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OF ASIA

Constitution-making in Asia

Decolonisation and state-building in the
aftermath of the British Empire

Edited by
H. Kumarasingham



Constitution-making in Asia

Britain's main imperial possessions in Asia were granted independence in the 1940s and 1950s and needed to craft constitutions for their new states. Invariably the indigenous elites drew upon British constitutional ideas and institutions regardless of the political conditions that prevailed in their very different lands. Many Asian nations called upon the services of Englishman and Law Professor Sir Ivor Jennings to advise or assist their own constitution-making. Although he was one of the twentieth century's most prominent constitutional scholars, his opinion and influence were often controversial and remain so due to his advocating British norms in Asian form.

This book examines the process of constitutional formation in the era of decolonisation and state-building in Asia. It sheds light upon the influence and participation of Jennings in particular and British ideas in general on democracy and institutions across the Asian continent. Critical case studies on India, Pakistan, Sri Lanka, Malaysia and Nepal – all linked by Britain and Jennings – assess the distinctive methods and outcomes of constitution-making and how British ideas fared in these major states. The book offers chapters on the Westminster model in Asia, human rights, nationalism, ethnic politics, federalism, foreign influence, decolonisation, authoritarianism, the rule of law, parliamentary democracy, and the power and influence of key political actors. Taking an original stance on constitution-making in Asia after British rule, it also puts forward ideas of contemporary significance for Asian states and other emerging democracies engaged in constitution-making, regime change and seeking to understand their colonial past.

The first political, historical or constitutional analysis comparing Asia's experience with its indelible British constitutional legacy, this book is a critical resource on state-building and constitution-making in Asia following independence. It will appeal to students and scholars of world history, public law and politics.

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First published 2016
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Names: Kumarasingham, Harshan, 1979– editor.

Title: Constitution making in Asia : decolonisation and state-building in the aftermath of the British Empire / edited by H. Kumarasingham.

Description: Abingdon, Oxon ; New York, NY : Routledge, 2016. |

Series: Routledge Studies in the Modern History of Asia ; 30 |

Includes bibliographical references and index.

Identifiers: LCCN 2015039735 | ISBN 0415734584 (hardback) |

ISBN 1315629798 (ebook)

Subjects: LCSH: Constitutional history--South Asia. | Constitutional law--South Asia--English influences. | Jennings, Ivor, Sir, 1903-1965--Influence.

Classification: LCC KNC527 .C66 2016 | DDC 342.5402/9--dc23

LC record available at <http://lccn.loc.gov/2015039735>

ISBN: 978-0-415-73458-5 (hbk)

ISBN: 978-1-315-62979-7 (ebk)

Typeset in Times New Roman
by Wearset Ltd, Boldon, Tyne and Wear

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The Queen after opening the Ceylonese parliament in April 1954.

Preface

Constitution-making in Asia examines the constitutional legacy of the British Empire in Asia. In particular India, Pakistan, Sri Lanka (Ceylon), Malaysia (Malaya) and Nepal are examined here during the imperative period when they sought to create a parliamentary system for their new states. Their quest was remarkable in both its scale and aspiration. Responsible government of the British variety had been viewed as the preserve of the ‘mature’ settler states of Canada, Australia, New Zealand and South Africa. The Asian states united by British dominion nonetheless engaged in state-building that was unavoidably laced by decolonisation, colonial experience, practices across the Empire and local nationalist aspirations. With this the seeds were sown for the Westminster model to grow in Asia. Its variety was at once related to Britain and the settler states and yet unquestionably determined by local conditions. This book’s focus is grounded in the historic period when responsible government was constructed and tried. However, despite the passage of time and the cavalcade of constitutions and changes since independence, the roots of British rule still remain critical to understanding contemporary Asia. As a major 2008 international report entitled *The State of Democracy in South Asia* commented, ‘The impact of the British parliamentary tradition is all too evident on the parliamentary practices in the region’. This provides the material to recognise the origins of lingering institutional pains, resilient autocratic tendencies as well as democratic practices and expectations.

Uniquely English constitutional scholar and adviser Sir Ivor Jennings (1903–1965) was present at the constitution-making of all these states as a counsellor, consultant, or at least familiar commentator. This volume does not exclusively or comprehensively use Jennings’ work or role in the region, but it does cover the same period that he operated in Asia, and in selected chapters focuses on him to explore the reception of the institutions and ideals of parliamentary government.¹ *Constitution-making in Asia*’s contributors and their chapters are drawn deliberately from History, Politics and Law disciplines, which fuels its relevance and reach. This volume is the first serious political, historical or constitutional text to compare Asia’s experience with its indelible British constitutional legacy. For too long Asia has been neglected as a region to assess and understand the reach of the Westminster model. Remembering that in 1950,

when constitution-making was underway, the states covered here were five times bigger than the combined populations of Britain and the settler states, this is a remarkable omission. It also in a single volume brings together and compares Asian states not often examined together to allow a greater sense of both distinction and commonality when searching for the foundations of the state in independent Asia. This study on these Asian states and Britain's legacy aims to provide a text that investigates at the critical decolonisation and state-building juncture why these states took on the system of the colonial power; the perils and opportunities of doing so; and the deviations and styles within Asia of the British parliamentary model consciously adopted. At a time when most Asian states are contemplating serious questions over their constitutional arrangements, or even re-making their constitutions, this book provides scholarly background for any renegotiation of the executive's powers in Asia and starkly shows lessons from past constitution-making.

H. Kumarasingham
September 2015

Note

- 1 For a collection of his writing on constitution-making and introduction to his work see H. Kumarasingham (ed.), *Constitution-Maker – Selected Writings of Sir Ivor Jennings*, Cambridge: Cambridge University Press, 2015.

1 Eastminster – decolonisation and state-building in British Asia¹

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‘Vous l’avez voulu, George Dandin’ mischievously exclaimed the Soulbury Commission’s report in 1945, implying that their recommendation of the British parliamentary system was at Ceylonese instigation if anything went wrong. The report quoted French playwright Molière’s 1668 comedy *Dandin* and defended their counsel that Ceylon adopt a Westminster inspired constitution on the grounds that not only was it best suited for the island, but it was also appropriate since ‘the majority – the politically conscious majority of the people of Ceylon – favour a constitution on British lines. Such a Constitution is their own desire and is not being imposed upon them’.² Ceylon strolled towards independence on 4 February 1948 with an unabashed fervour for Westminster government. The Soulbury Commission dutifully served an institutional tiffin that satisfied in large measure the specific appetite of Ceylon’s elite. A republic would have been as welcome as an Indian invasion, and instead a unitary bicameral realm within the Commonwealth was established that self-consciously saw any other style of government as beneath the dignity of the Ceylonese elect. As such, the new constitution was generally deaf to the apprehension from corners in the Colonial Office, old Ceylon civil service hands and a few local lawyers of loquacious and argumentative tendencies. The result was that precious few alterations were made of the Westminster model for the context, complexities and conventions of Ceylon.

This system was more commonly associated with the British settler countries like Australia, Canada and New Zealand, where ‘kith and kin’ links with Britain seemed to make this appropriate. However, the British and the Asian indigenous elites saw advantages in applying this very British system to the very different context of the East. These Asian nations did not have centuries to interpret and adjust in order to develop their constitution as the British had. Instead within months they needed to formulate and design a constitution and therefore invariably drew upon the system of their imperial master. The local elites with the involvement of external actors like Sir Ivor Jennings determined that Westminster could work in the East. Since the Westminster system is based on convention and ambiguity and not rigid rules and clarity the same Westminster system could be adopted and manipulated to produce diverse results and reactions that would shape their countries forever. These states therefore became *Eastminsters*

2 H. Kumarasingham

that consciously had clear institutional and political resemblances to Britain's system, but with cultural and constitutional deviations from Westminster, five of which will be explored below.

This chapter focuses on Westminster's trajectory through the Asian states of India, Pakistan, Ceylon, Malaya and Nepal when it transformed into Eastminster. Analysis is centred on the period when these states adopted a parliamentary state modelled on the British example set at the colonial and metropolitan levels. The approach taken will be to understand much of the state-building that occurred through the work of Jennings.³ This Cambridge educated scholar advised all these states in their constitutional quests in the state-building period with the exception of India, where he instead acted in those transition years as a major constitutional authority and commentator. Jennings' work on India was highly cited in those early years when few others existed from his vantage as a world famous English constitutional expert living and working in Asia.⁴ For India, Pakistan and Ceylon the key period observed was within the first five to ten years of freedom in 1947–1948. In Malaya Jennings was active with the Reid Commission leading up to independence in 1957,⁵ while in Nepal he worked for a short, but crucial time in 1958 in preparation for the Himalayan kingdom's first general election in February 1959. Though Nepal was never formally under British rule it was nonetheless very much part of imperial interests in the region from the nineteenth century and can be designated within the British 'sphere of interference'.⁶ Through the role of Jennings it is possible to gain a unique and comparative perspective of constitution-making and state-building in these key Asian territories. Jennings' work by no means fairly or comprehensively covers how these processes worked, but as an individual he is exclusive in linking these states constitutionally with his first-hand experience of them during the era of state-building in the wake of the British Empire. Never before has a study constitutionally linked these states to understand their constitutional lineage with Britain during their quest to craft a parliamentary state. Part I of this chapter examines the scholarly importance and present gap in history, law and politics of examining the British constitutional legacy and Westminster model in Asia. Part II will place Jennings' work and role in the region in context and Part III will outline five interrelated deviations the Eastminster model historically had from the traditional settler states.

Eastminster happened in a context when South Asian decolonisation captured international attention. India's first ambassador to Washington, M. Asaf Ali, told the *New York Times* that his country's independence was in the 'spirit of the American revolution' and for the benefit of his audience that the 'battle cry' of India's revolutionaries was also, curiously enough, Abraham Lincoln's everlasting and inspiring dictum, 'Government of the people for the people and by the people'.⁷ The government in India was still very much, however, drawn from the British and not the American model. Woodrow Wilson had believed in 1884, at the height of the British Empire, that the Westminster model had become the 'world's fashion'⁸ and it remained so as the empire decolonised. Sir James McPetrie and Sir William Dale, as legal advisers to the Colonial and Commonwealth Offices

respectively, recorded an enormous international appetite for Whitehall constitutional devices. McPetrie noted the 'exceptional activity' of the post-war era where, in the short period between June 1959 and June 1960 alone, 92 constitutional instruments were drafted by the Colonial Office for territories around the world.⁹ Dale wryly commented that very often the Colonial era legislation endured after independence since even though 'there was a new emperor ... his suit of clothes was far from new'.¹⁰

However, despite such activity there was no uniformity of approach even within regions. The 1956 colonial law of *Loi Cadre* dictated by the French metropolitan state, which provided a detailed institutional framework for an almost blanket application of major governance reforms across the French African empire would find no equivalent in the British decolonisation process in Asia or elsewhere.¹¹ The 1931 Statute of Westminster may have provided a critical constitutional milestone for the few settler dominions by clarifying their political independence, but with just four and half pages it could not, and did not, claim constitutional homogeneity, as the diversity of dominions and their individualist political temperament made any such attempt undesirable. Compared with continental cases the British Westminster model was malleable, moveable and mendacious. As Sartori assessed, unlike Britain most states could ill 'afford the luxury of not formalizing their constitutions' and observed that it was better to see the British constitution as 'written differently' than 'unwritten'. British constitutionalism unlike its European and American counterparts was not meant to be 'prescriptive', but instead practical.¹² This analysis lends weight to the view that British 'institutions prove themselves capable of adaptation to new conditions; and this arises in large measure from a refusal to define. The task of definition is left to academic lawyers who, being independent, are *ipso facto* irresponsible'. One of those 'irresponsible' academic lawyers and author of the above quote was Sir Ivor Jennings.¹³ The flexibility of the 'refusal to define' feature of Westminster allowed liberties and possibilities for the model to drift away from its moorings both geographically and theoretically leaving great scope for individuals to influence the constitutional character of their states more than any statute could. Jennings sought to explain why Westminster travelled East:

The one common characteristic of all these Constitutions was that they were all based on the unwritten British Constitution. This was a deliberate choice by the local politicians and it has, I suppose, several explanations. First, all the countries concerned had been under British rule, were familiar with British methods, and knew no other. Secondly, all the politicians concerned had been educated in British universities, or called to the English Bar, or educated in local institutions using an English medium. . . . There was thus a familiarity with English ideas and, perhaps, a lack of familiarity with other ideas. Certainly it was always difficult to persuade local politicians to accept anything for which there were not British precedents. This seemed surprising at first, but we soon realised that all the antagonism to British rule was

due to a nationalism imported from Britain. Though a great deal was said in public speeches about indigenous culture, there was little that could go into a Constitution, because the concepts of democracy, parliamentary government, and the rule of law which are the basis of constitutional government were all imported. I do not mean that one can take a Constitution from stock and hand it over. Clearly every Constitution must relate to local conditions. What I mean is that inevitably the framework of ideas was supplied from Britain; and when we borrowed, for example from Australian or India, we were inevitably borrowing from Britain at second-hand.¹⁴

Part I: the search for state-building in British Asia

History, once the leading discipline on the subject, has almost completely abandoned the field of the constitutional history of the British Empire, and thus provides few contemporary works that expose the Westminster model in Asia to the searching traditions available within the subject. C. A. Bayly's *Recovering Liberties* (2012) does, however, revive the interest on South Asian historic political liberalism. This work persuasively animates the ideology and ideals behind many of the Asian elites that wrestled with anti-colonialism while forging a state imbued with the liberal traditions of the colonising power.¹⁵ Ronald Hyam and John Darwin have in their expansive and erudite literature on British decolonisation done much to place elements of constitutional history in the larger account of imperial withdrawal. Historic works on Asian governance and state-building remain, however, scarce.¹⁶ David Arnold has recently implored scholars of India to look at German involvement in colonial India in the hope to more broadly understand global influences there and move away from trends that lately have British centric views of empire:

The view of empire as externally competitive and internally homogenous has been accentuated in recent years by histories of the 'British World' and through such works as the *Oxford History of the British Empire* and its 'companion series' in which the British identity of the Empire is assumed to be paramount, almost to the exclusion of any other alternative or external influence.¹⁷

A similar case can be made of the Westminster model.

Comparing Westminster (2009), *Democratic Decline and Democratic Renewal* (2012), *Understanding Prime Ministerial Performance* (2013), and *Constitutional Conventions in Westminster Systems* (2015) are four recent theoretically sophisticated and deeply researched volumes from comparative politics on the Westminster model abroad.¹⁸ These accounts have contemporised and enriched analysis of the system in contexts that are not limited to Britain. However, the contexts selected are as traditional as ever in their concentration on Britain, with a selection of Australia, Canada, New Zealand and South Africa as the 'great self-governing dominions'. Despite the comparable links to be

made between non-settler states, such cases are absent from the above volumes. Though there has been a welcome recent interest in ‘Westminster Lilliputs’ of the Pacific and Caribbean,¹⁹ even a cursory examination of recent articles in leading political science journals show an almost automatic and unquestioned belief that ‘Westminster Democracies’ or ‘Westminster Systems’ are confined to the problematically termed ‘old’ or ‘white’ states of Australia, Canada and New Zealand *if* the ‘model’ is examined at all outside of the British isles.²⁰ It is interesting to note that almost all the authors of the works above are not based in Britain. The situation described by Graham Wilson over 20 years ago, echoing Leon Epstein earlier still, remains largely true that for most British political scientists ‘far from seizing the opportunity to study the essentials of their system of government in different settings’ they instead ‘turned inward’ and most courses on British politics in British universities ‘are taught as if the Westminster model existed only in Britain’.²¹ The forerunner volumes and their authors, covering the governments of the British Empire and Commonwealth of the early twentieth century to the 1980s were arguably more open and more expansive in their analysis by incorporating cases beyond the ‘great self-governing dominions’. Instinctively covering history, law and politics, James Bryce, A. B. Keith, R. J. Moore, D. A. Low, Margery Perham, K. C. Wheare, Kenneth Robinson, S. A. de Smith, Nicholas Mansergh, A. F. Madden, R. T. E. Latham, Martin Wight and Ivor Jennings, for example, all used illustrations from a combination of Asia, Africa, the Mediterranean, the West Indies or the Pacific as well as the ‘traditional’ settler cases to explain their arguments covering the developments of the Westminster model overseas *and* in Britain.

Turning eastwards the welcome rise of attention given to India and to a lesser extent on the rest of South Asia and South East Asia has seen a great manifestation of scholarly accounts covering the political institutions and constitutional cultures of individual states.²² Comparative politics and history covering governance and democracy in what was British Asia is less available in a single volume – and very rarely providing coverage of both South Asia and South East Asia (some recent texts have contained elements of this for parts of each).²³ Law has primarily produced the closest recent Asia wide equivalents. *Asia-Pacific Constitutional Systems* (2002), *Emergency Powers in Asia* (2010), *Fates of Political Liberalism in the British Post-Colony* (2012), *Constitutionalism in Asia* (2014), *Constitutionalism in Asia in the Early Twenty First Century* (2014) are texts that valuably document an impressive range of constitutional and legal issues that undoubtedly contribute to a better understanding of the contemporary governance of key Asian states.²⁴ Nonetheless they do not attempt to provide a systematic concentration on the British parliamentary model’s intervention into Asian governance. By naturally being directed towards courts and cases these legal volumes cannot do justice to a political system that, more than any other democratic type, relies on politics and its personalities to inform with history its distinctive ‘studied ambiguity’.²⁵ Ran Hirschl reminds comparative constitutional law scholars of ‘a simple yet powerful insight . . . often overlooked: constitutions neither originate nor operate in a vacuum’²⁶ a view endorsed by the pioneering

work of Granville Austin that firmly established the value of using context and leading personalities as a means to understand the creation of republican India's constitution.²⁷ Unlike contemporary volumes, older works on individual states' experiences by scholars and civil servants such as H. M. Seervai, R. H. Hickling, S. Namasivayam, Chaudhri Muhammad Ali and the brothers B. N. Rau and B. Shiva Rao consciously drew not only on British parliamentary history and politics, but also from settler and colonial cases of the British Empire to place their accounts in a constitutional context of where they came from, where they were currently, where they hoped to go and also what they wanted to avoid. Their training, often legal, in the colonial system made such empire-wide assessments almost inevitable. Their accounts thus carried a mixture of perspectives that included observer, scholar, apologist, critic, participant and sometimes obituarist for the system they helped build and understand.

Westminster Legacies – Democracy and Responsible Government in Asia and the Pacific (2005) is the first text for many years that has made an attempt to focus on the parliamentary system derived from Britain that covered both settler and non-settler cases. In the edited collection, Rhodes and Weller make the distinction between the British settler populated 'transplanted' cases and the 'implanted' cases, where the Westminster system was imposed and had a legacy of imperialism.²⁸ This typology goes some way to providing a comparative framework for understanding Westminster abroad, but the distinction proves less useful when assessing the reasoning of building new Jerusalems in the tropics and the non-British leaders behind them. It cannot be forgotten that any implanting or constitutional design of Westminster in Asia followed a heavy period of colonialism that was largely bereft of representative government on Westminster lines. Andrew Harding has from a legal perspective charted the 'transplantation' and 'adaption' of Westminster in Commonwealth states and gives an important and lively legal account of a system that he astutely observes can be convincingly seen as both a 'spectacular failure' and 'remarkably durable', but definitely not a 'tame reiteration of British ideas'.²⁹

The field of constitutional design has flourished after the fall of the Berlin Wall and the demise of the Soviet bloc. The literature has covered Asia also, especially concerning the constitutional measures that could accommodate the prevalent diversity and complexity of the region's societies. Key collections such as *Constitutional Design for Divided Societies* (2008) and *Comparative Constitutional Design* (2012) have undoubtedly increased our understanding and appreciation of the complexity and trajectory of legal and institutional choices when creating a modern constitutional framework.³⁰ Tom Ginsburg with key colleagues has undertaken an immeasurably beneficial and ambitious database that collates written constitutions across the world since 1789.³¹ However, as Ginsburg, Elkins and Blount recognise, the 'former UK colonies whose independence constitutions were negotiated at elite level' are difficult to categorise.³² Asian decolonisation certainly created state-building situations not easily explained in data sets or quantitative schemata. The longest piece of legislation ever passed by the British parliament, the Government of India Act 1935, also

happened to be the effective constitution for the independent states of India and Pakistan. The Indian Independence Act also came via the British parliament for British India and the legally distinct Princely States created two new countries with the same person as their head of state wearing different crowns who formally assented to the creation of two constituent assemblies for each dominion one of which created a new constitution, while the other ultimately failed to do so. Ceylon became independent without even having an Act passed. Ceylon's constitution was instead delivered by a mere Order in Council from Buckingham Palace and even explicitly mentioned the need 'as far as may be' to follow the constitutional conventions of another country – the United Kingdom – and did not bother with a constituent assembly. The British queen and the Malay rulers jointly commissioned a group of eminent Commonwealth persons without a single member from Malaya to recommend the form of their constitution. No constituent assembly was required here. Nepal, never formally part of the British Empire, nonetheless was unquestionably affected by the gravitational pull of colonial and independent India. The elite-led constitutions that flowed through the Himalayan kingdom bore the debris of British and Indian influence. The above is mentioned on India, Pakistan, Ceylon, Malaya and Nepal, not to confuse, but instead to remind of the pronounced esoteric nature of Eastminster. This was an era that was dominated by an unrepresentative and miniscule band of men – they were almost entirely men – that interpreted, wrought and personalised government to an extraordinary degree. There is almost an unsavoury absence of the people, and thus gender, class and culture are lacking – unless the gender was male, the class an educated or landed one and culture of an elitist style. This was the reality of Eastminster government during this historical period and therefore will be the focus of the chapter.

The legacy remains, to rephrase Ginsburg's 2009 work, the endurance of Eastminster culture rather than constitutions in Asia. India, Pakistan, Sri Lanka, Malaysia and Nepal have all had either several constitutions and governance models or at least multiple changes to their political infrastructure. Despite this not only do the relics of colonialism remain, but so does the effects of the constitution-making period that followed the liberation from imperial tutelage and the system thence crafted from Britain and translated for Asian consumption. This chapter focuses on this period and conceptualises the historical Eastminster³³ to uncover the institutional traditions, commonalities and distinctions of the newly forged Asian states that rose from British colonialism.

Part II: the context for an Asian constitution-maker

To navigate the road to Jennings successfully requires the map of A. W. Bradley. Bradley's reflections on his former master at Trinity Hall on what would have been his centenary is invaluable and mandatory reading as an academic life of Jennings the scholar of English public law. Bradley's article is reproduced with minor alterations in this volume, with a new preface penned for this volume. In it Bradley reflects that it was his hope that beyond the English career covered in

his original article further work would have been done to understand Jennings' constitution-making role across the world. I have recently edited a collection of previously unpublished documents of Jennings, including letters, notes, diaries and memoranda that cover much of his worldwide constitutional role with the hope that it will provide scholars with a critical primary source to assist in their appraisals of constitutions, politics and history.³⁴ This chapter attempts to utilise Jennings' material on India, Pakistan, Ceylon, Malaya and Nepal to fulfil its ambition to explore and expose the historic Westminster credentials of these states. It concentrates on Jennings' contribution in understanding the Westminster model in Asia.

In his posthumously published memoir, Jennings claimed his attitude 'was that of an ordinary Englishman, who thinks it reasonable that a colony should obtain independence as soon as it can carry the burden'.³⁵ Possibly his self-proclaimed 'Fabian outlook' contributed to this view, along with his term as secretary of St Catharine's Labour Club where he was apparently known as 'a "Bolshevik" in the College'.³⁶ His obituary informed that 'in politics he was left of centre', but recognised that his work academically and professionally was not fuelled by any political or party ideology.³⁷ Jennings, when lecturing and writing on the British Empire in the interwar years at the London School of Economics, believed, as he did on the British constitution,³⁸ that a pragmatic approach was necessary seeing both black-letter law and philosophically abstract views as unhelpful to state-building. This view extended to the opinion of when should power be transferred for indigenous rule. As Jennings bluntly put it: 'To the question, when is a people fit for self-government, the answer is, never'. He continued:

You have only to watch the behaviour of British politicians during a general election to raise doubts whether the British people are not fit for self-government. They are fitter than most peoples, but it is always a question of degree. Self-government cannot be refused to the British dependency, Arcadia, on the grounds that the Arcadians are not fit for self-government. You can say only that they are not fit enough. To the question, when can power be transferred to the people of Arcadia – that is, when can British rule and jurisdiction be withdrawn – the answer is, as soon as an acceptable substitute to British rule has been provided.³⁹

Jennings sincerely believed – perhaps through the remarkable international array of graduate students at the LSE at that time as well his experience with Asia's educated elite – that the nationalism of major parts of Asia 'was not unfamiliar to the British. On the contrary, it was fundamentally English and was expressed in English terms. Its background was English constitutional history. In preaching self-government the politicians were converts preaching to the major prophets'.⁴⁰ Perhaps this view of his goes some way to answer the question of why Gandhi merits just one brisk mention in his memoir.⁴¹

In 1941, early in the war, Jennings had moved to Ceylon to become vice-chancellor of the island's newly established university. Almost immediately he

offered and took the opportunity to contribute not only to the war effort, but also to the Ceylonese objective to quicken the approach to self-government. He now had the occasion to see his academic work beyond the lecture theatre. 'Go anywhere, do anything' – this was the unofficial motto of Ceylon's Civil Defence Department during the Second World War when a Japanese invasion was expected and feared. Jennings was deputy civil defence commissioner during much of the war and this telling motto was attributed to him.⁴² It can with greater amplitude serve as an aphorism for Jennings' relentless and near omnipresent influence across the constitutions and politics of British Asia during the transfer of power that was launched from Ceylon. Whitehall recognised constitutional change was inevitable: 'On a longer view . . . the pre-war system does not seem capable of adjustment to the promotion of broad-based governing institutions in accordance with our proclaimed purpose in Colonial policy'.⁴³ Jennings never became a Colonial Office man.⁴⁴ Instead his services were sought from the locals – unofficially at first. Lord McNair in his address at Jennings' memorial service commented that the years he spent in Asia, 1942–1955, witnessed a critical period for the region's political complexion. Borrowing Harold Macmillan's lasting phrase, McNair observed that 'The wind of change was beginning to blow with some force in Asia during that period' and that Jennings quickly found himself in 'great demand for professional advice on the constitutional problems of other new and emerging Commonwealth countries'. This meant his 'private academical interests eventually coincided with the public need'.⁴⁵

Jennings constitutionally tied South Asia with South East Asia. Through his active involvement; constitutional breadth and dexterity; and scholarly influence both as an authority and recorder Jennings provides a life, which permits a unique and telling perspective on early state-building in British Asia that no other single person can provide. India, Pakistan, Ceylon, Malaysia and Nepal would have all, obviously, constructed Westminster-style constitutions without Jennings and as such his influence must not be exaggerated; nonetheless through his constitutional travails in Asia we can chart the path and impression of Westminster in the continent and track this through his work and the distinctions and characteristics of it in these related, but individual states. Eastminster was not his to bestow or to shape, yet, all these states in some form or another drew from him and his work to build their constitutional edifices. From a scholarly perspective also the works of Jennings were a natural port of call for those seeking to understand the constitutional development of these states following British withdrawal and remain so to this day. His scholarship remains at times argumentatively flawed, factually incorrect, arrogantly judgemental and overreaching in its conclusions in terms of authority and validity. One account of Jennings' work on India levels him with 'a big burden of errors of facts and interpretation'.⁴⁶ His work in Pakistan draws open ire while his role in Sri Lanka and Nepal have attracted enduring controversy.⁴⁷ However tempting, instances such as describing a fellow commissioner in Malaya as 'a stupid fellow, third class in ability and fourth in imagination';⁴⁸ telling a student in Colombo that he'd struggle in Britain as 'Ceylonese students . . . never learn to read';⁴⁹ or shambolically

thinking that Mahatma Gandhi was Indira Gandhi's father-in-law,⁵⁰ should not detract from Jennings' qualifications, energy, intellectual range and political intimacy in assessing Asian state-building.

Post-1918 Europe experienced a precarious vista where constitutional adviser-professors like Germany's Hugo Preuß or Austria's Hans Kelsen operated in what Mark Mazower describes as a 'heady post-war decade' when the 'jurist was king'. These constitutional adviser-professors were tasked with rebuilding states from feudal and denounced institutions, and saw an opportunity to 'subordinate politics to law' creating a constitutional utopia that would rationalise power by conditioning it to law.⁵¹ Jennings was not quite in that mould, conceptually or temperamentally, as the European adviser-professors, but he did face a context that also sought to promote constitutional optimism and idealism to replace despotic rule and dismantle local parochialism. Weimar was no Westminster, at the beginning or the end, but nonetheless there was a similar sense at the foundation that this system crafted from both the past and hope for the future would entrench democracy guided by invented traditions for Asia and elsewhere. Unlike the European adviser-professors, however, Jennings reversely believed that law should be subordinated to politics. The Cambridge-trained scholar saw that 'everything depends on the behaviour of human beings and especially ... homo ... politician'.⁵² Jennings was ready to do what needed doing, however challenging. Not for nothing was Jennings' name at the top of the list to go to political quagmires like Pakistan,⁵³ and the *Manchester Guardian* observed, that 'Sir Ivor is not appalled by difficulties, or ready to abandon a sound principle because of inevitable imperfections in practice'.⁵⁴

Jennings was one of the 'constitution mongers' of Asia⁵⁵ and his learning, experience and disposition led him to engage in conspicuous constitutional borrowing. When presenting his advice or illustrating his work Jennings naturally used precedents from across the world – particularly those parts once shaded pink. Malaya, for example, at Jennings' instigation saw its constitution openly include provisions formed from the experiences, documents and constitutional histories of India, Pakistan, Ceylon, Burma, Ghana, South Africa, Newfoundland, Canada, Australia, New Zealand and Ireland. When he referred to the constitutions of Asia being British in their 'context and texture' it can be presumed 'British' meant historic and imperial parts of the empire and not just the metropole. Asia did not necessarily need Jennings to do this. India's 1950 constitution openly pulled precedents from across the world and its learned adviser B. N. Rau collated an insightful collection of historical and contemporary international precedents and conventions. The section of the republican constitution dealing with the Council of Ministers for example owes considerable debt for its wording to Canada and Australia.⁵⁶ It is interesting to speculate whether Lord Mountbatten followed his staff's advice in the run up to independence and held confidential briefings from Jennings, who was seen as 'a real expert on the question of the structure of the Commonwealth', which the last viceroy was determined that both India and Pakistan must join.⁵⁷ Whether a republic, realm or traditional monarchy, Jennings believed that almost all the senior Asian leaders

studied constitutional issues, even if in criticism, ‘through the English language and through English eyes’ and this, naturally, coloured their views and explained their choices.⁵⁸

Jennings was aware of both the opportunities and dangers this implied for the Westminster model. Jennings’ role and that of his indigenous interlocutors was therefore crucial for Eastminster’s ‘complex of personal relationships’, but this could also be its downfall.

It is much easier to draw a formal constitution putting into words the outline of the Westminster model than it is to create the environment and the complex of personal relationships which make the Westminster model work. Indeed, it is to be expected that where democratic government works well it will work with a different set of political conventions from those observed in Westminster... Those countries which have succeeded in maintaining the democratic system, the Rule of Law, and constitutional government have shown that different forms may be used in political institutions and political conventions. Variations from the Westminster model must be expected; what one hopes is that they will be variations which do not infringe fundamental principles.⁵⁹

Part III: Eastminster in British Asia – five deviations from Westminster

Jennings’ legal contemporary S. A. de Smith explained in the framing of Westminster constitutions a ‘blueprint has never been part of the Commonwealth constitutional lawyer’s equipment’.⁶⁰ Without a blueprint the draftsmen were left trying to translate the political expectations into constitutional form. As Madden described of historic exports of British government and rule, it ‘was natural for men to create in the image they knew’. Importantly, it was not just a matter of the British intention in ‘charter, statute or instruction’ but how those on the ground ‘regarded the instruments they received and how they worked them’ because how they interpreted their powers and institutions in ‘one generation became the constitutional orthodoxy for the next’.⁶¹ The first generation of Asian political leaders created their own Eastminsters and their own orthodoxies, which projected well beyond their terms of office just as the settlers had done on the frontiers of ‘Greater Britain’.

A review of Jennings’ *The Approach to Self-Government* commended two key constitutional elements that stood out about new states from British rule.

The first is the profound degree in which the emergent countries have become impregnated with British constitutional thought. The second is the degree of modification or acclimatisation which the British model undergoes as it is adapted to the exotic setting.⁶²

The British ‘post-colony’, as Halliday and Karpik argue, struggles with the ‘inherent contradictions of colonialism’ and the ‘liberal-legal heritage’ that

Britain sought to 'pass on'.⁶³ This also highlights the critical distinction between colonial government and post-colonial government. However, the distinction should not be such as to remove the need to assess one to understand the other. Local political leaders under colonial rule, while denied 'responsibility' for governing their lands, were trained culturally and politically to articulate and manipulate their demands for freedom using the language and method of Westminster style responsible government. In Asia, Westminster style government was not effectively tried till after the British left. As Arvind Elangovan observes, the Indian constitution is often misleadingly viewed as 'the successful culmination of the story of Indian nationalism'.⁶⁴ The stance of seeing India's constitution as explicitly linked to nationalism and the end of colonialism unsurprisingly understates the continuities and borrowings from not only British India, but also the imperial world.

The Eastminster stage was also the transition stage – not only from colonial to post-colonial, but further ahead for some states from democracy to authoritarianism or a key stage in regime change. Earlier currents pushed the Asian states in the early-post war era to experience comparable transitions from colonial authoritarianism.⁶⁵ Fresh from the battle for independence the Asian political actors were not only operating in a fluxing hell where the governance of their state needed to be tested to be true, but also under an Eastminster system already sold with few rules that quickly became hotly contested. These political conflicts could and did in some cases like Pakistan and Nepal lead to regime collapse. Jennings warned: 'Those that have been bred under settled and ancient political systems cannot realise the short distance that lies between settled government and chaos'.⁶⁶

Assumptions were often made that were difficult to uphold. Jennings in preparing one of many memoranda for the Reid Commission in Malaya confidently stated that for the new country and its units: 'The ordinary conventions of Cabinet Government would apply. This system is well understood throughout the Commonwealth and will be used in the Federation'.⁶⁷ He predicted after watching the first year of deceptive tranquillity in Ceylon that 'communalism seems unlikely to obstruct the smooth operation of responsible government'.⁶⁸ These predictions were tragically wrong. Not all were so convinced of Westminster's viability in the region. In 1958, just a year after Malayan independence and over a decade after India's, the Labour politician and former South East Asian proconsul, Malcolm MacDonald, wrote from Delhi as Britain's high commissioner:

None of the Asian peoples are by nature fitted to govern themselves by a system of Parliamentary Democracy on the Western model. For many centuries they have all been used to authoritarian rule in one form or another; and in spite of a certain enthusiasm for demanding their democratic rights (without much corresponding zeal to assume their democratic responsibilities) the large majority in most countries are probably still inclined in acquiesce in being governed by others rather than governing themselves.⁶⁹

Whatever its manifest failings, Eastminster was a political fixture in Asia.

Thanks to works on the settler states like *Comparing Westminster*, scholars have a relevant and practical guide to discern the important ‘beliefs’ required to belong to the broad church of Westminster. The concept of beliefs is certainly more useful than rules when seeking to compare and categorise *New Westminster*s.⁷⁰ Like all faiths there are different sects within and this chapter does not seek here to challenge all the lessons.⁷¹ Instead this chapter and the section below in particular seeks to examine the deviations found in Asia. Rather than try and explain every difference and find every commonality, the chapter using the period selected and the involvement and assessment of Jennings concentrates on how these states differed from ‘traditional’ expectations of how the Westminster model was supposed to work. The Eastminsters historically had five key inter-related deviations from the traditional settler cases of the model. These deviations will now be explored and Table 1.1 below sets the Eastminster deviations against five key Westminster attributes found in the settler states.

1 *Asian Raj*

The Eastminster states contained no substantial settler population that sought to build a ‘Better Britain’.⁷² Instead civilisations, governance traditions and social factors existed that clearly made a British inspired political system’s reception problematic to say the least. ‘No Englishman can enjoy the prestige of the Brahmin’⁷³ Jennings remarked, and the political leaderships across Asia was drawn from those who frequently held important social rank in their societies. As Bayly and Harper argue the ‘British tended to see it, as they preferred to see all colonial nationalism, in terms of culture of a responsible middle class, united by English education and the values it carried’.⁷⁴ This remarkable Asian elite contained a much higher proportion of Oxbridge trained leaders than their settler equals. When examining the decade following independence in India, Pakistan, Ceylon, Malaysia (and Singapore) it is striking to record that nine of the 12 men who served as prime minister attended Oxbridge.⁷⁵ This fact is particularly bold when compared to their settler counterparts. An analysis of the ten-year period following ratification of the politically empowering Statute of Westminster,

Table 1.1 Eastminster deviations against five key Westminster attributes found in the settler states

<i>Westminster</i>	<i>Eastminster</i>
1 Settler states	1 Asian Raj
2 Ceremonial head of state	2 Interfering head of state
3 Prime ministerial and cabinet executive	3 Selective dictatorship
4 Majoritarian system	4 Minority rights
5 Reliance on conventions and flexibility	5 Colonial continuities and invented conventions

which gives a comparable juncture to independence in the Asian cases, shows that in Canada, Australia, New Zealand, South Africa and Ireland only one of the 12 heads of government, Jan Smuts, went to Oxbridge, and half of them could not claim any tertiary education at all. This illustration, of course, does not hide the deeply unrepresentative nature of Asia's political leaders or necessarily show their intellectual talents. The overwhelming majority of the governed during these years could scarcely write the names of the favoured few that *naturally* held power. As a vice-chancellor in Asia, Jennings saw the peculiar reception English education had for the privileged minority who had access to it

For those who had access [English education] was determined by syllabuses drafted in London for the benefit of English students. Latin was compulsory, and so nearly every educated Ceylonese has a vague recollection of the conjugation of *docere* but few know anything of Sanskrit and Pali. English was English for English students and that meant (in London) mainly Anglo-Saxon and linguistics, not English literature. I have no doubt that in 'English Literature' the following colloquy was common:

TEACHER: 'O daffodil we weep to see you fade away so soon'

PUPIL: What is a daffodil?

TEACHER: Just an English flower, but the examiners will not ask questions on that.⁷⁶

James Tully believes that the imperial constitution-making in colonial and post-colonial regimes created a manufactured climate of 'low intensity democratization', which nonetheless during and following decolonisation allowed for 'modifying the imperial dimensions of constitutional democracy from within'.⁷⁷ The institutions and idealisms subsequently changed and chopped, but this was because the system had new masters 'within' who could now do the manipulating instead of the colonial power whatever the intensity. For those kept out of the negotiation for power the drama of independence could be frustrating. As the Malayan Progressive Party viewed it

As the terms of reference of the Constitutional Commission do not call for recommendations for convening of a Constituent Assembly it would appear that unlike India and Pakistan, the people of Malaya cannot adopt, enact and give to themselves a Constitution but can only be granted one.⁷⁸

In Ceylon, where early prime ministers rotated the sherwani with Privy Council uniform, D. S. Senanayake was no less successful in taking a different approach from India and Pakistan.⁷⁹ A 'friendly' method of reasoning towards the British was used to help him become the anointed one despite lacking island-wide support for his position.

His line of approach, too, was quite different from what they had expected. He was far too experienced a politician to tell them that they were knaves

and fools. What he said in effect – in language which I cannot reproduce – was: ‘We are an ancient people, accustomed to governing ourselves before England was heard of. We are a friendly people. We welcomed you in 1795. We vested the Sinhalese Crown in your King in 1815. You have done things of which we do not approve, but we have also learned much from you. You gave us a most difficult Constitution, but we have worked it successfully. When you lost Malaya and Burma and met antagonism in India, you came to friendly Ceylon, and we helped you. We do not ask independence as a reward. We ask it because it is in your interest as well as ours. We want to keep your friendship. Do you not want to keep ours?’ Such an appeal was both unexpected and unanswerable except by a gesture of equally friendly a nature.⁸⁰

Jennings famously wrote of the supposed socialist leanings of the Indian constitution that ‘The ghosts of Sidney and Beatrice Webb stalk through the pages of the text’,⁸¹ but the shadows of other British figures including Sir Henry Maine, A. V. Dicey, A. B. Keith, Edwin Montagu, Sir Samuel Hoare and Harold Laski⁸² can be glimpsed too and all persons familiar to the legal-political elite that dominated India and its constitution framing. It could be argued that ‘The lawyer-politician has ... played a more important part in Indian politics than in the politics of any country in the world’.⁸³ This possibly helped create within India a legal cosmopolitanism at just the time that Rohit De argues its members were prevented from participating at the imperial–Commonwealth level.⁸⁴

Congress dominated India’s constituent assembly with 82 per cent of the members, which was controlled further by the party’s oligarchs Jawaharlal Nehru, Rajendra Prasad, Sardar Patel and Maulana Azad, who had ‘god-like status’.⁸⁵ As Sunil Khilnani argues, Indian democracy came to the people because it was ‘given to them by the political choice of an intellectual elite’ and not through ‘public pressures for it within Indian society’.⁸⁶ Though the members of the assembly were unrepresentative of the population at large in their caste, Westernised education and social milieu, it is not, as Bhargava argues, helpful or accurate to brand them or their counterparts across Asia as ‘alien’.⁸⁷ Sir Kenneth Roberts-Wray believed the constitutions the Colonial Office produced were ones that ‘can justly be claimed’ that they delivered to ‘the people what they ask for’.⁸⁸ Many scholars have criticised such sentiments since the people were never represented in the modern sense at the constitution-making table. However, it can be surmised that Roberts-Wray was trying to convey that constitutions from Britain were not imposed, but negotiated with people who the British expediently portrayed as representing the will of their people, however difficult it is to see how this was so. Constitutional commissions in Ceylon and Malaya accepted submissions from all manner of groups – though it is difficult to gauge any actual effect these had overall other than their admission since the main game remained in the hands of the accepted local elite.⁸⁹ The leadership of India and Pakistan’s negotiations with the British were extensive, complex and exhaustive and even the colossal 12-volume *Transfer of Power* series did not capture it all,

nor could it.⁹⁰ The elites operated in a ‘complex interplay of conflicting promises and constraints’, but mostly united in the goal for independence.⁹¹

All of this cannot remove the astonishing reality of a situation such as in Nepal in 1959 where the population with barely 6 per cent having literacy skills were given the right to vote in a national election for the first time based on a constitution framed by an Englishman that was released less than a week before the poll. A British correspondent covering the election ventured that the majority of the ‘pocket valley’ candidates knew ‘about as much about politics as the flying squirrel bouncing through the rhododendron bush’. Underneath the title ‘Nepal goes to the poll’ the article was thus accurately sub-headed ‘Guided by King Mahendra’.⁹² The ‘guided democracy’ Vernon Bogdanor describes of early twentieth-century Britain⁹³ was also in evidence in Asia following independence. Whether using the *Ramayana* or *Rex v. Halliday* as inspiration, the indigenous elites were the ones doing the interpreting and the ones doing the ruling for *their* Eastminster. As Nehru prophesied during revolutionary times, ‘Caesarism is always at the door’.⁹⁴ India and its neighbours now had Caesars of the soil once more.

