation within the meaning of the words "as far as may be", this cannot be counted as a precedent in future situations.

The fathers of the Constitution of the United States envisaged that the members of the Electoral College elected by popular vote in the States would use their own discretion in recording their vote for President. But by convention which has altered the letter of the law, the electors record their vote on the basis of the majority vote in the State.[35]

Rules stated in the Ceylon Constitution itself[36] have, subject to one exception,[37] not been modified by conventions. The *dicta* quoted above of Alles J. in *Peiris v. Perera* does not discount such a possibility. But in a highly legalistic age such modification is rather unlikely.

III. THE APPLICATION OF CONVENTIONS IN THE CONSTITUTIONAL HISTORY OF CEYLON

(a) Vacancy in the office of Prime Minister

When Mr. D. S. Senanayake died in 1952, Mr. Dudley Senanayake resigned in 1953 and Mr. S. W. R. D. Bandaranaike was assassinated in 1959, a vacancy arose in the office of Prime Minister during the continuance of a Parliament,[38] and the burden of appointing a successor devolved on the Governor-General. (It must be noted that the considerations which guide the Governor-General in this situation are very different from those which arise when the Governor-General has to appoint a Prime Minister after a General Election or following a defeat of the government party in Parliament).

Jennings points out[39] that there is no convention that the Leader of the House should be appointed. When Mr. Dudley Senanayake was appointed in 1952 there was some criticism because there was doubt whether he could be regarded as the recognised leader of the majority group, since Sir John Kotelawela was the Leader of the House and a more senior politician.[40] But Mr. Senanayake was acceptable to the majority of the government parliamentary group. The appointment of Sir John Kotalawela in 1953 and Mr. W. Dahanayake in 1959

34 See below at pp. 19 - 31.

35 A. W. R. West, *American Government*, (1951), p. 134.

36 As distinct from rules incorporated by reference or implication, see discussion above of *The reception in Ceylon of the conventions of the British Constitution.*

37 Discussed below at pp. 18 - 19.

38 Note meaning of *Parliament* in this context - a Parliament comes into existence after a General Election and endures until it is dissolved either by the Governor-General on the advice of the Prime Minister or after five years by effluxion of time.

39 W. I. Jennings, *Constitution of Ceylon*, (1953) pp. 110 - 12.

40 See A. J. Wilson in (968), Modern Asian Studies, 193 at 213.

were not controversial.[41] Jennings says[42] that the Governor-General may consult the outgoing Prime Minister and elder statesmen, but the ultimate decision is his, and it may be very controversial. The appointment by the Queen of Sir Alec Douglas-Home in 1963 was strongly disputed within the Conservative party on the grounds that he was not the leader acceptable to the majority of the party. Such internal strife and dissension has a demoralising effect on the party, and a party divided within itself can scarcely hope to govern effectively, and retain the confidence of the electorate.

Some political parties in other countries, immediately elect a party leader when a vacancy occurs, following a specified and preordained procedure. This procedure indicates the persons entitled to vote. The members of the government party in the lower and upper houses, the members of the party Executive Committee, representatives of party branch unions and of youth groups, generally would claim the right to participate in an election. But if all these elements are represented, the procedure becomes cumbersome and prolonged, and the result is that an election cannot be completed within a reasonably short time- the period within which a Prime Minister must be appointed. It appears that the most popular method adopted, which is also the most expeditious, is for the elected members of the government party in Parliament to be vested with the power of selecting the party leader. This is the practice adopted by the three major parties in Britain today. In such a situation the task of the Head of the State is eased, because he does not bear the responsibility for the decision. The possibility of controversy (and with it party strife and dissension) is diminished, since the position of a democratically elected party leader is less likely to be questioned than of one nominated on the basis of the opinion (which cannot be substantiated) of the Head of State that he is the most influential and acceptable parliamentarian in the party.

In Ceylon it is unfortunate that except during the Annual Sessions of the party, neither the United National Party nor the Sri Lanka Freedom Party have the machinery to elect a party leader. It is open to the party high command to take steps to remedy this situation. It is important that if an election of a party leader is to be held the rules governing the election should have been laid down in advance. If not, when a vacancy occurs, any attempt to lay down procedure will inevitably lead to allegations that the procedure laid down had the effect of favouring a particular candidate, and each candidate will suggest a procedure that favours his chances of victory.

(b) The choice of a Prime Minister in July 1960

The Sri Lanka Freedom Party, whose acknowledged popular leader was Mrs. Sirima Bandaranaike, won nearly half the seats at the General Election held on July 20th 1960 and the Governor-General invited Mrs. Bandaranaike to form

41 Controversy soon overtook Mr. Dahanayake, but his appointment was not questioned at the time it was made when he had the support of the entire Cabinet. See further A. J. Wilson in (1968) Modern Asian Studies, 193 at 213.

42 W. I. Jennings, *Cabinet Government*, 3rd. Ed. (1959), p. 27.

a government. Mrs. Bandaranaike was not a member of either of the Chambers of Parliament and she was therefore nominated by the Governor-General (presumably on her own advice) as a Senator. This incident raised three constitutional issues:

(i) Did the Governor-General act properly in appointing as Prime Minister a person who was not a member of either of the Chambers of Parliament ?

(ii) Was it proper for Mrs. Bandaranaike to obtain nomination to the Upper Chamber, and avoid seeking election to the House of Representatives?

(iii) Was it proper for the Prime Minister to advise the Governor-General to appoint her as a Senator?

(i) *The Appointment of a Prime Minister who is not a member of either House:* S. A. de Smith says:[43]

> British conventions were *prima facie* applicable..... I have failed to discover any statement in any modern work on the British Constitution which even mentions the possibility of appointing as Prime Minister a person who is not a member of either of two Houses of Parliament. I should nevertheless be prepared to contend that such appointment might be constitutionally proper in highly exceptional circumstances; it is not at all certain, however, whether those circumstances were present in Mrs. Bandaranayake's case.

In 1963 the Queen appointed Lord Home (a member of the House of Lords) Prime Minister, on the understanding that he would seek election to the Commons. Home thereupon renounced his peerages and vacated his seat in the Lords, and was elected to the House of Commons at a bye-election three months later. In the context of the Ceylon episode of 1960, it is significant that *for three months Britain had a Prime Minister who was not a member of either of the Houses of Parliament.* By comparison, Mrs. Bandaranaike was Prime Minister without being a member of either of the Chambers of Parliament, for only a matter of days. The difference between the two cases, is that while at the time of appointment, Lord Home was a member of Parliament, Mrs. Bandaranaike was not, and shortly after appointment, Home ceased to be a member of either House of Parliament and Mrs. Bandaranaike became a member of the Senate.

While the test that de Smith lays down is unobjectionable, it is difficult to agree with his application of this test to the facts. It could be maintained that the "highly exceptional circumstances" referred to in the above quotation were present. Mrs. Bandaranaike was unquestionably the leader of the Sri Lanka Freedom Party and the mandate of the electorate was given to her.[44] There was no other person who could contest her position whom the entire Party would have accepted. Thus even on the assumption that British conventions were applicable it may be possible to argue that the Governor-General did not act unconstitutionally.

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43 *The New Commonwealth and its Constitutions* (1964) at p. 85.

44 See *ibid.*

But there were two other relevant factors which may be cited in support of the Governor-General's decision. Section 4 (2) only makes British conventions applicable "as far as may be" and these words may be construed so as to confer on the Governor-General a power to adapt British conventions in the light of local conditions or exceptional and unforeseen circumstances which may arise.[45] Section 49 (2) of the Constitution enacts that a Minister may hold office for a period of four months, without being a member of either Chamber of Parliament. The word "minister" can be construed as including the "Prime Minister". It is submitted that the propriety of Mrs. Bandaranaike's appointment cannot be questioned because of section 49 (2).

(ii) Must a Prime Minister in Ceylon be a member of the House of Representatives?: Constitutional lawyers were not certain whether the precedents (the choice of Baldwin in preference to Lord Curzon in 1923 and the choice of Churchill in preference to Lord Halifax in 1940) gave rise to a convention that the Prime Minister should be a member of the Lower House.[46] But the immediate resignation from the Lords of Sir Alec Douglas-Home in 1963 following his appointment as Prime Minister and his subsequent election to the Commons, may be regarded as establishing the convention.

The Prime Minister is not under the same express legal obligations to follow British conventions, as the Governor-General is.[47] But this fact alone cannot render constitutionally correct the Prime Minister's decision to obtain nomination to the Upper House, instead of seeking election to the House of Representatives. There are very good reasons, as valid in Ceylon as in Britain, which render it desirable that the Prime Minister should be a member of the elected House.

> The Government owes a responsibility to the House of Commons alone. The composition of the House determines the nature of the Government. A vote in that House can compel the Government either to resign or to advise a dissolution. The Prime Minister is not merely Chairman of the Cabinet, he is also responsible for the party organisation. That organisation matters in the House of Commons and does not matter in the House of Lords. It is, in practice, essential that the Prime Minister should have his finger on the pulse of Parliament; and that is the House of Commons. The most important reason is, however that the Opposition would insist on having the Prime Minister in that House in order that he could be cross-examined and criticised. He, in his turn, would want to be in that House in order that he might defend himself and his Government in the forum in which he is most strongly attacked.[48]

45 See discussion above at pp. 5 - 10.

46 See Hood Phillips. *op. cit.* p. 293; Wade and Phillips, *op. cit.* p. 80-81. W. I. Jennings, *Cabinet Government*, (1959), pp, 23-24. See also discussion above of how a convention becomes established.

47 See above at p. 7

48 W. I. Jennings, *Cabinet Government*, (1959), at p. 20.

(*iii*) *Mrs. Bandaranaike's advice to the Governor-General to appoint her Senator*: It would perhaps be improper for an United Kingdom Prime Minister to advise the Queen to confer any title or dignity upon himself.[49] The Ceylon Senate is not the House of Lords and nomination to the Senate unlike appointment to the House of Lords does not carry with it a peerage or other title. But this awkward situation which must necessarily affect the dignity of the office of Prime Minister need not have arisen if Mrs. Bandaranaike had sought immediate election to the House of Representatives.