2 Interfering head of state

British and settler accounts of the Westminster model almost uniformly relegate the sovereign or their representative solely a ceremonial role, if the head of state is mentioned at all.⁹⁵ As Rhodes, Wanna and Wella argue ‘[while the Australian constitution states that] “The executive power of the Commonwealth is vested in the governor-general” [n]o one takes it literally’.⁹⁶ Robert Blackburn has sought to ‘bury, not praise’ any reference to the British monarch having ‘independent’ personal powers and forever remove Jennings’ ‘unfortunate’ phrase and philosophy of the monarch having ‘personal prerogatives’ from the United Kingdom.⁹⁷ Arguing ‘nor is it absolutely necessary that the Governor-General should act on the advice of the Prime Minister’ would be received as ludicrous in the settler states.⁹⁸ In contrast, in Eastminster the preceding argument made by Jennings would have been seen as highly credible. Successor heads of state in British Asia, professedly modelled on the settler and especially British royal template, actually engaged in political activism to say the least and did see themselves as having ‘personal prerogatives’ that encouraged them to intervene in politics. The king, Yang di-Pertuan Agung, (and sultans in the states) in Malaysia or the king in Nepal as traditional rulers saw their duty to defend not only their inviolable religious status, but also their historic monarchical powers despite being posited in their modern national documents as constitutional heads of state. The mystic powers of Malay kingship described in the *Sejarah Melayu* had great nationalistic influence on Malays and how they viewed their rulers and themselves. This was important in drawing up the new constitution, and in Tunku Abdul Rahman’s view ‘the Rulers have been given more rights than they had once enjoyed in British colonial days’ and their influence certainly endures.⁹⁹ Meanwhile the governor-generals of India, Pakistan and Ceylon saw themselves

as indispensable from the affairs of state. Sacking and selecting prime ministers and ministers; commanding the military; formulating policy; chairing major committees; directing the cabinet and civil service; ignoring the legislature; and playing very dangerous politics were all examples of political activism almost unheard of in Britain or the settler states. The principles of responsible government in some instances were overturned, reducing the prime minister as a sort of *chef de cabinet* instead of the principle agent of power. Jennings neatly posed this as: ‘Can you imagine the British Constitution with Winston Churchill as King and George VI as Prime Minister?’¹⁰⁰

As Jennings recounted from his time in Pakistan under Governor-General Ghulam Mohammad: ‘The decisions of primary importance were taken by the Governor-General himself. He regarded Cabinet decisions as advice to him which he was free to reject, and the Cabinet acquiesced in that interpretation’.¹⁰¹ Jennings is supported by Jinnah replying to Mountbatten’s question of why not become prime minister since as governor-general he would have to listen to advice: ‘In my position it is I who will give the advice and others will act on it’.¹⁰² Ghulam Mohammad did follow that advice and used the vice-regal office for example to sack the prime minister Khawaja Nazimuddin – himself a former governor-general – recall and install a serving diplomat in Washington to take his place and then proceed to summarily dissolve a constituent assembly that intended to circumscribe his powers and all of this carried out in the Queen’s name.¹⁰³ A particularly eccentric imagination would be required to see Elizabeth II do that at Westminster – even with advice, which was absent in Pakistan.

Pakistan, admittedly stands at the extreme, as will be further argued below, but the head of state in Ceylon and even India were no shrinking violets when it came to politics. Harding calls these proclivities ‘dyarchical malfunctions’.¹⁰⁴ The governors-general of India and Ceylon were politically active and this was robustly the case during constitutional and political predicaments such as in Ceylon over the controversial selection of the first prime minister’s successor in March 1952 and dealing with the virulent ethnic riots in 1958 as the government had ceased to take leadership on the crisis. In India Mountbatten, no longer viceroy, welcomed Nehru’s invitation to influence and interfere in the post-partition policies of India while his successor as governor-general, C. Rajagopalachari, a senior politician in his own right, continued the vice-regal office’s prominent interventions over the vexed issue of Hyderabad’s inclusion by military means into the Indian Union in September 1948.¹⁰⁵ Sovereignty in constitutional monarchies resides with the Crown and in Asia this was no mere piece of legal flummery. Eastminster legally and politically provided the capacity for its heads of state to act as political and not just ceremonial leaders. One of the reasons for this can be surmised that the pre-eminent political figures in India, Pakistan, Ceylon, Malaysia and Nepal either held, were considered or were substantially linked to the position of head of state in a manner unseen in the settler states.¹⁰⁶ In addition, all of these states had seen the awesome authority of the colonial agent, and ‘viceregalism’¹⁰⁷ was a term connoting autocratic power held by the Crown’s representative in South Asia before and after independence, as

opposed to the limited and legally arcane expression of ‘vice-regal powers’ used in the traditional settler states for their governors-general.¹⁰⁸

In some ways the post-colonial successors were more assertive than their colonial era predecessors. The unhinging from the India or Colonial Office and the trappings, nationalist realisations and political opportunities of their new position of head of state created fertile conditions for gubernatorial interference. These constitutionally problematic conditions at the centre of an interfering head of state was very often replicated in the less scrutinised sub-state level of the federal polities of India, Pakistan and Malaya. In discussing the origins of parliamentary responsibility Przeworski, Asadurian and Bohlken argue using historical case studies from constitutional monarchies that the actions of the sovereign ‘could not be predicted by reading their constitutions’. Constitutions ‘construct a game’ for the actors involved.¹⁰⁹ This realisation is inherently applicable for not only the heads of state in the Eastminsters during their time of state-building, but also those who formally served at their pleasure.

The maxim made by Sir Lewis Namier and Vernon Bogdanor that the ‘influence of the sovereign was in inverse relation to the growth of the party’ in Britain¹¹⁰ held true afar in the Eastminsters where all political parties that took office had limited if non-existent experience of government, thereby giving the Crown’s representative or equivalent a real influence over politics. Even the most organised and powerful parties in Asia, such as the Indian National Congress founded in 1885, due to colonial detention and obstruction as well as boycotts had shallow depth of government involvement and consciously relied on Mountbatten and Rajagopalachari to assist in the administration and direction of the executive after August 1947. The republican constitution that followed did not transform this situation greatly. The presidential successors were still expected to model themselves on their erstwhile liege at Buckingham Palace. However, the combination of active party politics experience, (indirect) national election and a new constitution devised under his chairmanship gave Rajendra Prasad a sense of legitimacy as the first president of the republic that was lacking in his predecessors. Rajni Kothari, and others afterwards, thought that the constitution in fact made the president ‘incomparably more powerful than the British monarch’ despite opposite expectations from the leading politicians.¹¹¹ Differing interpretations were exacerbated by the new president regarding every mention of president as conferring personal powers for himself rather than an abstract constitutional term like Crown, which the republic had to replace. Contained in Prasad’s papers was a passage by Jennings on the presidency, which outlined the potential problems.

The Indian Constitution provides for an elected President who is apparently intended to be a Constitutional monarch without the trappings of monarchy. This is perhaps a somewhat hazardous experiment. Constitutional monarchy has evolved in Great Britain by a long and at times stormy process of evolution. It is easy to translate this system through the appointment of a Governor-General, but it may be less easy where an elected President,

presumably a politician of some ambition, assumes royal functions. We have trained our kings, and Governors-General copy kings. There is some risk that a President will desire to set his own precedents and the Council of Ministers will not always agree with him. Rather than accept allegiance to the former Emperor of India, the Constituent Assembly prefers to run the risk.¹¹²

When Prasad was taking his role too assertively and threatening intervention in policy areas Nehru thought out of bounds, the legal pundit Sir Alladi Krishnaswami Aiyer advised the cabinet in classic Westminster terms of how the president should react if he was to receive a bill not to his liking: ‘In the felicitous language of . . . Bagehot, the King has no alternative to signing his death warrant if the Parliament chooses to pass a measure in that behalf’.¹¹³ This, of course, was just another interpretation, but one the cabinet preferred.

In Nepal, Jennings gave the head of state the interpretation requested. The constitution ‘provided for Cabinet Government so long as it was practicable, but gave the King ample powers to suspend Cabinet Government; or even the whole Constitution, if it proved unworkable’.¹¹⁴ This was no dead letter as the king did indeed suspend the state’s brief experiment of parliamentary democracy and proved the Crown’s power in Eastminster was anything, but dormant.

3 Selective dictatorship

In 1976 the British Conservative grandee Lord Hailsham memorably cast British government as an ‘elective dictatorship’ that is ‘absolute in theory, if hitherto thought tolerable in practice’.¹¹⁵ Hailsham was explaining to his British audience the long observed tendency of Westminster to fuse together substantial powers and vest them in the executive. However, 10 Downing Street was far from being the only locus of this political phenomenon.¹¹⁶ The model’s institutional inclination to centralise power was prominently evident in British Asia from the beginning.

At the transfer of power the deviation was especially pronounced, as even the ‘elective’ part needed qualification. Both India and Pakistan’s constituent assemblies were indirectly elected from provincial legislatures prior to independence. Tasked with drawing up a constitution rather than holding the executive to account or representing the people was the objective, though even this was not achieved in Pakistan. The executive dominated by the governor-general and their placeman was largely untroubled by the assembly and the country had to wait till 1970 before a general election. Government in Pakistan often resembled a game of ‘musical chairs’ where key figures in this era danced between seats at the cabinet table, desks in the civil service and the governor-general’s throne.¹¹⁷ Though India fared better in terms of elections and constitution-making the fact that a general election only occurred in 1952 was enough for the first president of the republic to query the assembly’s legitimacy and the executive’s validity.¹¹⁸ In Malaya’s 1955 Legislative Council election, which preceded independence,

the governing coalition held every seat but one. The statistics have somewhat altered since, but the United Malays National Organisation's (UMNO's) grip on the executive remained impassive, with Tunku Abdul Rahman alone staying in power till 1970. Ceylon's 1947 general election almost posted an upset by failing to deliver a majority to the UNP (United National Party) as the ordained party of power, but independents and others were convinced of their duty to support the planned itinerary for independence. While in Nepal, elections, like constitutions, came at the king's behest and were withdrawn just as quickly. B. P. Koirala on becoming prime minister after the first ever parliamentary election in 1959 was not only out of a job just over a year later, but was arrested while the constitution and parliament were suspended, all on the king's command. The above points to the precarious nature of electoral legitimacy. It also shows the selective nature of the executive. Therefore the democratic chain of delegation from elector to executive was non-existent, irrelevant or subverted any clear accountability to the electorate and parliament.¹¹⁹ Another key element of the selective nature of these executives was their reliance on a reservoir of relatives and retainers for political ballast. Merit was elusive. Families such as the Nehrus, Bandaranaiques and Koiralas, for example, continue to exert incredible power over their states in the present age, often defying the democratic ideals that their ancestors held intrinsic for their lands to escape the clutches of parochialism.

Historically, the two-party system was seen as critical to the practice of Westminster government. Eastminster, like much of the Commonwealth, did not exhibit such conditions to make a two-party system operable. As Harding states, political parties in the Westminster export variety are almost never mentioned, though 'their existence is implied' despite conditions often making them 'inimical'.¹²⁰ This situation was not helped by no serious thought being given to alternative voting systems in place of the traditional majoritarian 'first past the post' method. More often one party dominated politics such as the Muslim League and Indian National Congress, or coalitions of elites such as Malaya's Alliance¹²¹ or Ceylon's UNP, created with the purpose of receiving power from the colonial masters. The selection came with risks. The British were worried that Abdul Rahman was not up to the serious problems his new state faced.¹²² Pakistan learned quickly the problem of relying on a single selected person, as Jennings sardonically observed: 'We can appreciate the revenue to which Jinnah was entitled without approving the process of establishing a Caesar. Caesar is unfortunately mortal'.¹²³

Jennings' description on how to build a functioning political class in Nepal does not evoke confidence. Jennings hoped a 'Court Party' could emerge that could carry out the wishes of the king since he assessed that the 'one stable element is the monarchy' in Nepal.¹²⁴ A view shared by others, such as one British reporter speculating that if 'the King would stand as the leader of a divine Royal Socialist party he would undoubtedly win'.¹²⁵ For King Mahendra, however, parties did not possess 'Nepaliness' unlike the monarchy, and the principle that all sovereignty emanated from the king was not one of legal abstraction.¹²⁶ In case that was not enough, Jennings gave the king other options: 'To give the King a buffer against popular discontent, I invented a Council of

State, which he could “pack” if he so desired, or use as an assembly of Kathmandu politicians if he thought that preferable’.¹²⁷ S. W. R. D. Bandaranaike believed that Ceylon ‘adopted lock, stock and barrel the British machinery’ and while prime minister he argued before a joint select committee the need to move away from the British inspired constitution since, using words that prefigured Hailsham’s, ‘the British System is in effect a dictatorship clothed in democratic forms’.

In my opinion, what appears to some people as the breakdown of Democracy itself in certain countries recently, is really not a failure of Democracy but of the particular democratic machinery adopted ... in the first place, there is the dictatorship of the Party which has obtained a majority at the elections, without the Opposition or even the back-benchers of the Government having any important voice in the conduct of affairs; secondly, there is the dictatorship of the Cabinet over the Government party; and thirdly, there is the dictatorship of a small Inner Cabinet over the Cabinet.¹²⁸

The selective dictatorship was far from being merely conceptual in the Eastminster as all the states experienced their own version of dictatorship, both bad and benevolent from the view of their hapless citizenry. Jennings’ words that in ‘many countries ... the success of “democracy” depends upon the character of the oligarchy at the top’ is almost dull in its obviousness for the Eastminsters.¹²⁹

4 *Minority rights*

India’s 1950 constitution begins in very un-Westminster style with the preamble ‘We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic’.¹³⁰ The major departure, however, was its symbolically powerful and legally actionable section on Fundamental Rights. Jennings had been for much of his career in common with his British legal and academic brethren against the need for bills of rights with entrenched status in constitutions. Leaving aside whether such a legislative device is critical for British liberty, the demographic facts and contemporary fissures of decolonising Asia made bills of rights much discussed as tools to assure minorities and restrain executives. Between Ceylon and Malayan independence Jennings’ attitude changes. He had attacked India’s constitution publically in the early 1950s for its fundamental rights provisions as being restrictive and cumbersome.¹³¹ The common law, in his view, and some non-discrimination clauses were substantial enough to defend the liberties and rights of citizens, and as such Ceylon with his guidance did not follow the Indian style of rights protection. However, by the time Jennings was working in Malaya in 1956 he had seen the autocratic excesses of Pakistan and the linguistic and ethnic firestorm in Ceylon. In both cases the constitution was unable to prevent or reverse draconian executive powers in Pakistan or majoritarianism chauvinism in Ceylon.

His work in Malaya therefore reveals evidence of rethinking his ideas on bills of rights not seen in his published works. Showing pragmatic agility over intellectual pride, Jennings saw how Asia was turning, and for Malaya was able to craft a Fundamental Liberties draft bill that not only drew directly from articles in India's constitution and its courts that he had previously criticised, but also from several other Commonwealth states as well as Burma and Ireland. Alongside this he still had to balance the political needs of the UMNO to give special protection to the Malays while not impairing the rights of the federation's numerous and well-established minorities.¹³² Perhaps, as Charles Parkinson argues, Jennings' bill of rights was not as critiqued as expected by the UMNO due to them not having any 'legal luminaries' or external legal experts to fully explore whether it was compatible for Malays to have special rights and all other communities their own rights.¹³³ Constitutionalising Islam, which the Reid Commission saw as pragmatic to win the favour of the Sultans and UMNO, produced considerable concern, expressed in piles of memoranda pleading either complete equality and secularism or specific constitutional protection for individual ethnic, religious, linguistic and sometimes professional identity.¹³⁴ Writing just before he died, Jennings admitted that his views on India in the early 1950s were 'misconceived' and his earlier 'criticisms to have been exaggerated'. His reasoning for India's surprising 'success' was due to the Indian judiciary's grounding and felicity in common law, since 'a body as able and as well trained in the common law as the Supreme Court of India can make use even of so complicated a bill of rights to defend the liberties of citizens'. Thus, 'The Indian Constitution came not to destroy the common law but to fulfil it, by applying some of the eternal principles to Union and State legislation'.¹³⁵ Jennings was clearly thinking of Pakistan, where the military discarded the short-lived constitution with the bill of rights he devised there as its adviser in 1954–1955, when he said 'No bill of rights could, however, have prevented a military coup d'état'.¹³⁶ The work in Malaya to instil constitutional status for bills of rights should not, however, be confused with a new wave of enthusiasm. Jennings was no born again convert. From Kathmandu he complained in 1958 when advising the Nepali leaders that 'A Chapter of Fundamental Rights was forced upon me' conspiratorially adding 'but it will be easy for the King (but not the politicians) to suspend them if they prove too restrictive'.¹³⁷ By 1965 as he wrote his piece on constitutionalism in the Commonwealth he appreciated that bills of rights were becoming the norm for states emerging from colonial rule, in contrast to the views that flowed through the English legal mind.

The contemplation of the problems of the newly independent countries has led to a changed view of bills of rights. The combination of a common law suffused with the principles of Magna Carta and a Parliament active in the defence of the liberties of England was thought by English lawyers to provide all that the Englishman needed, especially when every village had its Hampden and every town its cohort of Pymms.¹³⁸

Throughout Asia political realities dictated that minority rights were ultimately secondary to majority ambitions and realities. As the British observed in Malaya

The Tunku has clearly made up his mind that while the Chinese must be given reasonable opportunities, he cannot afford to ignore the Malay demand for the best place in the sun. Present indications are that, if the present Alliance leadership does not move towards a more extreme position in support of purely Malay demands, it might very well fall from power and be replaced by more extreme Malay leaders.¹³⁹

With different degrees of severity the same feeling was held across Asia. Politically the majoritarian mechanics embedded into Westminster suited the Eastminster leaders, who invariably came from the dominant group in their society. Minority rights, whatever their legal status, owed their success or failure to the precarious realm of the political exigencies of the centre, which often functioned without credible minority representation. Eastminster worked with the Damoclean threat of suspending both reality and rights.

5 Colonial continuities and invented conventions

A fascinating table exists in the Jennings archive that contains three columns of constitutional articles.¹⁴⁰ The first has articles from the Government of India Act 1935, the second the Republic of India's constitution and the third Pakistan's. Though de Smith with derisive justification exclaimed that 'the comparison of constitutions by tabulation is perhaps the bleakest form of scholastic aridity', this tabulation of Jennings shows a remarkable endurance under new headings.¹⁴¹ Almost two-thirds of the Republic of India's 1950 constitution's articles consciously and acquiescently transferred provisions from the Government of India Act, which, of course, was initiated, debated, scrutinised and assented without any real Indian involvement. The most controversial elements appropriated were the emergency provisions, which Indian nationalists had with good reason spent much time and ink decrying the colonial power for using to retard Indian rights and suffocate the democracy. Often working for opposing objectives Winston Churchill and his allies across the House nonetheless thought the emergency provisions in what would become the Government of India Act would give the Viceroy 'power similar to that of Lenin, Hitler or Mussolini'.¹⁴² The Indian constituent assembly debated these powers with keen interest as the majority of its members had experienced the viceroy's and provincial governor's exercise of these autocratic provisions to frustrate and criminalise their political activities. The Republic of India's freshly minted constitution contained in its Part XVIII a rebranded version of pertinent schedules from the Government of India Act 1935. Powers such as those in art. 356 giving the centre provisions for 'suspending in whole or in part the operations of any provisions of this Constitution relating to any body or authority in the State' are more than reminiscent of the colonial era. Though B. R. Ambedkar, the Indian constitution's protagonist,

argued that the emergency provisions ‘would remain a dead letter’ they have in fact been used over 100 times since 1950, the majority of which the 1988 Sarkaria Commission found to be politically motivated against provincial opponents.¹⁴³

The ‘Malayan Emergency’ of communist rebellion against British rule from 1948 had as Tim Harper argues clearly intensified and expanded colonial structures not long after the ‘second colonial occupation’ following the Japanese defeat.¹⁴⁴ Emergency powers remained at the forefront on Malaysian political thinking and their use did not greatly trouble their users. As the British observed of Abdul Rahman:

He has an overwhelming Parliamentary majority, the local forces and police are largely Malay, and for his own ends he will keep legal powers to detain without trial. He is therefore serenely confident of his ability to absorb the Chinese terrorists into the community and to deal with any who give trouble (an assessment which incidentally betrays his lack of experience and which, in my view, is highly questionable).¹⁴⁵

The trade union backed Labour Party of Malaya in their written submission to the Reid Commission questioned the axiomatic nature of Commonwealth membership and saw the need for an elected head of state and constitutional provision for the ‘Declaration of Fundamental Human Rights’. They also went ahead to advise other institutional recommendations highly in line with Eastminster credentials such as the ‘supremacy of parliament’, ‘bicameral legislature’, ‘unitary state’, ‘common nationality’, ‘equal rights’, ‘strong central government’ and, remarkably, advocated an unwritten constitution – a feature seen nowhere in the Commonwealth outside Britain except New Zealand – since they believed the country ‘must not be unduly subject to such constitutional fetters as a written Constitution must necessarily create’.¹⁴⁶ This thinking, however, was not blindly trying to follow British modes. Instead there was a genuine fear, particularly among minority groups, that the constitution would favour the Malays and Islam to the detriment of the rights and freedoms enjoyed by other groups.

Ceylon’s emergency laws were used during riots of 1958 as a result of the Sinhala Only Act legislation and its effect on the Tamil minority. However, it was not the prime minister, S. W. R. D. Bandaranaike, who utilised them, but instead as in colonial days the queen’s representative, Sir Oliver Goonetilleke, who actively gave directions to the cabinet, police, civil service and military personnel using emergency provisions of the constitution to ultimately preserve security during the first ethnic riots in Ceylon for almost 50 years. As if this was not enough he wished to dispense with the long held Commonwealth convention that the governor-general’s additional title of commander-in-chief was ceremonial in order to buttress his supremo status to the utter bewilderment of the Commonwealth Relations Office. Though the same officials privately commended the governor-general’s administrative and political skill in preventing fatalities and avoiding a major breakdown of law and order.¹⁴⁷

In Nepal the monarchy was viewed by the British, Jennings and the local people as the only reliable political institution in the country and as such emergency powers at the whim of the king was seen as defensible. Even leading Gurkha Parishad politician Randhir Subba who had ‘major criticisms’ of placing too much power on the monarchy admitted that, due to emergency precedents from British India, he ‘agreed that in time of emergency power must be left with the King’.¹⁴⁸ The conventions and provisions surrounding Nepal’s parliamentary monarchy were crafted to aid the king and not the democrats.

Emergency laws were revived to an even more extraordinary degree in Pakistan, when added to the dangerous usage of conventions. In the newly forged dominion these powers were exercised effectively at the governor-general’s discretion. Jinnah took this ‘unexpected bonus’¹⁴⁹ and sacked within weeks of Pakistan’s existence the chief ministers of North-West Frontier Province and Sindh, pushing out even further the ‘bounds of the constitutional limits’ of his office.¹⁵⁰ Many have argued that the internal and external emergencies of Pakistan’s creation justified these extraordinary powers. Yet even if it is accepted as Ayesha Jalal argues that Jinnah ‘intended such concentration of power in the hands of a single individual as a temporary measure and not as a norm for the future’ this did in fact become the custom his successors almost uniformly followed.¹⁵¹ In October 1954 the governor-general, without responsible advice, dissolved Pakistan’s constituent assembly as an attempt to forestall the body and especially its president, Maulvi Tamizuddin, from circumscribing his power. Jennings was summoned as a paid advocate of Ghulam Mohammad to defend his actions as governor-general against a petition presented by Tamizuddin charging the head of state for the illegal dismissal of the assembly. Jennings, as quoted below, privately believed the action was also illegal, but was able to invent conventions in the defence of his client’s indefensible actions.¹⁵²

There is no provision in the Government of India Act for the dissolution of the Constituent Assembly. The action taken was therefore both unconstitutional and illegal. This raised certain problems, which seem to have been solved at least temporarily with considerable success. . . . There is thus initial dictatorship. It seems very unlikely that either the Governor-General or the Prime Minister would wish to perpetuate this position: but, now that there has been departure from strict legal principles, there is no great practical difficulty about going further’.¹⁵³

Drawing on seventeenth-century English precedents that included Oliver Cromwell, James II and the co-regents William and Mary to convince the Federal Court of a twentieth-century South Asian state of the validity of decisions taken in the name of the queen of Pakistan required a stretch of political (if not legal) imagination. The ability to conjure conventions was useful. However, it was historically inappropriate, legally suspect and politically fantastical to use such conventions to cover such incredible situations and in turn created modern precedents and conventions that made a mockery of democracy.

In Ceylon, conventions employed by nineteenth-century Liberal, Tory and Whig grandees were distributed in the late 1940s to cabinet ministers on collective responsibility. In fact Ceylon, like its neighbours, better resembled culturally the days when England was run by old families and mid-twentieth-century British responsible government.¹⁵⁴ It is a moot point how well the conventions Jennings and the Eastminster states he advised crafted would pass his famous and still cited test on the existence of conventions: were there any precedents for these conventions; did the actors in those precedents believe they were bound by them; and what was the reason behind such conventions¹⁵⁵ since the precedents were often far-fetched and hastily cited; the actors did what was expedient; and reasons could be made to go: ‘To speak of “African” conventions is perhaps misleading, for it assumes that the conventions must be the same from Bathurst in The Gambia to Dar es Salaam in Tanzania’. The same, of course, is true of any grouping of ‘Asian’ conventions. James Manor’s chapter title ‘Setting a Precedent by Breaking a Precedent’ on the controversial succession in Ceylon following the death of the first prime minister, which Jennings was instrumental in justifying, describes very well the conditions in which conventions and precedents operated in historical Eastminster.¹⁵⁶ There was a ‘provisional’ nature of conventions during the period covered¹⁵⁷ that intensified constitutional questions that proved valuable in its flexibility, but also handicapped in its ability to provide guidance for very different contexts of Eastminster indigenous rule that British and colonial conventions could not necessarily clarify.

The Eastminsters historically at times could be classified as fulfilling Mark Tushnet’s concept of ‘Authoritarian Constitutionalism’ where the state uses the rule of law for its benefit, formally operates within the constitution, is dominated by a single party, imposes political and legal sanctions with low-intensity coercion, but is still sensitive to public opinion and the appearance of democratic normalcy.¹⁵⁸ As Kevin Tan argues, those Asian nationalist leaders who protested against emergency powers during the colonial era were also quick to ‘accept and adopt’ the same powers and thus the process of decolonisation created a ‘structural legacy that treats as normal the exceptional situation of emergencies’.¹⁵⁹ If, as H. P. Lee argues, the constitution has weathered a ‘storm of exigencies’¹⁶⁰ following independence, then the Eastminsters all were battered by a monsoon of emergency and fickle conventions that remains a seasonal and regional danger.

Conclusion

An enormous constitutional cornucopia of British imperial and colonial precedents to legitimise or situate what appeared for some without precedent or inappropriate forged a powerful formula for adaptation of Westminster to all parts of the globe. Westminster may have travelled light, but it travelled often and in so doing provided transnational routes to avoid or follow in the quest for independence.

Krishnar Iyer J in a judgement made over a quarter of century after Indian independence remarked

The law of our Constitution is partly eclectic but primarily an Indian-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions – basically a blended view of the British parliamentary system, and the Government of India Act 1935 and near-American, nomenclature-wise, and in some other respects.¹⁶¹

In 1950, in terms of population, the United Kingdom, Canada, Australia, South Africa and New Zealand combined was even then just a fraction of Asia's size, with only a fifth of the population of the Asian states of India, Pakistan, Ceylon, Malaya and Nepal. Yet, the study of their common constitutional heritage and place in the Westminster corpus has been largely invisible. The examination of historical Eastminster is an attempt and approach to rectify this large gap. It is not claimed that the method above and its reliance on Jennings gives a full picture of the British constitutional legacy in Asia, but the argument is strongly proffered for the inclusion in the study of the Westminster model and more attention from history, law and politics especially. The five deviations outlined above only give a small flavour for Eastminster's conceptual and empirical distinction from the 'traditional' settler cases. The inter-related deviations show how commonplace assumptions and 'beliefs' of Westminster can be challenged and interpreted differently when seen in the Asian context. Ivor Jennings has been utilised here heavily since he connects the constitutions of the selected states like no other figure, through his writings, interests and as the Englishman 'on the spot' who was intimate with many of the generation that forged independent Asia. His interpretations must be viewed cautiously, but they still add a compelling perspective on the state-building enterprise of Eastminster.

Just as Susanne Hoerber Rudolph rightly criticised how the term 'Oriental despotism' 'implies an undifferentiated condition from Constantinople to Edo',¹⁶² the meaning of Eastminster differs from Kathmandu to Kuala Lumpur. Borrowing from Rudolph again it is hoped that this chapter will be a 'prolegomenon to a comparative study' of Eastminster and to expand it further to case studies like Singapore, Burma, Mauritius, the Maldives and into the Pacific. Though it has not been possible here it is hoped that this chapter and book will lead to further research, first on the periods that followed this state-building phase to understand Eastminster's reach in the contemporary era and second to open new comparative avenues to properly evaluate multi-regionally the *New Westminsterers* and evade the present temptation to examine just Britain or 'traditional' cases when analysing the Westminster model and its extraordinary global personality. Eastminster was a powerful political, historical and constitutional phenomenon in Asia and it deserves further scholarly attention to help scrutinise the tribulations of democracy in a region that still struggles to understand the complex legacies of colonialism.

Notes

- 1 Parts of this chapter are drawn from my Smuts Memorial Lecture delivered at Trinity College, Cambridge on 29 May 2014 and an opinion piece on Sri Lanka for *Groundviews* on 31 January 2015.
- 2 [Soulbury Report] Colonial Office, *Ceylon: Report of the Commission on the Constitution*, Cmd 6677, London: His Majesty's Stationery Office, 1945, pp. 108–109.
- 3 For a guide to Jennings' career see my introduction in *Constitution-Maker – Selected Writings of Sir Ivor Jennings*, Cambridge: Cambridge University Press, 2015 (henceforth *SWIJ*) and in H. Kumarasingham (ed.), *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings*, Colombo: CPA, 2015; A. W. Bradley's chapter in this volume; Jennings' posthumously published memoir *The Road to Peradeniya – An Autobiography*, Colombo: Lake House, 2005 edited and introduced by H. A. I. Goonetilleke; a special issue edited by Martin Loughlin on Jennings' British influence in public law can be found in *Modern Law Review*, vol. 67, no. 5, September 2004 and individual chapters in this volume.
- 4 Another key early foreign observer who was working in India during the early years of independence was C. H. Alexandrowicz, who was head of law at the University of Madras from 1951.
- 5 Singapore was initially part of, and then expelled from, the federation that the commission recommended and crafted a constitution that drew heavily on the Malayan federation. Due to space and coherence Singapore will not be covered in this chapter.
- 6 A handy term John Darwin borrowed from W. C. Sellar and R. J. Yeatman to use in his work on Britain's 'informal empire' to cover places like Iran and South America that were never formally part of the British Empire. See John Darwin, *The Empire Project – The Rise and Fall of the British World System 1830–1970*, Cambridge: Cambridge University Press, 2009.
- 7 16 August 1947, *New York Times*.
- 8 Pippa Norris, 'The Twilight of Westminster? Electoral Reform and its Consequences', *Political Studies*, vol. 49, no. 4, 2001, p. 877.
- 9 J. C. McPetrie, 'Survey of Constitutions Drafted at the Colonial Office since 1944' in J. N. D. Anderson (ed.), *Changing Law in Developing Countries*, London: Allen & Unwin, 1963, pp. 29–30.
- 10 William Dale, 'The Making and Remaking of Commonwealth Constitutions', *International and Comparative Law Quarterly*, vol. 42, no. 1, 1993, p. 68.
- 11 See Frederick Cooper, *Africa since 1940 – The Past of the Present*, New York: Cambridge University Press, 2002, pp. 76–84.
- 12 Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion', *American Political Science Review*, vol. 56, no. 4, December 1962, p. 862.
- 13 Ivor Jennings, *Constitutional Laws of the Commonwealth, Volume 1: The Monarchies*, Oxford: Oxford University Press, 1957, p. 2.
- 14 Text of Speech by Ivor Jennings given in Nepal on 'Constitutional Experiences in Asia' c.1958, C16.9, ICS 125, Sir Ivor Jennings Papers, University of London (henceforth IJP).
- 15 C. A. Bayly, *Recovering Liberties – Indian Thought in the Age of Liberalism and Empire*, Cambridge: Cambridge University Press, 2012.
- 16 Rohit De and Arvind Elangovan have recently provided compelling impetus for Indian constitutional history. Joseph M. Fernando and Kevin Y. L. Tan have also done this for Malaysia and Singapore.
- 17 David Arnold, 'Globalization and Contingent Colonialism – Towards a Transnational History of "British" India', *Journal of Colonialism and Colonial History*, vol. 16, no. 2, 2015, online, available at: <https://muse.jhu.edu/>.

- 18 R. A. W. Rhodes, John Wanna and Patrick Weller, *Comparing Westminster*, Oxford: Oxford University Press, 2009; Ian Marsh and Raymond Miller, *Democratic Decline and Democratic Renewal – Political Change in Britain, Australia and New Zealand*, Cambridge: Cambridge University Press, 2012; Paul Strangio, Paul 't Hart and James Walter (eds), *Understanding Prime Ministerial Performance – Comparative Perspectives*, Oxford: Oxford University Press, 2013; Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems – Controversies, Challenges and Changes*, Cambridge: Cambridge University Press, 2015.
- 19 See for example Dag Anckar, 'Westminster Lilliputs? Parliaments in Former Small British Colonies', *Parliamentary Affairs*, vol. 60, no. 4, 2007, pp. 637–654, and Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean – A Contextual Analysis*, Oxford: Hart, 2014.
- 20 Recent political science literature for instance seems to indicate that Westminster 'systems' or 'democracies' implies looking beyond England, but adding in other parts of the United Kingdom. See Andrew Eggers and Arthur Spirling 'Ministerial Responsiveness in Westminster Systems: Institutional Choices and House of Commons Debate, 1832–1915', *American Journal of Political Science*, vol. 58 no. 4, 2014, pp. 873–887; Torun Dewan and Arthur Spirling, 'Strategic Opposition and Government Cohesion in Westminster Democracies', *American Political Science Review*, vol. 105 no. 2, 2011, pp. 337–358.
- 21 Graham, Wilson, 'The Westminster Model in Comparative Perspective' in Ian Budge and David McKay (eds), *Developing Democracy*, London: Sage Publications, 1994, p. 190.
- 22 For example Hart's series *Constitutional Systems of the World* edited by Peter Leyland and Andrew Harding provides valuable volumes on individual countries and their constitutions.
- 23 Once again the field of constitutional law is where such accounts are found. A leading example covering South Asia is Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam, *Comparative Constitutionalism in South Asia*, New Delhi: Comparative Constitutionalism in South Asia, 2013, and Kevin Y. L. Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 3rd edition, Singapore: Lexis Nexis, 2010 provides beneficial coverage of these two South East Asian states.
- 24 Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems*, Cambridge: Cambridge University Press, 2002; Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia – Exploring the Limits of Legality*, Cambridge: Cambridge University Press, 2010; Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley (eds), *Fates of Political Liberalism in the British Post-Colony – The Politics of the Legal Complex*, New York: Cambridge University Press, 2012; Wen-Chen Chang, Li-ann Thio, Kevin Y. L. Tan and Jiunn-rong Yeh, *Constitutionalism in Asia – Cases and Materials*, Oxford: Hart, 2014; Albert H. Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge: Cambridge University Press, 2014.
- 25 Peter Catterall, '“Efficiency with Freedom”? Debates About the British Constitution in the Twentieth Century', in Peter Catterall, W. Kaiser and U. Walton-Jordan (eds), *Reforming the Constitution – Debates in Twentieth-Century Britain*, London, Frank Cass, p. 2 and H. Kumarasingham, 'Exporting Executive Accountability? Westminster Legacies of Executive Power', *Parliamentary Affairs*, vol. 66, no. 3, 2013, pp. 579–596.
- 26 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford: Oxford University Press, 2014, p. 152.
- 27 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford: Oxford University Press, 1966.
- 28 R. A. W. Rhodes and Patrick Weller, 'Westminster Transplanted and Westminster Implanted: Exploring Political Change' in Haig Patapan, John Wanna and Patrick

- Weller (eds), *Westminster Legacies – Democracy and Responsible Government in Asia and the Pacific*, Sydney: University of New South Wales, 2005, pp. 2–6.
- 29 Andrew Harding, ‘The “Westminster Model” Constitution Overseas: Transplantation, Adaption and Development in Commonwealth States’, *Oxford University Commonwealth Law Journal*, Winter 2004, p. 164.
- 30 Sujit Choudhry (ed.), *Constitutional Design for Divided Societies – Integration or Accommodation*, Oxford: Oxford University Press, 2008; Tom Ginsburg (ed.), *Comparative Constitutional Design*, Cambridge: Cambridge University Press, 2012.
- 31 Online, available at: www.comparativeconstitutionsproject.org.
- 32 Tom Ginsburg, Zachary Elkins and Justin Blount, ‘Does the Process of Constitution-Making Matter?’, *Annual Review of Law and Social Sciences*, vol. 5, note 2, p. 205.
- 33 The concept of Eastminster was originally outlined from a comparative politics perspective for India and Sri Lanka in H. Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka*, London: I. B. Tauris, 2013.
- 34 See *SWIJ* and Note 3 above.
- 35 Jennings, *Road to Peradeniya*, p. 165.
- 36 *Ibid.* pp. 74–77.
- 37 20 December 1965, *Guardian*.
- 38 For Jennings’ theoretical legal view on the British constitution see Martin Loughlin, *Public Law and Political Theory*, Oxford: Oxford University Press, 1992, pp. 167–176.
- 39 *SWIJ*, p. 258.
- 40 *Road to Peradeniya*, p. 162.
- 41 *Ibid.* p. 108.
- 42 Charles Jeffries, ‘O. E. G.’: *A Biography of Sir Oliver Ernest Goonetilleke*, London: Pall Mall Press, 1969, p. 49.
- 43 ‘Future Constitutional Policy for British Colonial Territories in South East Asia’: memorandum by Mr Stanley for War Cabinet Committee on Malaya and Borneo, 14 January 1944, CAB 98/41, CMB (44)3 in S. R. Ashton and S. E. Stockwell, *Imperial Policy and Colonial Practice 1925–45, Part I, British Documents of the End of Empire Project* (henceforth *BDEEP*), series A, vol. 1, p. 371.
- 44 For an example of what the Colonial Office thought of Jennings see Charles O. H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain’s Overseas Territories*, Oxford: Oxford University Press, 2007, pp. 79–80.
- 45 Lord McNair’s address reproduced in *Cambridge Law Journal*, vol. 24, no. 1, April 1966, pp. 1–3.
- 46 Ram Sharma, ‘Sir Ivor Jennings and the Constitutional Laws of India’, *Indian Journal of Political Science*, vol. 14, no. 2, 1953, p. 145.
- 47 On Pakistan see for example A. G. Noorani, ‘Court Martial: The Great Betrayal’, *Dawn*, 27 October and 1 November 2008; Allen McGrath, *The Destruction of Pakistan’s Democracy*, Karachi: Oxford University Press, 1996. For Sri Lanka and Nepal see respectively Welikala and Malagodi’s chapters in this volume.
- 48 *SWIJ*, p. 69.
- 49 Note 18 May 1954, A1, IJP.
- 50 *SWIJ*, p. 241.
- 51 Mark Mazower, *Dark Continent – Europe’s Twentieth Century*, London: Allen Lane, 1998, pp. 5–6.
- 52 *SWIJ*, p. 265.
- 53 Jennings was seriously considered as a potential adviser for Pakistan as early as 4 July 1947. H. L. Ismay to Liaquat Ali Khan 4 July 1947, F. 2/175 in Z. H. Zaidi (ed.), *Jinnah Papers*, vol. III, Islamabad: Quaid-I-Azam Papers Project/Government of Pakistan, 1996, p. 85.

- 54 21 December 1956, *Manchester Guardian*.
- 55 A term used in A. J. Stockwell, 'Princes and Politicians: The Constitutional Crisis in Malaysia, 1983–4' in D. A. Low (ed.), *Constitutional Heads and Political Crises – Commonwealth Episodes, 1945–85*, London: Macmillan, 1988, p. 183.
- 56 Kumarasingham, *A Political Legacy*, p. 84.
- 57 'Memorandum from Lieutenant Colonel V. F. Erskine Crum to the Governor General of India, Proposing that the Governor General should Discuss with Sir W. I. Jennings the Question of the Structure of the British Commonwealth', 17 January 1948, D132, MB1/D, Papers of Earl Mountbatten of Burma, University of Southampton.
- 58 Ivor Jennings, *The Commonwealth in Asia*, Oxford: Oxford University Press, 1949, pp. 59–60.
- 59 Ivor Jennings, *Magna Carta and its Influence in the World Today*, London: Her Majesty's Stationary Office, 1965, pp. 35–36.
- 60 S. A. de Smith, 'Westminster's Export Models: The Legal Framework of Responsible Government', *Journal of Commonwealth Political Studies*, vol. 1, no. 1, 1961, p. 3.
- 61 A. F. Madden, '"Not for Export": The Westminster Model of Government and British Colonial Practice', *Journal of Imperial and Commonwealth History*, vol. 8, no. 1, 1979, p. 11.
- 62 21 December 1956, *Manchester Guardian*.
- 63 Terence C. Halliday, Lucien Karpik, 'Political Liberalism in the British Post Colony: A Theme with Three Variations' in *Fates of Political Liberalism*, p. 4.
- 64 Arvind Elangovan, 'The Making of the Indian Constitution: A Case for a Non-Nationalist Approach', *History Compass*, vol. 12, no. 1, 2014, p. 2.
- 65 Kumarasingham, *A Political Legacy*, pp. 14–18.
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- 70 Kumarasingham, 'Exporting Executive Accountability? Westminster Legacies of Executive Power', pp. 579–596.
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- 72 James Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the year 2000*, Auckland: Allen Lane, 2001, pp. 11–12.
- 73 *SWIJ*, p. 241.
- 74 C. A. Bayly and T. N. Harper, *Forgotten Wars – The End of Britain's Asian Empire*, London: Allen Lane, 2007, p. 100.
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- Singapore: Lee Kuan Yew (Fitzwilliam College, Cambridge). Jennings regarded Chaudhri Muhammad Ali ‘as a typical Cambridge man’ though he was educated at the ‘degree factory’ of University of the Punjab. *SWIJ* p. 237.
- 76 Ivor Jennings, ‘Universities in the Colonies’, *Political Quarterly*, vol. 17, no. 3, 1946, p. 234.
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- 78 People’s Progressive Party of Malaya memorandum for Commission, 18 July 1956, B10/5/2, IJP.
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- 84 Rohit De ‘“A Peripatetic World Court” Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council’, *Law and History Review*, vol. 32, no. 4, 2014, pp. 821–851.
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- 86 Sunil Khilnani, *The Idea of India*, London: Penguin, 2004, p. 34.
- 87 Rajeev Bhargava, ‘Introduction’ in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution*, New Delhi: Oxford University Press, 2009, pp. 1–40.
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- 92 (Taya Zinkin), 18 February 1959, *Manchester Guardian*.
- 93 Vernon Bogdanor, ‘Magna Carta, the Rule of Law and the Reform of the Constitution’, in Robert Hazell and James Melton, *Magna Carta and its Modern Legacy*, Cambridge: Cambridge University Press, 2015, p. 40.
- 94 See Kumarasingham, *A Political Legacy*, pp. 46–47.
- 95 Two volumes of enduring exception to this that cover settler and non-settler cases are Low (ed.), *Constitutional Heads and Political Crises* and David Butler and D. A. Low (eds), *Sovereigns and Surrogates – Constitutional Heads of State in the Commonwealth*, London: Macmillan, 1991.
- 96 Rhodes *et al.*, *Comparing Westminster*, p. 48.
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- 98 Ivor Jennings, *The Approach to Self-Government*, Cambridge: Cambridge University Press, 1958, p. 121.