(c) The appointment of a Prime Minister in March 1960 and the dissolution of Parliament in April 1960

No party was returned with an absolute majority in the House of Representatives after the general election which was held on 19th March 1960. The party representation in the House of Representatives was as follows:- United National Party 50; Sri Lanka Freedom Party 46; Federal Party 20; Mahajana Eksath Peramuna 10; Lanka Sama Samaja Party 10; Lanka Prajathanthara Pakshaya 4; Communist Party 3; Jathika Vimukthi Peramuna 2. There were six members returned as "Independents". The Prime Minister, Mr. Dahanayake, the leader of the Lanka Prajathanthara Pakshaya resigned. The Governor-General after conferring with Mr. C. P. de Silva (leader of the SLFP) called upon Mr. Dudley Senanayake (leader of the UNP) to form a Government, which he did. Mr. Senanayake's government was defeated on April 22nd on an amendment to the vote of thanks to the Queen's speech by 93 votes to 61. Mr. Senanayake on April 23rd advised the Governor-General to dissolve Parliament and the Governor-General accepted this advice.[50] These events raised three contentious constitutional issues: (i) whether Mr. Dudley Senanayake should have been appointed Prime Minister; (ii) whether Mr. Senanayake acted properly in asking for a dissolution, instead of resigning; (iii) whether the Governor-General should have acceded to Mr. Senanayake's request for a dissolution.

(*i*) *The appointment of Mr. Dudley Senanayake as Prime Minister*: The British convention applicable to the appointment of a Prime Minister after a general election is that the Head of State should call upon *the party leader who appears best able to command the support of a majority of members of the Lower House.*[51] In a situation where no single party has obtained an absolute majority of the seats in Parliament, it is important to note that the person capable of commanding such support is not necessarily the leader of the party with the largest number of seats. The following illustration will elucidate the type of problem which may arise. After a general election the party position is: Party A 60 seats; Party B 45 seats; Party C 35 seats and other parties 11 seats. The

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49 S. A. de Smith, *op. cit.* p. 85.

50 See *Ceylon Daily News*, 24. 4. 1960, p. 1.

51 S. A. de Smith *op. cit.* pp. 94-95; O. Hood Phillips, *op. cit.* p. 85; Wade and Phillips, *op. cit.* p. 80.

policies of Party A have isolated it from the other parties, while Party B and party C have more in common. In such a situation the Head of State would be well advised to wait for a few days, watch the movement of political events, invite party leaders and other influential politicians to meet him individually and collectively, and ascertain their attitudes to the other parties, and discuss with them and watch their reaction to possible coalition governments.[52] If Party A is isolated because of its policies, the correct course of action would be to call upon a person capable of leading a coalition consisting of Parties B and C.

The party position after the March 1960 election has been stated above. According to the above analysis it appears that the Governor-General would not have acted correcily if he called upon Mr. Dudley Senanayake *merely* on the basis that his party had obtained the largest number of seats. It is possible that if the Governor-General before appointing a Prime Minister had met the leaders of parties[53] (i. e. of the Federal Party 20; LSSP 10; CP 3; and JVP 2) they would have indicated that they would be more inclined to support Mr. de Silva,[54] who with the appointed members would have the support of 87 members in a House of 157, and that it would have been apparent that no party was inclined to support the UNP. The fact that the UNP was isolated appeared beyond doubt from the events in the months following the formation of the government, when the UNP, despite being in office and despite Mr. Senanayake frequently asserting that he would dissolve Parliament if defeated, [55] was only able to attract the support of 2 SLFP members who crossed over[56] and 2 or 3 Independents. (On the two occasions when the 1960 Parliament divided, the government was defeated by 60 to 93 and 61 to 93. The UNP obtained 50 after the polls and the Prime Minister recommended the appointment of 6 members).

It is rumoured that the Governor-General called Mr. Senanayake to form a government after being assured by three veteran members of the UNP that the Federal Party had agreed to support Mr. Senanayake. [57] The Federal Party in an official statement outlining their past relationship with the UNP, and in particular referring to the UNP opposition to the Bandaranaike-Chelvanayakam Pact, denied that at any time they had given an assurance of support to the UNP. [58] If the Governor-General had acted on information without consulting the leader

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52 See O. Hood Phillips, *op. cit.* p. 290

53 The Governor-General should have done this, see O. Hood Phillips, *op. cit.* p. 290

54 See A. J. Wilson in (1960) *Ceylon Journal of Historical and Social Studies*, at p. 200 who states that he interviewed the leaders of the FP, LSSP, CP and JVP, and that these leaders stated that they would have supported a SLFP Government. The MEP was the only party which was not willing to commit itself.

55 See *Ceylon Daily News* of 29-3-1960, p. 1; *ibid.* of 7-4-1960, p. 1; *ibid.* of 22-4-1960, p. 1

56 See *Ceylon Daily News* of 22-4-1960.

57 Statement by N. M. Perera in *Ceylon Daily News*, 4-4-1960, p. 4; See also A. J. Wilson in (1968) Modern Asian Studies, 193 at 212.

58 See official statement released by Secretary to the Federal Party, *Ceylon Daily News*, 18-4-1960; See also *Ceylon Daily News*, 4-4-1960.

of the Federal Party he would have been guilty of a serious error. On the other hand it would have been equally improper if the Governor-General had called upon Mr. Senanayake as leader of a party with 50 members to form a Government without evidence that he could hope to command a majority in the House. On the above analysis of the facts, and the relevant legal principles, it appears that if the Governor-General had called upon the party leader best able to command the support of a majority of members of the House of Representatives, after proper consultation, his choice would have fallen on the leader of the SLFP.[59]

Wade and Phillips[60] take the view that "the support of a party or coalition which may be expected to command a majority in the House of Commons *is a condition precedent to acceptance of the office*" (i. e. of Prime Minister). On this view, Mr. Senanayake should never have been appointed.

(*ii*) *The request for a dissolution by Mr. Dudley Senanayake in April 1960:* There have been instances in British constitutional history where a Prime Minister who is called upon to form a government hands back his commission where he is unable to command adequate support. [61] Thus in the general election in December 1923 the Conservative Government under Baldwin won the largest number of seats, but failed to win an overall majority (Conservatives 258, Labour 191, Liberals 159) and was defeated on an amendment to the Address in reply to the King's Speech by a combination of Labour and Liberal votes. Baldwin *resigned* and the Labour leader formed a government with the discriminating support of the Liberals.[62]

The British situation of 1923 is an almost exact parallel to the Ceylon episode of March – April 1960, except that Mr. Baldwin had the support of a greater part of the House, (42 per cent, as against 35 per cent by Mr. Senanayake). Mr. Senanayake at no stage commanded the support of more than 55 *elected* members in a House of 151 elected members. His government was not able to pass a single bill or resolution in the House and was defeated twice on the only two occasions when the House divided. In the circumstances, the course of conduct open to Mr. Senanayake was to resign (as Mr. Baldwin did in 1923) and hand back his commission to the Governor-General as soon as it became apparent to him that he could not form an administration which could effectively govern.

Dr. N. M. Perera argued that until he obtained a vote of confidence from the House of Representatives Mr. Senanayake was only a Prime Minister-designate.[63]

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59 See further facts stated below at pp. 16-17, 24-25. Note particularly the degree of support offered to the leader of the SLFP by the leaders of the other parties.

60 Wade and Phillips, *op. cit.* p. 80.

61 See W. I. Jennings, *Cabinet Government*, (1959) Chapter II.
G. Wilson, *Cases and Materials on Constitutional and Administrative Law*, (1966) p. 47.

62 G. Wilson, *op. cit.* p. 47

63 Article in *Ceylon Daily News*, 4-4-1960, p. 4.

Therefore it appears that the request for a dissolution which followed the defeat of the Speech from the Throne was improper, and this can be gauged from the fact that in British Constitutional history there is not *one* example of a Prime Minister who has asked for a dissolution without *ever* having possessed a majority in the House, when there was the possibility of an alternate government.[64] Since this is not an issue which has occurred or is likely to occur in Britain, only one authority had in 1960 discussed it, expressing the view that "no government defeated on the address, or before, at the beginning of the first session of a new Parliament is entitled to a dissolution".[65] It is perhaps significant that the view that a Prime Minister who never had a majority in the House is not entitled to a dissolution, is expressed for the first time in the seventh edition in 1965 of a leading work on Constitutional law.[66] The earlier editions did not refer to the issue, and it may be that this addition was made with the Ceylon episode of 1960 in mind.

It appears that Mr. Senanayake accepted the commission to form a government not for the purpose of governing the country, but for the purpose exercising the power of dissolution and preventing the Sri Lanka Freedom Party from forming a government. Wilson[67] takes the view that the Prime Minister's frequent assertions that he would advice a dissolution if defeated in Parliament was used as a threat to prevent members who did not want to face another General Election from voting to defeat the government and to persuade them to join the government group.

But three points must be noted in evaluating the course of conduct chosen by Mr. Senanayake. While the Governor-General is under an express obligation to follow British convention, in the case of the Prime Minister the obligation must be implied.[68]

It may with some confidence be asserted that no other Ceylonese political leader in the same situation as Mr. Senanayake would have acted differently. One of the problems involved in the setting up of Westminster institutions in a foreign environment is that traditions and standards of parliamentary conduct cannot be transplanted. As such, it is perhaps too much to expect a politician to place considerations of parliamentary government and tradition above party interests.

During the crisis, it was unfortunate that an impartial and disinterested voice was not heard. The supporters of the UNP and the SLFP were concerned with finding constitutional precedents and views which supported their party interests. The newspapers too were heavily committed to one or the other of

64 See W. I. Jennings, *Cabinet Government*, (1959) Chapter II, for situations in which a Prime Minister resigned when defeated, instead of seeking a dissolution.
65 E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, 1953, p. 266
66 Wade and Phillips, *op. cit.* p. 118
67 A. J. Wilson in (1960) *Ceylon Journal of Historical and Social Studies*, p. 196
68 See above

the political parties and there was no newspaper which was in a position to discuss the issue without bias in an objective and disinterested fashion. Professor S. A. de Smith of the University of London who wrote a short article to the *Ceylon Daily News*[69] could scarcely be expected to be familiar with the local political climate, party lines and the background to the situation. Dr. N. M. Perera alleges that the newspaper which solicited de Smith's views may have misrepresented the facts to him.[70] Such a politically charged climate makes it more difficult for a politician to rise above party interests.