- 99 Hugh Hickling, 'Malaysia' in Butler and Low (eds), *Sovereigns and Surrogates*, pp. 206–207.
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- 101 *Ibid.*, p. 138.
- 102 Viceroy's Personal Report no. 11, 4 July 1947 in Mansergh (ed.), *Transfer of Power 1942–7*, vol. XI, pp. 898–899.
- 103 See McGrath, *The Destruction of Pakistan's Democracy* for greater detail.
- 104 Harding, 'The "Westminster Model"', p. 159.
- 105 See A. G. Noorani, *The Destruction of Hyderabad*, London: Hurst, 2014.
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- 114 *SWIJ*, p. 103.
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- 128 Memorandum submitted in January 1959 to the Joint Select Committee to Revise the Constitution in *Speeches and Writings – S. W. R. D. Bandaranaike*, Colombo: Government Press, 1963, pp. 442–444.
- 129 Jennings, *Approach to Self-Government*, p. 83.
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- 132 Joseph M. Fernando, ‘Sir Ivor Jennings and the Malayan Constitution’, *Journal of Imperial and Commonwealth History*, vol. 34, no. 4, 2006, pp. 589–590.
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2 **British constitutional thought and the emergence of bills of rights in Britain's overseas territories in Asia at decolonisation**

Charles O. H. Parkinson

Introduction

In the decades following the Second World War, Britain decolonised its overseas empire in Asia (which included territories controlled by Britain both through formal legal ties and informal ties). The processes by which Britain decolonised its empire in Asia were largely determined by two factors: Britain's waning geopolitical position (which meant that Britain could not, in truth, dictate either the timing or content of the decolonisation settlements) and the colonial structures appropriated, established and designed to gradually transition each territory to self-rule. One consequence was that British constitutional ideas were dominant, but not prescriptively so, in the decolonisation constitutions of Asia.

The focus of this chapter is the process by which bills of rights became the norm in decolonisation constitutions, first, in Britain's territories in Asia, and latterly throughout Britain's far-flung possessions. Critically, bills of rights appeared in the constitutions of Burma (1947), India (1950), Pakistan (1956) and Malaya (1957) against the backdrop of negative British attitudes towards bills of rights to the effect that such instruments were at best useless and at worst dangerous. As late as the mid-1950s, when the question of a bill of rights was raised with the Colonial Office, it followed closely the catalogue of arguments honed by British constitutional lawyers since the first appearance of human rights instruments at the end of the eighteenth century: a bill of rights was ineffective at protecting rights, it limited the actions of the colonial administration, it hamstrung parliament, it invited litigation, it required skilled judges to interpret, it politicised the judiciary, it was almost impossible to draft effectively, and perhaps most importantly it was not the British method of protecting rights!¹ Moreover, during the period when this cluster of bills of rights appeared in Asia, bills of rights were largely unknown in Britain's other territories.

By 1962, however, there was a complete shift in British attitudes to, and practices for, the inclusion of bills of rights for new nations at independence and in that year the Colonial Office had developed a policy mandating bills of rights for its overseas territories moving towards independence, subject only to express local opposition.² In that process over 30 territories throughout Britain's overseas

territories, whether at independence or before, had a bill of rights inserted in their constitution.

Some significant questions arise. Is it meaningful to speak of an Asian tradition of bills of rights in Britain's former Asian territories in consequence of this first wave of bills of rights, or was the process by which each of these new states obtained a bill of rights *sui generis*? Was this first wave of bills of rights instrumental in changing the attitudes of British lawyers to bills of rights? And did it influence the Colonial Office to change its policy towards bills of rights in Britain's other overseas territories? These questions will be explored in this chapter.

Jennings and British constitutional thought about bills of rights

Jennings was a leading English constitutional academic who wrote widely about the legal protections afforded by bills of rights. In this regard, however, he stands out from his contemporaries because he was both a participant in, and a close observer of, the process by which bills of rights became the norm in independence constitutions of new states with British ties. Nonetheless, his attitude to bills of rights mirrored precisely what might be described as the British orthodox view, including as it changed in relation to the use of bills of rights for new states at decolonisation. Prior to 1960 he opposed bills of rights generally; thereafter he changed his opinion to support bills of rights for newly independent states, but continued to oppose vehemently a bill of rights for Britain.

British antipathy to bills of rights was deep-seated. Since the constitution-makers in France and America in the late eighteenth century incorporated statements of rights into national constitutions,³ English lawyers criticised such statements on the basis that they simply did not work.⁴ They did not need to look beyond the violations of the rights in the Declaration of the Rights of Man during the French Revolution both to confirm and sustain this view. But it was not simply that bills of rights were ineffective. The key criticism, which was echoed by Jennings, was that bills of rights either created conflict between the legislative and executive branches on the one hand, and the judicial branch (responsible for maintenance of the rights) on the other if strictly adhered to, or brought the constitution into disrepute if the rights were ignored.⁵

By contrast, the British constitution protected rights through the political will of society as expressed through the Parliament, and the British legal establishment viewed this method as doing a better job of protecting rights than any other model. As late as 1956 Jennings wrote

in Britain we have no Bill of Rights; we merely have liberty according to law; and we think – truly I believe – that we do a better job than any country which has a Bill of Rights or a Declaration of the Rights of Man.⁶

Jennings had earlier explained his rationale for this view as 'Generally speaking ... fundamental liberties are protected not by law but by public opinion'.⁷

To many British lawyers and officials, the Allied victory affirmed that the Westminster system and its method of protecting rights (without any entrenched rights) was far superior to those systems reliant upon statements of rights that had succumbed to fascist regimes with concomitant human rights abuses.⁸

In the aftermath of the Second World War, two human rights charters emerged: the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and the European Convention on Human Rights, signed up to by members of the Council of Europe in 1950. The British government was an early proponent of both instruments, but not because there had been any change in attitude to bills of rights. Lord Jowitt, the lord chancellor, strongly opposed Britain's ratification of the European Convention on Human Rights on ideological anti-bill of rights grounds, but was completely outmanoeuvred by the Foreign Office and Britain ratified the convention in 1951. The Foreign Office promoted these international instruments as a means of protecting the existing democracies in Europe and throughout the world from the communist threat.⁹ The fact of ratification of these international human rights charters made no immediate impact on attitudes to bills of rights, and throughout the 1950s English opinion remained strongly opposed to bills of rights as a method of protecting rights.¹⁰

But for Jennings the question of protecting rights was not merely academic. In the post-war years, Jennings was closely involved in drafting colonial and independence constitutions. In the mid-1940s Jennings, while vice-chancellor of the University of Ceylon, had assisted in drafting a constitution for the local Ceylonese politicians.¹¹ This established his reputation as a trusted adviser to local politicians, and he was subsequently asked by local politicians to advise on constitutional issues arising in the Central African Federation, Cyprus, Malaya, the Maldives,¹² Malta, Nepal, Nigeria,¹³ Pakistan, Singapore and the Sudan¹⁴. The Colonial Office archives make clear, however, that Jennings was reporting his meetings and, in at least some cases, his advice, back to the colonial authorities in London.

The Colonial Office, however, viewed Jennings with suspicion and it never sought him out to act on its behalf in advising on colonial constitutions.¹⁵ (This may be contrasted with English academics of equal standings like Wheare and de Smith, both of whom the Colonial Office sought out to advise on colonial constitutions.¹⁶) The Colonial Office records also suggest that some within the Colonial Office considered him to be a poor legal draftsman.¹⁷

At some point after 1960, Jennings changed his opinion about the value of bills of rights for post-colonial states.¹⁸ (In those states where Jennings had advised prior to 1960, he was not a proponent of a bill of rights but nonetheless inserted them where local politicians sought their inclusion.) In a public lecture delivered in 1965, Jennings stated that he had been wrong in his previous opposition to human rights instruments and expressed regret that he had opposed a bill of rights for Ceylon in 1943.¹⁹ At about the same time, British legal opinion also changed. In three papers written between 1961 and 1963, de Smith also supported the use of bills of rights in colonial and post-colonial constitutions.²⁰ And in 1962, the

Colonial Office changed its policy to mandate their insertion in independence constitutions, which reflected what had been practice by around 1960. Jennings did not change his opinion about, and opposition to, a bill of rights for Britain.

Some preliminaries about decolonisation

It is relevant to identify some recent work on decolonisation that impacts upon the issues arising in this chapter.

On decolonisation, two recent works have exerted a particular influence. The first is Niall Ferguson's *Empire: the Rise and Demise of the British World Order and the Lessons for Global Power* (2004). In that work Ferguson argued that nationalist (and other indigenous resistance) movements had a minimal effect upon the decline and fall of the British Empire compared with Britain's parlous financial position following 1945 and inability to fund its continuation as an imperial power. The second is John Darwin's *The Empire Project* (2009). Darwin argued that Britain's decolonisation was brought about by geopolitical factors following the re-alignment of world power after 1945, and the inability of Britain to maintain its military spending to assert a position as the Third World power.

These works have emphasised endogenous factors in Britain's decolonisation. Certainly, there can be little doubt that Britain did not view as complete its civilising mission in Africa or Asia. This may be compared with the staged transfer of power through constitutional instruments and conventions in Canada, Australia and New Zealand (which, while each retains the British queen as head of state, some may argue is still ongoing).

These works have also emphasised Britain's recognition of its practical inability to maintain control of its overseas territories in the face of any sustained local opposition. This is an important theme in understanding the power dynamic between Britain and local political groups during the constitutional conventions that resulted in constitutional changes leading to independence.

On the relevance of human rights to the decolonisation movement, there is heated academic debate as to whether human rights were a relevant consideration to those groups pressing for independence. In *The Last Utopia: Human Rights in History* (2010), Sam Moyn argued that human rights played no role in the anti-colonial movement and that anti-colonialism was driven solely by the desire for self-determination. Roland Burke, in *Decolonization and the Evolution of International Human Rights* (2010), and Fabian Klose in *Human Rights in the Shadow of Colonial Violence* (2013), argued in response that violations of human rights, and the desire to protect them, played a critical role in bringing about the end of colonialism.

This debate translates directly into opposing perspectives on the inclusion of bills of rights in independence constitutions: were they simply a tool to facilitate the path to decolonisation by allaying the fears of minorities, or were they designed to right the perceived wrongs of colonialism and secure the protection of individuals from the state?

Burma, India and Pakistan

Burma, India and Pakistan constituted the first wave of bills of rights to appear in Britain's former empire.

While the British government had great experience in transitioning its former colonies to dominion status through the gradual transfer of political power under variants of the Westminster model, as occurred in the cases of Canada, Australia, New Zealand and South Africa, that model was not acceptable to the former territories administered as part of British India. Independence was granted by a British Act that cut the ties of dependency and a local constituent assembly was charged with preparing the new constitution. This change meant that the independence constitutions were now written completely independently of the British government. Consequently the British government did not need to address the question of a bill of rights, and equally the clamant local demand for a bill of rights could be given full expression.

Burma was the first to write its constitution. In April 1947 a constituent assembly was elected. The rights of the many minority groups in Burma had previously been protected by legislation positively discriminating in their favour, and the constituent assembly decided that one protection for them in the independence constitution would be a bill of rights.²¹ Inspiration for the bill of rights was taken from the Irish constitution of 1937. The resulting bill of rights in the constitution of the Union of Burma included rights of equality, rights relating to religion, cultural and educational rights, economic rights, rights in relation to criminal law, and rights to constitutional remedy, as well as directive state principles.²²

But undoubtedly India set the trend on bills of rights. There had long been a general consensus within the Indian community in support of a bill of rights. Although the Indian National Congress had demanded a bill of rights for India as early as 1885, it was not until the inter-war years that the British government took the request seriously.²³ At the All Parties' Conference of 1928, the Indian National Congress demanded a bill of rights in conjunction with a series of measures whose purpose was greater self-government.²⁴ The British government thereupon established a commission on Indian constitutional reform. The chairman of the commission was Sir John Simon KC, attorney general and later lord chancellor. In 1930 the Simon Commission reported:

Many of those who came before us have argued that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.... Until the spirit of tolerance is more widespread in India and until there is evidence that minorities are prepared to trust to

the sense of justice of the majority, we feel that there is indeed need for safeguards. But we consider that the only practical means of protecting the weaker or less numerous elements in the population is by the retention of an impartial power, residing in the Governor General and the Governors of provinces, to be exercised for this purpose.²⁵

Despite the Simon Commission's repudiation of a bill of rights, claims were pressed by the Indian leadership at the three round table conferences. A 1933 White Paper on 'Proposals for Indian Constitutional Reform' yielded to these demands by suggesting the constitutional entrenchment of rights to personal liberty, property and eligibility for public office, regardless of race, caste, or religion.²⁶ A joint parliamentary select committee on Indian constitutional reform was established to reconsider the overall assumptions behind the legislation. It adopted the view of the Simon Commission on the ineffectiveness of bills of rights and concluded that there were practical objections

which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature, and to create a risk that large numbers of laws may be declared invalid by the Courts.²⁷

Nonetheless it still recommended the incorporation of two limited rights.²⁸ As the Government of India Bill passed through the House of Commons, the poor understanding of the scope and ramifications of the proposed rights led to their further limitation.²⁹ In the end, the Government of India Act 1935 guaranteed property rights and protected against discrimination based on religion, place of birth, or colour for the purposes of public sector employment, property rights, and access to a profession.³⁰

At independence the reasons put forward in support of the bill of rights were to protect the communal minorities by safeguarding the rights of individuals and to protect against arbitrary government as occurred during the latter stages of British rule.³¹ An elaborate bill of rights was adopted by the Indian constituent assembly in 1949 and the new constitution came into force in 1950. It owed little to British influence, drawing instead on the bills of rights in the American, French and Irish constitutions. The bill of rights included the rights to equality, freedom, religious freedom, property, minority protection, protection from exploitation, and constitutional remedies for breaches.³²

Although granted independence at the same time as Burma and India, Pakistan did not draft a new constitution until 1956. Jennings was retained by the constituent assembly of Pakistan in 1954 to advise it in drafting a new constitution for Pakistan. Pakistan's bill of rights drew heavily upon the Indian bill of rights³³ and included rights to equality before the law, protection of life, liberty and property, freedom of association, freedom of speech, assembly and association, as well as freedom of religion.³⁴ It is possible that Jennings was referring

to his experience with Pakistan when he wrote in 1956: 'No draftsman can produce a formula [of rights in a bill of rights] which will be satisfactory even in the short run and I speak as one who has tried'.³⁵

Ceylon

Ceylon is important for the reason that Britain managed its constitutional decolonisation and there was no bill of rights included in its independence constitution.

Whereas the British government administered India (including India, Pakistan, Burma and Bangladesh) through the India Office, the British government administered Ceylon through the Colonial Office. This distinction was important because the Colonial Office had its own approach to decolonisation (derived from its civilising mission for the many territories it administered across the globe); it administered the great majority of Britain's overseas territories; and it tried to apply policies consistently throughout those territories including in relation to constitutional instruments.

For Ceylon, which gained dominion status and with it independence in 1948, a new procedure was established for independence constitutions. The British Parliament passed an Act that authorised the British government to prepare an independence constitution by Order in Council, which effectively gave the Colonial Office free rein to draft the document. The policy adopted for British India of allowing the dependencies themselves to draft new constitutions at independence was effectively abandoned so that the British government could exert greater control over constitutional settlements. And the Colonial Office placed great importance on entrenching these new constitutions to stop arbitrary amendments. This basic mechanism was subsequently followed in almost all territories.

The local debate about a bill of rights for Ceylon is particularly noteworthy because Ceylon was the first colony under direct Colonial Office supervision to be granted independence after the Second World War and Jennings was the constitutional adviser to the local politicians.

In 1943 Jennings had been asked by D. S. Senanayake, who became the first prime minister after independence, to prepare a constitution for Ceylon for the purpose of negotiating full self-government with the British government.³⁶ His instructions were to create constitutional provisions to assuage the fears of the minority Tamils. He rejected a bill of rights in favour of other mechanisms: an anti-discrimination clause; giving the Tamil minority greater representation in parliament than its population would justify; and vesting the appointment of public officers in an independent commission. When the Congress Party put forward a bill of rights based on the Irish model at the inter-party negotiation, Jennings persuaded the meeting that this was 'inappropriate'. Jennings later reflected on the absence of a bill of rights in his draft constitution. He explained that when he wrote the first draft of his Ceylonese constitution in 1943, the only Commonwealth example of a bill of rights was in the Irish constitution; his aim was to produce a traditional colonial constitution on the British model with the

power of the legislature unfettered. Neither the Supreme Court of Ceylon nor the Privy Council had any experience interpreting bills of rights. There was no history of repressive legislation in Ceylon and he did not foresee any erosion in individual liberties after independence. Further, a bill of rights would have created the impression that liberty was protected under British rule, but not Ceylonese rule.³⁷ The proposal for a bill of rights was then put aside and not raised again.³⁸ Although Jennings' draft constitution had the support of all the Ceylonese political parties apart from the communists, the Colonial Office thought it 'quite useless'.³⁹

In 1944 the Ceylonese Board of Ministers produced a new draft constitution that included a guarantee of religious freedom and a prohibition of communal and religious discrimination taken from section 5 of the Government of Ireland Act 1920. Although there were strong representations made by the Tamil minority in Ceylon for better guarantees,⁴⁰ the proposal received in principle support from the Soulbury Commission in 1945.⁴¹ The final provision stated that no law could prohibit or restrict the free exercise of any religion or make persons of any community or religion liable to disabilities or restrictions, or privileges or advantages, to which persons of other communities or religions are not given, or alter the constitution of any religious body except with the consent of the governing authority of that body.⁴² And any law made in contravention of this provision was void.⁴³ The resulting 1946 constitution was implemented but operated for just a few months before the British government agreed to grant Ceylon dominion status. The same basic document, including the antidiscrimination clause, then became the independence constitution.⁴⁴

Malaya

Malaya reflected the start of the second wave of bills of rights throughout Britain's overseas territories. Malaya achieved independence on 31 August 1957 with a minimalist bill of rights. It was the first dependency under the administration of the Colonial Office to receive a bill of rights, although not at the initiative of that department. Rather, the bill of rights was proposed by an independent commission of Commonwealth jurists who drew heavily on the Indian constitutional tradition. The critical issue in Malaya revolved around the relationship between Malays, who comprised just under half the population and controlled political power, the Chinese, who comprised around 37 per cent of the population and held economic power, and the Indians, who comprised around 12 per cent of the population.

The Colonial Office policy at this stage was to tailor all constitutional instruments to the local conditions of the dependency. The Malayan experience with its bill of rights, however, demonstrated the incompatibility of this approach with producing an effective bill of rights.

The incorporation of a bill of rights hinged on whether the Independence constitution of Malaya should establish a communal or a non-communal state. The independent commission of Commonwealth jurists, which was heavily

influenced by the constitutions of India, Pakistan and Burma, proposed a bill of rights as the core element of a design for a non-communal constitution. But the Malays wanted to continue a communal policy and so opposed elements of a bill of rights that limited the legislature's power to make special regulations for Malays. The Chinese were indifferent to the bill of rights and the Indians, the only community to support it, did not have the influence to secure its insertion without amendment. The result was a communal constitutional settlement with a minimalist bill of rights.⁴⁵

At the conference on the constitutional future of Malaya, held in London in February 1956, the conference agreed that the Federation of Malaya would become an independent nation within the Commonwealth on 31 August 1957, and that an independent commission be established to make recommendations as to the form of the independence constitution. The independent commission was to have one delegate from each of Britain, Australia, Canada, India and Pakistan, and a British chairman. Jennings was put forward for the British member, but the Colonial Office considered his drafting skills to be poor, and his draft Ceylon constitution to be 'useless'.⁴⁶ The Commonwealth Relations Office, which had been asked to assist in finding suitable members for the commission, thought Jennings 'a bit of an advertiser', 'apt to throw his weight around', and 'lacking in tact'. Sir Charles Jeffries, the deputy permanent under secretary in the Colonial Office, agreed with the Commonwealth Relations Office's assessment, and the panel chose another Cambridge academic.⁴⁷ It was only the personal request of Tunku Abdul Rahman (the leader of the dominant local political party, the Alliance Party) to the Colonial Office to appoint Jennings that led to his selection as the British member: Jennings and the Tunku were contemporaries at Cambridge. The Colonial Office considered there to be some advantage in having Jennings owing to this friendship, and the secretary of state for the colonies approved Jennings' appointment.⁴⁸

The commission⁴⁹ heard evidence and prepared a draft over around nine months. The most controversial issue throughout the constitution-making process was the protection of rights.⁵⁰ The commission was independent, and although receiving general instructions from the Colonial Office, the commission was directed to take account of local opinion such that the constitution had popular support. The Colonial Office internally did not consider a bill of rights should be suggested, reflecting the then orthodox position.⁵¹

From the outset, the commission decided to recommend a bill of rights for Malaya.⁵² Jennings was allocated the task of drafting the bill of rights, and drew upon the rights in the constitutions of India, Pakistan, Burma, Eire.⁵³ He generally preferred clauses from the Indian and Pakistani constitutions, only turning to the Burmese and Irish constitutions when he found the former models lacking. Jennings envisioned an 'Asian' bill of right for Malaya, with additions and modifications to meet the special needs of the Malays.

There were only two critical local groups whose support was required for the new constitution: the Conference of Rulers, representing the traditional rulers of some of the states, and the Alliance Party, the dominant political party that was

an alliance of the United Malays National Organisation (UMNO), the Malay Chinese Association and the Malayan Indian Congress. The Conference of Rulers did not oppose a bill of rights, so long as it did not affect the special position of the Malays.⁵⁴ The Alliance Party supported a bill of rights because the Malayan Indian Congress sought one, but the UMNO and the Malay Chinese Association considered a bill of rights 'immaterial'.⁵⁵ The UMNO's position was the same as that of the rulers, a bill of rights was fine so long as it did not affect the special position of the Malays. The Malay Chinese Association considered that maintaining a political alliance with the UMNO was the best protection going forward for the Chinese minority – what in essence was a political solution to minority protection.⁵⁶

Jennings' draft bill of rights was amended in various respects to take account of the submissions of the Alliance Party, and the commission agreed to Jennings' draft with few alterations.⁵⁷ The commission reported, with a draft constitution, in February 1957.⁵⁸ On the minorities issue, the commission recommended keeping the special position of the Malays for a transitional period of 15 years, and for the Chinese and Indians, an increased franchise to better reflect their numbers, and a bill of rights. That is, the commission proposed, after 15 years, a non-communal constitutional with a bill of rights as the centrepiece for individual protection.

The commission's report was then considered at a constitutional meeting, chaired by the British high commissioner, of representatives from the Conference of Rulers and the Alliance Party. Those groups rejected the transitional period for the special position of the Malays and an increased franchise for the Chinese, as well as weakening the bill of rights so that it did not infringe upon parliamentary sovereignty.⁵⁹ The Malay Chinese Association, which was most affected by these changes, accepted them on the basis that continued comity with the UMNO was the best way to protect Chinese interests in the long term. The meeting decided to refer the bill of rights to London to address their general concerns.

The commission's draft constitution, as amended by the constitutional meeting, was sent to London to be finalised by the parliamentary counsel, Sir Noel Hutton, although the Colonial Office lawyers assisted in that process. The Colonial Office lawyers, taking the orthodox position that bills of rights were ineffective and dangerous in that they fettered the power of Parliament (especially when dealing with security considerations), further watered down the protections in the bill of rights.⁶⁰

In consequence, the Malayan bill of rights provided no meaningful protection of either individual or communal rights. This was transparently so. In 1962, Ellis Clarke, a former student of Jennings who was then the constitutional adviser to Trinidad and Tobago, prepared a memorandum to the Trinidad and Tobago cabinet on the preferred model for a bill of rights to adopt. In it he wrote that the Malayan model 'would hardly be acceptable to anyone to-day' because 'it affords no real protection whatsoever'.⁶¹

Influence of the Asian bills of rights on British attitudes to bills of rights in its colonies

Although Burma, India, Pakistan and Malaya all had constitutions with a bill of rights by 1957, it is not meaningful to speak of an Asian tradition of bills of rights emerging from Britain's former empire in Asia. Collectively, their bills of rights do not exhibit any unique features to distinguish them from other nations. Further, the process by which each obtained a bill of rights was not relevantly common. Moreover, rights were viewed, consistently with such international charters as the Universal Declaration of the Rights of Man and the European Charter of Human Rights, as universal.

That said, the fact that each had a bill of rights was plainly influential within Asia. So much is exemplified by the experience of Nepal. Although not formally part of the British Empire, the British government had supported the Rana regime in Nepal from 1846 to 1951. An interim constitution was promulgated in 1951, with a view to a new constitution being drafted that would create a modified Westminster model constitutional monarchy and parliamentary democracy in Nepal.⁶² In 1958, King Mahendra Shah appointed a five-member commission to undertake that task and asked Jennings to draft the document. The Foreign Office encouraged Jennings to accept, and it paid for him to spend one month in Kathmandu in spring 1958.⁶³ Jennings said that the commission pressed him to include a bill of rights, and he did so basing it largely upon the Indian model, but also providing for the king to suspend it if required.⁶⁴ The king suspended the constitution in 1960 and thereafter ruled autocratically for 30 years.⁶⁵

That said, did this first wave of bills of rights from Asia change British attitudes to the use and incorporation of bills of rights in its other territories? Certainly, Jennings thought the Indian bill of rights to have been very important. Writing in 1965, Jennings considered that the key development in changing opinion in the British territories was the success of the Indian bill of rights.⁶⁶ That is, he saw the desire for bills of rights being driven locally, and the Indian bill of rights in particular being critical to changing local opinion.

In the early 1960s, Stanley de Smith, professor of public law at the University of London, argued that the British government used bills of rights to protect minority groups at independence.⁶⁷ He considered that the catalyst for the British government's policy change was the demand for a bill of rights from the minority groups in Nigeria.⁶⁸ The British government agreed to the bill of rights in Nigeria because it saw little reason to oppose a bill of rights in an independence constitution; after independence it would not have to face any problems that the bill of rights might create. Thereafter this pattern was repeated in other colonies. This emphasis on the protection of minority rights may reflect de Smith's personal perspective as one of the legal academics, along with Kenneth Wheare and Ivor Jennings, who were involved in drafting colonial constitutions and trying to solve, through constitutional means, the 'minorities problem'.

Since the release of the British government papers on decolonisation, there has been a re-evaluation of the impact of the first wave of bills of rights upon the

decision of the Colonial Office, in 1962, to formulate a policy mandating the insertion of bills of rights in colonial territories where no opposition to bills of rights existed.

In 2004, Brian Simpson published his monumental and brilliant study, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. Simpson argued that the British government adopted its policy on bills of rights to extend the application of the European Convention on Human Rights to its overseas territories after their independence. According to this thesis, the European Convention on Human Rights could not apply to Britain's non-European dependencies after independence and so a bill of rights that codified this convention was inserted into the constitutions of all Britain's overseas territories as a precursor to independence.

This author takes a different view, but also sees little influence from the Asian bills of rights upon British attitudes to bills of rights for its colonies.

The story of how the Colonial Office developed its policy on colonial bills of rights is complex, and what follows is necessarily only a summary.

By the 1950s, forces were acting to create local demand within Britain's overseas territories for bills of rights.

First, the appearance of bills of rights in former dependencies and human rights instruments in international declarations popularised the concept. The United Nations Universal Declaration of Human Rights and the European Convention on Human Rights were important developments, as were the Irish bill of rights, the Indian bill of rights, the Sudanese bill of rights, the Nigerian bill of rights, and latterly the Canadian declaration of rights. Rights contained in the constitutional instruments of trust territories under League of Nations or United Nations mandate were also significant.

Second, local groups identified particular benefits of bills of rights post-independence. While the principal support for bills of rights came from minority groups that saw them as a means to protect minority rights, there were other groups with other reasons for supporting bills of rights. For example, in Malaya the Malays latterly saw the proposal for a bill of rights as a method to lock in their privileged status.⁶⁹ In Nigeria the ruling party in the Western Region wanted a bill of rights to instil the rule of law and democratic values throughout the country and to ensure free elections in the north.⁷⁰ In Kenya the European population sought a bill of rights to entrench its property rights.⁷¹ In Trinidad and Tobago the Williams Government endorsed a bill of rights to meet the expectations of the international community, while the opposition also sought the bill of rights to lock in the Westminster system of government.⁷² In Jamaica the Manley Government agreed to a bill of rights to reassure foreign investors of the intentions of the Jamaican state after independence, while the opposition pressed for the bill of rights to entrench the existing constitutional balance.⁷³

Third, the process of constitutional decolonisation operated to create local consensus for bills of rights. Decolonisation created a dynamic within each territory with a vocal minority group apprehensive about the withdrawal of British oversight. Throughout the dependencies minority groups proposed constitutional

instruments for independence that were designed to restrict the power of the majority group. Thus a bill of rights was commonly put forward in conjunction with devolution of power from the central government, reserved seats for minority groups in the legislature, and a council of state. The majority group, however, aspired to maximise its powers in the independence settlement; it conceded a bill of rights because it believed that the bill of rights was the proposal of the minority groups that least restricted its power. While consensus was inevitably reached for a bill of rights, in many cases this was the result of a poor understanding about the potential ramifications of a bill of rights.

Fourth, the Colonial Office inadvertently created a political environment that fostered local consensus for bills of rights. The Colonial Office wanted the peaceful transfer of power, and that required a viable constitution within which all the major groups would participate. It was equally important for the majority group to feel able to govern under the constitution and hence not to rewrite it after independence, as for the minority group to feel able to oppose the government under it and hence not pursue violent dissent. To achieve this outcome the Colonial Office exerted great pressure upon the local groups to agree to the design of any new constitution. The incentive for both the majority and minority groups to agree was that the British government rarely granted a new constitution and hence any extra powers of self-determination contained therein without local agreement. There was also the prospect that without local agreement the British government might impose a constitutional settlement unfavourable to one group.

Prior to the 1950s, bills of rights were virtually unknown in Britain's overseas territories.⁷⁴ The Colonial Office's longstanding position was that bills of rights were not effective at protecting rights and created long-term difficulties for governments.

The Colonial Office developed its policy towards bills of rights on a case by case basis. And once the Colonial Office decided to grant a particular territory a bill of rights, other territories with similar characteristics were treated the same. Most of the pivotal cases occurred in Africa: the basic policy emerged from Ghana and Nigeria, was then extended in British Guiana and Kenya, and finally reformulated as a result of Tanganyika.

The Colonial Office first reconsidered its position towards bills of rights in 1955 in response to events in Nigeria. Four major developments facilitated this review.⁷⁵ First, a coalition of Christian church organisations wanted a right to religious freedom in the new Nigerian constitution. The church organisations had the political capacity to embarrass the secretary of state for the colonies if their demand was not met. Second, Nigeria had a new governor-general, Sir James Robertson, who had assisted in drafting the bill of rights in the Sudan Self-Government Statute and was pro bill of rights. Third, the only major political party in Nigeria that previously did not want a bill of rights had dropped its opposition. And finally, Oliver Lyttelton, who, as secretary of state for the colonies, had personally derailed the proposal for a Nigerian bill of rights in 1953, had been replaced by Alan Lennox-Boyd.

When the Colonial Office began its review of constitutional rights for Nigeria in 1955, it lucidly expounded the standard arguments against bills of rights. But the argument that most resonated was that a bill of rights would restrict the power of the legislature to deal with subversion. The Colonial Office nonetheless saw little alternative but to agree to a right to religious freedom. And given the unanimous local demand for a bill of rights, the Colonial Office understood that it could not insert a right to religious freedom without also agreeing to a bill of rights. The Colonial Office therefore decided to propose as a model the Sudanese bill of rights, but with an augmented right to religious freedom, because it believed that the Sudanese bill of rights did not effectively restrict the power of the legislature.⁷⁶ A similar rationale later led to the drafting of Basutoland's 'baby bill of rights', which was specifically designed to be ineffective in restricting the legislature because Basutoland did not have a minority population and hence was not thought to need a bill of rights.⁷⁷

Before the Colonial Office drafted the Nigerian bill of rights, it addressed the question of a bill of rights for Ghana, which had minority populations and local demand for a bill of rights. British parliamentary pressure forced the secretary of state for the colonies to agree to reconsider the Colonial Office's opposition to bills of rights. For Ghana there was insufficient time for the Colonial Office to prepare a bill of rights, but in the ensuing review the Colonial Office advisers changed their position towards bills of rights. The major reason for the policy reversal was that the Colonial Office saw political advantage in agreeing to a bill of rights. The aim of the Colonial Office was to ensure a peaceful transfer of power to a constitution under which all political groups were willing to work after independence. If a bill of rights could achieve this outcome, the Colonial Office believed that this benefit outweighed the reasons against having a bill of rights. But at this point the Colonial Office thought that the political benefits of a bill of rights only out-weighed its practical detriments when a dependency nearing independence had a minority population that was fearful of losing its rights post-independence and the minority population wanted a bill of rights.⁷⁸

The Colonial Office then drafted the Nigerian bill of rights, but based it on the European Convention on Human Rights. There were three major reasons for its decision not to use the Sudanese bill of rights. First, the Colonial Office supported the recommendations of an independent commission to use a bill of rights as the main minority protection in the Nigerian Independence constitution. Consequently the minimalist Sudanese bill of rights would not in itself have been sufficient to present to the minority groups as the main protection. Second, the Malayan bill of rights had highlighted to the Colonial Office the difficulties of justifying controversial rights when a bill of rights had been tailored to the needs of a specific dependency. It was easier to submit an extensive bill of rights and place the burden upon the majority group to justify why a specific provision should be excluded. Third, the human rights violations then being committed by the Ghanaian government made the Colonial Office recognise that there might in fact be benefits to limiting the powers of the Nigerian legislature over human rights. Relevantly, the Colonial Office draftsmen were not using the European

Convention on Human Rights as the model for the Nigerian bill of rights with the intention to extend the operation of the convention after independence. The convention merely provided a practical template for those unfamiliar with drafting bills of rights.⁷⁹

The Colonial Office now applied to other dependencies the policy on bills of rights it had developed for Ghana using the bill of rights it had drafted for Nigeria. That is, the Colonial Office would include a bill of rights in a dependency with a minority population and local demand for a bill of rights.

East Africa was the catalyst for the next major development in Colonial Office policy on bills of rights. In 1961 the Colonial Office affirmed that its policy to protect the European population in Kenya at independence was to entrench in the constitution a bill of rights and an independent judiciary. Lord Kilmuir, then lord chancellor, characterised the proposal for a bill of rights for Kenya as filling the void of justice left by the departure of Britain.⁸⁰ However there was no illusion that a bill of rights actually protected minority rights: following Ghana's descent into dictatorship and the Congo's collapse into civil war it was accepted that nothing short of refusing independence could absolutely protect minority rights.⁸¹ Nonetheless a bill of rights was pressed upon Kenya as the best protection then available.

To create an East African precedent for Kenya, the Colonial Office determined to give Tanganyika a bill of rights in its independence constitution. But Tanganyika had no vocal minority group and no local demand for a bill of rights. Interestingly, the Colonial Office advisers tried to persuade the Tanganyikan government to accept a bill of rights by arguing that a bill of rights was about protecting individual, not minority rights. But it was to no avail as the Tanganyikan government rejected the proffered bill of rights. The Tanganyikan government's reasons for resisting a bill of rights, principally the fear that a bill of rights would undermine the legal system by putting the expatriate judiciary into conflict with the African executive and legislature, were not disclosed to the Colonial Office.⁸² Consequently, Tanganyika's rejection of a bill of rights did not spark a re-evaluation of the appropriateness of inserting human rights instruments into all independence constitutions. Nonetheless, as the Colonial Office had pushed Tanganyika and intended to press Kenya for a bill of rights, the Colonial Office felt that it could not reasonably refuse any other requests for bills of rights.

The final phase in the formulation of the Colonial Office policy on bills of rights was instigated by Lord Perth, the minister for state in the Colonial Office.⁸³ As a consequence of Tanganyika's rejection of a bill of rights, Perth proposed that all Britain's overseas territories be given human rights instruments. This was itself an ad hoc response to a specific circumstance. In the ensuing Colonial Office review on bills of rights no evaluation was made about the benefits of a bill of rights; they were taken for granted.⁸⁴ The resulting Colonial Office policy slightly tempered Perth's proposal: bills of rights were to be given to all overseas territories except where there was local opposition.⁸⁵ And most of Britain's overseas territories were granted bills of rights over the following decade.⁸⁶

Concluding observations

As the foregoing discussion indicates, this author takes a different view to Jennings, de Smith and Simpson as to the cause of the change in British attitudes to bills of rights in colonial constitutions. Simply put, the Colonial Office recognised the political value of bills of rights in expediting Britain's peaceful withdrawal from her empire. The British experience in Palestine (1946) and India (1947) and the events then occurring in the Congo and Algeria highlighted the perils both short and long term of having to abandon a territory gripped by civil conflict. The local political dynamic in dependencies with minority groups invariably resulted in local demand for a bill of rights. The Colonial Office recognised that bills of rights reconciled both the majority and minority groups to work within the new constitution as well as keeping the powers of the independence government largely intact. The Colonial Office, however, had no illusion that a bill of rights actually protected minority rights or even individual rights. The Colonial Office decision to support bills of rights was based on the pragmatic calculation that the political benefits outweighed the practical detriments of bills of rights in certain dependencies. And herein lies the explanation as to why the British government supported bills of rights for its colonies, while opposing a bill of rights for Britain. Inserting bills of rights into colonial constitutions had more to do with ending Britain's imperial age without post-independence violence than extending the British civilising mission into the post-colonial world.

Hence the experiences of Burma, India, Pakistan and, to a lesser extent, Malaya, stand apart from the later introduction of bills of right throughout Britain's territories. While it is possible to identify clear links between the first wave of bills of rights in Asia and the later wave of bills of rights throughout Britain's overseas territories, the first wave in Asia was not especially significant in changing British attitudes to bills of rights and played little role in changing British policy towards bills of rights in its overseas territories.

Notes

- 1 Sir Ralph Hone, Memorandum regarding the including of Fundamental Rights in the written constitution, 19 December 1956, CO 554/821.
- 2 Human Rights Provisions in Colonial Constitutions, Colonial Constitutional Note 23, 26 September 1962, CO 1032/283.
- 3 For America see N. H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* (1997); for France see K. M. Baker, 'The Idea of a Declaration of Rights' in Dale Van Kley (ed.), *The French Idea of Freedom: The Old Regime and the Declaration of Rights of 1789*, Stanford: Stanford University Press (1994).
- 4 See especially Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, London: Macmillan (1885), 188–196.
- 5 Ivor Jennings, *Some Characteristics of the Indian Constitution – Being Lectures Given in the University of Madras During March 1952 under the Sir Alladi Krishnaswami Aiyer Shashtiabdapoorthi Endowment*, Madras: Cambridge University Press (1953), 53; Ivor Jennings, *The Law and the Constitution*, 5th edition, London: University of London Press (1959), 255–279.

- 6 Ivor Jennings, *The Approach to Self-Government*, Cambridge: Cambridge University Press (1958), 99.
- 7 Jennings, *Some Characteristics of the Indian Constitution*, 53; Jennings, *The Law and the Constitution*, 255–279.
- 8 Charles O. H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, Oxford: Oxford University Press (2007), 21–26.
- 9 Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford: Oxford University Press (2004), 739–745.
- 10 See, for example, the writings of K. Wheare *Modern Constitutions*, London: Oxford University Press (1951), 38, 47–49.
- 11 See H. Kumarasingham (ed.), *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings*, Colombo: CPA (2015).
- 12 See: Jennings, *The Approach to Self-Government*, 47.
- 13 Jennings was retained by the leader of the Western Region in Nigeria, Chief Rotimi Williams, to advise at the constitutional conference of 1958: Jennings, 10 May 1957, Jennings Papers, B/14/5. The Nigerian constitution at independence, which was granted on 1 October 1960, included a fulsome bill of rights. Jennings, however, had no discernible role in advising on its inclusion (that decision was taken earlier) nor in its drafting (that task was undertaken within the Colonial Office): Parkinson, *Bills of Rights and Decolonization*, 133–173.
- 14 Jennings was involved in the 1958 discussions on a new constitution for the Sudan (which was recognised as an independent state on 1 January 1956, previously having been controlled jointly by Britain and Egypt: FO 371/131715/JS1017/1–4; Parkinson, *Bills of Rights and Decolonization*, 51–72. More information on Jennings in Sudan and other parts of the world are now available in H. Kumarasingham (ed.), *Constitution-Maker – Selected Writings of Sir Ivor Jennings*, Cambridge: Cambridge University Press (2015).
- 15 See A. W. Bradley, ‘Sir William Ivor Jennings’ (2004) 67 *Modern Law Review*, 716, 730 fn. 79.
- 16 Wheare was constitutional adviser to the National Convention of Newfoundland (1946–1947) and to the conferences on Central African Federation (1951, 1952, 1953). De Smith was secretary of the Buganda Constitutional Committee and Namiirembe Conference (1954) and the constitutional adviser to the Mauritius Constitutional Conference (1961 to 1968).
- 17 Sir Kenneth Roberts-Wray, 5 January 1956, CO 1030/124.
- 18 J. A. L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, Colombo: Hansa Publishers (1973), 509.
- 19 Ivor Jennings, ‘Law and the Individual’, 1965, Jennings Papers, C/102.
- 20 De Smith, ‘Fundamental Rights in the New Commonwealth’ (1961), 10 *ICLQ* 83–102 and 215–237; de Smith, ‘Fundamental Rights in Commonwealth Constitutions’ (1962), 18, *Journal of the Parliaments of the Commonwealth*, 10–19; de Smith, *The New Commonwealth and its Constitutions*, London: Steven & Sons (1964), 162–215.
- 21 Maung Maung, *Burma's Constitution*, The Hague: Martinus Nijhoff (1961), 81–82.
- 22 *Ibid.*, 92–104.
- 23 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford: Oxford University Press (1966), 52; S. J. Sorabjee, ‘Fundamental Rights in the Indian Constitution’ in A. G. Noorani (ed.), *Public Law in India: A Survey*, New Delhi: Vikas, (1979), 30.
- 24 *Report of a Committee to Determine Principles of the Constitution for India*, Allahabad: All India Congress Committee (1928), 89–90.
- 25 *Report of the Indian Statutory Commission, 1930* (Cmd 3569, 1930), 22–23.
- 26 *Proposals for Indian Constitutional Reform, 1933* (Cmd 4268, 1933), 37.

- 27 *Report of the Joint Parliamentary Committee on Indian Constitutional Reform* [1933–1934], vol. I, para 366.
- 28 *Ibid.*
- 29 *Hansard*, HC (series 5) vol. 300, cols 1044 and 1075–1079 (1935).
- 30 Government of India Act 1935, sections 275, 298(1), and 299.
- 31 Durga Das Basu, *Introduction to the Constitution of India*, Calcutta: Sarkar (1960), 63; M. V. Pylee, *Constitutional Government in India*, London: Asian Publishing House (1960), 190–195; Austin, *The Indian. Constitution*.
- 32 Constitution of India (1950), arts 14–34; DO 142/325.
- 33 Jennings Papers, B/15/8.
- 34 K. J. Newman, *Essays on the Constitution of Pakistan*, Dacca: Pakistan Co-operative Book Society (1956), 214–223.
- 35 Jennings, *Approach to Self-Government*, 101.
- 36 Ivor Jennings, *The Dominion of Ceylon: The Development of its Laws and Constitution*, London: Stevens & Sons (1952), 36–47 and 63–76.
- 37 Sir Ivor Jennings, ‘Individual and the State’ [1965], Jennings Papers, C/10/2.
- 38 Jennings, *Donoughmore to Independence* [unpublished, 1949], 48; Ivor Jennings, *The Road to Peradeniya* [unpublished, undated], 127–140 in Jennings Papers, C/14/1.
- 39 Sir Kenneth Roberts-Wray, 5 January 1956, CO 1030/124.
- 40 Howard Wriggins, *Ceylon: Dilemmas of a New Nation*, New Jersey: Princeton University Press (1960), 258; Sakarajasingham Namasivayam, *Parliamentary Government in Ceylon, 1948–1958*, Colombo: KVG de Silva (1959), 101–105.
- 41 *Report of the Commission on Constitutional Reform, 1945* (Cmd 6677, 1945), 64, 90, and 96.
- 42 Ceylon (Constitution) Order in Council, 1946, section 29(2).
- 43 *Ibid.*, section 29(3).
- 44 Ceylon (Constitution and Independence) Order in Council 1948, SI 1948 vol. III, p. 560, section 29(2).
- 45 Parkinson, *Bills of Rights and Decolonization*, 73–101.
- 46 Sir Kenneth Roberts-Wray, 5 January 1956, CO 1030/124; 20 March 1956, CO 1030/129.
- 47 Jeffries, 27 January 1956, CO 1030/129.
- 48 Sir John Martin, 15 February 1956, CO 1030/129; Lord Kilmuir to Alan Lennox Boyd, 25 February 1956, LCO 2/4932.
- 49 The other members of the commission were: Lord Reid (chairman), Sir William McKell (Australia), Bibhubusan Malik (India), and Abdul Hamid (Pakistan); Edward Hopkins, the Canadian member, was ill and did not take part in the commission.
- 50 Tunku Abdul Rahman, ‘Speech in the Federal Legislative Council, Kuala Lumpur, 10 July 1957’, in Tunku Abdul Rahman, *Malaysia: the Road to Independence*, Sepangor: Pelanduk Publications (1984) 206.
- 51 Alan Lennox Boyd to Reid Commission, 16 August 1956, CO 1030/132; Sir Ralph Hone, ‘The Constitutional Position of an Independent Federation of Malaya’, 21 March 1956, CO 1020/132.
- 52 4th meeting of the commission, 27 June 1956, CO 889/8; Lord Reid, ‘Matters to be Considered for Inclusion in the Constitution’, undated, CC 2000/6, CO 889/2.
- 53 First draft of the Declaration of Fundamental Rights, distributed 28 September 1956, and Comments on the First draft, CC 2000/26, CO 889/2.
- 54 Meeting with Malay Rulers, 14 and 15 September 1956, CC 3003/32, CO 889/2.
- 55 Thirty-fifth meeting, 27 September 1956, CC 3303/1 33, CO 889/1; meeting, 27 September 1956, CO 889/6.
- 56 Parkinson, *Bills of Rights and Decolonization*, 90.
- 57 Forty-fourth meeting, 8 October 1956, Forty-fifth meeting, 9 October 1956, Forty-sixth meeting, 9 October 1956, CC 1000, CO 889/1; Sir Ivor Jennings, Second Draft of the Declaration of Fundamental Rights, 19 October 1956, CC 2000/6, CO 889/2.