Section 11(2) of the Constitutional Order in Council enacts that six members may be appointed by the Governor-General after every general election to represent any important interest in the Island which is not represented or is inadequately represented. This power has in practice been exercised on the advice of the Prime-Minister because of section 4(2).[71] This means that in the type of situation which arose in March 1960 when no party obtained an absolute majority, the first Prime Minister to be called upon increases his majority by six. This has the effect, in a situation where votes are counted, of conferring a numerical majority of twelve, e. g. when the Senanayake government was defeated by 60 votes (which included the 6 appointed members) to 93, the majority was 33; if the appointed members had voted on the other side the voting figures would have been 99 to 54 and the majority would have been 45. Thus where no party obtains an absolute majority and the parties are numerically evenly balanced the choice of a Prime Minister by the Governor-General is very significant. This factor places a greater responsibility on the Governor-General, than is placed on the Queen in a similar situation. This makes it all the more necessary for the Governor-General, after due deliberation and discussion, to make a considered choice in the first instance.

Section 11 (2) of the Constitution Order in Council of 1946 enacted:

> In addition to the Members specified in subsection (1) of this section, there shall be six Members appointed by the Governor-General after every general election to represent any important interest in the Island which in his opinion is not represented or is inadequately represented.

Section 2 and 6 of the Ceylon Constitution (Special Provisions) Act, 1954, which was to come into force on a date in 1966 to be appointed by the Governor-General by Order published in the Gazette, amended Section 11 (2) so that it read:

> Where after any general election the Governor-General is satisfied that any important interest in the Island is not represented or is inadequately represented, he may appoint any persons, not exceeding six in number, to be Members of the House of Representatives.

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69 *Ceylon Daily News*, 1-4-1960, p. 5; discussed below

70 See *Ceylon Daily News*, 29-3-1960, p. 1 and 22-4-1960, p. 1

71 Quoted above

It appears that the Governor-General on a construction of section 11 (2) of the original Order in Council had a discretion to act on his own initiative. The original section 11 (2) enacts that the Governor-General should make the appointment "according to his own opinion." Section 4 (2) of the Constitution states that the obligation on the Governor-General to follow British conventions is subject to the "provisions of this order." Therefore the words "according to his own opinion" must take precedence over section 4 (2).

But it appears that the express words of the original 11 (2) were qualified by a *convention established by local precedent*[72] that the Governor-General acts on the advice of the Prime Minister. But with one exception (Mr. Dudley Senanayake in 1960) the advice has always been tendered by a Prime Minister with a decisive majority in the House. The amendment to 11 (2) deleted "in his own opinion" and substituted the words "where . . . the Governor-General is satisfied . . ." This phraseology also seems to confer on the Governor-General an element of personal discretion. It is open to the Governor-General, relying on the words of section 11 (2) which still confers on him an area of discretion, to establish a practice that he will accept advice only from a Prime Minister who enjoys the confidence of a majority in the House. Likewise, a Prime Minister who does not enjoy such a majority should not embarrass the Governor-General by making such a request. Such a convention would not be in accordance with the strict letter of the law but would be in the interests of constitutional government. Such a growth of convention is envisaged by the *dicta* quoted above of Alles J in *Peiris v. Perera*.

(iii) The dissolution of Parliament by the Governor-General in 1960 on the advice of Mr. Dudley Senanayake: It is not doubted that a Head of State has an ultimate residuary power to refuse to accede to a Prime Minister's request for dissolution.[73] It is, however, not at all clear in what circumstances this power may be exercised. Some precedents and the views of constitutional authorities may be quoted, before the constitutional propriety of the Governor-General's conduct in 1960 is analysed.

Precedents governing refusal by a Head of State to advise a dissolution In Australia in 1909 the Governor-General refused a dissolution of the House of Representatives because an alternative Government was possible owing to a coalition between the two minority parties and because the Parliament had only a year to run.[74]

In Tasmania in 1950 the Government had one supporter more than the Opposition party. There were two independent members, one of whom normally voted with the Opposition and the other was the Speaker. Mr. Speaker had

72 See discussion above at p. 6

73 See authorities discussed below.

74 W. I. Jennings, *The Constitution of Ceylon*, (1953), pp. 69.
See also H. V. Evatt, *The King and his Dominion Governors*, (1951), pp. 30-36

announced on his appointment that he would normally give his casting vote for the Government. During the recess, the Opposition announced its intention of moving a motion against the Government and Mr. Speaker said that he would support it. Having thus lost his majority, the Premier asked for a dissolution without meeting Parliament. The Governor asked for time to consider the matter and, sending for the Leader of the Opposition, asked him whether he would be prepared to form a Government if a dissolution was refused and the Government resigned. The Leader of the Opposition said he would not, and accordingly the dissolution was granted.[75]

In September 1925 in Canada the Liberal Government under Mr. Mackenzie King had failed to secure a majority of seats at the general election but had managed to remain in power with the support of the Progressive and Labour parties. In June 1926 the Governor-General, Lord Byng, refused the Prime Minister's request for a dissolution after he had ascertained that Mr. Meighen, the leader of the opposition Conservative party, was prepared to form a Government with the support of the Agricultural party. Mr. Mackenzie King therefore resigned and Mr. Meighen was invited to form a Government. Within three days, the new Conservative Government was defeated in the House by one vote, after the Agricultural Party had failed to support it. When the Conservative Prime Minister in his turn asked Lord Byng to dissolve Parliament, he granted his request. At the election, the Liberals were returned with a large majority and their success was regarded as a vote of censure on Lord Byng who was criticized for granting to the Conservatives what he had refused the Liberals.[76]

On the outbreak of war in 1939, General Hertzog, then Prime Minister of the Union of South Africa, proposed to his Parliament a resolution that South Africa should declare neutrality. This was opposed by General Smuts, and after debate General Hertzog was defeated in the House of Assembly by a majority of 13. General Hertzog thereupon advised the Governor-General, Sir Patrick Duncan, to dissolve Parliament. Sir Patrick Duncan refused to accept the advice and sent for General Smuts, who formed a Government which carried on successfully albeit with a small majority, until that Parliament expired by effluxion of time in accordance with statute in 1943.[77]

In Victoria in 1872 the Governor refused a dissolution.[78]

The views of contitutional authorities. Jennings says.[79]

> The position may be summarised by saying that in all normal circumstances the Governor-General must accept the advice of his Prime Minister, but that there may be cases where he might feel a dissolution to be unnecessary and to be almost if not quite, an abuse of his legal power to dissolve. It would be impossible to indicate the cases in advance; but they might occur, for instance,

75 W. I. jennings, *The Constitution of Ceylon,* (1953), p. 70.
76 G. Wilson, *Cases and Materials on Constitutional and Administrative Law, op. cit.* p. 26.
77 *Ibid,* p. 25
78 H. V. Evatt, *op. cit.* p. 219
79 W. I. Jennings *op. cit.* p. 71.

> where a Prime Minister had lost the support of his own colleagues and of his party, so that a perfectly satisfactory Government could be formed without him and without a dissolution; or it might occur where a Government, having failed to get a majority (or an effective majority) at one election proceeded almost immediately to advise a second dissolution. These must be taken as examples only, and even as examples they might not be applicable; for instance, two elections in rapid succession might be the only means of persuading the electorate to make up its mind which Government it wanted - as in the United Kingdom in 1923 and 1924.

Jennings specially refers to Ceylon and says: [80]

> The question does not often arise in practice, because if the Cabinet has a majority in the House of Commons (or the House of Representatives) it is in a strong position. If the Queen (or the Governor-General) does not accept the advice, the Cabinet can resign. If their majority holds, no alternative Government having a majority can be formed, and accordingly the new Government has to advise a dissolution in the hope of getting a majority. Thus the Queen (or the Governor-General) has to accept the dissolution. This may not happen quite so easily in Ceylon, for it is unlikely that party lines will always be so strict as in the United Kingdom, and in all probability if the Governor-General refused it would be because he thought that an alternative Government could be formed. This was done in South Africa in 1939.

Jennings also refers to the Australian incident of 1909 referred to above and says "the Governor-General refused a dissolution because an alternative Government was possible owing to a coalition between two minority parties (a situation which might easily arise in Ceylon).[81] Hood Phillips[82] and Jennings[83] agree that even if there is a rule that a sovereign has no option but to accept to dissolve, this rule assumes the continuance of the two party system. "If the major parties break up, the whole balance of the Constitution alters, and then possibly the Queen's prerogative becomes important".[84]

A letter in *London Times* by Senex[85] (identified as the Private Secretary to George VI)[86] reads:

> . . . . . it can be assumed that no wise Sovereign . . . . . would deny a dissolution to his Prime Minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons. When Sir Patrick

80 *Ibid.* pp. 67 - 68

81 *Ibid.* p. 69

82 O. Hood Phillips, *op. cit.* p. 111

83 W. I. Jennings, *Cabinet Government*, (1959), pp. 427 - 28

84 *Ibid.*

85 *The Times*, (London), 2-5-1950

86 G. Wilson, *Cases and Materials on Constitutional and Administrative Law*, (1966), p. 26, note 2

> Duncan refused a dissolution to his Prime Minister in South Africa in 1939, all these conditions were satisfied; where Lord Byng did the same in Canada in 1926, they appeared to be but in the event the third proved illusory.

Wade and Phillips say:[87]

> If the Sovereign can be satisfied that (1) an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it followed closely on the last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government for a reasonable period with a working majority, the Sovereign could constitutionally refuse to grant a dissolution to the Prime Minister in office. It will be seldom that all these conditions can be satisfied. Particularly dangerous to a constitutional Sovereign is the situation which would arise if having refused a dissolution to the outgoing Prime Minister he was faced by an early request from his successor for a general election.

Wade and Phillips also say:[88]

> Whether the convention as to the right to a dissolution would survive the presence of three parties, each with a fair proportion of seats, it is difficult to determine. It may be that the Sovereign would refuse, should the occasion arise, to grant a dissolution at the request of a Prime Minister who had never had a clear majority in the House of Commons. But what happened in 1924 is a precedent to the contrary.[89]

Forsey[90] has dealt with the subject in some detail. He states: that a Prime Minister would not be entitled to a dissolution unless (a) no alternative Government was possible or (b) some great new issue of public policy had arisen or (c) there had been a major change in the political situation or (d) the Opposition had explicitly invited or agreed to dissolution. Forsey adds that "the same considerations would hold true even for a Government with a larger majority, and at any time during the first session of a new Parliament".[91] Even where a great new issue of public policy has arisen, he is of the view that "the Crown would be justified in refusing a dissolution if supply had not been voted, or a re-distribution or franchise act had not yet had time to come into operation, provided an alternative Government could be found, or provided the issue was not one which brooked no delay, e.g. a mandate for the despatch of troops overseas."[92] Forsey also says, "no Government defeated on the Address, or before, at the beginning of the first session of a new Parliament is entitled to a dissolution."[93]

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87 Wade and Phillips, *op. cit.* p. 82

88 *Ibid.* p. 118

89 It is submitted below at pp. 26-27 that the 1923 episode was not a contrary precedent

90 E. Forsey *The Royal Power of Dissolution of Parliament in the British Commonwealth*, (1943), p. 262

91 *Ibid.*

92 *Ibid.*

93 *Op. cit.* p. 266

The views of academicians expressed in the Ceylon newspapers in the days and weeks before the dissolution may in this context be considered. The burden of Professor S. A. de Smith's argument[94] was that the Governor-General should accept the advice to dissolve "notwithstanding that this would involve two general elections within a few months", unless he felt that "there were the strongest grounds for believing that an alternative government capable of maintaining a parliamentary majority for a substantial period of time could be formed without a dissolution". De Smith apparently thought that the Governor-General would be placed in a difficult situation and accused of partiality if the Prime Minister appointed, following a refusal to grant a dissolution, was defeated and asked the Governor-General to dissolve Parliament.

Mr. J. A. L. Cooray,[95] Advocate and Lecturer at the Ceylon Law College expressed a more extreme view. While accepting the latter's general conclusions, Cooray was of the view that "the mere fact that some sort of alternative government is possible, does not and should not as Evatt points out, prevent the grant of a dissolution by the Queen's Representative". Cooray placed much emphasis on the British precedent of 1923. He says:[96]

> . . . none of the three main parties at that time (Labour, Conservative and the Liberals) had an absolute majority in the House. In that situation Mr. Asquith, the leader of the Liberal Party, suggested "that the time had come when it should be accepted as a constitutional convention that, in the event of a party taking office in a minority and being defeated in the Commons, it should not be entitled as of right to a dissolution, but the Crown should be at liberty to consider the possibility of finding a leader who would consent to take office and carry on the administration without a dissolution". Mr. Asquith argued that the prerogative of the Crown meant that, when a second dissolution was called for very soon after an earlier one, the Crown was "not bound to take the advice of a particular Ministry to put its subjects to the tumult and the turmoil of a series of general elections so long as it can find other Ministers who are prepared to give it a trial". He went on to state more explicitly that on the defeat of the Labour Government, which was in a minority in the House, the King would be at liberty to refuse a dissolution to Mr. MacDonald, the Labour Prime Minister, if it were asked for, and that an effort should be made to find a Ministry ready to carry on, and avoid a fresh dissolution of Parliament so soon after the election of 1923.
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> The comments of Keith and Laski on this episode are so relevant to us at the present time that they merit reproduction. Keith stated: "Serious consideration would have shown that, however, when the occasion arose in the particular political conditions, the King would be under every conceivable obligation to allow the ministry to take the verdict of the country. Mr. Asquith perhaps forgot that a dissolution is an appeal to the political sovereign and that when it is asked for every consideration of constitutional propriety normally

94 *Ceylon Daily News*, 1-4-1960, p. 5

95 *Sunday Times of Ceylon*, 10-4-1960, pp. 8-9, reproduced in J. A. L. Cooray, *Constitutional Government and Human Rights in a Developing Society*, (1969) at pp. 21-25

96 *Ibid.*

> demands that it be conceded. In fact the King did concede it without hesitation to Mr. MacDonald as had been clear even to many of Mr. Asquith's sympathisers long before the event took place. Laski also argued with great force that if the King had refused a dissolution to Mr. MacDonald and invited Mr. Asquith to form a Government, the latter being the head of a party even smaller than that of Mr. MacDonald would have been bound, in course of time, to be defeated also and to have requested a dissolution. To have granted it would have evoked once more the accusation that the King was discriminating between parties. In fact Laski went so far as to suggest that the emphasis upon what he called "the automatism of the prerogative" was the surest way to the preservation of royal neutrality, and further, that the safeguard against an unwise dissolution was the probability that the Government which sought it would be forced to pay the penalty by the country for so doing. That, he added, was the case with Mr. Baldwin in 1923 and with Mr. MacDonald in 1924.
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> Although this precedent cannot be said to have definitely settled the General question of refusal it clearly shows that a request for a dissolution will be refused only in very exceptional circumstances.

Cooray also referred to Dominion precedents and pointed out that they are not strictly applicable under our Constitution (which refers to United Kingdom conventions) and that Dominion usage in this matter has varied from the British in some degree.

Dr. A. J. Wilson and Dr. K. H. Jayasinghe[97] of the University of Ceylon thought that if Mr. Dudley Senanayake failed to get a vote of confidence from the House, the Governor-General must in the circumstances have summoned Mr. C. P. de Silva to form a Government, having assured himself that there was reasonable support from other parties at that time in the opposition for Mr. C. P. de Silva. Nicolson, Jennings, Keith, Carter and Forsey were quoted at various points to confirm the view that the Governor-General had the discretion to refuse a request for dissolution and that he should call on the leader of the opposition, in the circumstances, to form an alternative government.

The Prime Minister, Mr. Senanayake, frequently asserted that he had an absolute right to a dissolution and his statements received wide publicity. Mr. Senanayake relied heavily on the British precedent of 1924, which had been referred to.[98] Mr. Senanayake argued that if Mr. MacDonald with only 191 seats out of 615 (much less than his ratio) could have been allowed to dissolve, there was no reason for the Governor-General to refuse his request.

The Governor-General summoned the leaders of the Opposition parties to confer with him,[99] after Mr. Senanayake had tendered his advice. Mr. C. P. de Silva expressed his willingness to form a government. The leaders of the LSSP, CP and JVP agreed to support a SLFP government. The leader of the MEP

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97 Special Supplement of the *Tribune*, 22-4-1960, pp. III - IV. See also for a similar view, N. M. Perera in the *Ceylon Daily News*, 5-4-1960, p. 4.

98 *Parliamentary Debates (House of Representatives)* Vol. 38, Columns 178-180.

99 The information about the Governor-General's meetings with Opposition party leaders is extracted from an article by A. J. Wilson in the (1960) *Ceylon Journal of Historical and Social Studies*, pp. 195-210, who obtained the information from interviews with party leaders.

suggested that an interim Caretaker National Government should be formed. In all these cases, the Governor-General merely inquired from the leaders concerned what their attitude would be to a SLFP government. But the Governor-General inquired from Mr. Chelvanayakam, the leader of the Federal Party, whether he would be prepared to render unconditional support to a SLFP government for a period of two years. Mr. Chelvanayakam replied that his group had an understanding with the SLFP, that there was no reason for him to think that this understanding would not be honoured and that his group therefore would support a SLFP government not merely for two years but till the end of the term of Parliament. Shortly after meeting Mr. Chelvanayakam, the Governor-General dissolved Parliament. On the same day, the leaders of all opposition parties with the exception of the leader of the MEP issued the following joint statement following a meeting in the House of Representatives:

> We are unanimous in expressing our regret that His Excellency has thought it fit to dissolve the present Parliament a little over a month after the last General Election. In view of the fact that all Opposition parties, barring the MEP, had intimated to His Excellency quite clearly that an alternate government could be formed by the SLFP and that there was a reasonable possibility of it continuing, the dissolution of Parliament cannot be treated as being in the best interests of the country which has already suffered by the absence of an effective government for many months.[100]

Dr. A. J. Wilson in an analysis[101] made after the dissolution criticises the Governor-General's decision. He cites the views of Forsey (no government defeated on the Address is entitled to a dissolution[102]) and Jennings.[103] He points out that at the time of the dissolution supply had not been voted, and that following changes in the election law, the voting registers were in the process of being prepared - circumstances which, according to Forsey,[104] should have prompted the Governor-General to refuse a dissolution. About the 1924 British precedent[105] involving Mr. MacDonald, Wilson says that the King agreed with the utmost reluctance after he had ascertained from the leaders of the Conservative and Liberal parties that they themselves were unable or unwilling to form an administration[106] He also criticises the test laid down by de Smith,[107] and Cooray[108] as being too strict and points out that in another context de Smith had laid down a less strict test and said, "refusal of dissolution are generally considered

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100 See *Ceylon Observer*, 24-4-1960, p. 1.