- 58 *Report of the Federation of Malaya Constitutional Commission, 1957* (Colonial No 330, 1957).
- 59 Sir David MacGillivray, Report of the Constitutional Commission Working Party, 6 April 1957, CO 941/86.
- 60 Fourth meeting, 16 May 1957, CO 1030/496.
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3 Discretionary reserve powers of heads of state

Anne Twomey

Overview – the consequences of a change in drafting style

The constitutions that Britain granted to, or approved for, its colonies in the nineteenth century tended to be prescriptive about legislative matters but flexible about executive matters. For example, the constitutions of Canada and Australia¹ set out detailed rules about the allocation of legislative powers amongst the levels of government and the structure and composition of their respective federal parliaments, but made little reference to executive power,² leaving to convention many of the rules governing the exercise of executive power. These constitutions made it clear that the governor-general had the power to summon and dissolve the federal parliament,³ appoint the prime minister and other ministers,⁴ assent to bills⁵ and act as commander-in-chief of the armed forces.⁶ However, neither stated whether such powers had to be exercised upon ministerial advice or which, if any, could be exercised without or contrary to such advice.⁷ Nor did either constitution set down the conventional rules that govern the exercise of any such reserve powers. These were matters that were simply expected to be understood and complied with – a form of constitutional ‘gentlemen’s handshake’.

As former colonies achieved their independence in the early to mid-twentieth century, the attitude towards executive power and the use of convention changed. The constitutions of former British colonies in Asia tended to become much more prescriptive, both as first drafted under direct British influence and as later drafted locally to achieve a republic. The powers of the governor-general, or his or her republican substitute, were set down in greater detail. Sometimes the conventions underlying reserve powers were expressly tied to existing British conventions, as in the case of Ceylon. Other times the conventions were partially codified in the constitution. For example, section 25 of the constitution of Singapore codifies convention by providing that the

President shall appoint as Prime Minister a Member of Parliament who in his judgment is likely to command the confidence of the majority of the Members of Parliament, and shall, acting in accordance with the advice of the Prime Minister, appoint other Ministers from among the Members of Parliament.

Institutions such as the cabinet were expressly referred to in Asian constitutions and principles such as collective ministerial responsibility were explicitly laid down. For example, the Malaysian constitution requires that if the prime minister loses the confidence of the House, it is the entire cabinet that resigns.⁸ Express provisions were commonly included that set out when a governor-general could exercise discretion and when he or she was confined to acting on advice.⁹

In explanation of this change, Sir Ivor Jennings noted that the older dominions 'moved from colonial to Dominion status by a slow process of evolution and so their status is founded on convention'.¹⁰ He contrasted the position of the newer dominions, such as Ceylon. He argued that it was 'politically essential' to provide for full self-government in the written law, including providing a written basis for conventions.¹¹ The problem, however, as Harding has pointed out, is that the British conventions developed from precedent and political practice, but were transformed into the written law of countries such as Malaysia, 'shorn of the particular national history that gave rise to them'.¹² These conventions, therefore, do 'not operate in precisely the same way in Malaysia as they do in Britain and other Commonwealth states, because Malaysia has a different history of democratic politics' and has 'to some extent developed its own constitutional conventions or interpretations of them'.¹³

Attempts were made in Asian constitutions to anticipate and deal with all sorts of different potential constitutional problems. Constitutions became longer, more detailed and more difficult to comply with. The constitution of India, for example, is one of the longest in the world.¹⁴ Jennings famously described it as too 'lengthy, detailed and rigid'.¹⁵ He attributed this in part to its attempt to incorporate most of the matters covered by the Government of India Act 1935 (Imp), which he claimed was the largest Act ever passed by the Parliament of the United Kingdom. The difference, he noted, was that the British Act was simply an ordinary Act of Parliament that could be amended at any time, whereas the Indian constitution was a fundamental law that could not be changed like an ordinary law. He criticised the constituent assembly that prepared the Indian constitution on the ground that it had never faced the question of what rules ought to be enacted as fundamental law and what ought to be enacted as ordinary law.¹⁶

The more prescriptive and detailed Asian constitutions became, the more brittle they became, increasing the potential for crisis due to a country finding itself operating outside its constitution with no legally valid means of returning to constitutional government. This created the foothold for emergency powers and a 'doctrine of necessity', which in turn provided an opening for extreme executive actions, including coups, military rule and extra-constitutional 'states of emergency' that were used to weaken opposition and change the constitution.

Another consequence of this approach was that these prescriptive constitutional provisions were regarded as justiciable, resulting in the active use of courts as adjudicators upon disputes about the exercise of constitutional powers. In Australia and the United Kingdom, questions about the validity of the dissolution of parliament or the appointment of a particular person as prime minister

would normally be regarded as 'political questions' that a court should not determine.¹⁷ In Asian countries with systems of responsible government, we have seen not only court challenges to the dismissal and appointment of prime ministers, but also court orders that have overturned the dissolution of parliament.¹⁸

This more prescriptive approach to constitutional drafting has also led to wider interpretations of the scope of reserve powers. Sometimes this is in direct defiance of constitutional provisions. If the prescriptive provisions that limit the power of the head of state do not deal with a particular matter, then it tends to be argued that it must be the subject of a broader inherited prerogative power, which in turn is contended to be a reserve power that can be exercised without the advice of the prime minister or chief minister. An example arose in Pakistan where it was held that inherited prerogative powers gave the governor-general the power to dissolve the constituent assembly, without ministerial advice and in the absence of an express power to do so.¹⁹

Finally, the extent of the powers of the head of state in Asian nations will depend very much on the local culture and history. In countries such as Pakistan, regional instability and the enhanced role of the military in national life have affected the role and powers of the head of state. In Malaysia, the hereditary rulers of the states have a significant religious role as heads of Islam, as well as being central to Malay culture.²⁰

This chapter considers how 'Eastminster' countries, primarily India, Pakistan, Sri Lanka and Malaysia, have dealt with the reserve powers of the head of state in their post-colonial constitutions, showing both the British legacy and how Asian countries have departed from it.

Level of discretion granted to the head of state and its justiciability

Asian countries had two conflicting precedents to deal with in terms of the extent of the powers of the head of state. On the one hand, during the colonial period, governors-general had significant discretionary powers, especially in terms of dealing with emergencies. They often behaved in autocratic ways and were regarded as the most powerful figures in the political system. In contrast, as independence was conferred upon Asian countries, the British intention was that the role of the governor-general revert to the largely ceremonial and symbolic role seen in the older Realms of Australia, New Zealand and Canada, which was similar to the role played by the king in the United Kingdom. Under that system, the reserve powers are limited and are subject to conventions and precedents. The governor-general's role is more that of a symbol of unity and wise elder statesman, than an active political player with real power.

In form, the office of governor-general (or his or her replacement), tended to commence upon the independence of Asian countries as a largely ceremonial one, but rapidly moved towards a more powerful office, depending upon the personality and personal power of the incumbent as well as the instability, ethnic tensions and powers vacuums to which independence had given rise. In the case

of Sri Lanka such a change has been formalised, with the Westminster parliamentary model being abandoned in 1978 in favour of a presidential system based upon a French model. In Pakistan, the president remains powerful and capable of dismissing governments with little constraint. In other countries, however, there has been a back-lash, with amendments having been made to the constitutions of India, Malaysia and Singapore to reduce the powers of the head of state.

Ceylon/Sri Lanka

One of the biggest dilemmas for Asian countries in drafting their constitutions has been whether or not to codify the powers of the head of state. At one extreme, Ceylon preferred to tie the powers of its governor-general to British constitutional conventions. It had initially been quite prescriptive in its proposed constitution, classifying vice-regal powers into three categories: '(a) those exercised on advice according to British constitutional conventions, (b) those exercised on recommendation, implying a power to refer back once, and (c) those exercised at discretion'.²¹ Thirteen powers were to be exercised at discretion. However, once it was agreed that Ceylon would be granted full dominion status, giving it independence, a decision was made that the governor-general should hold the equivalent role in Ceylon to the king in the United Kingdom.

Section 4(2) of the Ceylon (Independence) Order in Council 1947 therefore provided that the governor-general shall exercise his powers '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 His Majesty'. Jennings interpreted this as meaning that the governor-general, having become the equivalent of a 'constitutional monarch', would always act on the advice of ministers.²² This provision, while invoking conventions, also gave them a formal legal basis.²³ Recognising that this might make them justiciable, a proviso to section 4(2) was included, which stated 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 sub-section have not been complied with'. This effectively gave the governor-general an unreviewable discretion, allowing him to interpret conventions and apply them according to his own predilection. However, where the governor-general's powers did not fall within traditional categories of reserve powers or where it was expressly provided that a power had to be exercised on advice, no such discretion applied.²⁴

India

India, too, initially proposed to codify the constitutional conventions that constrained the exercise of the discretionary power of the head of state. This was to be done in an Instrument of Instructions to the President (similar to the notion of 'Royal Instructions'), which was to be included in Schedule IIIA of the constitution. During the drafting process, however, it was decided to drop this schedule and rely instead upon the president exercising his or her powers in a manner

consistent with the conventions as applied in the United Kingdom.²⁵ Allied with this approach was the decision to abandon the idea of directly electing the president²⁶ and to adopt instead the indirect election of the president through an electoral college to ensure that he or she had no mandate from the people and would not be likely to become a political rival of the prime minister.²⁷

While the president was intended to be able to exercise discretion within the limits of British constitutional conventions, two further factors affected the extent of this discretion. First, the president is required to swear an oath to 'preserve, protect and defend the Constitution and the law' and may be impeached if he or she violates the constitution.²⁸ This has led to implications being drawn about the discretion, and indeed the duty, of the president to reject ministerial advice that would involve a breach of the constitution or the law:

It is a necessary implication of Arts. 60 and 61, that if the Council of Ministers should advise the President to take action which is contrary to the Constitution and the law, or which the Ministers are driven to admit is contrary to the Constitution and the law, the President should reject such advice, and if necessary, dismiss the Ministry if it persists in its advice. And if he is unable to form another Ministry, he can direct a dissolution of the House of the People and order a fresh general election.²⁹

The traditional British view has been that if the Crown law officers advise that a course of action is legal, then the governor-general should act in accordance with that advice, leaving any issues of legality to the courts.³⁰ Responsibility for any illegality would then shift to ministerial advisers. The intention was to protect the governor-general from having to make quasi-judicial decisions on the legality of government Acts. In India, however, the president could be impeached for breaching the constitution, placing pressure on him or her to reject advice that the president believes to be unconstitutional.

This leads, however, to a potential breach of the separation of powers if the president is determining the legality of government advice. As a consequence, art. 143 of the constitution of India gives the president the power to obtain an opinion from the Supreme Court on questions of law. This permits the president to obtain an authoritative judicial opinion before rejecting government advice.

The second factor is the express implementation of the conventions of responsible government in the constitution. Article 75(3) provides that the Council of Ministers 'shall be collectively responsible to the House of the People'. From this an implication has been drawn that if a government ceases to be responsible, then the president is not obliged to act upon its advice. For example, where a government that has lost the confidence of the lower House is operating in a caretaker capacity pending an election, the president is regarded as entitled to reject government advice that goes beyond the ordinary administration of government.³¹

In 1974, the Indian Supreme Court accepted that the powers of the president in India were similar to those of the monarch in the United Kingdom, where he

or she acts on the advice of ministers. The remaining reserve powers were limited to particular well-known situations, such as the choice of prime minister, the dismissal of a government and the dissolution of the House.³² Nonetheless, there was sufficient governmental concern about the scope of the president's discretion for it to be further limited by a constitutional amendment passed during a state of emergency in 1976. Article 74 had previously stated that there 'shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President'. To this was added 'who shall, in the exercise of his functions, act in accordance with such advice'. In 1978 a further proviso was added that permitted the president to require the Council of Ministers to reconsider such advice, but which required the president to act in accordance with the advice tendered after reconsideration.³³

At the state level, however, the state governors are regarded as having greater discretion than the president.³⁴ There has also been greater political instability at the state level, leading to more opportunities for the exercise of reserve powers and much more jurisprudence on the subject.

Pakistan

In Pakistan the genesis and scope of the reserve powers was affected by the failure of the constitution-making process. The British, on their departure, had left India and Pakistan with constituent assemblies to form new constitutions, while operating temporarily under a modified colonial regime. Whereas India quickly drafted its constitution, bringing it into effect in 1949, Pakistan's constituent assembly failed to produce a new constitution in a timely fashion, leading to its dissolution by the governor-general in 1954.³⁵ The constituent assembly also had the role of a temporary legislature during the constitution-making period. The delay in finalising a constitution led to a concern that the constituent assembly had turned itself into a permanent legislative body that did not face elections and could not be dissolved.

This interim constitutional period turned into a battle between the governor-general, the constituent assembly and the government. In April 1953, the governor-general dismissed Prime Minister Nazimuddin and his cabinet on the ground of incompetence.³⁶ The next government, fearing it too could be dismissed, whipped through the constituent assembly in 1954 a constitutional amendment that removed the governor-general's powers to dismiss ministers. The constitution was also amended to require the governor-general to appoint as prime minister the person who enjoyed the confidence of the majority in the legislature, and to make explicit the convention of collective ministerial responsibility.³⁷ Finally, the constituent assembly conferred upon the courts powers of judicial review of executive action. On 24 October 1954, the governor-general responded by dissolving the constituent assembly and proclaiming a state of emergency.

The litigation that followed considered, amongst other things, the scope of the governor-general's powers. There was no express power conferred upon the

governor-general to dissolve the constituent assembly. It was argued on the one hand that the British prerogative powers were picked up and conferred upon the governor-general by the general conferral of executive power in section 5 of the Indian Independence Act 1947. On the other hand it was pointed out that any prerogative power to dissolve Parliament (as opposed to the refusal of advice to dissolve) had long ceased to exist in the United Kingdom, and therefore could not be inherited. In response, it was contended that there could not be a lacuna in the constitution of an independent country and that in the absence of any express power to dissolve the constituent assembly, this power must be held by the queen and exercisable by the governor-general.³⁸ The cases were complicated by the fact that the constitutional amendments by the constituent assembly had not been given royal assent and were held to be invalid,³⁹ causing a major constitutional crisis and undermining both the powers of judicial review of the courts and the constitutional power of anyone to rectify the situation. Ultimately, it was held that the governor-general did have the power both to dissolve the constituent assembly and to reconstitute it.⁴⁰ This opened the door, however, of the 'doctrine of necessity', which was to prove critical in the subsequent history of Pakistan.

Pakistan became a republic in 1956 with a new constitution. The governor-general was replaced by a president, who continued to exercise significant powers against the government, forcing the resignation of Prime Minister Suhrawardy in 1957 under threat of dismissal⁴¹ and Prime Minister Chundrigar two months later. The constitution was then abrogated by President Mirza on 8 October 1958 and martial law was imposed. This commenced an ongoing pattern of states of emergency, martial law and the dismissal of prime ministers by presidents.

Malaysia

While India, Pakistan and Ceylon all achieved independence in the late 1940s, the Federation of Malaya did not achieve independence until a decade later, in 1957, giving it a 'next generation' constitution. In 1963 its constitution was further amended to incorporate into a new Federation of Malaysia the additional states of North Borneo, Sarawak and Singapore, with higher levels of autonomy than the other states. Singapore left the federation shortly afterwards, in 1965, becoming independent.

The Malaysian constitution is unique in form, as it replaces the British constitutional monarchy with a local monarchical system. The rulers of nine of the Malay states are hereditary rulers who reign for life, but four other states have appointed governors.⁴² The king of Malaysia is elected by, and from amongst, the nine hereditary rulers for a five-year term. Hence the king, known as the Yang di-Pertuan Agong, is both hereditary and elected for a fixed term.

The Malaysian constitution and the constitutions of the Malay states partially codify Westminster conventions but also rely upon their application where the relevant constitution does not otherwise provide. Article 40(1) of the Malaysian

constitution provides that the king 'shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution'. The king is expressly permitted to 'act in his discretion' in the performance of the functions of: (a) appointment of a prime minister; (b) withholding consent to a request for the dissolution of parliament; (c) the requisition of certain meetings of the Conference of Rulers; and (d) in any other case mentioned by the constitution. While this might appear to strictly limit the king's discretion, there has been a debate about whether other executive prerogatives have survived and have been accommodated under art. 39 which vests executive authority in the king.⁴³ The lack of certainty regarding the scope of the prerogative and what aspects of it, if any, have been inherited or abrogated by specific provisions included in the constitution (such as those concerning emergency powers) has been an issue in Malaysia.

The partial codification of reserve powers in the constitution has resulted in their justiciability, leading to a rich jurisprudence on the subject, particularly at the state level where there has been greater political instability. Harding has observed that in Malaysia:

The courts are less inhibited from assuming ultimate constitutional control over the exercise of conventional powers. Case law in Malaysia is remarkable for the extent to which the courts have proved willing to assert review of such traditionally 'political', 'prerogative' or 'purely executive' functions, for example the appointment, dismissal or resignation of a Chief Minister.⁴⁴

Appointment of prime minister

The well-accepted rule, be it expressly provided in the constitution or applied by way of convention, is that the head of state shall appoint as prime minister the person who holds the confidence of the lower House. Normally, the identity of this person is obvious, but uncertainty can arise in the case of a hung parliament or the sudden death of a prime minister where there is no immediate mechanism for identifying the new leader. For example, the death of the Ceylonese prime minister, D. S. Senanayake, in 1952 drew the governor-general, Lord Soulbury, into controversy when he appointed Senanayake's son Dudley as the next prime minister, rather than Sir John Kotelawala, a more senior minister. Lord Soulbury has been criticised for breaking convention by appointing a person who was not the person most likely to hold the confidence of the House.⁴⁵ Nonetheless, the new government was supported by the parliament, and others have contended that the bulk of political support had swung behind Dudley Senanayake by the time he was appointed.⁴⁶ The longer-term problem created by this appointment was that it was seen as creating a precedent of the governor-general exercising political discretion in determining the leadership of the country,⁴⁷ an impression that remained hard to shift.⁴⁸

Conditions placed upon appointment

In India in 1979, after the government had fallen, the president invited one of the contenders for office to form a government, having assessed the number of his supporters. He requested that the new prime minister seek a vote of confidence in the lower House at the earliest opportunity. This action was later challenged upon the ground that the president cannot place a condition on the appointment of a prime minister. The Calcutta High Court agreed, but held that no condition had been imposed. The president had merely 'suggested a course' and the court concluded that he had 'acted with the highest propriety'.⁴⁹ This course has now become a practice⁵⁰ which protects the president by ensuring that the will of the lower House is respected.⁵¹

The justiciability of appointments

In Malaysia, at both the national and state levels, there is an express constitutional requirement that the head of state appoint as prime minister or chief minister the person who in his judgment is likely to command the confidence of the majority of the members of the lower House of parliament.⁵² This has made the issue of appointment justiciable.

For example, in 1985 an election in the state of Sabah resulted in a surprise change of government. The losing parties pressured the ruler to appoint their leader and then give them a majority by nominating six additional members from their parties to the assembly. The ruler, acting under duress, initially made the appointment of chief minister, but later revoked it and appointed the person who had the confidence of the assembly. Nonetheless, the revocation of appointment was challenged in the courts. Both the High Court and the Supreme Court held that the court had no jurisdiction in relation to the *manner* in which the ruler's discretion was exercised, but it had jurisdiction in relation to the question of whether or not a valid appointment had been made.⁵³

The High Court held that no valid appointment had been made because the ruler had not exercised his 'judgment' as required by the constitution of Sabah.⁵⁴ He had not received the official results of the election and the appointment had been made while he was the subject of pressure and threats. Further, nominated members could not be used to turn a minority into a majority.⁵⁵ Hence the challenge was dismissed and the chief minister who held the confidence of the assembly remained in office.

After this controversy, the constitution of Sabah was amended to state that where a political party has won a majority of the elected seats in the legislative assembly in a general election, its leader, if a member of the legislative assembly, 'shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly'.

Dismissal of prime minister or chief minister

While the dismissal of a prime minister is an extremely rare occurrence in countries such as Australia, Canada and New Zealand, it has not been so rare in Asia. In Pakistan, in particular, prime ministers have often been dismissed, starting with the dismissal of Prime Minister Nazimuddin in April 1953. Nazimuddin, himself a previous governor-general, contended that the governor-general was a 'constitutional' governor-general who had to act on advice and had no discretionary powers. He sought to advise the queen to dismiss the governor-general, but was thwarted by the governor-general's order to cut phone lines and overseas telegrams.⁵⁶ The governor-general contended that as he appointed ministers and they served at his 'pleasure', then he had an implied power to dismiss them. British officials accepted that the legal power of dismissal existed, but queried the constitutional propriety of its exercise and noted that if a new government that held the confidence of the legislature could not be formed, the governor-general would be compelled to resign his office.⁵⁷ However, a new government was formed, including a number of the dismissed ministers and it was supported by parliament, which appeared to accept the governor-general's actions.

This dismissal opened the door for others, including the forced resignations of Prime Ministers Suhrawardy and Chundrigar in 1957, the dismissal of the Junejo government in May 1988, the dismissal of Benazir Bhutto's governments in August 1990 and November 1996 and the dismissal of Nawaz Sharif's government in 1993. The Supreme Court, while regarding such dismissals as justiciable, has vacillated between interpreting the president's power strictly, requiring the president to demonstrate objective reasons for dismissal that satisfy the terms of the constitution,⁵⁸ to taking a broader view of the power, accommodating action in relation to an 'imminent' breakdown of constitutional machinery.⁵⁹ The Supreme Court has also vacillated on the types of remedies that can be applied in such circumstances. On one occasion, the Supreme Court held that even though the dismissal of the government and the dissolution of parliament was invalid, it was too late to reverse events and restore the former government.⁶⁰ On another occasion, however, it went so far as to hold a dissolution invalid and order the restoration of the former government and assembly.⁶¹

In contrast, in India dismissal has been much less frequent (except at the state level) and has occurred in the context of a loss of responsibility. There is no express power in the Indian constitution to dismiss a government. However, art. 75(3) provides that the Council of Ministers is collectively responsible to the lower House of the parliament. This has been interpreted as requiring that the Council of Ministers hold the confidence of the House. If it loses that confidence, then it must resign or advise a dissolution.⁶² If it does neither within a reasonable time, this is regarded as a breach of the constitution and the president's 'residuary power to preserve, protect and defend the Constitution comes into play'.⁶³ This includes the power to dismiss the prime minister.⁶⁴

While this has not occurred at the national level, there have been incidents of dismissals at the state level. For example, in the state of West Bengal in 1967, it

was contended by the opposition that the government had lost the confidence of the legislative assembly. The governor repeatedly requested the chief minister to advise the summoning of the parliament to test confidence in his government. When the chief minister failed to act, the governor dismissed him. The dismissal was challenged in *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*.⁶⁵ Mitra J. of the Calcutta High Court held that it was within the discretion of the governor to dismiss the chief minister, as the chief minister held office at the governor's pleasure. The power to appoint and dismiss the chief minister was conferred exclusively upon the governor and was not subject to ministerial advice or control by the legislative assembly.⁶⁶ Further, the governor's decision, in the circumstances, was not tainted with bad faith, as it was reasonable for the governor to take the view that confidence should be established without delay.⁶⁷ In the result, however, the newly appointed government could not establish confidence either and President's Rule was imposed. When elections were eventually held, the government that had been dismissed was re-elected, leading to the governor's resignation from office.⁶⁸

In a contrasting case, the governor of Uttar Pradesh dismissed the Kalyan Singh government in 1998 on the ground that it had lost the confidence of the legislative assembly. In this case there was no vote on the floor of the parliament and there was no request either that the government establish confidence in the assembly. The chief minister had demanded the chance to prove confidence on the floor of the House, but the governor had dismissed him before this could be done. The Allahabad High Court issued an interim order staying the dismissal and restoring the Kalyan Singh government in the interim.⁶⁹ The Supreme Court then directed that a special session of the legislative assembly be summoned in order to determine confidence.⁷⁰ This occurred, and Kalyan Singh won the vote.⁷¹

These cases highlight the fact that the dismissal of a government is not practical where: (a) the government is supported by a majority in the House; (b) no other party or group of parties can secure the support of the House; or (c) a fresh election is likely to result in the re-election of the dismissed government. As a consequence, presidential rule under art. 356 of the constitution is more frequently invoked to deal with state governments that retain majority support but which have acted illegally, corruptly or in breach of the constitution, because there is no immediate need to find a new government.⁷²

Presidential rule, however, was also frequently misused by the federal government as a means of dismissing state governments controlled by a different party. The Supreme Court put a brake upon the exercise of this power in 1994, after it had been used on more than 90 occasions to remove state governments.⁷³ A majority of the Supreme Court held that:

In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation where because of all-pervasive violence, the Governor comes to the conclusion and records the same in his report that for the reasons mentioned by him, a free vote is not possible in the House.⁷⁴

The Supreme Court overturned the proclamations of presidential rule issued for the states of Karnataka, Meghalaya and Nagaland, while upholding those issued for Madhya Pradesh, Rajasthan and Himachal Pradesh. As fresh elections had taken place in Karnataka, Meghalaya and Nagaland, and new governments had been formed, the court did not order the restoration of the previous government and legislature.⁷⁵ Since then, the president has queried recommendations for the application of President's Rule where the Supreme Court's requirements have not been met, and sent back recommendations for the reconsideration of cabinet.⁷⁶

Like India, there is no express power in Malaysia to dismiss a prime minister. However, it has been argued that such a power might be implied from the power to appoint the prime minister. It might also be implied from the need to find some mechanism to enforce art. 43(4) of the constitution, which provides that if the prime minister ceases to command the confidence of the House, then unless at his request the parliament is dissolved, the prime minister shall tender the resignation of the cabinet.

The issue has arisen at the state level in Malaysia. In Sarawak in 1966 a letter was sent to the governor by 21 of the 42 members of the legislative assembly advising him that Chief Minister Ningkan no longer held their confidence. Ningkan sought the opportunity to test his confidence on the floor of the House, but this was denied. The governor dismissed him and appointed a new chief minister. Ningkan challenged his dismissal in the High Court, seeking a declaration that he was still chief minister. The court held that confidence has to be tested on the floor of the House.⁷⁷ It was critical of the fact that Ningkan had been denied the opportunity to seek a dissolution or test his confidence. It also held that the governor did not hold any power to dismiss the chief minister.⁷⁸

The matter was then resolved by political means. The king declared a state of emergency in Sarawak. The federal parliament enacted a law that changed the constitution of Sarawak so that the ruler could summon the parliament and, if there was a vote of no confidence in the chief minister and he did not resign, the ruler could dismiss the chief minister. After this law was passed, the ruler then summoned the parliament. It voted no confidence in the chief minister and he was dismissed.

In contrast, when similar events occurred in the state of Perak in 2009, the Federal Court (which replaced the Supreme Court) held that confidence did not have to be tested on the floor of the parliament. It was enough that the ruler was satisfied that there was a loss of confidence in the chief minister.⁷⁹ In this case the ruler had met with all 31 members to satisfy himself that they no longer held confidence in the chief minister. The ruler called upon the chief minister to resign. The chief minister sought a dissolution, which the ruler refused. The court held that it was within the ruler's discretion to refuse a dissolution. It further held that the effect of the refusal was to vacate the offices of the chief minister and the ministry. No separate dismissal was necessary.⁸⁰

Dissolution of parliament

Dissolutions where a government has lost majority confidence

Traditionally, in the Westminster system, the head of state has a reserve power to refuse a dissolution. If the prime minister has a majority in the lower House, however, it is impractical for the head of state to refuse a dissolution, because if the government resigns in response, there will be no other person who can form a government that has the confidence of the lower House, so that a dissolution would be necessary in any case. Hence this reserve power is usually only exercised when the prime minister has lost the confidence of the lower House and there is another person who could form a stable government. In India, in particular, the rationale for the exercise of this power is that the governor-general is not bound to act on the advice of a person who has ceased to be a responsible adviser.⁸¹

One of the pressures on a governor in making a decision as to whether a dissolution should be held is the 'great reluctance in the public to hold frequent elections as holding an election in India is a very costly proposition'.⁸² It has also been contended in India that British conventions concerning dissolutions are not relevant to India for two reasons. First, because of 'the peculiar phenomenon of defection which is unknown to England, and also because of the multi-party system in India as against a two party system in Britain'.⁸³ Indeed, the phenomenon of multiple parties with a fluidity of membership across the parties, including allegations of bribery and corruption in shifting majorities, has tended to be problematic in many Asian nations.

Overturning a dissolution

In countries such as the United Kingdom and Australia, the grant of a dissolution of parliament would most likely be held to be non-justiciable. It would be regarded as unthinkable for a court to hold a dissolution to be invalid or to go so far as to order the restoration of the previous parliament. Yet, such actions have been taken in Asian countries, including India and Nepal.⁸⁴

In India, controversy over dissolutions has often arisen at the state level in the context of presidential rule under section 356 of the constitution. Once the central government took over control of a state it would frequently dissolve the parliament rather than leave it in suspension. In 1994 the Supreme Court limited this power by requiring that no dissolution occur at least until the establishment of presidential rule had been ratified by the federal parliament. It also held that dissolution should not occur as a matter of course, but rather, should only be resorted to when necessary to achieve the purposes of the proclamation of presidential rule.⁸⁵

The Supreme Court regarded proclamations of presidential rule as being justiciable and was prepared to give wide-ranging remedies for proclamations illegally made. It held that:

If the court strikes down the Proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension.⁸⁶

In practice, however, if an election has since been held and a new ministry has been formed, the courts do not tend to overturn this exercise of democracy in favour of restoring the previous government and parliament.⁸⁷

For example, in the Indian state of Bihar in 2005, after an inconclusive election, the state was made the subject of President's Rule. The governor raised with the president of India a concern that members of the legislative assembly were being bribed to change their political allegiances and recommended a dissolution. The national cabinet met, considered the report of the governor, and advised the president of India to dissolve the legislative assembly of Bihar, which the president did on 23 May 2005. A majority of the Supreme Court held that the proclamation of dissolution was illegal and unconstitutional and that the governor's recommendation did not justify the extreme action of dismissing the legislative assembly. As the elections were already underway, the court permitted them to proceed notwithstanding the illegal proclamation.⁸⁸

Dissolutions immediately after an election has been held

The reserve power to refuse a dissolution is particularly likely to be exercised if an election has been recently held but the losing incumbent advises a fresh election rather than the formation of a minority government by another party or coalition of parties. For example, in the Malaysian state of Sabah, Datuk Pairin was refused a dissolution in March 1994, less than a month after the general election.⁸⁹ In Ceylon, in contrast, a fresh dissolution was permitted shortly after an election in circumstances where the governor-general was not satisfied that a stable government could otherwise be formed.⁹⁰

The constitution of Sri Lanka now provides limitations upon the holding of a dissolution within 12 months of an election if the previous parliament was also dissolved by the president. This applies unless the ground for dissolution is the rejection of two appropriation bills in a row.⁹¹

Positive power to force a dissolution

In Pakistan, the Eighth Amendment to the 1973 constitution extended the president's power to refuse a dissolution to one that gave him or her a positive power to dissolve the National Assembly without ministerial advice. It inserted art. 58(2) into the constitution, giving the president power to dissolve the National Assembly in his discretion, where (a) a vote of no confidence has been passed against the prime minister and no other member is likely to command the confidence of the House, as ascertained on the floor of the House; and (b) where government cannot be carried on in accordance with the constitution and an appeal to the electorate is necessary. This provision (which has frequently been

amended to remove para (2)(b) and then to reinsert it)⁹² has been used not only to dissolve the assembly, but as a means of dismissing governments. As noted above, the Supreme Court has held dissolutions to be invalid, and in one case restored the previous assembly to office.⁹³

Royal assent

The power to refuse royal assent is generally not regarded as a reserve power, although in some rare circumstances, there may be a justifiable use of it in this way. It has, however, been used more commonly in Asia as a reserve power, usually through delay in the giving of assent, rather than outright refusal.

For example, art. 111 of the Indian constitution provides for presidential assent to bills. It retains the classic form of stating that the president ‘shall declare either, that he assents to the bill, or that he withholds assent therefrom’.⁹⁴ If the president declares that he or she withholds assent, this is known as an ‘absolute veto’. However, there is no time limit for making that decision, so it may be delayed for a considerable period.⁹⁵ This is sometimes known as a ‘pocket veto’.

Art. 111 also gives the president the power to return the bill (if it is not a money bill) to the parliament with a message requesting that it be reconsidered, including the desirability of introducing the amendments that the president may recommend.⁹⁶ If the bill is passed again by the Houses, with or without amendment, and presented to the president for assent, he or she is no longer permitted to withhold assent. This is sometimes known as a ‘suspension veto’, because it delays assent, but ultimately the president must give assent if the Houses return the bill to the president. The president has a degree of personal discretion in returning a bill. Patnaik has observed that:

If a Bill submitted to [the President] violates a fundamental right or the prescribed ambit of State powers, he is bound, consistent with his oath, to exercise one of the two vetoes; otherwise he would be guilty of a failure to protect the Constitution.⁹⁷

For example, President Zail Singh returned the Indian Post Office (Second Amendment) Bill 1986 because it enabled the interception of mail.⁹⁸ His successor as president, Mr Venkatarman, also did not sign this bill. However, rather than return it, he simply held onto it. He did not return it until 1990, after the prime minister had lost the 1989 election.⁹⁹ In 2006, President Abdul Kalam returned a bill concerning the disqualification of Members of Parliament. The bill was again passed without change and the president gave assent to it, as required by the constitution.¹⁰⁰

In Malaysia there has also been controversy over the grant of assent to bills. It has been argued that the rulers have no power to refuse assent and that any such refusal is ‘clearly unconstitutional’.¹⁰¹ Nonetheless, some rulers have delayed assent to state legislation for years.¹⁰² This led the federal parliament to

pass a constitutional amendment which would have allowed bills passed by the parliament to become laws without royal assent if assent was not given within 15 days. It would also have limited the powers of the rulers of the states with regard to giving assent to bills and allowed a state of emergency to be declared on the basis of the satisfaction of the prime minister, rather than the king, as to its necessity.

The king, with the concurrence of the Conference of Rulers, refused to give assent to the amendment. This led to a constitutional crisis and a long stand-off which finally resulted in a compromise in December 1983. The king retained the power to proclaim an emergency, but had to act on the advice of cabinet. The king was also given the power to return Bills to parliament with objections and comments, but if the Bill was again passed, it automatically became law after 30 days if assent was not given earlier. The constraints upon the rulers of the states were removed, subject to an oral agreement that assent would be promptly given.¹⁰³ In 1993 there was a further conflict over assent to a bill to amend the constitution to remove the immunity of the king and the rulers from suit when acting in a personal capacity. Assent was refused, but a compromise was reached on an amended Bill, to which assent was given.¹⁰⁴ In 1994 a further constitutional amendment reduced the king's powers so that if he does not assent to a Bill within 30 days, it automatically becomes a law, as if he had given it assent.¹⁰⁵

Emergency powers

The most significant development of the powers of heads of state in Eastminster countries has been in the area of emergency powers. The older former colonies of Australia, New Zealand and Canada do not have emergency powers expressly conferred in their constitutions. While there may be common law prerogatives to deal with emergencies and possibly additional executive powers drawn from implied 'nationhood' powers¹⁰⁶ or doctrines of 'national concern',¹⁰⁷ such powers must ordinarily be exercised upon ministerial advice.¹⁰⁸ Any use of a doctrine of necessity to operate outside the constitution can only be justified for the purpose of returning to constitutional rule and cannot be used to support permanent changes to the constitution.¹⁰⁹

Asian colonies, however, had a different background. First, the need for some kind of emergency power to deal with internal violence or insurrection has proved much greater in Asia than the older realms. Second, there is an historical basis for the use of such powers in Asia. Emergency powers were conferred upon British governors and governors-general as a means of asserting colonial power and suppressing insurrection and independence movements. They were, for example, included in the Government of India Act 1935 (Imp) and had become part of the legal framework of India and Pakistan long before independence. The constitutions of both countries picked up on these powers, which had been designed originally for an imperial over-ruler, and attempted to apply them as part of the democratic constitution of sovereign nations. This has proved problematic.

While Pakistan was still in its constitution-drafting stage, a crisis arose after the Federal Court held that constitutional amendments made by the constituent assembly were invalid because they had not been given royal assent by the governor-general.¹¹⁰ The consequence was that not only were 44 constitutional amendments invalid, but so were many other laws because they were made by bodies, including the provincial legislatures and the constituent assembly itself, that had been reconstituted pursuant to the invalid constitutional amendments. Even the State Bank of Pakistan, which had been constituted and empowered under an invalid order, was affected.¹¹¹ Much of the criminal law of Pakistan was rendered invalid and there was no properly constituted legislature in Pakistan to redress the consequential legal chaos.¹¹²

The litigation concerning this crisis gave birth to the doctrine of necessity in Pakistan, as a way of dealing with emergencies. Munir CJ discerned from an earlier judgment of Lord Mansfield the principle that

an act which would otherwise be illegal becomes legal if it is done *bona fide* under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or Society and to prevent it from dissolution.¹¹³

In what has become recognised as the first use in modern times of a ‘doctrine of necessity’, Munir CJ held that it applied, permitting the governor-general to validate the laws temporarily until this could be done by a new constituent assembly.¹¹⁴ He added two conditions. The first was that while the Crown could exercise legislative powers in an emergency when parliament could not sit, it was an ‘indispensable condition’ that the exercise of such powers be subject to the legislative authority of parliament, which could be exercised *ex post facto*. Further, the doctrine of necessity did not extend ‘to matters which are not the product of the necessity, as for instance, changes in the Constitution which are not directly referable to the emergency’.¹¹⁵ Hence, an emergency could not be used as a cloak to make other constitutional changes – only those necessary to resolve the emergency.

While this finding was relatively narrow, the scope of the doctrine of necessity was relatively broad. Munir CJ compared the powers and responsibilities of a head of state during an emergency with those of an army commander during martial law, basing them on the same common principle.¹¹⁶ It has been argued that this approach ‘laid the groundwork [for revolution] by conflating legality and legitimacy’.¹¹⁷ At the very least, this advisory opinion provided the foundation for future exercises of both martial law and the doctrine of necessity by presidents. The limitations imposed by Munir CJ were gradually ignored, while the powers took firm hold. Hence, despite the fact that there are formal provisions in the constitution of Pakistan concerning states of emergency,¹¹⁸ Pakistani presidents, such as General Musharraf in 2007, have generally preferred to rely upon the more malleable doctrine of necessity in proclaiming states of emergency.¹¹⁹

India, in contrast, has tended to use the emergency powers set out in its constitution,¹²⁰ rather than a doctrine of necessity. An example is Indira Gandhi's declaration of a state of emergency in 1975. While it was stated to be made in response to violent agitation, it was also used as an opportunity to achieve other political aims, such as significant changes to the constitution. The emergency was lifted in early 1977, but the constitutional changes remained. While a change in government resulted in some being later repealed, significant parts survived.¹²¹ The use of constitutionally conferred emergency powers is not necessarily more benign or more closely limited and reviewed than the use of the doctrine of necessity.

Like Pakistan, Malaysia was also in a state of emergency when its constitution was being drafted. In Malaysia, an emergency was declared in 1948 to deal with communist insurgency. The 1948 emergency continued until 1960, causing a state of emergency to be regarded as the norm rather than the exception. Further emergencies were declared in 1964, 1966, 1969 and 1977, with emergency provisions not being revoked until November 2011.¹²² Judicial attempts to limit the executive's emergency powers¹²³ were thwarted by retrospective laws and a constitutional amendment in 1981 which ousted judicial review of emergency ordinances.¹²⁴

In Ceylon, the path to emergency powers was slightly different. When an emergency arose in 1958, the governor-general, Sir Oliver Goonetilleke, by force of personality and skill, assumed the role of dealing with it. He took his nominal role as commander-in-chief of the armed forces, and transformed it into a substantive role, directing the armed forces in how to deal with the emergency. This created the public impression that the governor-general was directly in charge of the armed forces. Hence, when disgruntled citizens plotted a coup against the government in 1962, their plan was to enlist or coerce the governor-general into directing the armed forces to support the coup. While the proposed coup failed and the governor-general had no involvement in it, the Ceylonese government sought his dismissal, for fear that he would become the focus of future insurrection.¹²⁵ His perceived power over the armed forces was regarded as dangerous. Buckingham Palace proposed that instead of dismissal, he simply be replaced as his term had expired,¹²⁶ which is what eventually occurred.¹²⁷ Since then Ceylon and Sri Lanka have had increasingly long periods of states of emergency, with the period from 1971 to 2011 largely covered by declarations of emergency.¹²⁸ Like Malaysia, a state of emergency has become the norm rather than the exception,¹²⁹ and it has been contended that emergency regulations 'have helped provoke and entrench a prolonged political crisis'.¹³⁰

Conclusion

While the reserve powers of heads of state in Westminster countries have their roots in Westminster conventions, they have developed differently in Asia. This has been in part due to their partial codification and the more prescriptive form of Asian constitutions, leading to their justiciability and consequential

development by the courts. It has also been due to the different social and political environment in Asia, including greater political instability, the multiplicity of parties and the prevalence of party defection, the greater influence of individual personalities and the higher risk of internal violence and external threat. The British legacy to its former colonies of parliamentary democracy, responsible government and the rule of law remains a valuable one. The challenge for Eastminster countries is to retain the benefits of this structure of government while utilising the inherent flexibility of executive powers to adjust them so that they operate in an effective way in the quite different political environment of Asia.