101 A. J. Wilson in *Ceylon Journal of Historical and Social Studies*, (1960) pp. 187-207

102 E. Forsey, *op. cit.* See passages from Forsey quoted above

103 W. I. Jennings, *Constitution of Ceylon*, (1953) pp. 67-68
See passage from Jennings, quoted above

104 Forsey, *op. cit.* pp. 262-66. See passage from Forsey quoted above.

105 Discussed above. See passage from Cooray quoted above.

106 A. J. Wilson. *op. cit.* at p. 202, citing Jennings, *Cabinet Government*, (1959) p. 426.

107 See above.

108 See above.

proper not only where the request is capricious, but also where it can reasonably be supposed that an alternate government can be formed without a dissolution".[109] The test he suggests is that the Governor-General should not have dissolved Parliament if there was a reasonable supposition of an alternate government, and citing Forsey, he states that stability is not a condition for bringing an alternate government into existence. Applying the above test he states that the Governor-General acted unconstitutionally in dissolving Parliament and not calling upon Mr. C. P. de Silva to form a government. The Governor-General's question to the leader of the Federal Party[101] was in Wilson's opinion framed in such a way as to make a negative answer inevitable, because no party could be expected to give an assurance of unconditional support, and that an unsatisfactory answer " ..... would provide a suitable excuse for taking a course of action which had already been decided upon".[111] Wilson concludes [112] Sir Oliver Goonetilleke's action, however, exposed him to the charge of being partisan and of being guilty of unconstitutional conduct ..... His was indeed an unconstitutional act". But Wilson seems to have subsequently modified this view.[113]

De Smith comments rather ambiguously that the Governor-General's decision " ..... was constitutionally proper though possibly inexpedient in the circumstances ....."[114]

If it is accepted that a Prime Minister is not entitled to a dissolution (i) if his government is defeated on the Address in the first session of a Parliament [115] (ii) or if he was never able to command a clear majority in the lower House,[116] there would be no doubt that the Governor-General acted unconstitutioally. Prior to 1960 there was no precedent against these two propositions and it is submitted that such an approach is in accordance with reason and principle. But because it is clear that the Governor-General thought that these propositions were inapplicable, the issue must be analysed further in the light of the reasons which probably actuated him.

It may be assumed that the British precedent of 1924[117] strongly influenced the Governor-General. But there are many reasons why *the 1924 precedent was totally inapplicable to the circumstances of the 1960 dissolution*. Firstly, the dissolution was granted after the King had ascertained that no other party leader was willing to form a government.[118] Jennings says [119], "It is of course not true that the grant

109 Contribution by S. A. de Smith and O. M. Stone to Volume Five of Halsbury's Laws of England, entitled *Commonwealth and Dependencies,* (1953).
110 Stated above at p. 25
111 A. J. Wilson, *op. cit.* p. 201.
112 *Ibid* p. 207.
113 See A. J. Wilson in (1968) *Modern Asian Studies,* pp. 193, 213-14, 218
114 S. A. de Smith, *The New Commonwealth and its Constitutions,* (1964) p. 84.
115 E. Forsey, see passage quoted above
116 Wade and Phillips, see passage quoted above.
117 Discussed above. see passage from Cooray, quoted above.
118 W. I. Jennings, *Cabinet Government,* (1959) p. 426
119 *Ibid.* p. 428

of a dissolution to Mr. MacDonald in 1924 settled the issue.[120] George V could have taken no other decision". In Ceylon in 1960 the position was very different because Mr. C. P. de Silva was willing to form a government.

Secondly, Mr. MacDonald was the first ever Labour Prime Minister and Jennings says "The Labour Government could reasonably demand that it should ask the electors whether its record was not such as to warrant a majority." [121] Further the sympathies of the Crown were known to be with the Conservative party, and therefore it would be very inexpedient if the King refused a request from the first ever Labour Prime Minister.[122]

Thirdly, the events leading up to Mr. MacDonald's request are relevant.. After the General Election in 1923 the party positions were Conservatives 258, Labour 191, Liberals 159. The Conservative Leader resigned following a defeat in Parliament and then Mr. MacDonald was called upon to form a government.[123] If after the defeat of the Senanayake government, Mr. C. P. de Silva assumed office, was defeated and asked for a dissolution, the 1924 British precedent would have been an exact parallel. Thus a comparison of the position of Mr. Senanayake with that of Mr. MacDonald is very inexact.

Fourthly, the main opposition to Mr. MacDonald's request came from the Liberal leader Mr. Asquith.[124] Mr. Asquith was neither willing nor able to form an administration, and his idea was that either Mr. Baldwin or Mr. MacDonald should be Prime Minister. Mr. Asquith apparently did not desire a dissolution, because in the then existing Parliament, the Liberals would hold the scales and exercise influence out of proportion to their numbers, whether there was a Labour or a Conservative government - and this position may have been radically altered by a general election at which the Liberal representation may have been reduced.[125] When Mr. MacDonald was defeated on a no-confidence motion (the issue that led to the dissolution request) the Liberals went as far as to suggest that the issue was "not a sufficiently grave matter for which to inflict 600 elections on the country".[126] Here the Liberals were arguing that the Labour government should continue in office, notwithstanding its defeat.

Fifthly, the MacDonald government had been in office for one and half years with the discriminating support of the Liberals and had an impressive record of legislation to its credit.[127] Mr. MacDonald's position was therefore very different from that of Mr. Senanayake's government which held office for a month and had never obtained an affirmative vote on any issue.

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120 i.e. whether the Sovereign has the power to refuse to accept advice to dissolve.

121 W. I. Jennings, *Cabinet Government*, (1959), p. 428

122 O. Hood Phillips, *op. cit.* p. 110.

123 G. Wilson, *Cases and Materials on Constitutional and Administrative Law*, (1966) p. 47.

124 See passage from Cooray quoted above; W. I. Jennings, *Cabinet Government*, (1959) pp. 426-28.

125 W. I. Jennings, *Cabinet Government*, (1959) pp. 426, 481

126 177 H. C. Deb., 5 S. C. 581 ff., quoted in G. Wilson, *op. cit.* p. 48. of. the Ceylon episode of December 1964, discussed below.

127 W. I. Jennings, *Cabinet Government*, (1959) p. 426.

Cooray cites the strong denial by Laski of the power of a Head of State to refuse a dissolution.[128] But Laski was a staunch supporter of the Labour Party as well as possessing anti-monarchial views, and it must be remembered that the opinion quoted by Cooray was written at a time when he was provoked by those who argued that the sovereign should refuse a request for a dissolution made by the first Labour Prime Minister.

It appears clear that for the above reasons, the MacDonald dissolution episode, which as we have noted Cooray and the Prime Minister strongly relied upon, and which it may be assumed influenced the Governor-General, was not a relevant precedent.

A rigid test was laid down by Cooray[129] who brushed aside cases where dissolutions were granted in the countries of the Commonwealth and the Empire,[130] on the basis that only United Kingdom precedents were applicable in Ceylon and that these cases had not followed British conventions. But though only United Kingdom precedents are binding, the other precedents must at least be regarded as persuasive precedents. Cooray cites no authority in favour of his proposition that United Kingdom conventions have been departed from. However, Jennings[131] definitely assumes that British conventions have been followed in the Commonwealth and Empire dissolution cases.[132]

The article written by de Smith[133] (as has been noted) laid down a stricter test than one stated by the same author in a different context.[134] It is submitted that the latter opinion is to be preferred. It may be said that *a dissolution should not be granted where it can reasonably be supposed that an alternate government can be formed and carried on.* In formulating this test the following factors have been considered relevant: the approach of Jennings, Senex, Wade and Phillips and Forsey whose views have been quoted above; the second opinion of de Smith quoted by Wilson; the special point made by Jennings (who specially refers to Ceylon) that a Head of State would have a wider discretion to refuse a dissolution in a situation where the two party system was not functioning; and the Empire and Dominion cases in which the dissolutions were refused. De Smith in his article emphasised that the Governor-General would have been placed in an embarrasing situation if Mr. C. P. de Silva's coalition government broke up. The Governor-General would then be forced to grant a dissolution to Mr. de Silva having refused Mr. Senanayake. It is undeniable that an element of risk was

128 See passage quoted above

129 See above

130 Discussed above at pp. 19-20

131 See W. I. Jennings, *Constitution of Ceylon*, (1953) pp. 66-71

132 See also Senex (Private Secretary to George VI) in *The Times* (London) 2-5-1950, who in laying down the applicable principles in Britain (quoted above) refers to the Empire precedents.

133 Referred to above at p. 23

134 See above at p. 25

present. But, if de Smith's argument is accepted, then the logical conclusion is that a Head of State should never refuse a request for a dissolution, because an element of risk will always be present. But if it is conceded that a Head of State has a discretion to refuse, it must follow that when the possibility of a reasonably stable alternate government exists, the risk must be run, i. e. the element of risk must be discounted.

Forsey argues that if an alternate government assumes office and is compelled to ask for a dissolution soon afterwards, the Head of State is under a duty "to recall the former government and grant it a dissolution",[135] and thus repair any damage that may have been caused. But this solution does not take account of the rule that a Head of State cannot dissolve Parliament on his own initiative, but can only do so on advice.[136] The Head of State cannot call back the earlier Prime Minister to whom he refused a dissolution unless the head of alternative government resigns, instead of advising a dissolution. If, however, an alternate Prime Minister insists on a dissolution, the Head of State cannot refuse it. The only method by which he could grant a dissolution to the first Prime Minister, is by dismissing the alternate Prime Minister, and by calling upon the earlier Prime Minister to form a government, and by granting him a dissolution, if he requests it. But it is very doubtful whether the above situation falls within the very exceptional circumstances in which a Head of State could take the drastic step of dismissing a Prime Minister.[137]

A test has been formulated above, following an analysis of the relevant authorities. The test must now be applied to the facts, and this involves two issues: (i) Would a government led by Mr. C.P. de Silva have possessed a working majority in the House and (ii) Was there a reasonable supposition that such government could be carried on. The Senanayake government was defeated by 61 to 93.[138] The 93 votes included 10 members of the Mahajana Eksath Peramuna whose leader did not express support for an SLFP government.[139] On such a count an SLFP government may have claimed 83 members. The parties which agreed to support the SLFP which had 44 members[140] were the FP (20), LSSP (10), CP (3), JVP (2); and on this count the tally is 79. The crucial question would have been, the votes of the appointed and independent members. The convention has been established that the appointed members vote with the government, except when the special interests they are appointed to represent are involved. But these members had been appointed on the recommendation of Mr. Senanayake (it has been submitted that they should never have been appointed).[141] Since in Ceylon politics

135 E. Forsey, *op. cit.* p. 263

136 O. Hood Phillips, *op. cit.* p. 110

137 See discussion below at pp. 35-36 of the relevant principles

138 See *Ceylon Daily News*, 23-4-1960, p. 1

139 See A. J. Wilson, *op. cit.* p. 200

140 The SLFP tally of 46 after the General Election was reduced when two members resigned and joined the UNP. See *Ceylon Daily News*, 23-4-1960, p. 1

141 See above

'Independents" align themselves with a particular party after election, it may be assumed that the "Independents" who had refused to support Mr. Senanayake would have joined the SLFP. It is also perhaps significant that the two opposition parties, the UNP and the MEP in the political climate of the 1960 were to the right and left respectively of the SLFP. Therefore, issues which the UNP may have opposed may have attracted the support of the MEP, and *vice versa*. Since it may reasonably be supposed that some independent and appointed members would have supported a SLFP government, it is submitted that with the vigiliance of party whips Mr. de Silva would have commanded a working majority,[142] especially if the legislative programme was chosen with care so as not to offend the UNP and the MEP at *the same time*. The second issue is whether the "coalition" would have endured. This of course, is very much a matter of opinion. But it could be said that there was no definite reason for believing that it would not endure. There is of course authority for the proposition that stability is not a condition for bringing an alternate government into existence,[143] and if this is so the second issue is irrelevant.