Notes

- 1 *British North America Act 1867 (Imp)*; and *Commonwealth of Australia Constitution Act 1900 (Imp)*.
- 2 *British North America Act 1867*, sections 9–14; *Commonwealth Constitution*, sections 61–70.
- 3 *British North America Act 1867*, sections 24, 38, 50; *Commonwealth Constitution*, section 5.
- 4 *British North America Act 1867*, section 11; *Commonwealth Constitution*, section 64.
- 5 *British North America Act 1867*, section 55; *Commonwealth Constitution*, section 58.
- 6 *British North America Act 1867*, section 15 vested this power formally in the queen, whereas section 68 of the *Commonwealth Constitution* vests it in the ‘Governor-General as the Queen’s representative’.
- 7 Note the exception, that royal assent powers in both Australia and Canada refer to the governor-general acting ‘according to his discretion’, but that the governor-general is not regarded as having any discretion based upon a policy objection to the bill.
- 8 Constitution of Malaysia, art. 43(4).
- 9 See, e.g. section 9 of the *Government of India Act 1935 (Imp)*; and section 8 *Indian Independence Act 1947 (Imp)*.
- 10 Sir Ivor Jennings, *The Constitution of Ceylon* (Oxford: OUP, 2nd edition, 1951), 170.
- 11 *Ibid.*
- 12 Andrew Harding, *The Constitution of Malaysia – A Contextual Analysis* (Oxford: Hart Publishing, 2012), 54.
- 13 *Ibid.*
- 14 M. P. Jain, *Indian Constitutional Law* (Nagpur: Lexis Nexis, 6th edition, 2010, 2012 reprint), 11.
- 15 Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (Oxford: OUP, 1953), 1.
- 16 *Ibid.*, 17–18.
- 17 *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374, 418 (Lord Roskill); *Stewart v. Ronalds* [2009] NSWCA 277, [45] (Allsop, P.). See further: Geoffrey Lindell, ‘The Justiciability of Political Questions – Recent Developments’ in H. P. Lee and G. Winterton (eds) *Australian Constitutional Perspectives* (Sydney: Law Book Co, 1992), 180; and Dominic McGoldrick, ‘The Boundaries of Justiciability’ (2010) 59(4) *ICLQ* 981.
- 18 See the more detailed discussion below.

- 19 *Reference by His Excellency the Governor-General* (1955) PLD FC 435.
- 20 Harding, *The Constitution of Malaysia*, 114.
- 21 Jennings, *The Constitution of Ceylon*, 168.
- 22 *Ibid.*
- 23 James Manor, 'Setting a Precedent by Breaking a Precedent: Lord Soulbury in Ceylon, 1952' in D. A. Low (ed.), *Constitutional Heads and Political Crises – Commonwealth Episodes, 1945–85* (Basingstoke: Macmillan Press, 1988), 26, 33.
- 24 See, for example, the governor-general's power to appoint senators, which was originally intended to be discretionary, in order for the governor-general to be able to appoint minorities and balance the senate, but eventually was made subject to the advice of the prime minister: H. Kumarasingham, *A Political Legacy of the British Empire – Power in the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), 140–141 and 179.
- 25 A. G. Noorani, "'India" in Republic Advisory Committee', *An Australian Republic – The Options*, vol. 2, (Canberra, 1993) 74, 85.
- 26 H. M. Seervai, *Constitutional Law of India* (Mumbai: Universal Law Publishing, 4th edition, 1996), vol. 2, 2052.
- 27 Raghunath Patnaik, *Powers of the President and Governors in India* (New Delhi: Deep & Deep Publications, 1997), 124.
- 28 Constitution of India, articles 60 and 61.
- 29 Seervai, *Constitutional Law of India*, 2044.
- 30 Telegrams by colonial secretary to the Western Australian governor, 6 December 1924; and to the Tasmanian lieutenant-governor, 29 November 1924 and to the Tasmanian governor, 21 January 1925 and 26 November 1925: TNA CO 881/15/8.
- 31 *Madan Murai Verma v. Choudhuri Charan Singh* AIR 1980 Cal 95.
- 32 *Samsher Singh v. Union of India* AIR 1974 SC 2192, [153].
- 33 See the forty-second and forty-fourth amendments to the constitution of India.
- 34 Jain, *Indian Constitutional Law*, 374.
- 35 Compare the similar failure of Nepal's constituent assembly to produce a constitution in a timely fashion and its dissolution in May 2012.
- 36 Press release by the governor-general of Pakistan, 17 April 1953, set out in telegram from UK high commissioner, Pakistan to Commonwealth Relations Office, 17 April 1953: TNA DO 35/5106.
- 37 *Gazette of Pakistan*, 21 September 1954. See also: Paula R. Newberg, *Judging the State – Courts and Constitutional Politics in Pakistan* (Cambridge: CUP, 1995) 41.
- 38 Sir Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: CUP, 1957) 72.
- 39 *Federation of Pakistan v. Moulvi Tamizuddin Khan* (1955) PLD FC 240.
- 40 *Reference by His Excellency the Governor-General* (1955) PLD FC 435; and *Federation of Pakistan v. Ali Ahmad Hussain Shah* (1955) PLD FC 522.
- 41 The prime minister had sought to face parliament to obtain a vote of confidence, but was denied this opportunity by the president.
- 42 These governors are appointed by the king, in his discretion, after consultation with the chief minister of the state, to a four year term: Harding, *The Constitution of Malaysia*, 115.
- 43 Andrew Harding, 'Monarchy and the Prerogative in Malaysia' (1986) 28 *Malaya Law Review* 345, 354–357.
- 44 Andrew Harding, *Law, Government and the Constitution in Malaysia* (London: Kluwer Law International, 1996), 107.
- 45 Manor, 'Setting a Precedent by Breaking a Precedent', 26–34; and Kumarasingham, *A Political Legacy of the British Empire*, 149–155.
- 46 A. Jeyaratnam Wilson, 'The Role of the Governor-General in Ceylon' (1968) 11 *Modern Asian Studies* 193, 213. The British government also accepted that the governor-general had acted correctly, noting that 19 backbenchers had threatened to

- withhold support for the government if Sir John Kotelawala was appointed: TNA DO 35/5361.
- 47 See: Letter by Sir J. Kotelawala to Lord Soulbury, 24 March 1952, extracted in: Kumarasingham, *A Political Legacy of the British Empire*, 152.
 - 48 Memorandum by Acting UK High Commissioner, Ceylon, N. E. Costar, to Captain Crookshank, 22 October 1953: TNA DO 35/5361.
 - 49 *Madan Murai Verma v. Choudhuri Charan Singh* AIR 1980 Cal 95.
 - 50 Noorani, “‘India’ in Republic Advisory Committee”, 74, 98–99.
 - 51 *Dalapt Raj Bhandari v. President of India and Ors* AIR 1992 Raj 70. See also the codification of this practice in art. 42 of Nepal’s 1990 constitution.
 - 52 Note, however, the examples at the state level where a ruler rejected the majority party’s choice of chief minister, with another member of the same party being appointed instead: Harding, *The Constitution of Malaysia*, 124–125.
 - 53 *Tun Datuk Haji Mohamed Adnan Robert v. Tun Datu Haji Mustapha Bin Datu Harun; Datuk Joseph Pairin Kitingan v. Tun Datu Haji Mustapha Bin Datu Harun* [1987] 1 MLJ 471 (High Court and Supreme Court decisions reported together). See also: Harding, *Law, Government and the Constitution in Malaysia*, 109–110.
 - 54 *Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah and Datuk Josph Pairin Kitingan* [1986] 2 MLJ 420, 452.
 - 55 [1986] 2 MLJ 420, 473.
 - 56 Letter by UK High Commissioner, Pakistan, Secretary of State for Commonwealth Relations, 8 May 1953: TNA DO 35/5106.
 - 57 Telegram sent by Commonwealth Relations Office to UK High Commissioner, Pakistan, 17 April 1953: TNA DO 35/5106.
 - 58 *Pakistan v. Muhammad Saifullah Khan* (1989) 41 PLD 166; and *Muhammad Nawaz Sharif v. President of Pakistan* (1993) 45 PLD 473.
 - 59 *Ahmad Tariq Rahim v. Pakistan* (1992) 44 PLD 646; and *Benazir Bhutto v. President of Pakistan* (1998) 50 PLD 338.
 - 60 *Pakistan v. Muhammad Saifullah Khan* (1989) 41 PLD 166.
 - 61 *Muhammad Nawaz Sharif v. President of Pakistan* (1993) 45 PLD 473.
 - 62 Seervai, *Constitutional Law of India*, 2047.
 - 63 *Ibid.*, 2051.
 - 64 See the principles and conventions applicable to the exercise of this power, as agreed upon by state governors: Report of the Committee of Governors, (President’s Secretariat, New Delhi, October 1971), 45, quoted in Jain, *Indian Constitutional Law*, 381. They were later endorsed by the Supreme Court in *S. R. Bommai v. Union of India* AIR 1994 SC 1918, [393].
 - 65 AIR 1969 Cal 198 (Calcutta High Court).
 - 66 AIR 1969 Cal 198, [41]. For other cases in which the courts have upheld the dismissal of a state government see: *Pratapsign Rajorao Ran v. Governor of Goa* AIR 1999 Bom 33; and *Jogendra Nath Hazarika v. State of Assam* AIR 1982 Gau 25.
 - 67 AIR 1969 Cal 198, [47].
 - 68 Jain, *Indian Constitutional Law*, 382.
 - 69 *Narendra Kumar Singh Gaur v. Union of India* (1998) (1) AWC 438.
 - 70 *Jagdambika Pal v. Union of India* AIR 1998 SC 998.
 - 71 Jain, *Indian Constitutional Law*, 382.
 - 72 *Ibid.*, 379.
 - 73 *S. R. Bommai v. Union of India* AIR 1994 SC 1918, [104].
 - 74 AIR 1994 SC 1918, [395].
 - 75 AIR 1994 SC 1918, [434].
 - 76 See the examples in Uttar Pradesh and Bihar set out in: Jain, *Indian Constitutional Law*, 769.

- 77 *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187, 193. See also: H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford: OUP, 1995), 11–13.
- 78 [1966] 2 MLJ 187, 195.
- 79 *Datuk Nizar Jamaluddin v. Datuk Seri Zambry Abdul Kadir* [2010] 2 MLJ 285, [48].
- 80 [2010] 2 MLJ 285, [55].
- 81 See examples of refusals of dissolutions in India: Jain, *Indian Constitutional Law*, 333–335.
- 82 *Ibid.*, 378. See also: *S. R. Bommai v. Union of India* AIR 1994 SC 1918, [101].
- 83 Jain, *Indian Constitutional Law*, 333.
- 84 For discussion of two controversial dismissals in Nepal and the Supreme Court's response, see: Bipin Adhikari, 'Nepal' in C. Saunders and G. Hassall (eds), *Asia-Pacific Constitutional Yearbook 1995* (Melbourne: University of Melbourne, 1996), 159–165; and Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: CUP, 2002), 121.
- 85 *S. R. Bommai v. Union of India* AIR 1994 SC 1918, [434].
- 86 AIR 1994 SC 1918, [434].
- 87 AIR 1994 SC 1918, [111], [154], [264] [266], [398], [406] and [434].
- 88 *Rameshwar Prasad v. Union of India* AIR 2006 SC 980. See also a case in Goa where a dissolution was set aside on the basis that the governor should have made an enquiry whether an alternative viable Government could be formed, the reasons for the Council of Ministers seeking dissolution and whether it was really necessary to put a heavy burden on the State Exchequer by holding another election mid-way in the life of the Assembly.
(Jain, *Indian Constitutional Law*, 335)
- Note, however, *Shri Luizinho Joaquim Faleiro v. State of Goa* (2003) 2 MhLj 334 (High Court of Bombay), where a later judge held that the intervening election, which was not challenged, and the election of the petitioners to the new legislative assembly, meant that the dissolution ought not now be overturned.
- 89 Harding, *Law, Government and the Constitution in Malaysia*, 113.
- 90 A. Jeyaratnam Wilson, 'The Role of the Governor-General in Ceylon' (1968) 11 *Modern Asian Studies* 193, 217.
- 91 Constitution of Sri Lanka, art. 70.
- 92 The provision permitting the president to dissolve parliament where government cannot be carried on in accordance with the constitution was omitted in 1997, reinserted in 2002, validated in 2003 and removed in 2010. In 2003 a provision was added that required a dissolution on these grounds to be referred to the Supreme Court for a decision. This too was removed in 2010.
- 93 *Muhammad Nawaz Sharif v. President of Pakistan* (1993) 45 PLD 473.
- 94 See further: Seervai, *Constitutional Law of India*, vol. 2, 2152.
- 95 While the president usually promptly assents to union legislation, there have been very long delays in assenting to, or withholding assent from, reserved state bills: Raghunath Patnaik, *Powers of the President and Governors in India* (New Delhi: Deep & Deep Publications, 1997), 178, referring to *Purushothaman v. State of Kerala* (1962) AIR SC 252.
- 96 This power may be used where a Bill has been referred to the Supreme Court for an advisory opinion and the Court has noted changes that would need to be made to make the bill constitutionally valid. The president may then return the bill and recommend that the parliament make such changes. For an example, see: Patnaik, *Powers of the President and Governors in India*, 179.
- 97 Patnaik, *Powers of the President and Governors in India*, 123.
- 98 Noorani, "'India" in Republic Advisory Committee', 74, 100.

- 99 Ibid., 74, 102.
- 100 Note also the acceptance by the Supreme Court of the English proposition that the monarch or his or her vice-regal representative, cannot refuse royal assent on the ground of personal disapproval of the bill: *Samsher Singh v. Union of India* AIR 1974 SC 2192, [153].
- 101 Y. A. M. Raja Azlan Shah, 'The Role of Constitutional Rulers in Malaysia' in F. A. Trindade and H. P. Lee (eds), *The Constitution of Malaysia – Further Perspectives and Developments* (Oxford: OUP, 1986), 76, 86. See also: F. A. Trindade, 'The Constitutional Position of the Yang di-Pertuan Agong' in Tun Suffian, H. P. Lee and F. A. Trindade (eds), *The Constitution of Malaysia – Its Development* (Kuala Lumpur: Oxford University Press, 1978), 103, 111.
- 102 Harding, 'Monarchy and the Prerogative in Malaysia', 345, 360–361; and H. F. Rawlings, 'The Malaysian Constitutional Crisis of 1983' (1986) 35 *ICLQ* 237, 245.
- 103 See further: Harding, 'Monarchy and the Prerogative in Malaysia', 345, 360–364; Rawlings, 'The Malaysian Constitutional Crisis of 1983', 237; and Lee, *Constitutional Conflicts in Contemporary Malaysia*, 23–34.
- 104 Harding, *The Constitution of Malaysia*, 120–121.
- 105 See further: Harding, *The Constitution of Malaysia*, 118.
- 106 In Australia, the High Court held that the executive had an implied nationhood power to deal with a financial emergency during the global financial crisis: *Pape v. Commissioner of Taxation* (2009) 238 CLR 1.
- 107 In Canada, 'emergency' and 'national concern' are seen as two branches of the power in section 91 of the constitution to make laws for the peace, order and good government of Canada: *Re Anti-Inflation Act* [1976] 2 SCR 373; and *R v. Crown Zellerbach Canada Ltd* [1988] 1 SCR 401.
- 108 An exception would arise if it was impossible to receive such advice, for example, if ministers were held in captivity, as has happened in Fiji and Trinidad and Tobago.
- 109 *Mitchell v. Director of Public Prosecutions* [1986] LRC (Const) 35, 88–89 (Haynes, P.); *Republic of Fiji v. Prasad* [2001] 2 LRC 743, [48–49]; and *Qarase v. Bainimarama* [2009] FJCA 9, [132].
- 110 *Federation of Pakistan v. Moulvi Tamizuddin Khan* (1955) PLD FC 240.
- 111 For a detailed analysis of the various consequences, see: Jennings, *Constitutional Problems in Pakistan*, 38–40.
- 112 Jennings, *Constitutional Problems in Pakistan*, 40 and 46.
- 113 *Reference by His Excellency the Governor-General* (1955) PLD FC 387, reprinted in: Ivor Jennings, *Constitutional Problems in Pakistan*, 259, 306, referring to *Proceedings Against George Stratton* (1779) 21 Howell's St Tr 1046, 1230.
- 114 *Reference by His Excellency the Governor-General* (1955) PLD FC 387, reprinted in: Jennings, *Constitutional Problems in Pakistan*, 259, 309.
- 115 *Reference by His Excellency the Governor-General* (1955) PLD FC 387, 485 reprinted in: Jennings, *Constitutional Problems in Pakistan*, 259, 307.
- 116 *Reference by His Excellency the Governor-General* (1955) PLD FC 387, reprinted in: Jennings, *Constitutional Problems in Pakistan*, 259, 304.
- 117 Paula R. Newberg, *Judging the State – Courts and Constitutional Politics in Pakistan* (Cambridge: CUP, 1995), 56.
- 118 Constitution of Pakistan, articles 232–237.
- 119 For a list of examples, see: Anil Kalhan, 'Constitution and "Extraconstitution": Colonial Emergency Regimes in Postcolonial India and Pakistan' in V. Ramraj and A. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: CUP, 1995), 89, 100.
- 120 See further: I. Omar, *Emergency Powers and the Courts in India and Pakistan* (London: Kluwer Law International, 2002).
- 121 Kalhan, 'Constitution and 'Extraconstitution'', 89, 114.
- 122 Harding, *The Constitution of Malaysia*, 166–167.

- 123 See, e.g., *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50.
- 124 Harding, *The Constitution of Malaysia*, 169–170.
- 125 Memorandum, Commonwealth Relations Office, ‘Ceylon: Departure of Sir Oliver Goonetilleke’, 29 March 1962: TNA DO 196/98.
- 126 Telegram from Sir Saville Garner to UK High Commissioner Ceylon, 14 February 1962: TNA DO 196/98.
- 127 Memorandum, Commonwealth Relations Office, ‘Governor-General of Ceylon – Relinquishment of Office’, 27 March 1962: TNA DO 196/98.
- 128 For a list of emergency periods, see: Vasuki Nesiah, ‘The Princely Impostor: Stories of Law and Pathology in the Exercise of Emergency Powers’ in V. Ramraj and A. Thiruvengadam (eds), *Emergency Powers in Asia – Exploring the Limits of Legality* (Cambridge: CUP, 2010), 121, 123.
- 129 See further: Asanga Welikala, *A State of Permanent Crisis – Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2008).
- 130 Nesiah, ‘The Princely Impostor’, 121, 123.

4 A British misreading

Sir Ivor Jennings' early assessment of the Indian constitution

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Introduction

Sir Ivor Jennings delivered the Sir Alladi Krishnaswami Iyer Lectures at the University of Madras in March 1952. He spoke on the Indian constitution. Jennings saw the constitution take shape from a distance; he had no influence or involvement. The Iyer Lectures lent him an opportunity to diagnose it: The constitution was still in its early years and relatively in its original form. Over the course of three lectures, Sir Ivor Jennings shared his assessment. He focused on three aspects: The constitution's 'rigidity' and its superfluous provisions; fundamental rights and directive principles of state policy; and finally, key aspects of India's federalism. He kept himself to the bare text; an already large body of judicial precedents formed no part of his analytic arsenal.¹ His slim resources in tow, Jennings handed down a mostly 'unfavourable' verdict.² India's constitution, he bemoaned, was 'far too large and therefore far too rigid', too caged by its history, and too unwieldy to be moulded into something useful through judicious interpretations.³ Overall, his diagnosis was a caveat writ large: The constitution would not endure.

Some 65 years have elapsed. The constitution endures, warts and all. It has seen much: Copious growth, frequent amendments, popular paeans, and the occasional censures.⁴ Widely celebrated as an important legal document, it is, for some, India's 'holy book'.⁵ What then are we to make of Jennings' early assessment?

Jennings looked for drawbacks in the constitution. He found many. In this chapter, I focus on two of his lectures. I assess his claims, and thereafter highlight some institutional responses – events, amendments and interpretations – that helped overcome many of his concerns. The chapter has two main sections. In line with the structure of the original presentation, the first section analyses his claim that the constitution is too long, rigid and unwieldy. The second section takes up his assessment of the interplay between fundamental rights and directive principles of state policy. Taken together, I defend the following arguments. An exclusive focus on the text led Jennings astray. Constitutions do not function in a vacuum; nor do they work by themselves. They are necessarily embedded in a set of political – and legal – structures that lend meaning to them. Jennings'

anxieties were amplified by an independent assessment – one that dissociated the text from the structures within which it functions. He correctly identified specific provisions with problematic undertones. But he underestimated, I shall argue, the extent to which those provisions in particular – and written constitutions generally – could innovate from within. Consequently, what Jennings saw as flaws, it turns out, were interpretative opportunities to reform and revise – a task judges in India aggressively took to in due course.⁶

Constitutional garrulity: words, words and more words

Like its people, India's constitution was too garrulous and, therefore, rigid. That was Jennings' first charge against the constitution.⁷ A. V. Dicey was among the earliest to distinguish flexible constitutions from rigid ones. Writing in 1885, Dicey claimed that the British constitution was 'flexible'.⁸ It was mostly unwritten. Conventions regulated key aspects of political administration, thereby making change easier. More importantly, Parliament was, legally speaking, omnipotent. A simple parliamentary majority was sufficient to change *any* aspect of Britain's constitution.⁹ Jennings accepted this formulation, but offered a further gloss. 'Flexibility and rigidity is necessarily a question of degree', he said.¹⁰ And two conditions determined, for him, the extent of rigidity: The degree of difficulty in amending a constitution, and the vastness of its content. India failed on both counts, Jennings alleged. The amending process was too difficult, and too much had been written into the constitution.

The Indian constitution recognises three types of amendment procedures. Article 368 prescribes the general rule: The support of a majority of the total membership of both Houses of parliament along with a majority of not less than two-thirds of the members that are present and voting in each House is necessary for a constitutional amendment.¹¹ This super-majority requirement is the norm. But on matters that implicate India's federal character, ratification by at least one-half of all state legislatures is also required.¹² In other words, a special super-majority involving the states is occasionally needed. Lastly, in some instances, a simple parliamentary majority is sufficient. These instances are littered all over the constitution, and they vary in their degree of importance. Both significant and relatively trivial provisions benefit from the simple-majority rule.¹³ For example, Art 2, 3 and 4 authorise parliament to admit or form new states, and in effect redraw India's map. It may do so by simple majority. Approval of the state legislatures or even the affected states is *not* required. These varying requirements of representative strength generate an eclectic, if inconsistent, architecture. Super-majority is the norm for constitutional amendments. But a simple majority suffices in some notable cases. In federal matters, special super-majority involving the state legislatures is necessary. But, once again, on some key issues that directly affect India's federal structure, a simple majority is sufficient. Jennings appreciated the eclecticism of the amendment provisions. While they softened the rigidity of the constitution, for him, they didn't go far enough.¹⁴

Rigidity, for Jennings, also had to do with garrulity. Along with a preamble, 395 articles and eight schedules made up the original text. That for Jennings was simply too long.¹⁵ Even allowing for duplications for provisions at the state level, he estimated that there were '260 (distinct) articles and four schedules', i.e. roughly two-thirds of the constitution.¹⁶ A long constitution meant that the framers had invariably included all kinds of matters. Some were important; others less so. He pointed to art. 224 as evidence of the latter. The provision empowers a retired judge to sit in a High Court. Puzzled by this triviality, Jennings asked:

Is that a provision of such constitutional importance that it needs to be constitutionally protected and be incapable of amendment except with the approval of two-thirds of the member of the each House sitting and voting in the Union Parliament?¹⁷

India's constitution, he felt, suffered from two self-inflicted wounds. The framers inscribed a difficult amendment procedure, made worse by a text littered with irrelevant details of administration.

Jennings' argument about the difficult amendment procedure was not novel. Members of the constituent assembly had already litigated that charge along identical lines. P. S. Deshmukh saw merit in an easier procedure for a limited duration: 'For some time to come it would be necessary to amend the Constitution in many particulars', he argued.¹⁸ Concerned that it had 'many defects' and 'contradictory provisions', he demanded that 'every facility be afforded for amending the Constitution'.¹⁹ Otherwise, future parliaments may have no alternative left 'but to go the whole hog and reject the Constitution as a whole'.²⁰ He offered a middle way: 'At least for a period of five years . . . it should be possible for the Parliament to pass amendments by a majority of the House'.²¹ Brajeshwar Prasad echoed this concern. The requirement of two-thirds majority was 'totally detestable, totally repugnant', he declared in exasperation.²² 'It would act as a brake and render constitutional amendments almost impossible'. Anticipating Jennings' line of argument, Prasad declared himself 'all for a flexible Constitution and not a rigid [one]'.²³ A 'new social order' was coming, he prophesied, and for 'heaven's sake' urged the constituent assembly not to make the constitution rigid.²⁴ He doubled Deshmukh's suggestion: Not five, but 'at least for a period of *ten* years from the commencement of [the] Constitution, the method of amending the Constitution must be made easy'.²⁵ H. V. Kamath also batted for flexibility. Fearful that a rigid constitution may not withstand a 'social storm', he argued that an easier amendment procedure would make it more flexible, much like 'little plants [and] blades of grass' that can withstand a storm.²⁶ Mahavir Tyagi too argued against the rigidity of the amendment procedure. The constitution effectively adopted 'the parliamentary system of Britain' but proposed to deviate from its 'perpetual flexibility'.²⁷ And this he felt was a contradiction:

We have adopted that very system, but have not adopted the real basis of that system – the basis that it is ever ready to be changed and ever ready

to be adapted to the circumstances that the nation may face from time to time.²⁸

These snippets suggest that the charge of rigidity had been thoroughly laid out. How did the assembly respond? B. R. Ambedkar spoke in defence of the provisions. He offered two arguments; one was empirical, the other political. He analysed the amendment procedures in the Canadian, Irish, Swiss, Australian and American constitutions. None of them provided for constitutional amendments by simple-majority.²⁹ Rather, a difficult procedure was the norm. Perhaps also implicit in these references was the idea that the Indian constitution and its system of government was an assorted amalgam, put together from diverse sources. The British imprint was merely pronounced, not exclusive. Therefore, in expecting a wholesale British import, some members had misunderstood the very project of constitution-making India's constituent assembly was engaged in.

But Ambedkar also grounded his defence in political necessity, emphasising that it reflected a degree of compromise. Two-thirds majority and ratification by a majority of the state legislatures surely made the procedure difficult, he admitted. However, the desire to retain 'provincial autonomy' and the 'federal structure of the Constitution' necessitated this.³⁰ After all, not all provincial constituents were fully reconciled to the idea of a united India in 1949. Some still aren't. The difficult amendment procedure was inserted with them in mind, and partly to engineer their consent.

Ultimately, Ambedkar's defence rested on an idea of a constitution that was at odds with his interlocutors – Prasad, Kamath, Tyagi and, by extension, Jennings. The latter made no distinction between law (legislation) and constitution. Jennings is instructive here. Explaining the benefits of a flexible constitution, he said:

Every constitutional provision relating to an organisation is a fetter upon its action, whether it prescribed membership or its procedure. The fact that such a fetter is desirable now does not imply that it will be equally desirable a century hence.³¹

'The ideas upon which a Constitution is based in one generation', he prophesied, 'may be spurned as old-fashioned in the next'.³² In this version, a constitution is no more than a convenient political arrangement. It is neither different from nor superior to parliamentary legislation. As such, both may be amended by a simple parliamentary majority. In its content too, Jennings' constitution neither reflects deeper principles nor stands for entrenched concepts. Indeed, it should not, for as he argued 'ideas of one generation may be spurned as old-fashioned in the next'.

Ambedkar, it is quite evident, thought of (at least some parts of) the constitution rather differently. To him, it was a 'fundamental document', one that sought to represent some basic principles generations could coalesce around. 'A modern Constitution', he said:

can only proceed on two bases: One base is to have a parliamentary system of government. The other base is to have a totalitarian or dictatorial form of government. If we agree that our Constitution must not be a dictatorship but must be a Constitution in which there is parliamentary democracy where government is all the time on the anvil, so to say, on its trial, responsible to the people, responsible to the judiciary, then I have no hesitation in saying that the principles embodied in this Constitution are as good as if not better than the principles embodied in any other parliamentary constitution.³³

Ambedkar may have erred in the particulars. Surely there are non-parliamentary forms of governments that are neither totalitarian nor dictatorial. But his arguments reveal a conception of a constitution different from that of Jennings. It is a higher law that aspires to a degree of permanence in a way ordinary legislation does not. A difficult amendment procedure, then, is a tribute, not a folly. English constitutional law, of course, recognises no such distinction between ‘fundamental’ and ordinary laws. As Dicey put it, ‘there is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional’.³⁴ Indeed, the absence of such a distinction, as he readily admitted, had to do with ‘the non-existence in England of any written or enacted constitutional statute or charter’.³⁵ Seen through English eyes, India’s permanent aspirations in its written constitution were both strange and insufficiently thought through. To that extent, Jennings’ verdict is understandable.

Jennings, it should be remembered, did not argue that the constitution was rigid simply because amendments were difficult. Rather, a difficult amendment procedure in an otherwise *long* constitution made the latter rigid. ‘The problem’, as he put it,

has two aspects. If a Constitution can be amended easily there is no great objection to inserting in it provisions which may have to be amended. If it cannot be amended easily it should be as short and as simple as possible. What the Constituent Assembly has done is to produce a long and complicated document which cannot easily be amended.³⁶

After 65 years, is there evidence to suggest that a long and complex constitution has stifled amendments? Consider these numbers. Between 1950 and 2015, the constitution has been amended 100 times at an average of 1.53 amendments every year.³⁷ This figure should be sufficient to bury the charge of rigidity. But even this average masks the real number of amendments: Many of these 100 amendments Acts introduced *several* changes to the constitution. The First Constitution (Amendment) Act, 1951 for example amended ten provisions, and introduced two new ones.³⁸ The changes were pioneered by Jawaharlal Nehru and his cabinet, barely one year after the constitution came into effect. Similarly, Indira Gandhi was responsible for, among others, the Forty-Second Constitution (Amendment) Act, 1976 – one that introduced the most sweeping

and voluminous changes to the constitution.³⁹ The Act amended over 55 provisions of the constitution and introduced two new chapters (or parts) to it. Table 4.1 provides the decade-wise breakdown of constitutional amendments between 1950 and 2015.

The beginnings were slow: The first decade saw no more than seven amendment Acts. Since then every decade has had about 16 amendments Acts. The 1970s is the only exception when the number of amendments increased to 22. Overall, these numbers suggest a degree of stability, and it matters. During these 65 years, India has had experience of broadly four types of cabinets: single-party cabinets, single-party minority cabinets, coalition-majority cabinets and coalition-minority cabinets.⁴⁰ With the exception of three relatively small periods, all cabinets from 1950 to 1989 were single-party majority. Indira Gandhi ran a single-party minority government between 1967 and 1971. Later, Morarji Desai and Charan Singh ran a coalition-majority and coalition-minority government respectively between 1977 and 1979. Interestingly, since 1989, India has only had minority governments; the Narendra Modi-led NDA government was the first to break the trend in 2014.⁴¹ Narasimha Rao's cabinet successfully negotiated a full term as a single-party minority government. All other prime ministers including V. P. Singh, Chandra Shekhar, A. V. Vajpayee and Manmohan Singh commanded coalition-minority governments till Modi arrived in New Delhi with a stunning majority in the lower House in 2014.⁴² Table 4.2 lists the number of constitutional amendments by each type of cabinet.

Table 4.1 Decade-wise breakdown of constitutional amendments

<i>Decade</i>	<i>Number of amendments</i>
1950–1959	7
1960–1969	15
1970–1979	22
1980–1989	18
1990–1999	16
2000–2009	16
2010–2015	6*

Note

* The 100th Constitutional Amendment Act, 2015 is, as of this date, in the process of being approved by state legislatures.

Table 4.2 Constitutional amendments by cabinet types

<i>Cabinet type</i>	<i>Total number of amendments</i>
Single-party majority	71
Coalition majority	2
Single-party minority	11
Coalition minority	26

Two things stand out in Table 4.2. Notice that nearly 40 per cent of all amendments came from governments that, by definition, did not enjoy majority support. In other words, absence of a majority in the lower House has not stood in the way of enacting constitutional amendments. To be sure, not all amendments were made equal. Of the 100 amendment Acts so far, some were consequential; others more cosmetic. A closer study of constitutional amendments is necessary to distinguish consequential ones from the more cosmetic.⁴³ But their spread over 65 years and four types of cabinets suggest, at least at first glance, that consequential amendments were made both by majority and minority governments. As such, the charge of rigidity, at least empirically speaking, does not bear out.

These numbers also help bring home the larger point that amendment methods provided for in the constitution are not inherently rigid. Rigidity isn't a function of the formal requirements of the amending provision. Rather, the circumstances of political representation determine the extent of a provision's rigidity. Article 386 and its requirement of two-third majority, for example, cannot stand in the way of a parliament populated mostly by members of a political party or coalition. The general elections of 1952, for example, returned Jawaharlal Nehru and the Indian National Congress to power with 364 of the 489 seats in the lower House. Similarly, in the 1957 elections, Nehru and his party won 371 of the 494 seats. In 1962, the verdict was once again decisively in favour of the Congress; it won 361 of the 494 seats. Likewise, Indira Gandhi roared back to power in 1971 winning 352 of the 518 seats in the lower House. And under tragic circumstances, Rajiv Gandhi and the Congress Party won 414 out of the 533 seats in 1984. In each of these instances, governments easily enjoyed more than two-third majority in the lower House. Article 368 could not have stood in the way of these cabinets at least in the lower House.⁴⁴

Indeed, for prime ministers with strong majorities – and many had them – the so-called rigid amendment procedure was little more than a plaything; it was at best an inconvenient limitation. But circumstances of political representation are not limited to initial electoral verdicts. When faced with fractured electoral verdicts, artful negotiations may also *generate* favourable circumstances. Narasimha Rao, for example, negotiated his way into favourable circumstances despite heading a single-party minority government. His cabinet was responsible for ten constitutional amendment Acts, a feat only made possible by skilful parleys. These examples demonstrate that art. 368 is not 'inherently' rigid: parliamentary composition coupled with floor management determines if, and the extent to which, the provision is rigid.

Jennings almost noticed this. In his conclusion, he alluded to the first constitutional amendment Act legislated in 1951. 'That the Constituent Assembly had to make substantial alterations in its own document, almost before the ink was dry', to him, was 'indicative of the nature of the problem'.⁴⁵ The constitution was long and complex and, therefore, would require frequent changes. Jennings was correct, but also obvious. The correctness, however, undermined his very argument. Nehru felt an amendment was needed. He got it, almost

immediately. The so-called rigid amendment procedure offered no resistance. It could not; an overwhelming majority of the Congress Party in the provisional parliament ensured that. Contrary to Jennings' assessment, no real demons afflicted art. 368. An amendment, easily enacted, barely a year after the constitution came into effect clarified that.

Sir Ivor Jennings made two arguments about the constitution's complexity and rigidity. In the process, he undermined one.

Constitutional promises: fundamental rights and directive principles

Jennings turned to the provisions on fundamental rights and directive principles of state policy in his second lecture. They are provided for in Part III and Part IV of the constitution respectively, the two parts India's Supreme Court would later describe as the 'two wheels of a chariot, one no less important than the other'.⁴⁶ This eulogy, however, was still three decades away. When Jennings delivered his verdict, directive principles were, in the constitutional imagination, a needless burden. Only fundamental rights mattered; they were the real thing.

Part III of the constitution was muddled; that's how Jennings saw it. Indeed, the title itself – 'Fundamental Rights' – was 'a little old-fashioned and perhaps not very appropriate', he claimed.⁴⁷ But his unease was more substantive, and he charged the constitution with three confusions. First, not all provisions on fundamental rights dealt with 'rights'. Article 18 was a case in point, listed under the right to equality. It prohibits the state from conferring titles except military and academic distinctions.⁴⁸ But Jennings found nothing concerning the right to equality in this provision. It entails 'no breach of the right to equality if Sri John Brown becomes Dr John Brown, or General John Brown, or Pandit John Brown' because it is 'in fact not a right at all', he stressed. Correctly read, the provision was a 'limitation on executive and legislative power'.⁴⁹

Second, the chapter confused fundamental rights with liberties. Rights create duties, generally (*in rem*) or against particular persons (*in personam*). Liberties, on the other hand, are restrictions on legislative and executive powers. To have a fundamental liberty (or privilege) regarding X means that a person has no duty not to engage in X.⁵⁰ Jennings read much of Part III as protecting liberties rather than creating rights.⁵¹ In fact, he found very few rights: art. 15(2) (commanding that citizens shall not discriminate on certain grounds with regard to access to shops, public restaurants, hotels, etc.); art. 17 (abolishing 'Untouchability') and articles 23 and 24 (restricting traffic in human beings and on the use of child labour) were the only rights he could locate in Part III.

Third, he found many provisions unhappily drafted. Article 14 was a good example. It guarantees 'equality before the law or the equal protection before the laws'. Jennings was 'very doubtful' though. Did the provision contain anything that was not provided for in art. 15(1) or art. 16(1)? Art. 15(1) prohibits discrimination against citizens of India on grounds only of 'religion, race, caste, sex, place of birth or any of them'. Article 16(1) commands that there 'shall be

equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'. As he saw it, the general proposition of equality in art. 14 was all encompassing, and capable of dealing with an instance not covered by the latter provisions. He offered two competing conclusions. Both were problematic. One reading made articles 15 and 16 'quite unnecessary'. Or the guarantee of 'equality before the law' in art. 14 'does not mean what it says'.⁵² Similarly, Jennings found art. 32 'very vague'.⁵³ The article guarantees 'the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part'. But 'who has the right and what are the "appropriate proceedings"?' he wondered.⁵⁴ The provision caused him considerable disquiet:

In English law [writs are not] available against the Crown, but by article 300 the Government of India may be sued by the name of the Union State. Does that mean that the prerogative writs may be brought against what in Part III is called 'the State'? If so, in whose name is the appropriate proceeding brought? Also, are other remedies, like the mandatory injunctions, available and can they be brought as private actions or only as relator actions?⁵⁵

Jennings noticed a common form in the arrangement of the bill of rights. General propositions came first. Specific applications followed. Exceptions and qualifications completed the sequence.⁵⁶ On equality, art. 14 states the general proposition. Articles 15(1), 15(2) and 16(1) were specific applications. The exceptions were found in arts 15(3), 16(3), 16(4) and 16(5), as the provisions then stood. But this ordering was insufficient; the ideas in the provisions were themselves wanting. As he saw it, the trouble with the Indian bill of rights was that it lacked a 'consistent philosophy'.⁵⁷ Relics of Dicey's nineteenth-century liberalism fermented with the Congress Party's experience of opposing British rule in India.⁵⁸ Add to that an impulse for social reform, and the result was a peculiar mix of complex and lengthy provisions – a murky cocktail of legalese that was sure to 'become the basis of a vast and complicated case law'.⁵⁹

The Directive Principles of State Policy in Part IV did not impress him either. As with fundamental rights, he made three charges against the Directive Principles. They were alien to India, and of doubtful longevity, Jennings alleged. And legally speaking, they were entirely irrelevant. As a matter of form, Directive Principles were borrowed from Catholic-inspired 'Eire, which in turn took it from the Constitution of Republican Spain'.⁶⁰ The substance of the propositions, however, was mostly Fabian. As he put it, 'the ghosts of Sidney and Beatrice Webb stalk through the pages of the text'.⁶¹ There were notable deviations, and he read them as inconsistencies. Take art. 38: The State is commanded to 'minimise the inequalities in income' and 'eliminate inequalities in status, facilities and opportunities' but without nationalisation of the means of production, distribution and exchange. The constitution left open the question of public ownership. And this, for Jennings, was 'Fabian socialism without the socialism'.⁶²

The inconsistencies aside, the provisions' longevity concerned him. Consistent with his argument that a constitution must not unnecessarily burden itself, Jennings doubted the long-term relevance of the Directive Principles. 'The ideas expressed in Part IV of the Constitution may survive for a generation', he prophesied. 'Some of them may even survive for a longer period'.⁶³ But he doubted the wisdom of inserting a collection of political principles (most derived from nineteenth-century English experience) into India's constitution in the middle of the twentieth century. 'The question whether they are suitable for the twenty-first century, when the Constitution may still be in operation cannot be predicted; but it is quite probable that they will be entirely outmoded', he wrongly foretold. 'Experiments in the use of atomic energy, if successful, may revolutionize the economic problem'. Likewise, 'references to international law may have become obsolete because there may be no nations'.⁶⁴ Clearly, Jennings had a malfunctioning crystal ball.

Ultimately, even he did not make much of his criticisms. Article 37 affirmed the provisions in Part IV as 'fundamental in the governance of the country'. But courts were not to have a say on them; they 'shall not be enforceable by any court'. The 'unenforceability' clause, Jennings felt, turned directive principles into 'pious aspirations'. They may matter in the realm of politics 'in which piety, or at least the appearance of piety, helps to capture votes',⁶⁵ but legally speaking, they would not matter, he reassured his audience. This assessment about the legal irrelevance of the directive principles is no longer applicable though. The principles started out as peripheral provisions in line with Jennings' assessment. But they incrementally transitioned from interpretative obscurity to relevance in one of the more spectacular journeys within Indian constitutional reasoning. By the 1990s, they were often regarded as 'supplementary and complementary to Fundamental Rights' and, therefore, in a way quasi-enforceable.⁶⁶

The transition happened in three indistinct phases. The first phase began in 1950. It lasted for nearly two decades. A year before these lectures, the Supreme Court consigned the directive principles to an interpretative columbarium. In *State of Madras v. Srimathi Champakam Dorairajan*, admission policies of eight medical and engineering colleges maintained by the state of Madras were challenged.⁶⁷ Admission were apportioned along religious and caste lines on the following basis: Of every 14 seats, six were to be filled up by Non-Brahmin (high caste) Hindu candidates, two by Backward Hindus, two by Brahmins, another two by Harijans (low caste), and one each by Indian Christians and Muslims. An unhappy Dorairajan challenged this apportionment: It violated art. 29(2), which prohibited 'educational institution maintained by the State' from discriminating 'on grounds only of religion, race, caste, language or any of them'. She was denied admission only because of her Brahmin caste, she claimed, and that infringed her fundamental right. Defending the apportionment, the state of Madras took refuge in art. 46. That directive principle requires the state to 'promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes'. The apportionment was, therefore, constitutional, the state argued.

The Supreme Court ‘completely’ rebuffed that claim.⁶⁸ ‘The chapter of Fundamental Rights is sacrosanct and not liable to be abridged’, Judge S. R. Das said. The ‘directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights’. And that, he said, was ‘the correct way’ of reading provisions found in Part III and IV of the constitution.⁶⁹

Despite an occasional hat tip to the principles and their constitutional relevance, the pre-eminence of fundamental rights held sway for almost two decades. By the late 1960s, however, the antagonistic view softened. In *Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore*,⁷⁰ the Supreme Court drew from the directive principles in assessing the constitutionality of a piece of legislation. Provisions of the Minimum Wage Act, 1948 were challenged by hotel owners; it interfered with their fundamental freedom to trade and occupation, they argued. The court rejected the argument. In doing so, it drew attention to art. 43 that commands the state to secure by suitable ‘legislation or economic organization’ a living wage and a decent standard of life. ‘Freedom of trade does not mean freedom to exploit’, Judge K. S. Hedge warned. ‘It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country’.⁷¹ ‘We see no conflict on the whole between the provisions contained in Part III and Part IV’, he concluded.⁷² No longer in conflict with or subsidiary to fundamental rights, directive principles soon became relevant for interpretive purposes. In the politically-contentious *Kesavananda Bharati v. State of Kerala*, some judges acknowledged the complementarity of the two parts.⁷³ The ‘Constitution makers did not contemplate any disharmony between the fundamental rights and the directive principles’ Judges Hedge and Mukherjea intoned. ‘They were meant to supplement one another’.⁷⁴ Judge Y. V. Chandrachud put it more boldly. Discussing the relative importance of the two parts in the constitution, he said:

What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. The freedoms of a few have to be abridged in order to ensure the freedom of all. If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.⁷⁵

By 1975, precedents weighed against the antagonistic understanding of fundamental rights and directive principles. Burying *Dorairajan* was a formality. It came in *State of Kerala v. N. M. Thomas*.⁷⁶ Special promotion rules for Schedule Caste and Schedule Tribe candidates in government services were under challenged. The respondent claimed that they violated his fundamental right to equality. The Supreme Court, however, upheld the rules. Judges in the majority drew part of their justification from art. 46: The provision mandates the state to ‘promote with special care the educational and economic interests of the weaker

sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes'. In his separate opinion, Judge K. K. Matthew reminded the respondent that directive principles were 'binding on the law-maker'. But they should equally 'inform and illuminate' the court's approach, he said.⁷⁷ Petitioners could not demand judicial remedies by invoking them; judges, nonetheless, could (should) look to them to make sense of related constitutional provisions and fashion appropriate remedies.