There were four other circumstances which it is submitted should have been taken into consideration by the Governor-General when considering Mr. Senanayake's request for a dissolution. The country had been without an effective government since the assassination of Mr. S. W. R. D. Bandaranaike in September 1959, which was followed by the non-government of Mr. W. Dahanayake culminating in a dissolution.[144] Another general election following Mr. Senanayake's request would have meant that the country would have been without effective government for close on an year. Secondly, the Senanayake government had not been able to obtain a single affirmative vote in the House. Thirdly, the Prime Minister had made an improper request for a dissolution.[145] Hood Phillips, citing Anson, says[146] "..... the uniform practice for more than a century that the Sovereign should not refuse a dissolution when advised by his Ministers to dissolve has been largely due to the observance of another convention, namely that dissolution should not be improperly advised". Fourthly, the Governor-General had been a Minister in an earlier UNP administration and he was identified with that party and it may be argued that if the decision was a very controversial one, it would be impolitic for him to decide in favour of the UNP. The relevance of the fourth point is debatable, but the other three should have been taken into consideration.

Conclusions. If the view of Forsey and Wade and Phillips is adopted, since the Senanayake government was defeated on the Address in the first session of Parliament, and since at no stage had Mr. Senanayake commanded a majority

142 See discussion below at p. 34 of what constitutes a "working majority".

143 See quotations above from E. Forsey and Wade and Phillips, A. J. Wilson and K. H. Jayasinghe expressed (see above) the same opinion

144 See A. J. Wilson (1969), *Ceylon Journal of Historical and Social Studies*, pp. 187-94

145 See submission above at pp. 16-19

146 Hood Phillips, *op. cit.* p. 111

in the House (the government had in fact never been able to pass a bill or even a resolution) the Governor-General should have refused the request for a dissolution. Such an approach is in consonance with reason and principle. But quite apart from this line of argument, after a detailed discussion of the precedents and academic authorities, the test was laid down that the Governor-General should deny a request for a dissolution where it could reasonably be supposed that an alternate government could be formed and carried on. On the analysis of the facts it appears that a government formed by Mr. C. P. de Silva would just about have satisfied this test, and certain special circumstances were present which also pointed to the appointment of Mr. C. P. de Silva.

It may be assumed that the Governor-General was influenced by four factors: (i) the MacDonald precedent (ii) the emphasis laid by de Smith on the awkward situation which could arise if a dissolution were refused to Mr. Senanayake. and granted to Mr. de Silva if his government collapsed within a short period (iii) the strict test of stable alternate government laid down by de Smith (iv) that Mr. C. P. de Silva would not have commanded a working (as distinct from a numerical) majority.

The Governor-General, perhaps not unnaturally, relied heavily on the analysis of de Smith, an eminent academic authority and a disinterested observer of the local scene. But de Smith could scarcely be expected to be familiar with the local political climate. It is strange that the opinion of Sir Ivor Jennings, a well-known constitutional authority who was associated with the drafting of the Ceylon Constitution, and who has written a book about it, was not solicited at the same time as de Smith's.

Perhaps the strongest factor which influenced the Governor-General was the fourth one. (i) in particular, and (ii) and (iii) above have been strongly (and it is hoped effectively) rebutted. But it must be conceded that reasonable grounds were present for the Governor-General's course of conduct (even though one disagrees with it) especially since some of the reasons which may have been adduced against a dissolution were not convincingly aired in the public debate which preceded the Governor-General's decision. It is therefore not possible to agree with Wilson's emphatic assertion that the Governor-General acted unconstitutionally, and even less with his association of bias. In the ultimate analysis it appears that this unfortunate and controversial episode in our constitutional history may have been avoided, if a correct choice of Prime Minister had been made after the general election[147] or if Mr. Senanayake had, like Mr. Baldwin in 1923, chosen to resign instead of advising a dissolution.[147]

147 See submission above

148 See submission above

(d) The defeat in Parliament of the government in December 1964.

The coalition government led by Mrs. Bandaranaike was defeated on an amendment to the throne Speech in the House of Representatives on December 3rd 1964 by 73 votes to 74. One Appointed Member present in the Chamber, declined to vote. The House normally consists of 157 members, but one seat had been rendered vaçant by the death of a member. Thus there were seven absentees (the Speaker did not vote). The seven absentees were all government members (3 SLFP, 2 LSSP and 2 Appointed) and of these, two were abroad and one was delayed by a punctured tyre on his way to Parliament. About an hour before the vote 14 government members crossed the floor and voted with the Opposition. Government spokesman after the defeat indicated that Parliament would be dissolved. But the date of the dissolution was not indicated. Some reports said Parliament would be dissolved by the end of the month, others that it would be done within three months.[149] Meanwhile it was rumoured that the reasons for the delay were, that the government was consulting astrologers about the auspicious day for the dissolution and the general election, and that new electoral registers were being prepared and were not ready.[150] Parliament met on December 4th (private members day) and was adjourned until 17th December (following a time table drawn up long before the December 3rd defeat). Parliament was finally dissolved on the morning of December 17th. Two issues were raised by the above events. Should the Prime Minister have resigned immediately? If the Prime Minister had not resigned, did the Governor-General possess the power under the Constitution to dismiss the Prime Minister and dissolve Parliament?

The British convention perhaps is that a Prime Minister defeated in Parliament on a major issue should either advice a dissolution or resign.[151] It is clear that a government defeated on something other than a major issue need not resign if it retains a working majority.[152] When a vote on a major issue is involved the government party whips are very careful to assemble all members and therefore when a government is defeated in Parliament it is because it has lost the support of a majority of the House. Thus the rationale for the convention that a defeated Prime Minister should advise a dissolution is that since he has lost his majority he cannot hope to govern.[153] But there is no accorded instance of a British Prime Minister who has been defeated on a substantial issue while retaining a majority in Parliament. Therefore it cannot be said that there is a

149 See *Ceylon Daily News* of 4-12-1964, 6-12-64, 7-12-64

150 *Ibid.*

151 See Wade and Phillips, *op. cit.* p. 118. Cf. W. I. Jennings, *Cabinet Government*, (1958) p. 493, who does not lay down an absolute rule

152 W. I. Jennings, *Cabinet Government*, (1959), p. 493; G. Wilson *Cases and Materials on Constitutional and Administrative Law*, (1966) p. 49

153 W. I. Jennings, *Cabinet Government*, (1959), pp. 495, 493 and 403

firm British convention governing the situation which arose in Ceylon in 1960. Ramsay MacDonald in a statement in the House of Commons observed:[154]

> I have a lively recollection of all sorts of ingenuities practised by Oppositions in order to spring a snap division upon a Government, so that it might turn out upon a defeat. I have known bathrooms downstairs utilised, not for their legitimate purpose, but for the illegitimate purpose of packing as many members surreptitiously inside their doors as their physical limitations would allow. I have known an adjoining building where there happens to be a convenient division bell, used for similar purposes. I have seen the House, practically empty when the bells begin to ring, suddenly transformed into a very ridiculous sort of market place by the inrush of Members,doing their best for their nation, for the House of Commons and for their party to find a Government napping and turn it out . . . . . I am going out on no such issue.

Jennings says : [155]

> It must not be thought however that a single defeat necessarily demands either resignation or dissolution. Such a result follows only where the defeat implies loss of confidence . . . . . What the Government will treat as a matter of sufficient importance to demand resignation or dissolution is, primarily a question for the Government. The Opposition can always test the opinion of the House by a vote of no confidence.

The question which arises in relation to the 1964 episode is whether a government which is defeated on a major issue but retains a working majority, has lost the confidence of the House.

A general election involves the expenditure of public funds and leaves the country without an effective government for some months, (ministers are too busy electioneering to attend to their duties and of course no legislation can be passed). Because there is no formulated British convention on the subject (bearing in mind the expense of an election and the absence of a government for a considerable period), on the basis of the underlying principle that a government vacates office when it is not in a position to govern because it has lost its majority in the House, the following rule may be deduced from the general principles of the Consititution and the conventions which govern analogous situations : a government defeated in the House on a major issue but retains a *working majority* in Parliament is bound to resign or dissolve Parliament, unless the defeat took place in exceptional circumstances which are unlikely to recur, and if another vote is taken on the same isssue on which the Government was defeated, the government could obtain a *clear* majority. The government should proceed to obtain a vote of confidence from the House as soon as possible.

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154 169, *House of Commons Debates*, 5 s. c. 749. 12 February 1924.
See also statement by Clement Atlee in 473 H. C. Deb., 5 s. c. 566; G. Wilson *Cases and Materials on Constitutional Law*, (1966), pp. 47-49

155 W. I. Jennings, *Cabinet Government* (1959) p, 493 and 495

Three conditions must be satisfied. Firstly, the government must possess a working (not necessarily a numerical) majority. Secondly, the defeat should take place in exceptional circumstances which are unlikely to recur - e. g. where some government members were ill or abroad or were unaccountably delayed on their way to Parliament (by an accident or traffic jam) coupled with some time trick or manoeuvre [156] on the part of the opposition which affected the voting, and radically upset the calculations of the party whips. Thirdly, the government must be in a position to obtain a vote of confidence on the issue on which it was defeated. It would perhaps not be sufficient for the government to conveniently forget the issue on which it was defeated, win back any defactors and proceed to govern thereafter.