By the late 1970s, two distinct ways of 'informing and illuminating' took roots. First, they became relevant in judging the constitutionality of legislation. Second, as the Supreme Court altered the 'liberty' guaranteed in art. 21 into a 'right', directive principles helped determine the content of the latter. The right to 'live with human dignity', for example, was interpretatively derived from art. 39;⁷⁸ the right to pollution free water, air and environment from art. 48A;⁷⁹ the right to health from arts 41 and 43⁸⁰ and the right to education from art. 45.⁸¹ In fact, the right to education offers the best example of borrowing from Part IV to 'inform and illuminate' Part III. In *Unni Krishnan v. State of Karnataka*, Judge B. P. Jeevan Reddy relied on the gradual expansion of art. 21, the importance of universal education in the democratic life of a nation and the efflux of 44 years since the inception of the constitution to conclude that the right to life includes the right to education. However, arts 41, 45 and 46 of Part IV helped him give content to that right; he restricted it to 'free education until the age of fourteen'.⁸²

Jennings anticipated this outcome, but by a different line of reasoning. Article 16(1) mandates that 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'. Jennings found the provision not 'very happily phrased, for it is difficult to know what it means'.⁸³ As he saw it, 'to reach the highest branch of the public service in India, or elsewhere, it is necessary to secure primary education, secondary education, and higher education'. Given this, 'can a poor peasant in the State of Madras secure an injunction against the Federal Public Service Commission because there is no school in his village and therefore he has been denied equality of opportunity?' To him it was a bemusing possibility. But after 65 years, we know the answer to his question. Perhaps the writ would lie against the Ministry of Education rather than the Federal Public Service Commission. The basis for it would be the right to education, not the right to 'equal opportunity' in art. 16. Nonetheless, the lack of a primary school in a village or elsewhere is now an actionable wrong; it violates a fundamental right in the constitution.

Fundamental rights and directive principles have come a long way. Jennings' dismissive view no longer holds. A 'mix and match' approach has taken over. It has impacted doctrines, but also helped usher in a new institutional balance. Specifically, it has elevated the role of the judiciary, generated a dialogic with parliament and the executive and made new ways of realising rights possible.⁸⁴ Some elements of the dialogic are briefly worth noting. First, the court's repeated utterances on rights induced formal amendments to the constitution. Almost ten years after the Supreme Court inaugurated the right to (primary) education,

parliament amended the constitution to categorically incorporate it.⁸⁵ Ordinarily, ideas about constitutional amendments are generated in the political realm, and often in opposition to judicial verdicts. But the 'right to education' amendment stands out: The court 'created' it; parliament incorporated it. Article 21A now mandates that the state 'shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine'. Second, parliament has absorbed some of the new rights through statutes. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (that guarantees a certain number of days of paid work for unemployed persons) and the National Food Security Act, 2013 (that guarantees a certain amount of food for certain sections of the population) are the best examples of this second form of dialogic.⁸⁶ Similarly, the Right of Children to Free and Compulsory Education Act, 2009 is another example of this. Third, executive policies – national plans that eventually gain statutory recognition – have also demonstrated sensitivity towards these rights' rulings. The National Rehabilitation Policy 2006 is a good example. It deals with internal displacements of communities brought about by large-scale industrial projects. The policy incorporates many of the court's directives on the right to work, right to compensation and the right to alternative provisions of land. To be sure, such institutional interactions are neither always harmonious nor one-sided. Occasionally, courts may self-censor in the facing of persistent legislative or executive opposition. But by compelling the legislative and executive branches to take constitutional doctrines seriously, the dialogic has the potential to improve the quality of governance in India. Ironically, the transition has been made possible by the very part Jennings dismissed as legally irrelevant.

Conclusion

The Indian constitution was still in its early days in 1952. Sir Ivor Jennings: He came; he lectured, but arguably did not conquer. An outsider's analysis held out hope of generating a new understanding of the constitution Indians had given themselves. But it is not readily clear if the lectures rose to the occasion. An English lawyer for almost 30 years at the time, Jennings brought his English sensibilities to bear on India's constitution. That led him astray, at least occasionally. He limited himself to the constitution's text and that introduced two inter-related limitations. On rigidity, Jennings took the text *too* seriously. A long constitution coupled with a difficult amendment procedure led him to charge that it was too rigid. But as I have tried to argue, the difficulty of an amending procedure is not inherent to the text; circumstances of political representation determine the nature and scope of its rigidity. By obsessing with the text, he lost sight of the realities of parliamentary representation and its bearing on constitutional amendments. With this second lecture, however, Jennings did not take the text seriously *enough*. His common law training determined his preliminary comments on fundamental rights, the enforcement provision in art. 32 and the directive principles of state policy. Locked in time and restricted by its formulation,

a written constitution, he felt, did not have enough space to grow and mature. But India's constitutional law and practice suggests otherwise. The evolution of the inter-connectedness of the fundamental rights and directive principles shows that often texts do not impose meaningful limits; they rarely constrain outcomes. Interpretative techniques often overcome 'inconvenient' texts – a possibility Jennings was loathe to seriously consider. Perhaps for that reason, what he saw as 'flaws' were at best interpretative opportunities for judges in India to 'revise and reform', much like in a common law context. 'The frills and furbelows of a constitution are as unnecessary as those of fashion', Jennings concluded.⁸⁷ India's experience shows that constitutional frills are not static; they grow, evolve, even mutate. They are far from being unnecessary. Though not always in a predictable way, constitutional frills and furbelows can – and do – matter.

Years later, Jennings reflected back on his Iyer invite: 'In some lectures which I delivered in the University of Madras in March, 1952, I was critical of [the bill of rights in the Indian constitution]'. Saged by experience, he retracted his hasty conclusions. 'I now think [those] criticisms to have been exaggerated'.⁸⁸ The revision, it seems, was brought about by abandoning 'inherent' ideas about constitutions. 'Almost any Constitution', he declared 'can be worked successfully if it is worked by reasonable men'. India had them, and he said so:

The justices of the Supreme Court have been reasonable. They realised, I think, that the Bill of Rights introduced very little that was new into Indian law because it was founded essentially on the common law. What was new, and also important, was the judicial review of central and State legislation. I have not used all the judgements, but the Supreme Court seems to have done the job well.⁸⁹

Elsewhere, he again wrote remorsefully of his misreading: 'In some lectures ... I was highly critical of [the constitution] ... [but] I think that my criticisms were misconceived'.⁹⁰ As before, he merited the common law training of Indian judges with the constitution's success.

It is plain from the considerable volume of case law which has developed around the bill of rights, that a body as able and as well trained in the common law as the Supreme Court of India can make use even of so complicated a bill of rights to defend the liberties of citizens. The Indian Constitution came not to destroy the common law but to fulfil it, by applying some of the eternal principles to Union and State legislation.⁹¹

Sir Ivor Jennings held two views about the Indian constitution, presumably separated by years.⁹² Originally sceptical, he eventually came around. The working of the constitution laid his doubts to rest. More importantly, his prophecies never came to fruition. Faced with overwhelming evidence, he did the right thing: He recanted, demonstrating, in the process the integrity of his intellect. Sir Ivor Jennings was a true intellectual.

Notes

- * Shubhankar Dam, Associate Professor of Law, City University of Hong Kong.
- 1 Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1953), p. 84.
 - 2 *Ibid.*, p. 84.
 - 3 *Ibid.*, p. 85.
 - 4 Austin's work remains the most engaging introduction to the Indian constitution and its everyday politics. Granville Austin, *Working of a Democratic Constitution* (New Delhi: Oxford University Press, 1997).
 - 5 Anon, 'In message to Muslims, Narendra Modi says "will reach out to all"', NDTV, 23 April 2014, online, available at: www.ndtv.com/elections-news/in-message-to-muslims-narendra-modi-says-will-reach-out-to-all-558423. **Access date???**
 - 6 Indians were well versed in the techniques of common law and 'constitutional' litigation long before the constitution came into effect. For a recent analysis see Rohit De "A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council', *Law and History Review*, vol. 32, no. 4, (2014).
 - 7 *Ibid.*, p. 84.
 - 8 A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Basingstoke: Palgrave Macmillan, 10th edition, 1959), pp. 126–133.
 - 9 *Ibid.*, pp. 39–40.
 - 10 Note 1 above, p. 9.
 - 11 India constitution, art. 368(2)

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill.

Note that a constitutional amendment also requires presidential assent, apart from the requisite majority in the two houses.

- 12 There are, it should be noted, several exceptions to this rule. See e.g. art. 343, which declares Hindi 'as the official language of the Union', while prescribing English as the 'language to be used for all the official purposes of the Union' for the first 15 years of the constitution. Later, the provision authorises parliament to extend the use of English language after the efflux of 15 years by a piece of legislation. Though directly connected to language, the provision of course has a pronounced effect on the working of the Indian federation.
- 13 Jennings listed 14 such instances. See e.g. art. 105(3); art. 124(1); art. 135 and art. 169(1).
- 14 Note 1 above, p. 12.
- 15 *Ibid.*
- 16 *Ibid.*, p. 14.
- 17 *Ibid.*, p. 16.
- 18 Constituent Assembly Debates (vol. IX, Bk 4) (New Delhi: Lok Sabha Secretariat, 2003), p. 1647.
- 19 *Ibid.*, p. 1647.
- 20 *Ibid.*, p. 1648.
- 21 *Ibid.*, p. 1647.
- 22 *Ibid.*, p. 1649.
- 23 *Ibid.*
- 24 *Ibid.*, p. 1650.

- 25 Ibid., p. 1649 (emphasis added).
- 26 Ibid., p. 1653.
- 27 Ibid., p. 1657.
- 28 Ibid.
- 29 Ibid., p. 1662.
- 30 Ibid., p. 1663.
- 31 Note 1 above, p. 15.
- 32 Ibid.
- 33 Note 1 above, p. 1664.
- 34 Note 5 above, p. 89.
- 35 Ibid. Public law in the United Kingdom has undergone important doctrinal and legislative changes in the last few years that call into question the Diceyan conception of parliamentary sovereignty. See e.g. *Jackson and Others v. Attorney General* [2005] UKHL 56.
- 36 Note 1 above, p. 16.
- 37 A list of all amendments thus far is online, available at: <http://indiacode.nic.in/coiweb/coifiles/amendment.htm>.
- 38 For controversy surrounding the enactment of the first amendment, see Granville Austin, *Working a Democratic Constitution* (New Delhi: Oxford University Press, 1999), pp. 38–50.
- 39 For a thoroughly engaging account of the amendment, its authors and their politics, see *ibid.* pp. 370–390.
- 40 India has a multi-party system. Barring highly exceptional circumstances, only four types of cabinets are possible: (a) single-party majority cabinets; (b) coalition majority cabinets; (c) single-party minority cabinets; and (d) coalition minority cabinets. The ‘majority’ point must be clarified. Because India’s lower House has 545 seats, by majority support, I have in mind cabinets that have the *active* support of at least 272 members. This definition, therefore, excludes governments whose majority status is dependent on parties giving ‘outside’ support. For example, the Vajpayee-led NDA government in 1998 had a bare majority in parliament, but only with the outside support of the Telugu Desam party (TDP). As a result, I classify the Vajpayee cabinet as a minority government. Put differently, for my purposes, a government is in a majority if and only if 272 representatives of parties (and independents) *participate* in it. By this definition, India has had three of the four types mentioned above: coalition majority cabinets are the only exception.
- 41 On the performance of minority governments in India, see Csaba Nikolenyi, *Minority Governments in India: The Puzzle of Elusive Majorities* (London: Routledge, 2009).
- 42 For a breakdown of the periods see, Shubhankar Dam, *Presidential Legislation in India* (Cambridge: Cambridge University Press, 2014), p. 109.
- 43 For some literature on the amending provisions, judicial interpretations and the politics thereof, see Bert Neuborne, ‘The Supreme Court of India’, *International Journal of Constitutional Law* (2003), pp. 476–510.
- 44 Starting in the early 1970s, the upper House became increasingly splintered to a large number of regional parties taking up seats. As a result, governments that had majorities in the lower House did not necessarily have majorities in the upper House. But this does not detract from the point I am trying to make. Even the lack of majority in the upper House evidently did not stand in the way of constitutional amendments. It is then safe to say that we would have seen many more constitutional amendments if the same party had comfortable majorities in both Houses.
- 45 Note 1 above, p. 84.
- 46 *Minerva Mills v. Union of India* (1980) 2 SCC 591 para 62.
- 47 Note 1 above, p. 36.
- 48 Constitution of India, art. 18(1).
- 49 Note 1 above, p. 36.

- 50 Lief Wenar, 'Rights', *The Stanford Encyclopedia of Philosophy* (Fall 2011 edition), online, available at: <http://plato.stanford.edu/entries/rights/> (last accessed 15 March 2014).
- 51 Note 1 above, p. 37.
- 52 *Ibid.*, pp. 43–44.
- 53 *Ibid.*, p. 39.
- 54 *Ibid.*
- 55 *Ibid.*, pp. 39–40.
- 56 *Ibid.*, p. 40.
- 57 *Ibid.*, p. 50.
- 58 *Ibid.* Much of Dicey's writings explained how British common law protected liberties. The Congress Party's agenda grew over time, and was certainly 'thicker'. The state was not meant to be avoided. Rather, the state was to play an active role in creating an ordered society.
- 59 *Ibid.*
- 60 *Ibid.*, p. 30.
- 61 *Ibid.*, p. 31.
- 62 *Ibid.*
- 63 *Ibid.*, p. 33.
- 64 *Ibid.*, pp. 33–34.
- 65 *Ibid.*, p. 35.
- 66 *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2178, p. 2230.
- 67 AIR 1951 SC 226.
- 68 *Ibid.* [10].
- 69 *Ibid.* [10].
- 70 AIR 1970 SC 2042.
- 71 *Ibid.* [13].
- 72 *Ibid.* [13].
- 73 (1973) 4 SCC 225.
- 74 *Ibid.* [634].
- 75 *Ibid.* [2219].
- 76 AIR 1976 SC 490.
- 77 *Ibid.* [89].
- 78 *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802.
- 79 *Subhash Kumar v. State of Bihar* AIR 1991 SC 420.
- 80 *Consumer Education and Research Centre v. Union of India* AIR 1995 SC 922.
- 81 *Unni Krishnan v. State of A. P.* AIR 1993 SC 2178.
- 82 *Ibid.* [242].
- 83 Note 1 above, p. 44.
- 84 For philosophical reflections on dialogic approaches, see C. Bateup, 'The Dialogic Promise – Assessing the Normative Potential of Theories of Constitutional Dialogue', (2006) *Brooklyn Law Review* 1109, p. 71.
- 85 The Constitution (Eighty-Sixth) Amendment Act, 2002.
- 86 For cases that have to do with the development of the right to work and the right to food, see *Olga Tellis v. Bombay Municipal Corporation* AIR 1993 SC 2178; *Kishen Pattanayak v. State of Orissa* AIR 1989 SC 677; *People's Union for Civil Liberties (PUCL) v. Union of India* (SC 2001), Writ Petition (Civil) no. 196/2001.
- 87 Note 1 above, p. 86.
- 88 See H. Kumarasingham (ed.), *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press, 2015), pp. 231–232.
- 89 *Ibid.*
- 90 *Ibid.*, pp. 279–280.
- 91 *Ibid.*
- 92 These later writings are undated.

5 Pakistan's first decade

Democracy and constitution – a historical appraisal of centralisation

Tahir Kamran

A historical appraisal of centralisation

In a culturally and ethnically plural country like Pakistan democracy is *sine qua non* for its territorial and political integrity. The equitable distribution of economic as well as environmental resources like water, gas, etc. among the provinces is possible only through democracy. Historically speaking Pakistan was conceived as a parliamentary democracy with a federal structure on the pattern of Westminster. H. Kumarasingham has coined a very appropriate term for such a post-colonial state emulating that particular pattern of governance as Eastminster. However, in a particular case of Pakistan, democracy could not strike firm roots in the 78 years of its chequered history. Consequently, federalism itself was barely sustained. In this chapter the first decade of the Pakistani state will be brought under scrutiny, in the course of which the process and policies that led to centralisation will be analysed. The regional responses to such centripetal tendencies will also be subjected to interrogation. The role of the governor general, the clique of top bureaucrats and the way Islam and Urdu were instrumentalised for homogenisation will be the main postulates of this study.

Right from the outset democracy was hobbled because of the self-aggrandisement of the ruling elite. Muslim League leadership itself was an impediment in the smooth nurturing of democracy. Most of its leaders in West Pakistan belonged to landed aristocracy, therefore distant from the masses. Generally Muhammad Ali Jinnah's early demise is considered as bad luck and one of the major reasons for the aborted growth of democracy. Historical facts however fail to corroborate such a view point. The vesting of the executive powers in the governor general proved anomalous for the political process to flourish. In such a circumstance the prime minister became a superfluous entity. Similarly, Muhammad Ali Jinnah reposed greater trust in the bureaucrats instead of his political comrades, which invigorated apolitical elements in Pakistan. Consequently neither could free and fair elections be held nor could constitution be framed and promulgated. Constitution-making and elections would have scuttled the unbridled powers of bureaucracy, represented by Malik Ghulam Mohammad, Chaudhri Muhammad Ali and Sikander Mirza. That trio along with General Ayub Khan ruled the roost in the 1950s, a decade that can

decidedly be designated as the decade of the bureaucratic rather than democratic/civilian rule.

Having said all that, one must not lose sight of the fact that the oligarchic rule that Pakistan witnessed comprised military and West Pakistani feudal politician, with bureaucrats being most powerful. Hamza Alvi's concept of an 'overdeveloped state' is very pertinent in understanding the role of two colonial institutions and their part in impeding the process of democracy. Ian Talbot terms Pakistan's political history as 'a fruitless search for stability with frequent changes of Government and regime'.¹ Talbot also mentions the experiments that the state of Pakistan made during the first two decades of its existence, with 'two constituent assemblies, one constitutional commission and three constitutions'.² Nevertheless Pakistan's quest for political stability and a lasting democratic set up remained a distant dream. However, while studying Pakistan's experience regarding democracy one cannot do without looking into the colonial perspective, which was underpinned by the steel frame of bureaucracy. It was, in the words of Mohammad Waseem, 'bureaucratic paternalism'³ that was central to the British imperial project in the Sub-Continent. Procedural safeguards were put in place to preclude 'any infringement of the bureaucrats' monopoly over the articulation of public interests by the non-officials'.⁴ Simply put, the controlling mechanism established by the British civil servants tended to rein in the representative institutions despite their embryonic form. The same mechanism came to Pakistan as the colonial bequest, viewing politicians and representative form of government as corrupt, inefficient 'irrational and uninformed'. Therefore, colonial legacy and its overall impact in the first decade after Pakistan's independence will be the important puzzle to be unravelled in the following section.

The colonial legacy and the post-colonial state of Pakistan

The colonial legacy still resonates in the political culture of Pakistan. R. S. Rajan seems spot on when he says; 'Colonialism is not simply a matter of legacy but of active, immediate and constitutive determinants'.⁵ Some Western scholars argue that without the colonial intervention the seed of democracy would not have sprouted in the Third World societies.⁶

Thus to their contention, the societies of any potentiality to germinate democratic institutions on their own were few and far between, if there were any at all. The examples of the countries in South and West Asia ruled by absolute rulers that did not directly experience colonialism but could not become democracies by their inner dynamics are cited to support this contention. Nepal, Thailand and Iran are quoted as an example. On the other hand colonial rule has managed to produce a few stable democracies 'usually in small size British colonies such Jamaica'.⁷ Some Third World scholars, particularly Indians, argue to the contrary. According to their contention Third World societies would have evolved their own modernity and developed democratic institutions had colonialism not scuttled their democratic potential. One tends to concur with Dr Inayatullah when he says that 'colonialism unleashed complex forces both favourable

and unfavourable for the democratisation of the colonised states and societies. A certain combination of these forces is interacting with local conditions fostered democracy while a different combination stifled it'.⁸ Ayesha Jalal on the other hand gives her insightful opinion about difference, brought about by colonial period. She therefore, argues that:

the British effort to stretch the ambit of imperial control through rule bound institutions based on Western concept of contractual law and impersonalized sovereignty rather than on the personal patronage of rulers was without historical precedent in the Sub-Continent, so too were the consequences. A political unity conceived and constructed in cold-blooded fashion and frozen in the impersonal rationality of bureaucratic institutions, could neither reflect nor capture the internal dynamics of a society accustomed to direct personalize rule.⁹

The direct and personalised rule as referred to by Ayesha Jalal, had an agency in the bureaucratic dispensation that provided substance to the very centralised administrative structure of Pakistan. Hence Pakistan resorted to draw heavily on 'colonial state's methods of bureaucratic control and centralisation'.¹⁰ The India Act of 1935 added further strength to the steel frame of the British Raj, which was subsequently altered to serve as the constitutional framework for Pakistan. The Westminster prototype of parliamentary democracy, in principle, called for a separation between 'bureaucracy and representative political executive'. However, the bureaucratic authoritarianism nestled in the colonial state largely remained intact. Therefore, it seemed exceedingly difficult from the very beginning to establish the supremacy of the legislative over executive. The Pakistani political elite also shirked from undertaking a radical reorganisation of the administrative structure of the colonial days to establish the supremacy of elected bodies. Therefore, the alliance of convenience with the bureaucracy were forged on the grounds of pragmatism and the need to afford the administrative continuity to grapple with the massive dislocation and law and order problems that followed in the wake of partition in the northern, north western and eastern part of the Sub-Continent.¹¹

While telescoping the democratic experience of the Pakistani state in juxtaposition to India, Asma Barlas laments over the failure of the former in fomenting the democratic institutions although both the states 'acquired almost identical administrative structures from the Raj'.¹² Hence she does not take into account the subtleties embedded in the historical, cultural and communal plurality that profoundly impacted the colonial mode of governance in India. Hamza Alvi is in complete discord with such line of argument and he links Pakistan's 'overdeveloped state structure' with the preceding colonial practices, aimed at the maintenance of law and order instead of facilitating the popular representation. Similarly Khalid bin Sayeed's term of 'viceregalism' affirms the continuity between the colonial and the post-colonial dispensations with respect to the Pakistani state. Ian Talbot while identifying the difference in the administrative

measures deployed in the north-western areas and the rest of India refers to the arbitrary methods enforced in the areas that subsequently constituted Pakistan. He recounts those coercive measures that were at the heart of the colonial technology of control. These strictures recounted below precluded the progressive spread of representative institutions.

Among them, preventive detention (originating in the Bengal State Prisoners Regulation III of 1818), the prohibition of political actions seen by magistrates as prejudicial to public order (Section 144 of the Criminal Code of Procedure) and control of the Press (1931 Indian Press Emergency Powers Act) figured quite prominently. Besides, the Pakistani state reinstated the emergency powers of Section 93 (as Section 92A) of the 1935 Government of India Act, enabling the centre to dissolve a provincial government. Similarly the Public and Representatives Office (Disqualification) Act, usually known as PRODA, promulgated in 1949 by Liaquat Ali Khan's ministry was the colonial legacy.¹³

The autocrats whether civilians or otherwise need a pliable judiciary. Therefore the doctrine of necessity remained an anathema precluding the Pakistani judiciary to be independent and pro-people. From the days of Munir J to Irshad Hassan Khan J, the Pakistani courts have been validating the arbitrary acts of the governor general and subsequently the army generals usurping power at the detriment of constitutional rule. Ironically the majority of judges found no qualms of conscious in taking oath under the Provisional Constitutional Orders.

Governor general as the executive head

Pakistan's political history right from the outset has been bedevilled with Muhammad Ali Jinnah's charismatic personality, imagined as a personification of 'the world spirit' in Hegelian terms. Muhammad Ali Jinnah, the founder of Pakistan, fitted into that role quite immaculately and ensconced himself in the position of centrality but at the detriment of the political and constitutional institutions. Jinnah's preference for the office of the governor general over the premiership had a profound bearing on the future politics of the country. He, in fact was the most powerful governor general of any country in the world. Campbell Johnson notes in his diary that Jinnah's first act after putting forward his name as governor general that was 'to apply for powers under the 9th schedule rather than Part II of the 1935 Act which gave him at once dictatorial powers unknown to any constitutional Governor General representing the King'.¹⁴ His status as a founder of the newly born republic had given him unequivocal acceptance and authority vis-à-vis any constitutional or legislative body. The *Dawn*, Delhi, stated in one of its editorials, 'Whatever the constitutional powers of the Governor General of a Dominion may nominally be, in Quaid-e-Azam's case no legal or formal limitations can apply'.¹⁵ Similarly Khalid bin Sayeed sheds light on Jinnah's revered persona in the following words:

He was the Quaid-e-Azam – the Great Leader of the national movement. And now that he had won Pakistan within the incredible period of

seven years, he had achieved something which no other Muslim leader had even dreamt of. Muslims, especially in Northern India, regarded him as a successor of great Mughal Emperors, Emperors like Babur and Aurangzeb.

Indeed soon after the announcement of the Partition scheme on 3 June 1947, he was hailed in New Delhi by Muslims as the Emperor of Pakistan. The *Dawn* wrote a few years after his death: 'The populace had already begun to greet the Quaid-e-Azam as Shahinshah-e-Pakistan. Had he so desired, 80 million willing hands would have rejoiced to put a crown upon his head'.¹⁶

The people of Pakistan wanted him to act like a king rather than a democratic leader. In their political vocabulary and comprehension the all-powerful king or *Shahinshah* like the earlier Mughals, the wellspring of all powers, could be a true leader. They therefore wanted Jinnah to restore the past glory of the Muslims, which had vanished from the eighteenth century onwards. He could fulfil their expectations by following the footsteps of the Muslim Kings. The vast majority of the populace was not well conversant with the concept of a democracy or a representative form of government. A lack of clarity and understanding about democracy among the people was the foremost impediment in the establishment of the democratic order. Jinnah being a staunch constitutionalist wanted to tread the Westminster path therefore he had envisaged the model of a parliamentary democracy for Pakistan. Thus the founder of Pakistan had the vision of Eastminster for Pakistan. However he assumed the mantle of a governor general which raised some eyebrows among the political analysts. Jinnah's vying for the office of the governor general also caused considerable concern in England because he was an active politician, as Khalid bin Sayeed notes in *Pakistan: The Formative Phase, 1857-1948*:

The constitutional theory of a Governor General in a Dominion is that he represents the King and bears the same relation to the Ministers forming the Government as the King does to his Ministers in the United Kingdom. It is recognised that the rights of a Dominion include the right of recommending a person for appointment as Governor General. But that the Governor Generalship should be held by an active party politician, who frankly states his intension of continuing his political leadership after assuming the office, is an innovation which radically alters the nature of the Dominion bond. The development is the more serious because Mr. Jinnah's rule gives promise of being a very thinly veiled dictatorship. His motive in demanding the office of the Governor General is no doubt to obtain the position which belongs to it in the eyes of the Indian masses. The Viceroy as Governor General has been hitherto, even though to a restricted degree in recent years, the supreme executive ruler and his Ministers have been simply the members of his Executive Council. By force of mental habit the man in the street will continue to think of the Governor General as being more important than his Prime Minister.

It virtually happened in subsequent years that the governor general overshadowed the prime minister because the former wielded the executive powers, which not only reduced the prime minister into a rubber stamp but it also bequeathed an appalling legacy, which was detrimental in the extreme for the growth of parliamentary democracy. The governor general drew its authority from the section of the Indian Independence Act that vested in him unlimited powers to amend the constitution. That, however, was intended purely to be a transitional provision to help find an instant solution to insurmountable problems that the newly founded state was facing. Such powers were 'to last for only seven and a half months until 31st March 1948'. Under the government of India Act 1935 the governor general was empowered to choose and appoint its ministers and he could also dismiss them. Similarly he had a definite say in the matters of defence, ecclesiastical and external affairs and also in the administration of tribal areas. The functions and powers vested in the governor general are listed below:

- 1 Maintenance of law and order;
- 2 The safeguarding of the financial stability and credit of the federal government;
- 3 The safeguarding of the rights and interest of minorities;
- 4 The prevention of commercial discrimination and action that would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment;
- 5 The protections of the rights of Indian States, etc.¹⁷

Ironically, the span of these discretionary powers was extended by another year, which became a practice in the subsequent years; Hamza Alvi opines 'these powers were regularly invoked by those who acted in the name of Jinnah, ignoring the cabinet and the constituent assembly, encroaching, without challenge, on their legitimate functions and powers'.¹⁸ Hamza also contests the prevalent view that Jinnah was personally in command of the affairs of state. The fact according to Hamza is that by the time of the partition Jinnah was a very sick man, indeed a dying man, in such a debilitating state of health he could not attend to

the hurly-burly of the crises ridden affairs of the Pakistan state in those difficult and exciting days, now to pull together his crumbling body which was in the hand of men whom he had come to despise and publicly criticise.¹⁹

In these circumstances all the crucial decisions including constitutional amendments were being promulgated in his name. When some members of the constituent assembly showed their reservations about being bypassed on so many matters of great importance, the prime minister, Liaquat Ali Khan, told the assembly, 'under the present constitution man who has been vested with all powers is the Governor General. He can do whatever he likes'.²⁰

Factors leading to centralisation

Three reasons can be advanced for the bureaucracy seizing power: (a) Jinnah's fatal illness, (b) mediocrity and incompetence of leaders other than him, and (c) the Muslim League's inability to hold together the diverse political and ethnic entities. During the pre-independence days, the Muslim League's core leadership barring M. A. Jinnah hailed from Muslim minority provinces, particularly United Provinces and Bihar. Provinces like Bengal and the Punjab had meagre representation among the ranks of the Muslim League. It was primarily because the Karshak Praja Party and the Unionist Party did not leave much space for political action for the Muslim League in these provinces until towards the far end of colonial era. After independence the central leadership of the founder party found itself totally deprived of the electoral base. Nevertheless the Muslim League kept on claiming for itself a role 'as a unifying national party'.²¹ Furthermore its leadership started equating the party with the nation, 'if you destroy the League you destroy Pakistan'.²² Jinnah even suggested that there was no need for any other party other than the Muslim League.²³ All said and done, in the absence of a representative institutional framework, the top leadership of the Muslim League 'relied extensively of the bureaucracy in the formulation and the execution of policy'.²⁴

Exactly like the league leaders, the Pakistani central government had a large number of officers from the minority provinces. Shortly afterwards, Punjabis also managed to carve out space for themselves into the glorious cadres of civil service. Hence the Muhajir–Punjabi alliance came to act as the fundamental instrument of centralisation in the state apparatus. That centralisation was forged ostensibly to ward off the 'perceived' security threats mostly on the part of the ruling elite. Omar Noman refers to the major consequences emanating from such a perception: 'Externally Pakistan joined military alliances under the American umbrella as protection against Indian military intervention. Internally, Jinnah accumulated power at the centre'. While summing up that situation he says, 'A powerful Central Government would bind diverse elements into a national framework. However, the power of the Central Government was divorced from any representative base'.²⁵ Another factor that contributed significantly to the failure of democracy and the delay in constitution-making was the Muslim League's sluggish attitude on constitutional issues. From 1948 to 1954, the constituent assembly met, on average, for only 16 days a year to frame a constitution. 'The average attendance consisted of 46 members, hardly an indication of urgency'.²⁶

The League's failure to emerge as an integrative force in a multicultural and ethnically plural society and state was predicated to a large extent on its exclusionary approach. Its central elite deployed Islam and Urdu as symbols to forge unity among the disparate groups and factions. These instruments of homogeneity proved counterproductive, particularly with reference to Bengal. Tahir Amin's assertion that the founding father of Pakistan wanted to build a strong nation based on the principle of 'one nation, one culture, one language'²⁷ seems quite pertinent and reflects the centrist mindset that was at work immediately after Pakistan's creation.

One cannot gainsay the fact that the slogan of Islam was used profusely for the political mobilisation in the length and breadth of the country. Mosques and shrines were the sites for the political activity where clerics and *Pirs* exhorted upon the public to espouse the Muslim League's demand for Pakistan. Conceived as an ideological state with supposedly Islamic character gave rise to political ambivalence but also provided an ample space to the clerics in the political arena of Pakistan. That ambivalence is compounded further when parliamentary democracy is also fore-grounded as a prerequisite for the sustenance of the Pakistani state. Hence the parliamentary democracy would function within the iron girdles of ideological framework. Islam was tipped, by some quarters, as a distinct code of life, with its peculiar system of government denouncing democracy as an alien system. Mercifully however, such view could not muster the popular support. Thus far the democratic experience predicating on Islamic ideology has led to the cultural and social fissure in the society that is essentially plural.

Islam and Urdu: the instruments of homogeneity

Right after Pakistan came into being, a large number of Ulema from East Punjab, United Provinces and Bihar migrated to Pakistan. The seminaries upholding the puritanical version of Islam were shifted to the major cities of Pakistan. Ulema like Shabbir Ahmed Usmani, Mufti Muhammad Shafi, Muhammad Hassan, Yusuf Banori, Idrees Kandalvi and Khair Muhammad Jullunduri migrated to the newly founded state. Khair-ul-Madaris Multan, Madrissa i Haqqania Akora Khatak, Jamia Salafia Faisalabad and Madrissa Banori Town, Karachi were a few of the countless seminaries that were relocated or built after independence, with the optimism that Pakistan would be an Islamic state. Many of them subscribed to the Deobandi school of thought. It had a tangible bearing on the state policy. The Objective Resolution enacted in 1949 was an evident testimony to their influence on the government and the functionaries of the state. The enunciations in the Objective Resolution like 'the sovereignty rests with Allah' and 'He delegates the sovereignty to the people', are in contravention to the dictates of democracy. Besides, such clauses provide a sufficient *niche* to the clerics in the realm of state craft and politics because of their supposed expertise on the ecclesiastical commands of Allah. The Anti-Ahmedi Movement in 1953 was the corollary of the religious activism spearheaded by the Ulema and subsequently it culminated into their denunciation as non-Muslims in 1974.²⁸ Besides, it also provided a background to a policy of Islamisation subsequently pursued by General Zia-ul-Haq, which was punctuated with statutory laws like the Hudood Ordinance or blasphemy law during the Nawaz Sharif era. The repercussions that unfolded from the 1980s onwards were the astronomical rise in sectarianism and militancy, exemplifying in suicide bombing and target killing.

Another variable that helped the centralisation and thus sharpening of regional fault lines was the Urdu language. Language has been a source of political mobilisation as well as an important identity marker in South Asia particularly

since the last quarter of the nineteenth century. Muslim separatism in nineteenth-century colonial India was firmly embedded in the Urdu-Hindi controversy triggered in 1867 in Banaras. The bulk of Muslim League leadership came from the either UP or Bihar (the minority provinces), which had been the breeding ground for the Muslim separatism in colonial India, Urdu, with particular emphasis on its Persian script was deemed as an extremely important symbol of Muslim and Pakistani identity. Since the days when the Urdu-Hindi controversy flared up, Muslim *Ashraaf* used Urdu as a symbol to bring the ethnically and culturally divergent Muslims together. A quotation from Mohammad Waseem's book will be quite pertinent here 'from Sir Syed (Ahmed Khan) onwards the UP's Muslim leadership was increasingly wedded to the principle of safe-guarding its rights through collective presentations to the government in the background of Urdu-Hindi controversy and communal strife for jobs in general'.²⁹ With the emergence of the *Urdu Defence Association* at the behest of Mohsin-ul-Mulk Urdu became a major symbol of Muslim identity. Ayesha Jalal is of the view that the India Muslim League for its part has always played down the linguistic specificities of the Muslims in the majority provinces. Having asserted distinctive Muslim political identity the league sought to strengthen the religious bond through the medium of the Urdu language at the supra-regional level.³⁰

Pakistan was founded as a multi-ethnic and multi-cultural state, with Punjabis, Sindhis, Pathans, Mohajirs, Balochis and, above all, Bengalis, which constituted around 55.6 percent of its total population. The fact of the Bengali majority sent tremors among the ranks of the West Pakistani ruling elite – comprising Muslim League politicians, bureaucrats and military officers. Hence, Urdu was deployed 'as a unifying symbol of the state' at the expense of other languages including Bengali.

In the first educational conference held from 27 November to 1st December 1947, the cardinal points of the language teaching policy included making Urdu the lingua franca of Pakistan and to instruct it as a compulsory language. That policy of deploying Urdu as an instrument for integration, however, boomeranged and evoked violent responses particularly in East Bengal (1948–52) and in Karachi (1972), in which scores of people lost their lives.³¹

In fact after Pakistan's creation, Urdu was projected as a vehicle to advance the ambitions of the centrist forces, which was one of the reasons that smaller provinces developed strong reservations about Urdu. According to Talbot, 'attempts at strengthening Urdu as part of nation building enterprise proved counterproductive as was demonstrated most clearly in East Bengal'.³² I have argued somewhere else that when Urdu was elevated to the status of a national language, the Bengalis, who were deeply attached to their own language and continued to venerate Bengali literature, organised protest movements, culminating into riots. The movement in support of the Bengali language was suppressed by the state machinery on 21 February 1952. In the course of that violence many people lost

their lives. Not only is the event commemorated each year by a Remembrance Day, but it has also proved to be a beginning to a fateful denouement, the cessation of East Pakistan in 1971.³³

The language issue was vitiated when Jinnah, while on his official tour of East Bengal, proclaimed that 'the state language of Pakistan is going to be Urdu and no other language'; a statement that incurred a trenchant response from the Bengali educated classes. Despite that stir, Jinnah reiterated his position on the issue of language when he explicitly stated that 'without one State language, no nation can remain tied up solidly together and function'.³⁴ When the Bengali bourgeoisie showed its reservation regarding Jinnah's unequivocal support of Urdu as a national language and also criticised his 'invalidation of a resolution of the East Bengal Assembly demanding a national status for Bengali'³⁵ Jinnah dismissed the Bengali reaction nonchalantly calling it a manifestation of provincialism, one of the curses that Pakistanis must guard against. Similarly Prime Minister Liaquat Ali Khan shot down a motion in the constituent assembly in February 1948 pleading equal status for Bengali and Urdu. Pakistan, to him 'has been created because of the demand of a hundred million Muslims in this Sub-Continent and a language of a hundred million Muslims is Urdu'.³⁶ Furthermore attempts were made by a language committee appointed by the East Bengal government to change the character of the Bengali language because its script had to be de-Sanskritised. Hence the proposal to change the script into the *Nastaliq* Perso-Arabic script met with the vociferous condemnation by the Bengali students in particular.³⁷

Bureaucratic statism

In order to counter the Bengali majority the 1954 provincial elections were nullified and then all the three provinces, namely Punjab, Sindh and the North West Frontier, along with Balochistan and tribal areas, were lumped together and dubbed 'One Unit', and a new designation of West Pakistan was conjured up in 1955. Hence West Pakistan province was created to ward off any possibility of Bengali dominance. Now two provinces, namely East Pakistan and West Pakistan, were given equal representation, thus denying Bengalis their 'rightful' majority in the parliament. Whosoever spoke against One Unit was sorted out forthwith by the bureaucrat masquerading as Pakistan's governor general, Malik Ghulam Mohammad (1895–1956).

A brief introduction to the individual who was a kingpin in the administrative set up of Pakistan for the first half of the 1950s seems imperative here. Born in a middle class kakezai family from Mochi Darwaza, in Lahore, Ghulam Mohammad had great promise. He went to the Aligarh University and graduated from there. Then he entered the Indian Accounts Service and served Nawab of Bahawalpur and Nizam of Hyderabad as financial adviser. After Pakistan came into being, he was inducted into cabinet as minister of finance and in 1951 he became the third governor general of Pakistan.³⁸

In November 1954, he dismissed Abdul Sattar Pirzada's Sindh ministry because he entertained reservations about the One Unit. The NWFP ministry also met the

same fate. Ghulam Mohammad intervened in the Punjab when Feroze Khan Noon expressed reservations on some aspects of the One Unit.³⁹ As regards the political deprivation of the Bengalis, the ruling elite of Pakistan, the bureaucrats among them being the most prominent and powerful had particularly been indifferent to the protests and pleadings of the Bengalis against the centrist policies. Change came, but for worse. However, before proceeding further, it seems appropriate that the rise of bureaucracy and the tightening of its stranglehold should be explored.

In fact the power transferred to the bureaucracy was not as result of any 'overt coup' but quite imperceptibly. In view of the enormous difficulties the state of Pakistan had to grapple with some institutional changes were made, enabling the bureaucracy to operate independently of the political leadership. The most significant of all such changes was the subordination of the entire bureaucracy to the newly created position of secretary general. Hamza contends that the post of secretary general was created at the insistence of Mr Jinnah probably advised by the first incumbent of that post himself. Hence, it was proposed that an official 'controlling the entire government machinery working directly under Jinnah as Governor General was needed for speedy decisions'.⁴⁰ Chaudhri Muhammad Ali was appointed as secretary general, undoubtedly a very capable Punjabi officer with substantial experience in the finance department of the government of India. Here it seems pertinent to furnish his background so that we can have better perspective of what unfolded in the realm of politics in the newly founded state of Pakistan. Born in 1905 in Jullunder, East Punjab, Chaudhri Muhammad Ali had a brilliant career in the University of the Punjab where he read Chemistry. Before entering the Indian Audit and Accounts Service by competitive examination in 1928, he served as a lecturer at the Islamia College, Lahore. After four years of entering the audit and accounts service he was transferred to Bahawalpur state as accountant-general, where he served until 1936. Afterwards he was made under-secretary, finance department and by 1945 he found himself in an enviable post of financial advisor, military finance and supply. In 1947, he became a member of the steering committee of the partition council, 'which made the complicated financial arrangements. After Pakistan's creation, he became a secretary general to the government of Pakistan, or in other words head of the public service'.⁴¹ As a secretary general, Chaudhri Muhammad Ali was accorded a direct access to all federal secretaries and all files. In order to institutionalise his role and position, he set up a 'planning committee' with the secretaries of all the ministries as its members. Hamza Alvi succinctly explains the functions of the planning committee in the following words:

Through the mechanism of the planning committee, presided over by the Secretary General, the entire state apparatus was able to function as a unified machine under a single head. Thereby it was no longer segmental in structure but was internally unified.... The Planning committee was in effect a 'parallel Cabinet' of bureaucrats, with a bureaucrat functioning in effect as 'Prime Minister'. Given this mechanism, the Cabinet was bypassed and its proceedings were reduced to meaningless ritual. Important issues were

decided in advance in the Planning committee and the ministers and the Cabinet acted as mere rubber stamps, ratifying bureaucratic decision with, at best, some minor amendments. Decisions on some large issues were not even referred to the Cabinet on the principle that ignorance is bliss.⁴²

So, in many ways it was the continuation of the colonial legacy whereby the bureaucrats used to despise the political leaders. The constituent assembly debates in 1956 provided an ample testimony to bureaucratic indifference, which has become an ethos on which the Pakistani civil servants were trained and raised. In these debates many provincial ministers complained about several officers who refused to carry out their orders because the ministers have no powers to hold those officers accountable. In such a situation where the military/bureaucratic oligarchy had become extremely powerful, ministers naturally could not do much. On top of that unfortunately Pakistan's political scenario was bedevilled with the paucity of effective political leadership. In fact, Jinnah himself did not allow potential rivals of any weight and standing to spring up. As a result political leadership of Pakistan after him was spineless and devoid of any foresight, which also had a negative fallout on the party organisation of the Muslim League. Hence, democracy in Pakistan rested on shaky and shifting foundations.

The Pakistan Army was weak and wanting in organisation; it had British officers as the commander-in-chief, namely General Frank Walter Messervy (1893–1974) and General David Douglas Gracey (1894–1964), General Ayub Khan (1907–1974) was elevated as the first Pakistani commander-in-chief in 1951. He was a close friend and confidant of General Sikander Mirza, secretary of the Ministry of Defence who later became the first president of Pakistan. Wily and shrewd, Sikandar Mirza (1899–1969) belonged to the political service of India but he was trained at Sandhurst. He rose to become the last governor general (1955–1956) and subsequently the first president (1956–1958) of Pakistan.⁴³ At Sandhurst, during the course of their training both Ayub Khan and Sikander Mirza became friends and that bond lasted till the third week of 1958 when Sikander Mirza was deposed from the presidency of Pakistan and sent packing to the United Kingdom by the former. Reverting to the earlier years of Pakistan, the portfolio of defence minister was retained by the prime minister, Liaquat Ali Khan. Hence, without having a full-fledged minister, everything pertaining to defence ministry was left to Sikander Mirza. As Ayub Khan's private secretary has noted:

The defence portfolio had always been held by the Prime Minister himself who, being the leader of the ruling political party had mostly been busy in consolidating his party position or in attending to the ever increasing parliamentary wranglings ... [He] never found time to attend to the real problems of the Defence Ministry.⁴⁴

When Ghulam Mohammad dismissed the then prime minister Khawaja Nazimuddin in April 1953, it was the first public manifestation of the power that

bureaucracy wielded behind the façade of parliamentary institutions. The charges were the government's inability to maintain law and order in the wake of Anti-Ahmedi movement (February–March 1953) and that it had failed to address the issue of the wheat crisis engulfing the whole country.⁴⁵ The significance of Ghulam Mohammad's dismissal of the prime minister 'lay in how it served to demonstrate the absence of an effective link between the Prime Minister and the institutions of party and parliament'.⁴⁶ The unceremonious exit of Nazimuddin did not bring any bad omens for the governor general. However it did provoke a belated response from the politicians, and the assembly attempted to curb the powers of the governor general in 1954 so that the powers to dismiss prime minister could be wrested away from him. The assembly also repealed the PRODA legislation, which was introduced by Liaquat Ali Khan in 1949, to rein in the politicians.

Here it will be instructive to draw on Ivor Jennings' account as he was in the thick of all the political chaos that unfolded after Nazimuddin's dismissal. In the scenario that emerged after Nazimuddin's deposition, Sardar Abdur Rab Nishtar became the central figure of the group of whom Fazlur Rehman was another important member. The president of the constituent assembly, Maulvi Tamizuddin Khan was also one of them. The Nishtar group is what Jennings called that clique, who began to 'whittle away' the governor general's powers and finally, on 22 September 1954, took them away altogether by a bill. The intention was to have a vote of no-confidence in Muhammad Ali Bogra (who was touring the United States at that time), by which he would automatically cease to be prime minister under the new Act. Nishtar would take over as prime minister and would 'advise the replacement of Ghulam Mohammad by Tamizuddin Khan'.⁴⁷ The constituent assembly was scheduled to meet on 27 October to receive the draft constitution put together by the drafting committee. The prime minister was hurriedly called back from the United States and as it transpired that move by the politicians proved to be a bit too ambitious. On 24 October 1954, the governor general dissolved the constituent assembly.⁴⁸ Dawn Karachi's prickly comments on the dissolution are worth noting here.

There have indeed been times – such as that October night in 1954 – when, with a General to the right of him and a General to the left of him, a half-mad Governor General imposed upon a captured Prime Minister the dissolution of the Constituent Assembly and the virtual setting up of a semi-dictatorial Executive.⁴⁹

Mawlvi Tamizuddin Khan at the behest of the Nishtar group challenged the 'validity of the dissolution' of the constituent assembly. As was the norm in any Eastminster, the Pakistani government asked Ivor Jennings for advice. He obliged without demur. Jennings saw no silver lining for the Pakistani government unless 'we challenged the validity of all the Acts of the Constituent Assembly on the ground that they required, and had not received, the Governor-General's assent'.⁵⁰ Despite that, the government of Pakistan lost the case in the

Sind Chief Court and had to go into appeal at the Federal Court, which upheld the governor general's decision. About that decision, which served as precedent for many subsequent decisions by the Pakistani Apex Court, even Jennings said that it 'put the legal system into complete chaos'.⁵¹ Jennings had 'worked out, and drafted, an ordinance under which most of the laws would be validated and a new Constituent Assembly summoned'.⁵² Thus a British constitutional expert came and rescued those whose exit would have done Pakistan a world of good. Politics and politicians were reined in and that pattern continued.

Over the next four years, Pakistan's political system was taken as a hostage by the civil service, which in cahoots with the military controlled and regulated the key decision-making process. In 1955, Sikander Mirza succeeded Ghulam Mohammad as the governor general of Pakistan. That was the period known for the political intrigues and conspiracies and exhilarated the process that led to military rule in 1958. Omar Noman sums up the political events of that period:

Khan Sahib was appointed Chief Minister of the province of West Pakistan. Sections of the Muslim League leadership did not approve of the appointment on the ground that this ex-congress leader had opposed the creation of Pakistan. In response, President Mirza encouraged Khan Sahib to form a new party, the Republican Party. The formation was followed by defections from members of the Muslim League, eager to cross over to a party which had the blessing of the Civil Service. Within a few months, the Republican Party ousted Muslim League at the centre, forming an alliance with Suhrawardy's Awami League. Later, there was a Republican–Muslim League alliance against the Awami League. Thus, a series of short lived government was formed. The legislature continued to operate, but its primary function was that of validating decisions taken outside the Assembly. Political parties, deprived of real power in the legislature, were reduced to the status of bickering factions controlled by the executive.⁵³

Conclusion

Pakistan's quest for democracy in the first decade of its existence remained unfulfilled. The constitution-making also proved to an uphill task for the political leadership, primarily because it wanted to stall the Bengali majority, which proved to be counterproductive. Several reasons are given in the main text for impending democracy to flourish, including the ineptness of the Muslim League leadership, the ascendancy of the bureaucratic-military oligarchy and the policy of centralisation for which Islam and Urdu were deployed as instruments. The enforcement of 'One Unit' epitomised the top-down approach of those at the helm. Not only were the political and economic interests of the regional and ethnic stake holders disregarded, but the attempts were made to submerge their distinctive identities into a single national identity, which was much of an abstraction at that time. The misgiving of Bengalis when Urdu was enunciated

as the national language had profound implications. One Unit caused an intense resentment among Sindhi and Pashtuns against Punjab. The embers of discontentment started smouldering in Baluchistan too.

The decisive moment for the politicians came when they managed to forge the Nishtar group against the dissolution of the constituent assembly but all non-political actors came together and sought counsel from the British constitutional expert from the University of Cambridge, Ivor Jennings and defeated the move. Thus the seed of democracy could not sprout and the struggle of the politicians to break free from the steel frame of bureaucracy. Ever since, the politics of Pakistan has been stage managed by the non-political actors and the distance between the state and the politics is far too tangible a fact.

Notes

- 1 Ian Talbot, *Pakistan: A Modern History* (London: Hurst & Company, 2005), p. 4.
- 2 Ibid.
- 3 Mohammad Waseem, *Politics and the State in Pakistan* (Islamabad: National Institute of Historical and Cultural Research, 2007), p. 51.
- 4 Ibid., p. 52.
- 5 R. S. Rajan, *Real and Imagined Women* (London: Routledge, 1993).
- 6 Inayatullah, *State and Democracy in Pakistan* (Lahore: Vanguard Books, 1997), p. 15.
- 7 Ibid., p. 18.
- 8 Ibid., p. 20.
- 9 Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical perspective* (Lahore: Sang e Meel Publications, 1995), p. 10.
- 10 Ibid., p. 18.
- 11 Ibid., p. 19.
- 12 Asma Barlas, *Democracy, Nationalism and Communalism: The Colonial Legacy in South Asia* (Boulder, CO: Westview Press, 1995).
- 13 Talbot, *Pakistan: A Modern History*, p. 54.
- 14 Alan Campbell Johnson, *Mission with Mountbatten* (London: Robert Hale, 1952), p. 156.
- 15 Editorial, 'Freedom and After', *Dawn*, Delhi, 18 August 1947.
- 16 Khalid bin Sayeed, *Pakistan: The Formative Phase, 1857–1948* (Karachi: Oxford University Press, 2007), p. 227.
- 17 Ibid., p. 235.
- 18 Hamza Alvi, 'Authoritarianism and Legitimation of State Power in Pakistan', in Subrata Kumar Mitra (ed.), *The Post-Colonial State in Asia: Dialects of Politics and Culture* (Lahore: Sang e Meel Publications, 1998), p. 31.
- 19 Ibid., p. 39.
- 20 Ibid., p. 40.
- 21 Omar Noman, *Pakistan: A Political and Economic History since 1947* (New York: Kegan Paul International, 1990), p. 10.
- 22 Miss Fatima Jinnah quoted in Sayeed, *Pakistan: The Formative Phase*, p. 83.
- 23 Ibid.
- 24 Ibid., p. 9.
- 25 Ibid.
- 26 Ibid., p. 10.
- 27 Tahir Amin, *Ethno-National Movements in Pakistan's Domestic and International factors* (Islamabad: Institute of Policy Studies, 1993), p. 73.

- 28 For details see Ali Usman Qasmi, *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (London: Anthem Press, 2014).
- 29 Muhammad Waseem, *Politics and State in Pakistan*, p. 61.
- 30 Jalal, *Democracy and Authoritarianism in South Asia*, pp. 224–225.
- 31 Tahir Kamran, 'Islam, Urdu and Hindu as the Other: Instruments of Cultural Homogeneity in Pakistan', in Bipan Chandra and Suchita Mahajan, (eds), *Composite Culture in a Multicultural Society* (New Delhi: Pearson Longman, 2007), p. 109.
- 32 Talbot, *Pakistan: A Modern History*, p. 26.
- 33 Kamran, 'Islam, Urdu and Hindu as the Other: Instruments of Cultural Homogeneity in Pakistan', p. 109.
- 34 Quaid-i-Azam Muhammad Ali Jinnah, 'Speeches as Governor General of Pakistan (1947–1948)', quoted in Waseem, *Politics and State in Pakistan*, p. 101.
- 35 Karimuddin Ahmed, *The Social History of Pakistan* (Dhaka: East and West Publishing Company, 1967), pp. 111–112, quoted in *ibid.*
- 36 Y. A. Mitha, 'Linguistic Nationalism in Pakistan', unpublished M.Phil Thesis, University of Sussex, 1995, quoted in Talbot, *Pakistan: A Modern History*, p. 26.
- 37 Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership, 2008), p. 32.
- 38 See for further details on Ghulam Mohammad, Safdar Mehmood, *Muslim League Ka Daur-i-Hakumat: 1947–1958* (Lahore: Sheikh Ghulam Ali, 1973).
- 39 Noman, *Pakistan: A Political and Economic History*, p. 10.
- 40 Alvi, 'Authoritarianism and Legitimation of State Power in Pakistan', p. 42.
- 41 H. Kumarasingham (ed.), *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press, 2015), p. 248.
- 42 Alvi, 'Authoritarianism and Legitimation of State Power in Pakistan', p. 42.
- 43 Sikander Mirza is sometimes spelt as Iskander Mirza but I opt to spell his name as Sikander. For his biographical sketch see Ayesha Jalal (ed.), *The Oxford Companion to Pakistani History* (Karachi: Oxford University Press, 2012), p. 338.
- 44 Muhammad Ahmed, *My Chief* (Karachi: Longman Green, 1960) quoted in Hamza Alvi, 'Authoritarianism and Legitimation of State Power in Pakistan', in Subrata Kumar Mitra (ed.), *The Post-Colonial State in Asia*, p. 34.
- 45 Khalid B. Sayeed, *Politics in Pakistan: The Nature and Direction of Change* (New York: Praeger, 1980), p. 34.
- 46 Noman, *Pakistan: A Political and Economic History*, pp. 11–12.
- 47 Kumarasingham (ed.), *Constitution Maker*, p. 138.
- 48 *Ibid.*
- 49 'Dawn', Karachi, 11 August 1957, quoted in Sayeed, *Politics in Pakistan*, p. 35.
- 50 Kumarasingham (ed.), *Constitution Maker*, pp. 138–139.
- 51 *Ibid.*, p. 139.
- 52 *Ibid.*
- 53 Noman, *Pakistan: A Political and Economic History*, p. 12.

6 ‘Specialist in omniscience’?

Nationalism, constitutionalism, and Sir Ivor Jennings’ engagement with Ceylon

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1 Introduction

When Sir Ivor Jennings died in December 1965, he had accomplished within a relatively short life of 62 years a quantum of work that would take many others several lifetimes to achieve. In his primary occupation as a legal academic, he achieved an ‘exalted place’ in the ‘hall of fame reserved for writers on law and the British constitution’ by virtue not only of his sheer prolificacy, but also the recognised originality of his work.² Sir Ivor’s vast contribution to his field was not restricted to the academic study of British and Commonwealth constitutional law, in which he was an early practitioner of the interdisciplinary method, for he was also a pioneer in the practical specialism of comparative constitution-making.³ In addition to Ceylon,⁴ he served as a constitutional advisor in Pakistan, Malaya, Singapore, Malta, the Maldives, Ghana, Guyana, Eritrea and Nepal: a bewildering number and diversity of countries in terms of their constitutional challenges.⁵ By the time Jennings arrived in Colombo in March 1941 to succeed Robert Marrs as the principal of the University College of Ceylon, he had already established an exceptional academic reputation at the age of 38. At ‘the peak of his powers’⁶ at the LSE between 1929 and 1940, he had unleashed a ‘flood of authorship’,⁷ including two editions of *The Law and the Constitution* that would go on to become a multiple edition classic on British constitutional law.⁸

This prodigious work ethic was abundantly in evidence during Jennings’ time in Ceylon between 1941 and 1955. While continuing to write and publish within the severe constraints of a colonial outpost in wartime, his main administrative task on appointment as principal of the University College was to undertake its conversion into Ceylon’s first fully-fledged university. Jennings not only established the University of Ceylon and became its first vice-chancellor, but also oversaw its relocation from Colombo to Peradeniya, near Kandy, the pre-colonial capital of the last Sinhala kingdom in the central hills of the island.⁹ This entailed the physical construction of a residential campus at Peradeniya.¹⁰ Designed, built and landscaped with great sensitivity to local architectural traditions and the natural beauty of the riverine, rolling, Kandyan countryside, the new campus provided both an outstanding environment and an auspicious

beginning for the fledgling university.¹¹ It has aptly been described as the 'Cambridge by the Mahaweli [river]'.¹²

In the context of Ceylon's war effort, Jennings also served as the deputy civil defence commissioner¹³ and chaired a commission on social services.¹⁴ His work in the Civil Defence Department brought him into contact with its head, Oliver Goonetilleke (later governor-general), and through him with the leader of the State Council, D. S. Senanayake, who would become the first prime minister of independent Ceylon. As Sir Charles Jeffries has remarked,

The control room of the Civil Defence Department was, in fact, the focal point of the independence movement, and it was a great help to Senanayake and Goonetilleke that Sir Ivor Jennings was there to give invaluable advice on constitutional matters.¹⁵

It was through these personal associations that Jennings came to play such a pivotal role in the constitutional reform process. These three men got along so well that they were described as forming 'the perfect partnership'¹⁶ and 'a triumvirate'¹⁷ (or less charitably, the 'Unholy Trinity'¹⁸) that drove Ceylon's constitutional process towards eventual independence in 1948. In the preface to the first edition of his *The Constitution of Ceylon*, published in 1948 and 'designed to indicate how, in the opinion of its framers, the [independence] Constitution was expected to work',¹⁹ Jennings' generous and self-effacing closing remarks are indicative of the warm regard in which he held his two principal Ceylonese colleagues. After outlining the negotiations process between 1943 and 1947, he wrote,

I am indebted to the Prime Minister not only for the permission to state the above facts but also for the patience with which he bore the lectures of a constitutional lawyer for nearly five years. Some day I hope to explain in print how much Ceylon owes to Mr Senanayake and to Sir Oliver Goonetilleke. But for them Ceylon would still be a colony.²⁰

Jennings' close involvement and common cause with Senanayake and Goonetilleke drew the displeasure of both British civil servants as well the Ceylonese Left opposed to Senanayake's preference for a negotiated constitutional transfer of power rather than outright republican independence. For the former, he had gone native and got 'mixed up in politics';²¹ for the latter, he was the *éminence grise* behind the conservative political elite that desired self-government in the form of dominion status within the British Commonwealth, which they regarded as a neo-imperialist sham.²² While the British government came eventually to appreciate Senanayake's moderate brand of nationalism (and by implication, we must assume, Jennings' role in supporting it) as a new model of Commonwealth co-operation in the post-war decolonising world, the Left proved less forgiving and would play a leading role in dismantling the independence constitutional settlement in 1970–1972.²³ Their loathing of the triumvirate, and the multifarious roles that Jennings was called upon to play in public life as

a result of his membership in it, was exemplified in the rebarbative letter to the *Ceylon Daily News* written by Dr N. M. Perera in January 1955 – as Jennings was leaving Ceylon for the last time – in which he was excoriated as ‘an over advertised mediocrity’ masquerading as ‘a specialist in omniscience’.²⁴

The Trotskyite Perera, who was independent Ceylon’s first leader of the opposition, was doubtless too far to the Left for Jennings’ tastes, but he was also a highly committed parliamentarist, an LSE doctoral graduate under Harold Laski’s tutelage and, like Jennings, an early Fabian. Ironically, therefore, it would seem they had more in common than Jennings did with his conservative and decidedly unintellectual fellows in the triumvirate. Jennings shared with Goonetilleke a working class background and self-made aspect, but not with Senanayake, who belonged to the Ceylonese elite that Patrick Gordon Walker memorably described as ‘extremely rich landowners with local power and influence comparable to a Whig landlord’s in George III’s time’.²⁵

Perhaps from the cooler perspective of hindsight, a more constructive assessment than Perera’s disparaging valediction is possible, even if some allowance must surely be made for Jennings’ aloof, cerebral, and at times querulous, demeanour, which led on occasion to the impolitic treatment of nationalist sentiments especially when held by those he regarded as rabble-rousers both communalist²⁶ and communist,²⁷ complacent students,²⁸ or inconsequential gadflies.²⁹ In his view, national independence, like any other constitutional problem, was a matter to be resolved by dispassionate and informed engagement, not by emoting irresponsibly about the multitudinous evils of imperialism.³⁰ While on the main issue of Ceylonese independence an indisputable and sincere progressive from a British point of view,³¹ he was manifestly impatient with the more impassioned aspects of the anti-colonial atmosphere that made the life of even a much more clubbable (and cricket-loving) man like Sir Alan Rose difficult at the time.³²

This chapter focuses on Jennings’ work as the constitutional advisor to the Ceylonese ministers and his decisive influence on both the form and the deeper conceptual assumptions of the scheme that eventually became, in all significant respects, the Independence constitution of Ceylon. This instrument has become known to posterity as the ‘Soulbury Constitution’, after Lord Soulbury, the chairman of the constitutional commission that recommended the scheme for adoption by the British government.

But perhaps the more accurate sobriquet for it might have been the ‘Jennings Constitution’, for his distinctive ideas on the full gamut of constitutional principles, doctrines and institutions associated with the Westminster model are everywhere reflected in the independence constitution. In this chapter I will deal with two specific aspects that in combination gave this constitution its distinctive character: the foundational conception of self-governing nationhood that underpinned its institutional edifice, and its Section 29, a ‘manner and form’ provision for the exercise of legislative power, which sought to protect minority rights in a communally plural society.³³

In the discussion of these two themes I also hope to show, as between his LSE and Ceylon phases, the continuities and the differences in Jennings’

application of a general constitutional model – the Westminster system – to different polities and cultural contexts: that of Westminster proper and that of Ceylon understood as an ‘Eastminster’.³⁴ This constitutes the third theme of the chapter, which seeks to add his contribution to constitutionalism in Ceylon to the broader exercise of locating his work within a discrete ‘style’ of British public law, on which there has recently been resurgent interest. Continuities between these chronologically successive phases of his career are most apparent in institutions and doctrines. Thus, for example, it was entirely in keeping with the thinking of his LSE phase that Jennings should be sceptical about the utility of a constitutional bill of rights in Ceylon, and even more notably, I argue that Section 29 of the independence constitution was a practical application of his distinctive doctrinal position on parliamentary sovereignty and ‘manner and form’ entrenchment.

The application to Ceylon of the methodological innovations in regard to the operation and study of the British constitution that he had developed in conjunction with Harold Laski and William Robson had less determinate results. It is a mode of thinking within the Westminster constitutional model that led Jennings to be acutely methodologically attentive to the political significance of cultural communalism in Ceylon. Yet this did not translate in his case to any constitutional radicalism in the design of institutions, particularly with regard to stronger minority protections, and I suggest that one of the explanations for this ambivalence between analytical method and institutional design in Ceylon lies in his association with the LSE school of constitutional functionalism and public law modernism.

2 Jennings' approach to self-government in Ceylon: normativist or functionalist constitutionalism?

In his theoretical elucidation of the conceptual structures that inform accounts of public law thought in the British constitutional tradition, Martin Loughlin has discerned two main ‘styles’ of approach, which he terms the ‘normativist’ and ‘functionalist’ styles.³⁵ Classifying public law scholars in terms of their ‘style’ has an important explanatory purpose by revealing ‘a spirit, culture or set of values that may be manifest in particular writings even though it is not made explicit’.³⁶ The distinction between the normativist and functionalist styles is in turn important because ‘between the ideal-typical representatives of each of these contrasting styles there is an almost complete lack of consensus over the fundamental issues of public law’.³⁷ Thus while an individual scholar’s work could be classified as belonging predominantly to one or other style, in reality that work would likely not fit neatly in all respects with the classification. This could be due to internal inconsistencies, or due to disagreements or differences of emphasis with other scholars of the same style, or indeed, because the work overlaps between the seemingly oppositional styles. The overlap problem, I suggest below, occurs in relation to Jennings’ work in Ceylon rather more obviously than in his work on British constitutional law, and further, that it occurs

because he takes the methodology of his predominantly functionalist style seriously.

In outline, ‘the normativist style in public law is rooted in a belief in the ideal of the separation of powers and in the need to subordinate the government to law’.³⁸ By contrast, ‘the functionalist style ... views law as a part of the apparatus of government. Its focus is upon law’s regulatory and facilitative functions’. Functionalism therefore ‘reflects an ideal of progressive evolutionary change’.³⁹

Building on these conceptual categories, Loughlin develops two variants of political and legal normativism – liberal and conservative – the latter informing the ‘dominant tradition of conservative normativism in British public law’,⁴⁰ which would become entrenched by the early twentieth century, led by Dicey but certainly not confined to him.⁴¹ The challenge to this orthodoxy came from the new functionalist style of public law that was developed by Laski, Robson and Jennings at LSE in the inter-war years.⁴² As Loughlin notes, ‘their basic objective was to challenge Dicey’s theory of the constitution. They sought both to contest his method and to expose the political values on which his theory rested’.⁴³ Underlying the functionalist challenge was a Leftist ideological disposition; pronounced reliance on Marxist theory in Laski’s case, a much weaker form of collectivism in Jennings.⁴⁴

In *The Law and the Constitution* – ‘a direct challenge to Dicey’s nostrums’⁴⁵ – Jennings argued that ‘Dicey’s ideas on sovereignty were overly conceptualistic and that his concept of the rule of law was based on an individualistic, *laissez-faire* philosophy’.⁴⁶ By contrast, Jennings’ focus was on ‘an examination of the functions of government and, in an approach reflecting the influence of sociological positivism, commenced with an outline of the growing interdependence of society founded in the increasing division of labour’.⁴⁷ As Loughlin further notes, for Jennings, an understanding of a constitution’s working ‘involves an examination of the social and political forces which make for changes in the ideas and habits of the population’.⁴⁸ Indeed, this approach to constitutions had deeper theoretical roots in Jennings’ thinking. In a discussion of institutional theory in public law, he observed that, ‘Ideas are the product of circumstance. They are modified and developed by changing economic and political conditions. The relation between them as of cause and consequence is obscure’.⁴⁹

In recent work, Loughlin has extended this exposition of the functionalist style in public law to situate it within the broader movement of modernism as ‘a historical phenomenon’.⁵⁰ This recasting of functionalism as a deliberate project at modernising constitutional law, and bringing it in line with other modernist movements in politics, architecture and the arts, has important implications for us and I will return to this in the discussion of nationalism below. More immediately, Loughlin’s analysis furnishes us with the conceptual tools with which to formulate a view about the methodological and substantive predispositions that Jennings brought with him to Ceylon.

The British modernists were engaged in an ideological project of securing a ‘new social order’⁵¹ that sought an explicit break with the prevailing orthodoxy

of 'analytical legal positivism underpinned by values of classical liberalism'. In Loughlin's words,

Modernists were opposed to the tenets of classical liberalism: they did not consider liberty and community to be opposing concepts and, far from viewing the extension of government into social life as a threat, they regarded it as an entirely progressive phenomenon.⁵²

For a functionalist like Jennings, working in the colonial context of Ceylon would have presented promising opportunities. On the one hand, he would have found the colonial state a far more interventionist entity than what conservative normativists in Britain wanted the metropolitan state to be; the colonial state was in fact, to use a Marxist sociological term, an 'over-developed' state.⁵³ The Donoughmore Constitution was itself a radical example of colonial modernisation, recommended by commissioners appointed by Lord Passfield (Sidney Webb) as the secretary of state for the colonies in Ramsay MacDonald's Labour government.⁵⁴ Webb and MacDonald were the progenitors of 'the blueprint for a new type of state'⁵⁵ that served as the inspiration for the LSE public law modernists. Ceylon's legal system was also more statute-based than in Britain – for example the entire criminal law and procedure, based on English law principles, had been codified in 1883⁵⁶ – and legislation for the functionalist was the transformative instrument of social change, unlike the hidebound common law. And there would not have been much difficulty in collaborating with Senanayake and Goonetilleke, who were notionally of the centre-right, because they were conservatives in an era before conservatism became associated with the small state. In the light of all this, Radhika Coomaraswamy's criticism of the '*laissez-faire* structure' of the independence constitution is possibly an overzealous characterisation.⁵⁷ On the other hand, the modernist in Jennings would have despaired of the Asian traditionalism as manifested in cultural communalism, and he wanted, like the Donoughmore commissioners, to encourage political nation-building, but unlike them, through a more conventional framework of parliamentary government.

In constitutional drafting, the functionalist influence is most visible in Jennings' disapproval of the idea of a constitutionally entrenched and justiciable bill of rights. While such a liberal normativist device would also be inconsistent with Diceyan normativists' commitment to parliamentary sovereignty, both schools of normativism were in general reliant on the 'common law method',⁵⁸ which entailed a prominent role for the courts in the legal and political system. Functionalists were opposed to normativism and the 'common law method' because they saw in this tradition's commitments to the property-owning values of classical liberalism a way of retarding social progress and 'active judicial review came to be viewed as a technique for preserving the old order'.⁵⁹ Law for the modernists was not 'a repository of ancient mysteries and timeless values'⁶⁰ but a functional instrument, or 'the technology through which the modern state was to be erected'.⁶¹ In this practical task, the common law method and judicial

intervention were a hindrance. As Jennings observed in *Local Government in the Modern Constitution*, 'It is a remarkable fact that so often a decision of a court acts as a spanner in the middle of delicate machinery'.⁶²

In *The Constitution of Ceylon*, he deals with the issue tersely. He observes that the insertion of 'fundamental rights' into a constitution had become 'common practice' since the American bill of rights and cites the Indian constitution as his example. He does not explain in detail why a bill of rights was not considered in Ceylon, or even if it was discussed, except to say that, 'The difficulty of all such clauses is that they have to use general language whose meaning can be ascertained only by litigation. Challenging the validity of legislation has become a major industry in the United States and in India'.⁶³ This is a markedly more practical rationale than the ideological grounds on which he would presumably have objected to a judicially supervised bill of rights in Britain. But this is neither a helpful explanation nor a particularly coherent position given that the independence constitution provided for comprehensive judicial review, and indeed for the mechanism in Section 29, which itself had to be framed in general language, to have any use, it needed to be judicially enforceable against inconsistent ordinary legislation. Perhaps he may have calculated that the narrower scope of Section 29, in contrast to a fully formed bill of rights, would curb the litigation industry he feared.

Jennings says more about his objections to the use of bills of rights to prevent racial, religious and caste discrimination in *The Approach to Self-Government*: 'one cannot change deeply imbedded social ideas by constitutional guarantees. It has been said that one cannot make people good by Act of Parliament. It should be added that one cannot overthrow a social system by drafting a Constitution'.⁶⁴ Here is a clear illustration of the tension between the methodology and the substantive ideas of functionalist constitutionalism in application to a communally plural Asian society. Social and political modernity was the ultimate good, but it could not be achieved without regard to the ethnographic reality. It could perhaps be argued this was no tension at all, given that the British functionalists, while prepared to use legislation as an instrument of social change and modernisation, were also pragmatists, empiricists and incrementalists who knew the limits of legislative instrumentalism.⁶⁵ But it is important to distinguish between ordinary legislation and constitutionally entrenched rights, which is the key to understanding Jennings' antipathy to the latter. Legislation is a flexible policy instrument of regularly elected (and similarly disposable) governments. By contrast, constitutional entrenchment of putatively immutable values in the form of justiciable rights imposes a 'temporal imperialism'⁶⁶ on the legislative freedom of government, especially that of a developing society.

While the rejection of a bill of rights would not have been a difficult choice in Ceylon – Senanayake conceivably was not an enthusiast and the Tamils were more concerned with 'balanced representation'⁶⁷ – there was of course no choice about whether to have a written constitution. It followed logically from that, although not necessarily, that judicial review of legislation should be available, if the written constitution was to be treated as supreme law. In addition to this

theoretical logic, there was moreover a crucial practical reason of law from which it followed that legislative Acts should be judicially reviewable. As Jennings pointed out in a note on the Privy Council's decision in *Ranasinghe*, the Colonial Laws Validity Act 1865 applied to Ceylon at the time the independence constitution was being drafted (1943–1947), and as such, there was no possibility that it could provide for a legislature that was 'sovereign' in the same sense as the imperial Parliament. I will discuss this case in more detail below, but Jennings was blunt when he stated that if the Privy Council had not held 'that the Ceylon Parliament was sovereign, it would be unnecessary to say that none of the draftsmen had any such intention'.⁶⁸

Given this legal reality, Jennings abandoned a strict adherence to functionalist beliefs, and his acceptance of this defining principle of liberal normativism is blandly set out in *The Constitution of Ceylon*:

[I]t is customary, in democratic Constitutions, to impose limitations on legislative power. That power is in fact, though not in theory, vested in the majorities in the legislature for the time being, and it is considered dangerous not to limit it.⁶⁹

Notwithstanding this concession to practical realities, we find his functionalism reasserting itself in not extending the scope of judicial review by way of a justiciable bill of rights. Nevertheless, the availability of comprehensive judicial review entailed the enshrinement of an implicit but robust conception of the separation of powers in the independence constitution that is quite incongruous with the functionalist style. This led to such landmark cases as *Liyana v. R* (1967),⁷⁰ a decision described by S. A. de Smith as 'founded entirely on constitutional implications drawn from a version of the separation of powers doctrine', which was 'possibly the most remarkable exercise in judicial activism ever performed by the Privy Council'.⁷¹

So to sum up: in coming to the conclusion that a written constitution and constitutional minority protections supervised by the courts were inescapable elements of constitution-making in Ceylon, in addition to the legal obligations of the Colonial Laws Validity Act, Jennings would have been helped by the methodological approach of the functionalist style, namely, sociological observation as the foundation of constitutional theorising and institutional design. The principal social consideration in Ceylon was the issue of communal pluralism. While committed normatively to the overarching liberal paradigm of modernist nation-building in addressing this problem, it is this functionalist trait that allowed him to methodologically incorporate the issue of communalism – or in more contemporary language, ethno-cultural identity – into constitution-making. If Jennings was a liberal normativist, arguably his approach would have depended more on philosophical first principles that a constitution conceived in abstract terms ought to reflect, rather than designing institutions by reference to social realities.⁷² But this methodological commitment to empirical investigation led logically to a substantive requirement of constitutionally entrenched minority

protections that could only be secured by the provision of constitutional review, which in turn meant that he had to concede a key tenet of liberal normativism. He explained this compromise in the following way:

a Constitution ought to be acceptable to the great mass of the people. A proposal should never be rejected on purely theoretical grounds. If there is a real demand for constitutional guarantees they ought to be inserted, and the task of the draftsman should be to make them as flexible as possible.⁷³

From his work in Ceylon then, we can see that when the circumstances demanded it, Jennings could be flexible about ideological and theoretical pre-conceptions, but only up to a point. It is a counterfactual question whether a positive bill of rights (including group differentiated rights) akin to the Indian constitution might have better served the ends of minority protection, and democratic nation-building more generally, than the negative limitation of legislative power in Section 29.⁷⁴ Instead of assuming these values to be inherent to the political culture of a Westminster-style system, or indeed, relying on the moderate statesmanship of a dominant figure like Senanayake, such a device would have made both explicit and justiciable the core liberties and the concomitant limitations on the institutionalised power of the democratic majority, and provided the positive basis for modernist nation-building in the way the constitution has served its purpose in post-colonial India.⁷⁵ Or perhaps it may not have made any difference at all, in view of the deeper political forces of historiographically impelled cultural renaissance that took post-colonial Ceylon in a fundamentally ethnicised majoritarian direction after 1956.⁷⁶ But certainly the consideration of his work in Ceylon tells us much that is useful about the intellectual tensions and ideological compromises that Jennings would have struggled with, and the impact of those tensions in the constitutional scheme he drafted for Ceylon.

3 Post-colonial nation-building and the independence constitution

The central conceptual issue for constitution-making in countries transitioning to post-colonial self-government was the issue of nationhood: the sense of political and cultural community that could provide legitimacy to the institutional framework of the new state. Constitution-making in these circumstances occurs in a moment of rupture between the colonial order and the new independent order, and in this context, the constitution plays a dualistic role. It is *descriptive* of the polity that it seeks to govern at the same time as it is *constitutive* of the polity. On the one hand, the constitution must reflect the social conditions of the polity for which it provides the fundamental rules of politics. It is important in a democratic polity that citizens enjoy affinity with and ownership of the constitution, and it is especially important in a communally plural polity that minority communities feel secure and represented in the constitutional order. On the other

hand, the constitution in the decolonising moment also plays a constitutive role. The sense of nationhood or political community at this moment is usually underdeveloped and often contested. Beyond providing for the basic institutions of government, therefore, the post-colonial constitution is one of the primary instruments through which the nascent and contested national identity of the new state is symbolically constituted. It does so by a variety of means including by describing the nation, recognising its constituent elements, invoking historical precedents and cultural characteristics, and by setting out the normative values upon which the unity of the nation is anchored.

In both descriptive and constitutive respects, the text of the independence constitution of Ceylon was completely silent; partly the result of its elitist creation,⁷⁷ and partly the result of the dispositions of its creators in the triumvirate. For them, securing independence through the new constitution was a major historical step no doubt, but as a self-governing dominion, it was nonetheless only another step in a continuing process of constitutional development in which independent Ceylon would effortlessly embody all the civic virtues characteristic of the Commonwealth tradition. Within this governing paradigm of Ceylonese nationhood, however, certain concessions could be made to allay minority anxieties, of which the major device was Section 29.⁷⁸ As we now know, the minority protection mechanisms were not sufficient especially in the case of the Ceylon Tamils to ensure their subscription to the Ceylonese nation.⁷⁹ But much more dramatically, this conception of nationhood failed entirely to anticipate the rise of Sinhala-Buddhist nationalism laying claims to the ownership of the entire nation-state, even though the potential for communalist majoritarianism was well known in the experience of electoral democracy under the Donoughmore Constitution.⁸⁰

All this has been abundantly documented elsewhere and need not be recapitulated here.⁸¹ My focus is on Jennings' conceptual approach to the issues of nationhood and communalism in drafting the scheme of the independence constitution. Even though the text of the constitution was silent, it is clear that these were issues that exercised his mind very considerably, and he reflected extensively on them in a series of lectures and a quartet of monographs between 1948 and 1961.⁸² There is no space here to closely analyse the development of his thinking in these writings, but a distillation of his ideas into an identifiable theoretical model is possible because the recurrent themes in these works are highly consistent. In short, on the nation and nationalism, Jennings was what is today known in nationalism theory as a 'classical modernist'.⁸³ While his functionalist method helped him to incorporate the issue of communalism into constitution-making, it is clear that in his view this was a concession to the context, in the nature of an exception, to the heuristic model of modern, civic, nationhood that decolonising constitution-making must not only reflect but also actively promote. In this he was a man of his time, and consistent with his earlier work as a leading exponent of modernism in British public law.

The classical modernist post-colonial nation-building model saw the nation-state as 'intrinsic to the nature of the modern world and to the revolution of

modernity'.⁸⁴ Proponents of the model sought to build territorial, civic, nations corresponding to states through a wide array of techniques, including communications, mass education, political mobilisation and constitution-making, in much the same way, in the words of Anthony D. Smith, as 'one might speak of building machines or edifices through the application of design and technical devices to matter'.⁸⁵ The idea was to institutionalise the Western model of nation-state in the Asian and African ex-colonies as they began their independent existence.

Smith's influential conceptualisation of modernist nation-building sets out five key contentions made by proponents of the model, of which the first two are especially important to this discussion. The first proposition was that 'nations [are] essentially territorial political communities. They [are] sovereign, limited and cohesive communities of legally equal citizens, and they were conjoined with modern states to form ... unitary "nation-states"'.⁸⁶ Second,

nations [constitute] the primary political bond and the chief loyalty of their members. Other ties – of gender, region, family, class and religion – [have] to be subordinated to the overriding allegiance of the citizen to [the] nation-state, and this [is] desirable because it [gives] form and substance to the ideals of democratic civic participation.⁸⁷

It may be that in the world of social science scholarship the model 'achieved its canonical formulation in the 1960s'⁸⁸ in the context of the proliferating processes of decolonisation in Asia and Africa. But in Ceylon, it was being applied from the late colonial period, and which by the 1940s, was considered the constitutional 'pioneer of the non-European dependencies' and the 'senior colony of the new empire'.⁸⁹ Indeed, the imprints of the model's early intellectual forerunners are discernible throughout Ceylon's constitutional evolution during the British colonial period. In 1802, it became the 'prototype of the "Crown colony"'.⁹⁰ The Colebrooke-Cameron reforms of 1833, which established an institutional framework of government that can be described as introducing the modern state to Ceylon, were an instance of 'Benthamite reforms'.⁹¹ In the mid-nineteenth century debate between Mill and Acton on the concept of nationality,⁹² it was Mill's view that prevailed insofar as imperial policy and ideology with regard to Ceylon were concerned.⁹³ Both the Donoughmore and Soulbury Commissions were explicit in their espousal of modernist nation-building (and attendant critiques of communalism), and these recommendations of the late colonial period were natural progressions on a long pedigree of political and constitutional development. Equally if not more importantly, influential sections of the Ceylonese political elite in the first half of the twentieth century were also, at least for the purposes of official transactions with the British government, committed to this model of an inclusive, civic nation.⁹⁴

For Jennings, therefore, this was a congenial environment in which his task of constitutional drafting was merely to push further along an established path. But the problem of communalism remained and had to be addressed, so that the desirable process of modernity would not be interrupted: 'the problem of getting a

Constitution in a “plural” society, where there are a great many competing loyalties ... is not simple’.⁹⁵ This was in contrast to an established nation-state like the United Kingdom (and here Jennings was typical of his generation in conflating the British and English national identities⁹⁶), where ‘the people’ are ‘homogeneous in several ways, which are seldom found in a colony’. This political, cultural, economic and linguistic homogeneity enabled competitive party democracy and the formation of ‘public opinion’ on national lines, as opposed to electoral competition in immature democracies where ‘the success of a candidate depends primarily on his personality and his influence in the locality’. However, if ‘self-government in the colonies had to await the development of a population as homogeneous and as politically mature as that of the United Kingdom it would never happen’.⁹⁷ But in working in these imperfect conditions, in the worldview of modernist nation-building, the way to dealing with communal pluralism emphatically was not to perpetuate or indeed augment the principle of communal representation as demanded by Tamil leaders like G. G. Ponnambalam.⁹⁸

Communal representation ... encourages communalism; and what a self-governing country must develop is not communalism but common loyalty. Even so, the first step towards common loyalty is inter-communal co-operation; and to develop that co-operation it is necessary to recognize communal distinctions and to enable each community to play its part in national development. At this stage of affairs it is impossible to hope for integration, but partnership is not impossible.⁹⁹

In these views of Jennings we can see clearly reflected practically every precept of classical modernist nation-building as delineated by Smith, underlying which were not only a definite normative preference for civic homogeneity over communal pluralism, but also a teleological commitment, gradually but deliberately, to devitalise the latter in favour of the former. As the general conception of nation-statehood that underpinned the independence constitution, it saw the emplacement of minority protections as a safeguard to ensure that communalism did not derail its continuous development, rather than the protection of minority rights as a normative good per se.¹⁰⁰ In this regard, the principal safeguard, Section 29(2), was a strategy of effectively ‘privatising’ race and religion: a typically modernist method grounded on an overarching vision of national integration rather than communal accommodation.¹⁰¹ Put another way, it was a conception of nationhood that drew upon the Millian emphasis on the whole, rather than the Actonian focus on the constituent parts.¹⁰²

This relentless focus on the inherent virtues of modernity and modernism foreclosed a more contextualised and historically attentive consideration of collective identity in Ceylon; it may even have induced an attitude of contemptuous dismissal of pre-European history and culture as primordial relics. The fateful consequences of this underestimation of the power of the past and the reanimated resonance of language and religion as determinants of post-colonial collective identity would become evident within a decade of independence. As K. M. de

Silva observed, notwithstanding its moderate and inclusive character, this conception of the Ceylonese nation was fatally flawed: 'It was basically elitist in conception and it had little popular support extending beyond the political establishment'.¹⁰³ Moreover, 'It required D. S. Senanayake's enormous personal prestige and consummate statecraft to make it viable'.¹⁰⁴ After his early death in 1952, Senanayake's successors possessed neither his reputation nor his political skill to contain the explosive forces of ethno-religious nationalism that would overwhelm the modernist project in Ceylon.