A government which stays in office after a defeat in Parliament leaves itself open to criticism on many grounds, and its image may be badly tarnished, and if it carries on with a bare majority and defeated a second time this would be a factor which the opposition can highlight at the polls.

Were the above three conditions present in December 1964? It appears that the government retained a working majority. The government was defeated by one vote in the absence of seven members. Mr. Harold Wilson was returned to power in 1964 with a majority of 5 which was reduced after a bye-election to 3, in a Parliament of 630, and governed the country for over one and half years. But in this context it is important to note that Mr. Wilson was careful not to introduce measures which would provoke the Liberal Party (which had 11 seats) to oppose him, and that the Liberal Party gave him qualified support from the opposition. Taking into consideration that the numerical strength of the Ceylon Parliament is less, it may be said that the minimum required for a working majority in the Ceylon Parliament would be six. If an opposition party is willing to provide qualified support (as the Liberals provided Mr. Wilson), and the legislative programme is prepared so as not to offend that opposition party, the number could be less.

The exceptional circumstances were apparently present. Two government members were abroad and one was delayed by a puncture while on the way to Parliament. One Opposition member was abroad and was not expected back at the time of the voting, suddenly appeared in the House, having been summoned back specially for the vote. A Minister in the government (Mr. C. P. de Silva) who voted with the Opposition tendered his resignation on the afternoon of December 3rd. During the debate on the Address three government members indicated that they were voting against the government. These and 10 other government members crossed the floor about *one* hour before the final vote. But it appears that the opposition leaders had known of the defection many weeks (some say months) earlier but had planned to delay the crossing over and kept it secret, until an occasion arose when it would be possible to spring a surprise

156 See quotation above from Ramsay MacDonald's speech

defeat on the Government. Mr. C. P. de Silva had not in the weeks before his resignation by any dissent in the Cabinet given any indication of an imminent resignation, nor had he opposed the drafting of the Address, an amendment to which he supported. [157] It appears that the crossing over was not accompanied by normal parliamentary ethics. The defeat of the government was a carefully planned manoeuvre designed to upset the calculations of the party whips and would therefore fall within "exceptional circumstances" in the test formulated above.

The third condition was not satisfied. The government did not attempt to obtain a vote of confidence. But Parliament was adjourned the day after the defeat of the government, and the dissolution took place on the day it was scheduled to meet.

As against the argument outlined above, it may be argued that a government which is defeated on a major issue, as an amendment to the Address undoubtedly is, should whatever the circumstances, resign.

The issue was heatedly discussed at the time whether if Mrs. Bandaranaike did not dissolve Parliament the Governor-General could do so. [158] The leaders of the opposition parties requested the Governor-General to exercise the right vested in him under the Constitution and to dissolve Parliament and fix a date for a General Election. [159] But it is submitted that this was a politically motivated misinterpretation of the Constitution. The British convention is that Parliament is dissolved on the *advice of the Prime Minister.* [160] Therefore the power of dissolution conferred on the Governor-General by section 15 of the Constitution Order in Council (which is the constitutional provision referred to by the six leaders) must, because of section 4 (2) be exercised in the light of the British convention. The course open to the Governor-General if he wished to dissolve Parliament without the advice of a Prime Minister, was to dismiss the Prime Minister and call upon a new Prime Minister who would have the option whether to govern (if he could command a majority) or who would advise a dissolution. There is a clear precedent to the effect that the Head of the State cannot in such a situation impose a condition on a newly appointed Prime Minister that he *must* advise a dissolution. [161] Therefore the Governor-General could not dissolve Parliament without dismissing the Prime Minister. Therefore the question is, in what circumstances a Head of State could take the extreme step of dismissing the Prime Minister. Jennings takes the view that the issue in modern practice does not arise because the ultimate sanction is that a Prime Minister who stays in office without a parliamentary majority cannot carry out the work

157 Cf. Statement made by Mrs. Bandaranaike (*Ceylon Daily News*, 8. 12. 1964) p. 1, with reply by Mr. C. P. de Silva (*Ceylon Daily News*, 11. 12. 1964) Mr. de Silva points out differences he had within the Cabinet in the preceding years, but does not cite any examples of dissent within the immediately preceding months.

158 See *Ceylon Daily News* of 7. 12. 1964; p. 5; 8. 12. 1964, p. 1; 9. 12. 1964, p. 5

159 *Ceylon Daily News*, 8. 12. 64, p. 1

160 O. Hood Phillips, *op. cit.*, p. 108 - 109; W. I. Jennings, *Constitution of Ceylon*, (1953) p. 67

161 W. I. Jennings, *Constitution of Ceylon*, (1953) pp. 68-69

of government and will be compelled to resign. [162] Jennings points out that no government has been dismissed by the sovereign in the history of modern cabinet government (the last dismissal was in 1783). [163] He is of the view that a sovereign may exercise such a right only in very exceptional circumstances. [164]

> The Queen's function is, it is suggested, to see that the Constitution functions in the normal manner. It functions in the normal manner so long as the electors are asked to decide between competing parties at intervals of reasonable length. She would be justified in refusing to assent to a policy which subverted the democratic basis of the constitution, by unnecessary or indefinite prolongations of the life of Parliament by a gerrymandering of the constituencies in the interests of one party or by fundamental modification of the electoral system to the same end. *She would not be justified in other circumstances.* [165]

Parliament was scheduled to meet on December 17th, and if Parliament had by then not been dissolved, the course open to the opposition was to defeat the government, and leave it with no alternative but to resign.

On this analysis, whatever view one takes of the conventional propriety of a decision by Mrs. Bandaranaike not to resign in the above discussed situation, it is clear that the Governor-General had no right of dismissal unless the Prime Minister was avoiding meeting Parliament, or in any other way was taking definite steps to destroy the democratic structure of the constitution. It is submitted that since Mrs. Bandaranaike possessed a working majority, and if she had obtained a vote of confidence, she would have strained the constitution without breaking it, if she did not resign not advise a dissolution.

The opposition members and their supporters holding public meetings in the country at large, and a section of press, worked up opinion against the government and alleged that the entire constitutional structure was being threatened by the Prime Minister's actions. The statement sent by the Opposition leaders to the Governor-General has been referred to. It may be that the Governor-General may have been precipitated into taking action. It is rumoured that the Governor-General sent a verbal message to the Prime Minister through a third party asking her to resign. If this is correct, this was surely an unconstitutional act. The Governor-General should have remained above the political controversy especially since Parliament was scheduled to meet. It was left to the Opposition to inflict a further defect on the Government if it stayed in office. The Governor-General should have intervened only in the circumstances outlined by Jennings.

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162 W. I. Jenning, *Cabinet Government*, (1959), pp. 493 and 403

163 *Ibid.* p. 403

164 *Ibid.* pp. 403-412. See also O. Hood Phillips, *op. cit.* p. 109

165 W. I. Jennings, *op. cit.* p. 411-12

(d) The election results of March 1965 and the conduct of the Prime Minister.

The party positions after the General Election held on 22nd March 1965 were as follows : United National Party 66; Sri Lanka Freedom Party 41; Federal Party 14; Lanka Sama Samaja Party 10; Sri Lanka Freedom Socialist Party 5; Communist Party 4; Tamil Congress 3; Jathika Vimukti Peramuna 1; Mahajana Eksath Peramuna 1. Six independent members were also returned. The complete results had come in by the 23rd evening. The Prime Minister Mrs. Bandaranaike resigned on the 26th morning. It appears that Mrs. Bandaranaike and her supporters had approached the leaders of other parties in an attempt to form a coalition government. Mrs. Bandaranaike resigned when it became apparent that all parties, except the LSSP and the CP, had pledged their support (expressed in a document signed by the leaders of these parties and handed over to the Governor-General) to the leader of the UNP. [166] Mrs. Bandaranaike was criticised for not resigning when it became apparent on the election results that she had lost her majority in the House. The issue to be analysed is whether in a situation where no party has obtained an absolute majority, the Prime Minister in the previous Parliament should resign immediately and leave it to the Governor-General to call upon the party leader best able to command a majority (who may be the Prime Minister who had resigned), or the Prime Minister may negotiate with uncommitted groups, and the obligation to resign arises only when it is apparent that he cannot hope to command a working majority in the House.

A similar situation arose in Britain in 1929, when no Party secured a majority at the General Election, but the Conservatives were returned as the largest single group, and their leader Mr. Baldwin could have continued as Prime Minister till he was defeated in the House. Instead of trying his hand, he realised that his party has lost support and decided to resign immediately. [167] He did this because the public would have thought it "unsporting" of him not to have done so and would have suspected him of "contemplating a deal with the Liberals". [168]

When the 1964 British election results were being announced Sir Alec Douglas-Home, the Conservative Prime Minister in the earlier Parliament, set off to tender his resignation to the Queen at the point when it became apparent that even if his party won all the remaining seats he would not be in a position to command an over-all majority, even though it was not at all clear at that time that any other party would obtain an over-all majority, and it was apparent that Home's party would obtain only a handful of seats less than the Labour Party. [169] The final results were Labour 317; Conservatives 304; Liberals 9; others nil;

166 *Ceylon Daily News*, 26. 4. 1965, p. 1

167 Harold Nicholson, *King George the Fifth*, (1952), pp. 434-35; W. I. Jennings, *Cabinet Government*, (1959) pp. 490-91.

168 *Ibid.* p. 435.

169 The writer witnessed and heard about this on B. B. C. Television. No written authority can be cited for verification.

which gave Labour an over-all majority of 4. In 1843 in Britain the Whigs were defeated at the General Election, but met Parliament and when a no-confidence motion was passed, the Prime Minister resigned. But since then there has been no comparable incident. [170]

A Prime Minister in Ceylon recommends the appointment of six members to the House of Representatives [171] and this is a factor which makes it desirable that a Prime Minister whose absolute majority has been cut down should resign immediately. An immediate resignation is called for by British conventions discussed above. But there may be a situation in exceptional circumstances, where a Prime Minister who does not comand an over-all majority, has definite support in the House, and can thus hope to govern and therefore may be justified in not resigning. But it is very clear that such exceptional circumstances were not present in March 1965. The SLFP with its allies the LSSP and the CP, had been isolated during the election campaign, and in the latter part of the previous Parliament, and it was clear on the basis of the election results that Mrs. Bandaranaike had the support of 53 members and would at the most hope to obtain the support of the Independents. The proper constitutional and more dignified course open to Mrs. Bandaranaike was to have resigned on the 23rd. evening.

The issue was discussed at that time whether the Govenor-General had the right to dismiss Mrs. Bandaranaike. But the sanction in such a situation is that a Prime Minister without a majority cannot hope to govern and will be defeated in the House. [172] Section 15 (4) of the Constitution Order in Council directs that when a Parliament is dissolved, a date for the meeting of the new Parliament be fixed. The opposition would thus have an opportunity to pass an immediate vote of no-confidence when the House met. Therefore, adopting the view of Jennings, [173] the Governor-General could have assumed power under the constitution to dismiss Mrs. Bandaranaike only if she did not come before Parliament on the specified date, or if in any other way steps were being taken to destroy the democratic character of the Constitution. Thus in a situation where a Prime Minister is defeated at the polls, refuses to resign, except in the circumstances outlined by Jennings, [174] the Governor-General would not be constitutionally justified in dismissing him.

A serious constitutional crisis would arise (which did not arise in 1965) if after a General Election the Prime Minister in a previous Parliament, who does not possess a working majority in the new House of Representatives, instead of resigning, submits to the Governor-General the names of six persons for appointment to the House under section 15 (1) of the Constitution. It has

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170 W. I. Jennings, *Cabinet Government*, (1959), p. 403.
171 See above.
172 W. I. Jennings. *Cabinet Government*, (1959), pp. 493, 495, 403.
173 Discussed above.
174 *Ibid*. But see A. J. Wilson in (1958) Modern Asian Studies, pp. 193, 214, 215.

been submitted that the Governor-General should not accept the advice of a Prime Minister who does not command a majority in the House. [175] If despite the Governor-General's reluctance to exercise the power of appointment, the Prime Minister persists in his request and also submits a list of Cabinet Members for appointment this *may* be a situation in which the Governor-General may dismiss a Prime Minister.

IV. CONCLUSIONS

The following rules (1-9) with the exception of (5) and (7) may be said to be conventions of the British Constitution and therefore applicable *prima facie* in the situations discussed in the above analysis. It must be noted that (1) to (5) relate to the powers of the Governor-General, and (6) to (10) to the conduct of a Prime Minister, and that (5) and (10) are not British conventions but suggestions made by the present writer.

(1) After a general election the Governor-General should call upon a party leader best able to command a majority in the House of Representatives to form a government. Where no party has obtained an absolute majority, such person is not necessarily the leader of the party which has obtained the largest number of seats.

(2) Where a Prime Minister advises a dissolution of Parliament, the Governor-General has a discretion to reject such advice, if there is reasonable supposition that an alternate Government may be formed and carried on.

(3) The Governor-General should not assume a power of dismissing a Prime Minister merely on the grounds of unconstitutional conduct. He would be justified in doing so only where the entire democratic structure of the Constitution is threatened.

(4) The Governor-General cannot dissolve Parliament except on the advice of the Prime Minister.

(5) It is submitted that it is open to the Governor-General to develop a very desirable convention that he would not accept advice, for the appointment of members to the House of Representatives under section 11 (2), from a Prime Minister who does not command a majority in the House. But the set of appointments in March 1960 is a definite contrary local precedent.

(6) A Prime Minister should not make a request for a dissolution unless, he commands a majority in the House, or no alternate Government is possible. But the request of Mr. Senanayake in 1960 is a definite contrary local precedent.

(7) The Prime Minister must be a member of the House of Representatives. If he is not a member at the time of appointment he should seek election

175 See above.

to the House. Mrs. Bandaranaike's tenure as Prime Minister (1960-1965), while being a member of the Senate is a contrary local precedent. But it appears that in Ceylon, a Prime Minister *at the time of appointment* need not be a member of either Chambers.

(8) A Prime Minister in the previous Parliament who after a general election does not command an absolute majority in the House of Representatives should resign, and leave it to the Governor-General to make a choice (on the basis of (1) above) of a Prime Minister, even if the defeated Prime Minister *may* be able to lead a coalition in the new Parliament.

(9) A Prime Minister defeated in Parliament on a major issue and who does not command the confidence of the House should resign, or subject to (6) above, advise a dissolution.

(10) It is submitted that a Prime Minister who does not command a majority in a newly elected House of Representatives should not embarass the Governor-General by asking him to appoint 6 members under section 11 (2) of the Constitution. But the set of appointments made by the Governor-General in 1960 is a definite contrary local precedent.

(11) The Governor-General's task of appointing a Prime Minister when a vacancy occurs during the continuance of a Parliament would be eased if the major political parties formulate rules for the election of a party leader.

Section 4 (2) imposes on the Governor-General an obligation to follow British conventions "as far as may be". But the Prime Minister, though generally governed by British conventions is not under a legal obligation to follow them. The consequence of this is that if the Governor-General does not follow a British convention, this act will not be relevant in the future as a precedent, unless the British convention has been adapted within the meaning of the words "as far as may be". But if the Prime Minister acts ignoring a British convention his action would be regarded as a precedent which if subsequently followed could give rise to a contrary local convention. Therefore, in the above statement, contrary local precedents to British conventions governing the Prime Minister (6-10) are noted, but not in the case of the Governor-General (1-5 above).

In assuming the effect of a local precedent on an established British convention it is important to note that a single precedent does not necessarily create a convention or alter an existing convention. The appointment of Mrs. Bandaranaike as Prime Minister even though she was not a member of either Chamber of Parliament at the time of appointment, may be regarded as an exception (justified by special circumstances) and therefore not altering the general rule that a Prime Minister must be a member of one of the Chambers. The British convention was not followed when the Prime Minister from 1960-1964 was a member of the Senate. But the single precedent does not necessarily make the British convention inapplicable to Ceylon in the future. Jennings

points out [176] that a convention is generally established or altered by "a course of precedents" [177] but concedes that exceptionally a single precedent might overthrow a long standing rule, provided that the single precedent was generally accepted and there was a good reason or purpose referable to the existing requirements of constitutional government for following it.

Since the reasons for the Governor-General's decisions are not made public, it is difficult to determine whether in 1960 the Governor-General applied (1) and (2) above. These principles would not have been infringed if Mr. Senanayake was called upon to form a government on the basis that the Federal party would support the UNP, and if Mr. Senanayake's request for a dissolution was granted because it was thought that an alternate government led by Mr. C. P. de Silva would not command a majority in the House. But the Governor-General may have appointed Mr. Senanayake merely because his party had obtained the largest number of seats, and granted a dissolution because he thought that a stricter exception than that stated in (2) above, be adopted or because he thought that a Prime Minister had an absolute right to a dissolution.

Situations have arisen where there was no relevent and formulated British convention. In 1960 when the question arose whether the Governor-General could appoint as Prime Minister a person who was not a member of either Chamber of Parliament, and in 1964 when the issue was whether a government defeated on a major issue, and which retained a majority in Parliament was bound to resign or advise a dissolution, there was no clearly formulated British convention which could be applied. It appears that in such an eventuality, the convention has to be deduced from the general principles of the constitution and from the conventions which govern analogous situations.

The analysis of the operation of conventions in the law of Ceylon shows that there is a wide area of uncertainty. This enables each party and the newspapers which support them, when a constitutional issue arises, to find arguments and authorities to justify the course of action which would favour their own party interests. Politicians thinking primarily of the present, may thus hope to gain an immediate advantage, which blinds them to the fact that if they stretch the rules to their own advantage, they will create future precedents for their opponents to follow. In controversial situations the newspapers could render a valuable service to the nation by placing the considerations of constitutional government over party interests. But the past record of the newspapers is such that it is unlikely that in the future the newspapers will do anything other than to play party politics.

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176 W. I. Jennings, *Cabinet Government* (1959) pp. 4-13, especially at pp. 6-7

177 *Ibid.* p. 7

Thus the Governor-General's position is even more difficult than that of the Queen. The Queen is somewhat removed from the arena of party politics. The Governor-General is ever associated with the party that recommended his appointment. It may be said that whatever course of action the Governor-General followed in April 1960 he would have laid himself open to criticism. It is possible that similar recrimination and controversy will follow decision of the Governor-General, if after the next general election no party obtains an absolute majority. The image of constitutional democracy in Ceylon will inevitably be affected by such controversies.

Conventions by their nature are unwritten. This lack of precise formulation breeds uncertainty. But there are two factors present in Ceylon (though not in England) which add to the uncertainty; the words "as far as possible" in section 4 (2) of the Constitution and the problems raised in assessing the relevance of local precedents which have ignored British conventions.

On the other hand the absence of precise formulation means that conventions may be adapted to suit changing circumstances and unforeseen events. If the rules had been spelt out explicitly in the constitution, it may be that the appointment of Mrs. Bandaranaike as Prime Minister in 1960 would have been prevented by a special contitutional provision which enacted that the Prime Minister must be a member of Parliament. De Smith says : [178]

> the blessed vagueness of the general clause may have proved to be the salvation of the body politic. One may recognise the force of these arguments without feeling any optimism that the adventitious combination of circumstances which gives them validity is likely to be reproduced, *mutatis mutandis*, on other occasions.

The problem for the constitutional craftsman is to balance the need for some degree of certainty with the need for flexibility. In Great Britain a proper balance is maintained. But it appears that the present state of the law of Ceylon leans too far on the side of flexibility, giving rise to vagueness and uncertainty. Therefore a written, but not too inflexible statement of the applicable rules is very necessary. This may be done by an amendment to the Constitution Order in Council 1946. A simpler procedure would be for the Governor-General to issue from Queen's House a statement of the rules which he will follow in the exercise of his discretionary powers, and for Parliament to pass Standing Orders which describe the more controversial conventions governing the Cabinet and the Prime Minister. Such procedure will be in order, provided the statement of rules, and the Standing Orders, do not infringe the provisions of the Constitution.

178 S. A. de Smith, *op. cit.* p. 85