Yet it would merely be the wisdom of hindsight to condemn Jennings' promotion of modernist nation-building on the cusp of independence. This was after all the universally accepted model of progressive nationalism and state organisation until the 1980s,¹⁰⁵ and for many liberals and moderates in Sri Lanka, it still serves as the aspirational model of 'Sri Lankan' identity.¹⁰⁶ But the discussion does warn us of the importance of appreciating the full implications of the circumstances of its failure in Ceylon under the independence constitution, and against reflexive recourse to this model in contemporary debates about the nation and nationalism in Sri Lanka.¹⁰⁷

4 Theory to practice: 'manner and form' and the independence constitution

Jennings' most inventive contribution to British constitutional law, one that has received renewed interest in the light of recent cases such as *Jackson* and *Thoburn*, was the argument that the sovereignty of parliament was not affected by procedural limitations placed on the exercise of legislative power.¹⁰⁸ By the time Jennings propounded this argument in the first edition of *The Law and the Constitution* in 1933, Dicey's exposition of the doctrine of parliamentary sovereignty had become the dominant orthodoxy of the British constitution. As he remarked in *The Road to Peradeniya*, 'I was a young man of 30 and I was attacking, not always very politely, ideas which had been not merely held but cherished for 50 years'.¹⁰⁹ Dicey's formulation of the doctrine was uncomplicated, which is part of the reason for its enduring appeal, including in Ceylon/Sri Lanka. In this view, parliament has 'the right to make or unmake any law whatever' and further, no person or body has 'a right to override or set aside the legislation of Parliament'.¹¹⁰ Neil MacCormick sets out the full implications of the doctrine in more complete form:

Parliament has an unrestricted and general power to enact valid law, subject only to two disabilities, namely, a disability to enact norms disabling Parliament on any future occasion from enjoying the same unrestricted and general power, and a disability to enact laws that derogate from the former disability.¹¹¹

In the context of the unwritten British constitution, Jennings did not deny that parliament could legislate on any substantive matter it chose to. His challenge related

to the second limb of Dicey's formulation, in which he sought to establish the proposition that parliament could, without impairing the substantive legal competence of its successors, lay down special procedures with regard to the *manner and form* in which any particular piece or class of legislation should in future be amended or repealed.¹¹² The logic of this he set out in the following terms:

'Legal sovereignty' [i.e., parliamentary sovereignty, in Dicey's terms¹¹³] is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the [Queen-in-Parliament], will be recognised by the courts, *including a rule which alters this law itself*. If this is so, the 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.¹¹⁴

Contrary to Dicey, therefore, for Jennings, 'legal sovereignty is not sovereignty at all. It is not supreme power'.¹¹⁵ As he explained,

It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form.¹¹⁶

It is on this terrain of disagreement that most of the theoretical battles have been fought within British constitutional law, and as I will show, he transparently put these principles into practice in drafting the scheme of legislative power in Ceylon. But there was another element in Jennings' argument (largely ignored in the British debates) that is important in considering the Ceylon case, and that concerned his observations on Dicey's distinction between 'sovereign' and 'non-sovereign' legislatures. Again it is important for us that he did not question the validity of Dicey's distinction itself, because he clearly applied the distinction in describing the Ceylonese legislature under the independence constitution as non-sovereign, as noted above. Rather, his criticism was that Dicey categorised under the non-sovereign rubric a widely different set of law-making bodies (such as dominion legislatures as well as town councils), which clearly cannot be, and the law did not, treat the same. As he noted,

in modern constitutional law it is frequently said that a legislature is 'sovereign within its powers'. This is, of course, pure nonsense if sovereignty is supreme power, for there are no 'powers' of a sovereign body; there is only the unlimited power which sovereignty implies. But if sovereignty is merely a legal phrase for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws on those subjects, but not any other subjects.¹¹⁷

Commonwealth legislatures like Ceylon, whose powers were derived from a written constitution, enjoy legislative powers of this nature, whereas local authorities or other subordinate law-making bodies clearly do not.¹¹⁸ Both are judicially reviewable, but unlike secondary law-making bodies whose powers are narrowly defined and subject to more stringent principles of judicial review, legislatures under written constitutions enjoy a wide ambit of legislative power.¹¹⁹ Thus, ‘The only function of the courts is to determine whether legislation is within the limits of these powers, and these powers are wide general powers, which may be called powers of government’.¹²⁰ These then were the instruments in Jennings’ theoretical toolbox when he commenced work on the Ministers’ Draft in June 1943. As they applied to Ceylon, they included the following propositions. Parliamentary ‘sovereignty’ was a misnomer in the sense that the legislature did not possess illimitable and indivisible power. In truth what was meant was that the courts would respect and give effect to the lawful commands of the legislature expressed in the legally accepted form.

It followed from this that the equation of the ‘sovereignty’ of the legislature with the sovereignty of the state of which it was a branch was a fundamental conceptual error. The absence of a constitutionally uncontrolled legislature did not affect the independence of the state, and this in turn meant that legislative power, although limited, was ample for the effective conduct of government. Legislative power could be limited in general terms, i.e. within the terms of the power-conferring written constitution, and ordinary legislation repugnant to those terms would be void. And it could also be limited in specific terms, for example, where some measures could not be enacted by process of ordinary legislation, and would require some higher form of legislation that would require greater agreement around the measure. According to the terms of the constitution, these may have to be in the form of amendments to the constitution itself. It followed from the constitutionally limited and procedurally regulated nature of legislative power that its exercise should be policed by the courts. In doing so, courts would seek to uphold substantive and procedural constitutionality within the law for the time being in place, although it was ultimately open to the democratic legislature to change these rules following constitutional process.

These principles clearly guided the scheme of legislative power that Jennings put into the Ministers’ Draft.¹²¹ This scheme provided the law-making power of the parliament for the peace, order and good government of Ceylon, subject to two restrictions.¹²² The first denied parliament the power to enact *ordinary legislation* that would: prohibit or restrict the free exercise of any religion; or subject any community or religion to any disabilities or restrictions that were not imposed on any other community of religion; or confer on any community or religion any privileges or advantages that were not conferred on any other community or religion; or alter the constitution of any religious body without the approval of the relevant governing body.¹²³ Legislative power also included the power of constitutional amendment, provided that the amending legislation obtained a two-thirds majority in the House of Representatives and could not be

presented for assent to the governor-general unless this requirement had been met. This provision excluded judicial review of the legislative process because that would involve courts in parliamentary procedure.¹²⁴ But the scheme did also provide that any constitutional amendment must be by express words, so that any future legislation could not be held to have impliedly amended the constitution.¹²⁵ By this requirement, the courts could supervise the constitutionality of both ordinary legislation and constitutional amendments without the need to investigate the legislative process (i.e. to establish whether the two-thirds majority had been met).

In what became Section 29 of the Ceylon Constitution Order-in-Council 1946,¹²⁶ this scheme was altered in three respects significant to the present discussion. First, the prohibitions on discriminatory legislation were reproduced but with an addition of a repugnancy clause.¹²⁷ This created a textual anomaly in that while the minority protections Section 29(2) were further protected by a repugnancy clause, the equally important power of constitutional amendment in Section 29(4) was not similarly clarified by a repugnancy clause.¹²⁸ Second, the requirement of express words for constitutional amendments was omitted, meaning that potentially, future legislation could be held to impliedly amend the constitution even if it had not been passed by the procedure for constitutional amendments. Although noted as a potential difficulty by Jennings at the time, it was not insisted upon by the Ceylonese ministers.¹²⁹ Third, Section 29(4), which concerned constitutional amendments, introduced an additional requirement whereby the two-thirds majority would have to be certified by the Speaker. Jennings took the view that 'the Speaker's certificate must have been intended to enable the courts to ascertain whether an assented Bill had been approved by the requisite majority, and had therefore brought in judicial review by a side-wind'.¹³⁰

A comparison of these two versions of the scheme shows that Jennings' draft was obviously more in line with his thinking on legislative power within the Westminster system, especially the exclusion of judicial review over the constitutional amendment procedure and the requirement of express words. Nevertheless, the eventual framework in Section 29, while providing for a stronger form of judicial review over constitutional amendments by the requirement of the Speaker's certificate rather than express words, did not categorically depart from the 'manner and form' model and this was why Jennings was able to agree to them at the time. In judicial interpretation, however, these small differences led to the transmogrification of Section 29 into an incoherent stipulation that pleased no one, and in the febrile atmosphere of nationalist politics in the 1960s, a gift for political opportunists and constitutional revolutionaries bent on doing away with the liberal democratic independence constitution. As M. J. A. Cooray has observed, 'The uncertainty which prevailed regarding the nature of the prohibition couched in section 29 (2) undoubtedly contributed to the inclination towards the replacement of the Constitution completely'.¹³¹

The manner and form model was intended to balance the protection of minority interests with majoritarian democracy, by structuring the exercise of

legislative power so as to ensure discriminatory legislation was not passed by ordinary process. While it was open to the legislature to change or repeal these restrictions, that would have to be undertaken by way of the constitutional amendment procedure, which would necessarily require a higher threshold of democratic agreement, possibly involving the consent of the minorities. Democratic legitimacy was also the concern in giving the courts a carefully calibrated role, rather than a power of strong constitutional review on the *Marbury v. Madison* model.¹³² It appears that understanding these underlying principles of Section 29 required a capacity for theoretical sophistication that, in most cases, the judiciary did not possess. In a very early case, the decision of Basnayake J in *Kulasingham v. Thambiayah* (1948)¹³³ suggested, as Jennings noted somewhat anxiously, that ‘it is possible for a Court to take a view very different from that of the draftsman; for the draftsman knows what was intended while the Court has to interpret the letter of the law’.¹³⁴

While some judges did appreciate the implications of the scheme, for example, T. S. Fernando J in *The Queen v. Liyanage* (1962) noted that, ‘Nor do we have a sovereign Parliament in the sense that the expression is used in with reference to the Parliament of the United Kingdom’,¹³⁵ more typical was the judgment in *Piyadasa v. The Bribery Commissioner* (1962). In this case, Tambiah J stated that,

It is hardly necessary to state that the Ceylon Constitution, being a written constitution, is paramount legislation which can only be amended (*and that too, only in certain respects*) by a two-thirds majority of the members of the House of Representatives as provided by section 29 (4) of the Ceylon Constitution.¹³⁶

while maintaining that, ‘Section 29 (2) and (3) prohibits the Parliament from passing certain discriminatory legislation, *except by* a two-thirds majority of the members of the House of Representatives’.¹³⁷ These comments appear to lack logical consistency inasmuch as they support *both* the substantive and procedural views with regard to the restrictions on legislative power, without apparent regard to the fact that if the constitution could be amended ‘only in certain respects’ (i.e. that it contained absolute limitations against its amendment), then the legislative power of constitutional amendment in Section 29(4) could not, at the same time, extend to those absolutely entrenched provisions. There would have been no inconsistency in this position, however, if Tambiah J had referred to a constitutional entrenchment of certain matters against *ordinary legislation*, rather than the legislative power of *constitutional amendment*.¹³⁸

If confusion reigned in the Supreme Court of Ceylon, then the situation was no different in the Privy Council. In *The Bribery Commissioner v. Ranasinghe*, Lord Pearce, speaking for the board, for the most part affirmed the manner and form position. Thus he noted that, ‘a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law’.¹³⁹ He went on to hold that,

Such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. The proposition which is not acceptable is that a legislature, once established, has some inherent power, derived from the mere fact of its establishment, to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.¹⁴⁰

So far so good, but the difficulty arose when he referred to the parliament of Ceylon as a 'sovereign' legislature that was, nonetheless, bound by the prohibitions of Section 29(2), which he described as,

entrenched religious and racial matters, which are not to be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution.¹⁴¹

As I have pointed out, this is not a matter in which the courts could have it both ways. Neither could either proposition – that the Ceylonese parliament was sovereign or that the Ceylonese constitution contained substantively and permanently entrenched provisions – stand alone, in view of the very nature of Section 29 reflecting a manner and form approach to legislative power. Lord Pearce's comment about the inalterability of Section 29(2) was of course *obiter*, but it did have momentous political consequences in convincing the Ceylonese opposition about the need to establish a republic and to do so by way of a constitutional revolution, because that was the only method by which the purportedly 'unalterable' provisions shackling parliamentary sovereignty could be disposed of. It was ironic that his depiction of Ceylon as a sovereign state with a sovereign legislature was studiously ignored.¹⁴²

It is perhaps appropriate to give Jennings the last word. In his note on *Ranasinghe's* case, as noted above in the discussion on the effect of the Colonial Laws Validity Act, he strenuously maintained the Ceylon constitutional drafter's point of view that the (Diceyan) conception of parliamentary sovereignty as applied to the British Parliament was not intended to apply to the Ceylon parliament (although like a good lawyer he also outlined three possible ways of supporting the argument that Ceylon's parliament was sovereign).¹⁴³ As he further argued, the Ceylon parliament was designed by reference to the way the Westminster Parliament actually worked, in which although what was 'sovereign' was the 'Queen-in-Parliament' in theory, in practice the monarch is hardly ever present in the daily operation of the legislative process in the two Houses. The difficulty in ascribing sovereignty to a parliament that is designed by reference to this legislative *practice* of Westminster, rather than the accident of history that produces the quasi-mystical *theory* of the 'Queen-in-Parliament', is that it is impossible to locate the seat of sovereignty.

An Act of the Ceylon Parliament is not passed by the Queen in that Parliament; it is approved by the House of Representatives and the Senate and then assented to by the Governor-General, wherever he happens to be – possibly on an elephant in his home town, or in a boat above the singing fish in Batticaloa.¹⁴⁴

As he wryly concluded, ‘it would have been better if the judicial committee had simply dismissed Dicey, with costs’.¹⁴⁵

5 Conclusion

In this chapter I have attempted to shed some further light on Jennings’ contribution to Commonwealth public law and constitutional theory through his work in Ceylon. The discussions about the nation and nationalism and about central concerns of constitutionalism in a communally plural democracy will have, I hope, relevance for constitutional reform debates in Sri Lanka, which continues to grapple with many of the same questions that Jennings and his colleagues dealt with at the moment of independence. More broadly, I hope the discussion of his work in Ceylon is useful in some way to the renewed interest that constitutional lawyers, political scientists and historians have recently shown in his work.

Revisiting this era of Sri Lankan political and constitutional history, however, remains an inescapably wistful exercise. At the end of his centennial appraisal of Sir Ivor Jennings’ life and work in 2004, Anthony Bradley cites the following observation from Jennings’ last published work, *Magna Carta and its Influence in the World Today*: ‘Most of the provisions in the bills of rights derive from [the] common law and therefore they never were mere paper propositions. They are peaks of high mountains, not clouds in the air’.¹⁴⁶ Bradley goes on to remark, ‘I found this a moving image from the pen of someone who must have been aware that what he had drafted had often become “mere paper propositions”’.¹⁴⁷ This sense of poignancy is nowhere more pungent than in the case of Ceylon, a country that at the moment of independence held so much promise as a beacon of Asian liberal democracy – or in Sir Oliver Goonetilleke’s racing simile, ‘the best bet in Asia’¹⁴⁸ – and to the constitutional development of which Sir Ivor had contributed much. By the time of his death, the train of events that would lead to the root and branch repudiation, not merely of the form of the independence constitutional order, but more importantly, its fundamental values, was well underway. In Sri Lanka, thus, the normative values of the liberal democratic Commonwealth tradition proved to be ephemeral clouds rather than scalable peaks.

Notes

- 1 Subject to the usual caveat, my sincere thanks to Tony Bradley, Chris Himsworth and Ben Schonthal for painstaking comments on an earlier and much longer version of this chapter, and to Harshan Kumarasingham for endless conversations about ‘WIJ’.

- 2 A. W. Bradley, 'Sir William Ivor Jennings: A Centennial Paper' (2004) *Modern Law Review* 67(5): pp. 716–733 at p. 717.
- 3 See Y. Ghai, 'A Journey around Constitutions: Reflections on Contemporary Constitutions' (2005) *South African Law Journal* 122(4): pp. 804–831 at p. 805.
- 4 Throughout this chapter I use 'Ceylon' instead of 'Sri Lanka' except where the context requires because this was the name of the country during the events addressed in this discussion.
- 5 H. A. I. Goonetilleke, 'Introduction' in W. I. Jennings (2005) *The Road to Peradeniya: An Autobiography* (Colombo: Lake House): p. vii; H. Kumarasingham (ed.) (2015) *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: CUP): pp. 1–19.
- 6 A. Tomkins, "'Talking in Fictions": Jennings on Parliament' (2004) *Modern Law Review* 67(5): pp. 772–786 at p. 722.
- 7 Bradley, 'Sir William Ivor Jennings' (2004): p. 722.
- 8 See partial bibliography (only book-length works) in Jennings, *The Road to Peradeniya* (2005): pp. 271–276.
- 9 Jennings, *The Road to Peradeniya* (2005): ch. vii.
- 10 *Ibid.*, chs vii, xii.
- 11 *Ibid.*, ch. xii.
- 12 S. Gunasekara, 'Cambridge by the Mahaweli: Peradeniya University', *The Island Midweek Review* (Sri Lanka), 29 April 2009.
- 13 Jennings, *The Road to Peradeniya* (2005): ch. viii.
- 14 Ceylon State Council (1947) Sessional Paper VII.
- 15 C. Jeffries (1969) *O. E. G.: A Biography of Sir Oliver Ernest Goonetilleke* (London: Pall Mall Press): p. 68.
- 16 *Ibid.*, pp. 79–80.
- 17 *Ibid.*, p. 69.
- 18 Attributed to C. Suntharalingam in L. Marasinghe, 'Sir William Ivor Jennings (1903–1965)' in Law and Society Trust (2005) *Legal Personalities of Sri Lanka* (Colombo: LST): ch. viii at p. 284.
- 19 W. I. Jennings (1953) *The Constitution of Ceylon* (3rd edition) (Bombay: OUP): p. vii.
- 20 *Ibid.*, p. x. See also Jennings, *The Road to Peradeniya* (2005): p. 177. Jennings did in fact write this account before his death, in a manuscript entitled *From Donoughmore to Independence: A Contribution to the Independence of Ceylon, 1931–1948*. This was published for the first time on the fiftieth anniversary of his death on 19 December 2015 in H. Kumarasingham (ed.) (2015) *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: CPA).
- 21 Jennings, *The Road to Peradeniya* (2005): p. 165.
- 22 See W. I. Jennings (1961) *The British Commonwealth of Nations* (London: Hutchinson): p. 28. On the decision of the Soviet Union in December 1948 to veto Ceylon's application for membership of the United Nations, see W. I. Jennings, 'The Dominion of Ceylon' (1949) *Pacific Affairs* 22(1): pp. 21–33 at pp. 21–22.
- 23 See A. Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon: How "Procedural Entrenchment" Led to Constitutional Revolution' in A. Welikala (ed.) (2012) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Colombo: CPA): ch. 3. Also online, available at: <http://republicat40.org/wp-content/uploads/2013/01/The-Failure-of-Jennings'-Constitutional-Experiment-in-Ceylon.pdf>.
- 24 Cited in Marasinghe, 'Sir William Ivor Jennings (1903–1965)' (2005): p. 284.
- 25 Cited in D. Cannadine (2002) *Ornamentalism: How the British Saw Their Empire* (London: Penguin): p. 67. See also H. Kumarasingham (2013) *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I.B. Tauris): pp. 133.

- 26 Jennings, *The British Commonwealth of Nations* (1961): p. 116; Marasinghe, 'Sir William Ivor Jennings (1903–1965)' (2005): pp. 305–306.
- 27 W. I. Jennings (1958) *Problems of the New Commonwealth* (Durham, NC: Duke UP): pp. 77–78, 82.
- 28 *Ibid.*, p. 82; Marasinghe, 'Sir William Ivor Jennings (1903–1965)' (2005): pp. 307–309.
- 29 Jennings, *The Road to Peradeniya*, (2005): pp. 90–91.
- 30 *Ibid.*, pp. 162–165.
- 31 Kumarasingham, *A Political Legacy of the British Empire* (2013): pp. 117–118.
- 32 Attorney-General (1947–1951), Chief Justice (1951–1956). See A. R. B. Amerasinghe (1986) *The Supreme Court of Sri Lanka: The First 185 Years* (Colombo: Sarvodaya): pp. 222–223.
- 33 For discussions of the executive and the judiciary under the independence constitution see, respectively, Kumarasingham, *A Political Legacy of the British Empire* (2013): ch. 6 and M. J. A. Cooray (1982) *Judicial Role under the Constitutions of Ceylon/Sri Lanka* (Colombo: Lake House): ch. 4.
- 34 Kumarasingham, *A Political Legacy of the British Empire* (2013): pp. 4–9.
- 35 M. Loughlin (1992) *Public Law and Political Theory* (Oxford: OUP): ch. 4.
- 36 *Ibid.*, p. 58.
- 37 *Ibid.*, p. 59.
- 38 *Ibid.*, p. 60.
- 39 *Ibid.*
- 40 *Ibid.*, p. 140.
- 41 *Ibid.*, pp. 139–165.
- 42 *Ibid.*, pp. 175–176.
- 43 *Ibid.*, p. 165.
- 44 Bradley, 'Sir William Ivor Jennings' (2004): pp. 724–725.
- 45 M. Loughlin, 'Modernism in British Public Law, 1919–1979' (2014) *Public Law*: pp. 56–67 at p. 63.
- 46 Loughlin, *Public Law and Political Theory* (1992): p. 167; see also W. I. Jennings (1967) *The Law and the Constitution* (5th edition) (London: University of London Press): pp. 305–315; W. I. Jennings, 'The Institutional Theory' in W. I. Jennings (ed.) (1963 [1933]) *Modern Theories of Law* (London: Wildy & Sons): ch. v at pp. 70–71.
- 47 Loughlin, *Public Law and Political Theory* (1992): p. 167.
- 48 *Ibid.*
- 49 Jennings, *Modern Theories of Law* (1963): p. 68.
- 50 Loughlin, 'Modernism in British Public Law, 1919–1979' (2014): p. 57.
- 51 *Ibid.*
- 52 *Ibid.*, p. 59.
- 53 J. Uyangoda, 'The United Front Regime of 1970 and the Post-Colonial State of Sri Lanka' in T. Jayatilaka (ed.) (2010) *Sirimavo: Honouring the World's First Woman Prime Minister* (Colombo: Bandaranaike Museum Committee): p. 32.
- 54 On the Donoughmore Constitution, see M. Wight (1946) *The Development of the Legislative Council, 1906–1945* (London: Faber & Faber); J. Russell (1982) *Communal Politics under the Donoughmore Constitution (1931–1947)* (Colombo: Tissara); R. Edrisinha, M. Gomez, V. T. Thamilmaran and A. Welikala (eds) (2008) *Power Sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008* (Colombo: CPA): ch. 2; L. Marasinghe (2007) *The Evolution of Constitutional Governance in Sri Lanka* (Colombo: Vijitha Yapa): ch. 3.
- 55 Loughlin, 'Modernism in British Public Law, 1919–1979' (2014): p. 56.
- 56 See generally, G. L. Peiris (1999) *General Principles of Criminal Liability in Sri Lanka* (Colombo: Stamford Lake): ch. 1.
- 57 R. Coomaraswamy (1984) *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society* (New Delhi: Vikas): p. 13.

- 58 Loughlin, 'Modernism in British Public Law, 1919–1979' (2014): p. 60.
- 59 *Ibid.*, p. 63.
- 60 *Ibid.*, p. 60.
- 61 *Ibid.*
- 62 W. I. Jennings (1931) *Local Government in the Modern Constitution* (London: Charles Knight): p. 3.
- 63 Jennings, *The Constitution of Ceylon* (1953): p. 77.
- 64 W. I. Jennings (1956) *The Approach to Self-Government* (Cambridge: CUP): p. 110.
- 65 Loughlin, *Public Law and Political Theory* (1992): pp. 133–137.
- 66 A. Norton (1993) *Republic of Signs: Liberal Theory and American Popular Culture* (Chicago: Chicago UP): p. 124.
- 67 See Edrisinha *et al.* *Power Sharing in Sri Lanka* (2008): ch. 6, esp. p. 190; Welikala, *The Sri Lankan Republic at 40* (2012): pp. 155–157.
- 68 W. I. Jennings, 'Limitations on a "Sovereign" Parliament' (1964) *Cambridge Law Journal*: pp. 177–180 at pp. 177–178.
- 69 Jennings, *The Constitution of Ceylon* (1953): p. 79.
- 70 *Liyanage v. R* (1967) AC 259.
- 71 S. A. de Smith, 'The Separation of Powers in a New Dress' (1966) *McGill Law Journal* 12: pp. 491–496 at pp. 492–493. See also Jennings, *The Law and the Constitution* (1967): pp. 280–304.
- 72 Jennings, *The Approach to Self-Government* (1956): pp. 22: 'the French lawyers thought in terms of juristic principles, while the English lawyer thought in terms of political and legal institutions. They both produced drafts, and they were alike as chalk and cheese'.
- 73 *Ibid.*, p. 110.
- 74 N. Chandhoke, 'Individual and Group Rights: A View from India' in Z. Hasan, E. Sridharan and R. Sudharshan (eds) (2005) *India's Living Constitution: Ideas, Practices, Controversies* (London: Anthem Press): ch. 9; R. Bajpai (2011) *Debating Difference: Group Rights and Liberal Democracy in India* (New Delhi: OUP): chs 2, 3, 4.
- 75 G. Austin (2004) *The Indian Constitution: Cornerstone of a Nation* (New Delhi: OUP): ch. 13; C. R. Epp, 'The Legal Complex in the Struggle to Control Police Brutality in India' in T. C. Halliday, L. Karpik and M. M. Feeley (eds) (2012) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: CUP): ch. 2.
- 76 N. DeVotta (2004) *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford: Stanford UP).
- 77 Welikala, *The Sri Lankan Republic at 40* (2012): pp. 150–167; K. M. de Silva, 'Ivor Jennings and Sri Lanka's Passage to Independence' (2005a) *Asia Pacific Law Review* 13, pp. 1–18.
- 78 Others safeguards included the nominated membership in the senate, a weighted system of delimitation for parliamentary constituencies, and an independent and neutral public service and judiciary.
- 79 See A. Welikala, 'Constitutional Form and Reform in Sri Lanka: Towards a Plurinational Understanding' in M. Tushnet and M. Khosla (eds) (forthcoming in 2015) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge: CUP).
- 80 Russell, *Communal Politics under the Donoughmore Constitution (1931–1947)*, (1982).
- 81 Kumarasingham, *A Political Legacy of the British Empire* (2013): ch. 7; DeVotta, *Blowback* (2004).
- 82 Jennings (1951) *The Commonwealth in Asia* (Oxford: Clarendon Press); Jennings, *The Approach to Self-Government* (1956); Jennings, *Problems of the New Commonwealth* (1958); Jennings, *The British Commonwealth of Nations* (1961).
- 83 A. D. Smith (1998) *Nationalism and Modernism: A Critical Survey of Recent Theories of Nations and Nationalism* (London: Routledge): pp. 1–24.

- 84 *Ibid.*, p. 3.
 85 *Ibid.*
 86 *Ibid.*, p. 20.
 87 *Ibid.*
 88 *Ibid.*, p. 3.
 89 Wight, *The Development of the Legislative Council, 1906–1945* (1946): p. 74.
 90 Jennings, *The British Commonwealth of Nations* (1961): p. 21.
 91 R. De S. Wijeyeratne (2013) *Nation, Constitutionalism and Buddhism in Sri Lanka* (London: Routledge): p. 99.
 92 G. Varouxakis (2002) *Mill on Nationality* (London: Routledge): ch. 1; W. Kymlicka (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: OUP): pp. 52–53; Z. Kurelić, ‘What Can We Learn from Lord Acton’s Criticism of Mill’s Concept of Nationality?’ (2006) *Politička Misao* xliii (5): pp. 19–27.
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 115 *Ibid.*, p. 149.
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- 119 For a recent judicial assessment of the competing issues in relation to the amenability to 'constitutional' review of legislation of an elected 'national' legislature of limited competence in the UK and Scotland, see: *AXA General Insurance Ltd and Ors. v. The Lord Advocate and Ors.* (2011) UKSC 46: para. 49 per Lord Hope. See also C. M. G. Himsworth, 'The Supreme Court reviews the Review of Acts of the Scottish Parliament' (2012) *Public Law*: pp. 205–213.
- 120 Jennings, *The Law and the Constitution* (1967): p. 150.
- 121 See arts 7 to 11 of Ministers' Draft, and Explanatory Notes, reproduced in the Soulbury Report (1945): pp. 170–171, 165. See also Jennings, *The Constitution of Ceylon* (1953): pp. vii–ix.
- 122 There were a number of other restrictions as well but most ceased to have effect after independence: see Jennings, *The Constitution of Ceylon* (1953): pp. 70–79.
- 123 Later amended by Act 29 of 1954 by the addition of a time-bound proviso to allow statutory changes to the law relating to the election to the House of Representatives of persons registered under the Indian and Pakistani Residents (Citizenship) Act.
- 124 Jennings, 'Limitations on a "Sovereign" Parliament' (1964): p. 178.
- 125 This was intended to avoid the problem encountered in *McCawley v. The King* (1920) AC 691: see Jennings, 'Limitations on a "Sovereign" Parliament' (1964): pp. 178–179; G. Marshall (1971) *Constitutional Theory* (Oxford: Clarendon Press): pp. 55–56.
- 126 The original version of Section 29 as reflected in the Ceylon (Constitution) Order in Council (1946) read as follows.

The amendments made by sections 2 and 3 of Act 29 of 1954 to section 29(1) are not relevant to the present discussion and are not included (but see fn. 123, *supra*).

- 29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
- (2) No such law shall –
 - (a) prohibit or restrict the free exercise of any religion; or
 - (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not make liable; or
 - (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
 - (d) alter the constitution of any religious body except with the consent of the governing authority of that body.

Provided that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

- (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.
- (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law.

- 127 Sections 29(2) and 29(3).
- 128 Jennings, 'Limitations on a "Sovereign" Parliament' (1964): pp. 178–179.
- 129 Ibid.
- 130 Ibid., p. 197; Jennings, *The Constitution of Ceylon* (1953): pp. 201–203.
- 131 Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka* (1982): p. 67.
- 132 M. Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' (2009) *Public Law*, pp. 519–543 at pp. 542–543; R. Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making' (2014) *The American Journal of Comparative Law* 62, pp. 127–169 at pp. 150–157.
- 133 *Kulasingam v. Thambiayah* (1948) 49 NLR 505. This case did not involve Section 29.
- 134 Jennings, *The Constitution of Ceylon* (1953): p. x.
- 135 *The Queen v. Liyanage* (1962) (1962) 64 NLR 313 at 350.
- 136 *Piyadasa v. The Bribery Commissioner* (1962) 64 NLR 385 at 387, emphasis added.
- 137 Ibid., 388, emphasis added.
- 138 See also the discussion of this case, contra the argument in this chapter, in C. F. Amerasinghe, 'The Legal Sovereignty of the Ceylon Parliament' (1966) *Public Law*, pp. 65–96 at pp. 77–79. Perhaps Dr Tambiah could have benefitted from closer study of the works of his co-author in I. Jennings and H. W. Tambiah (1952) *The Dominion of Ceylon: The Development of its Laws and Constitution* (London: Stevens & Sons).
- 139 *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 792.
- 140 Ibid.
- 141 Ibid., p. 789.
- 142 I have addressed these issues extensively elsewhere: Welikala, *The Sri Lankan Republic at 40* (2012).
- 143 Jennings, 'Limitations on a "Sovereign" Parliament' (1964): pp. 179–180.
- 144 Ibid., p. 179.
- 145 Ibid., p. 180.
- 146 Bradley, 'Sir William Ivor Jennings' (2004): p. 732.
- 147 Ibid., p. 733.
- 148 Jeffries, *O. E. G.: A Biography of Sir Oliver Ernest Goonetilleke* (1969): p. 10.

7 Constitutionalism and the politics of constitution-making in Malaya, 1956–1957

Joseph M. Fernando

Introduction

Constitution-making is an intricate yet dynamic process that in the modern nation-states that emerged during the period of decolonisation has been influenced by a wide range of political ideals, constitutional traditions and conventions. The form and content of constitutions are shaped by historical circumstances and the experiences of the states concerned and reflect the varying competing interests and compromises inherent in these societies. Most constitutions in the former British colonial territories in Asia and Africa were formulated after the Second World War during the period of decolonisation. The emergent independent states required new constitutions to facilitate the transformation from a colonial dependency or protected state status with limited popular representation to a fully independent sovereign state, and to enable the full working of the parliamentary system of governance. The new constitutions were usually formulated by a committee of representatives in the national legislatures, as in the cases of India¹ and Burma,² where committees in the respective constituent assembly framed the new constitution. In some cases, the drafting of new constitutions involved legal experts from Britain, as in the case of Pakistan³ and Ceylon,⁴ or from India as in the instance of Burma.⁵ In Malaya, the constitution was drafted by an entirely foreign panel of legal experts from the Commonwealth. It was, as we will see, a conscious choice made by the Malayan political elites.

Invariably, English constitutionalism and institutions shaped the constitutions of the Commonwealth nations as they became independent and drafted a new constitution, as in the case of India and Pakistan, or drafted a constitution and then became independent, as in the case of Malaya. Ideas of parliamentary democracy, bicameral legislatures, cabinet system, doctrine of separation of powers, an independent judiciary and free elections were embraced freely by the Asian and African Commonwealth nations.⁶ This is partly because the political elites of these emergent nation-states had been trained in the system of parliamentary democracy during the colonial period. Further, many of the elites in these states were educated in Britain and attracted to the Westminster system of parliamentary democracy and genuinely believed that it was the best system of

representation and governance available during the framing of the new constitutions. Kwame Nkrumah who led the nationalist movement in Ghana and Tunku Abdul Rahman who championed the independence movement in Malaya, for example, were educated in Britain and attracted to the Westminster model of parliamentary democracy. These countries also drew from the constitutions of the United States and Eire, which were based on English constitutionalism and common law principles. Some modification to the constitutional ‘borrowings’, to suit local conditions and peculiarities, was essential. Different social and economic conditions in the colonial territories as compared to England, the influence of local customary law and Islamic law, for instance, and developments in common law within the territories concerned often necessitated some adaptations.⁷

Constitutions are invariably a fusion between various ideas and conceptions of law that govern the powers of the state and determine the rights of the citizens. While the drafters of constitutions seek to provide the ideal provisions, in reality constitutions are often a compromise between constitutional ideals and the political realities prevalent when the constitutions were framed.⁸ Political expedience and compromises often underlie, and even undermine, the process of constitution-making. This is evident in the drafting of post-war constitutions in Asia such as India, Pakistan, Ceylon, Burma and Malaya, as it was also discernible in the framing of the American constitution. The American constitution, framed in 1787, for example, recognised slavery as a local institution although slavery violated the common law principle of equality before the law as the framers needed the support of the southern states, where slavery was a basic feature of the economic system, in order to create a stronger union through the new constitution.⁹ Electoral franchise was limited by the American constitution initially to property holders and freemen. The framers of the Indian constitution provided for equality before the law under art. 14 for all citizens but at the same time art. 16(4) provided for the state to assist certain categories of citizens to improve their socio-economic status through preferential treatment.¹⁰ The state thus can impose reasonable conditions on such provisions for equality.

Plural societies in Asia and Africa posed a greater degree of complexity and difficulty in the constitution-making process, especially in reaching compromises between the competing and often conflicting interests of the different communities that made up the citizenry. Sometimes the constitutional ideal had to be tempered with pragmatic provisions that were more inclusive and accommodated the demands of the various interest groups. This chapter examines the influence of certain cardinal principles of English constitutionalism in the drafting of the federal constitution of Malaya between 1956 and 1957. The chapter will first explain the meaning of the term ‘English constitutionalism’ and then provide some background to the process of decolonisation in Malaya and the appointment of a constitutional commission to draft the Malayan constitution. The following sections will then examine some areas of the Malayan constitution where the framers had to grapple with the principles of constitutionalism and the political and socio-economic realities in Malaya that tempered the framing of the document.

English constitutionalism and the Commonwealth

Constitutionalism refers to certain underlying principles embedded in constitutions and which, in the context of Britain and the Commonwealth, can be traced to the principles of English constitutionalism and common law practices.¹¹ These principles can be found in all Commonwealth constitutions and those other countries which are based on English constitutionalism and common law, such as the United States and Eire. Basu has rightly observed that no constitution adopting the parliamentary system of government could do without drawing from the basic principles of English constitutionalism.¹² Among the more important constitutional principles that underlie most Commonwealth constitutions are the rule of law, parliamentary sovereignty, the doctrine of separation of powers, equality of citizenship and guarantees for personal liberties, financial control and accountability (no taxation or expenditure unless authorised by law), an independent judiciary and free elections.¹³

One of the most important constitutional principles of British constitutional law is the legislative supremacy of the British Parliament or parliamentary sovereignty.¹⁴ This principle enables the British Parliament to pass any kind of law, including extra-territorial laws, and no other body in the land can override it.¹⁵ This was as a result of constitutional developments in sixteenth- and seventeenth-century England. Interestingly, this is in contrast to the United States, where the legislative supremacy is circumscribed by the American constitution and Congress cannot pass laws prohibiting, for example, the freedom of speech or the right to bear arms.¹⁶ The federal constitution is supreme in the United States and the judiciary is seen as its guardian.¹⁷ The constitutions of many Commonwealth states embraced this principle of legislative supremacy, although India followed the example of the United States and adopted the principle of the supremacy of the constitution.¹⁸ The doctrine of separation of powers is another principle enshrined in the British constitution to serve as a check and balance between and to prevent the government, the legislature and the judiciary from 'encroaching upon one another's province'.¹⁹ Practically, all the constitutions of the Commonwealth countries adopted this doctrine although there is no explicit statement in these constitutions.²⁰ Equality before the law, on the other hand, is a basic canon of common law, and articles professing equality before the law are found in all Commonwealth constitutions. The independence of the judiciary is another important principle of the British constitution.²¹ Provisions for judicial independence are found in most Commonwealth constitutions. Before examining some areas of the Malayan constitution in respect of certain underlying constitutional principles and the challenges faced by the framers in effecting or observing fully the spirit of English constitutionalism, some understanding of the background to the constitution-making process in Malaya would be useful.

Background to constitution-making process in Malaya

Beginning from the 1870s till the early part of the twentieth-century Britain gradually gained control of the states in the Malay Peninsula after a reversal in its previous non-interference policy following internal strife in some of the Malay states and disruption in economic activities with the British-controlled Straits Settlements.²² Apart from the Straits Settlements of Penang, Singapore and Malacca, which were Crown colonies under the full jurisdiction of Britain, four of the Malay states that had a British Resident with enormous powers of administration (Perak, Selangor, Negri Sembilan and Pahang) were unified under a federation called the Federated Malay States in 1895. The British also had considerable influence over the remaining five unfederated Malay states that had British advisers. The British colonial administration encouraged mass immigration from the last quarter of the nineteenth century from India and China to meet the labour needs of the tin and rubber industry, the foundations of the modern colonial economy, and to build the rail and road infrastructure for these export industries, and from Ceylon to fill the lower administrative positions in the civil service. Thus in the process a plural society was created in Malaya in the Furnivallian sense.²³ At the end of the Second World War, Britain decided to introduce a more unified system of governance called the Malayan Union to strengthen the administration and this combined the previous separated units – the Federated Malay States, the Unfederated Malay States and the Straits Settlements into a unitary system of government.²⁴ Under the Malayan Union the sovereignty of the nine Malay sultans were transferred to the Crown and a new citizenship scheme was introduced to create a common Malayan nationality. The Malayan Union scheme, however, met with strong protests from the Malay community and was replaced with the Federation of Malaya Agreement in 1948, which restored most of the powers of the sultans and tightened citizenship requirements for non-Malays.

Local elections were introduced in December 1951 as part of the British effort to involve local elites in the decision-making process and to negate potential support for the Malayan Communist Party, which had embarked on a violent struggle against the colonial administration and which had led to the declaration of a state of emergency in June 1948.²⁵ In the Kuala Lumpur municipal election of February 1952, the United Malays National Organisation (UMNO), which was formed to protest the Malayan Union in 1946, and the Malayan Chinese Association (MCA), which was formed in 1949 to offer a non-communist alternative to the Chinese, entered into an ad-hoc electoral pact. This alliance of two communal parties representing the Malay and Chinese communities won most of the seats in the Kuala Lumpur election defeating the non-communal Independence of Malaya Party (IMP).²⁶ Following this, the UMNO–MCA alliance expanded their collaboration to all the local elections and was joined in 1954 by a third communal party, the Malayan Indian Congress (MIC), formed in 1946 to represent the Indians.

The impetus for the drafting of a new constitution in Malaya came from the Alliance Party. After winning the local elections between 1952 and 1953, the

Alliance Party pressured the British colonial administration to hold national elections in 1954, and to appoint a constitutional commission to draft a new constitution for Malaya.²⁷ They felt that with the changing political situation, the 1948 Federation of Malaya Agreement, the then existing constitution, was no longer suitable. The British administration was initially reluctant to accede to the alliance's request but after the party launched a series of protests and boycott of the legislature following an unsuccessful trip to London to persuade the secretary of state to introduce federal elections in 1954, and with a threat of a potential breakdown in law and order compounded by the on-going communist insurgency, the British administration relented. In crisis talks the high commissioner, Sir Donald MacGillivray, offered a compromise.²⁸ The high commissioner was the chief executive of the federation and had considerable personal executive powers, including the power to veto legislation passed by the Federal Legislative Council. He assured the Alliance Party that the majority party would be entitled to fill the five reserve seats, usually nominated by the high commissioner. This would indirectly increase the majority of the elected seats and would come within the target of 60 per cent set by the alliance.²⁹ The alliance agreed and as a result, the alliance's representatives resumed the posts in the councils and legislatures and the boycott was ended. The Alliance Party gained considerably in political prestige as a result of this compromise, while the other major party, the Party Negara lost out considerably as it remained a bystander to these events. This was evident in the results of the first federal elections.

The first federal elections were held in July 1955 and the Alliance Party won 51 of the 52 seats, having campaigned successfully on the theme of 'independence'. A month after the federal elections, the Alliance Party leader and chief minister, Tunku Abdul Rahman, demanded during a meeting with the visiting secretary of state for the colonies that talks should be held on independence and that an independent constitutional commission should be appointed to draft a new constitution for Malaya.³⁰ The secretary of state, while initially reluctant, eventually agreed to hold talks with the Alliance Party and representatives of the nine Malay rulers on independence, the appointment of a constitutional commission, and a range of other issues such as finance, defence and the future of the civil service, at a conference to be held in London in January 1956.

Malaya took an unusual step of seeking an entirely foreign panel of legal experts to frame the constitution. This was mainly at the insistence of the Alliance Party, which felt that only a commission of legal experts from the Commonwealth would be able to undertake such a complex task, impartially, and considering the contentious inter-communal issues that would have to be addressed.³¹ Malaya was the only country in the Commonwealth that appointed a wholly foreign body of legal experts from within the Commonwealth to draft its constitution. Other Commonwealth nations either appointed indigenous committees from their legislative assemblies and other local legal experts, or used a mixture of foreign legal experts working with local legal experts. The Malayan sentiment was quite different to that of the Indian National Congress, which in 1935 asserted (and which was eventually adhered to for the drafting of the 1950

constitution) that Indians should frame their own constitution through a constituent assembly and without outside interference.³² The alliance's request was agreed to at the London conference of January 1956, which included representatives of the nine Malay hereditary rulers. The alliance leader and chief minister Tunku Abdul Rahman had already written to the Australian and Canadian government even before the London conference in January 1956 seeking constitutional experts for the framing of the Malayan constitution, much to the annoyance of the Colonial Office.³³ The London conference agreed, among other things, that an independent constitutional commission comprising legal experts from the Commonwealth and headed by a chairman from Britain would be appointed to draft a new constitution for Malaya, and, equally important, that Malaya would be granted independence on 31 August 1957.³⁴ As a result, Lord Reid, a Lord of Appeal in Ordinary in the House of Lords, was appointed as chairman of the constitutional commission.³⁵ Other members of the commission were Sir William McKell, a former governor-general of Australia; Sir Ivor Jennings, master of Trinity Hall at Cambridge University; B. Malik CJ from the Allahabad High Court in India; and Abdul Hamid J from the West Pakistan High Court. The Canadian nominee withdrew for health reasons and was not replaced.³⁶ The nominations for the constitutional commission were made by the individual countries that were invited to do so and only approved after agreement of the alliance government and the Malay rulers were obtained. In the case of the British nominees, the Colonial Office wanted to strike a balance between legal expertise and experience in political administration.³⁷ Jennings in fact was a personal choice of Chief Minister Tunku. There does not seem to be any particular reasoning for the choices from the other countries, which were determined by the individual countries, but a choice of a nominee from Pakistan may have been influenced possibly by the need for someone with adequate knowledge of Syariah laws. The commission began their work in Malaya in June 1956 and took evidence from a wide range of political and socio-economic organisations, and in December adjourned to Rome to prepare the final draft of the constitution. The draft constitution was submitted to the British government, the Malay rulers and the federation government on 10 February 1957.³⁸ A working party, comprising the high commissioner, the attorney-general T. V. A. Brodie, representatives of the Alliance Party and the Malay rulers reviewed the Reid draft constitution between March and May 1957.³⁹ A further constitutional conference was held in London in May 1957 between the British government, the alliance government and the representatives of the rulers to discuss the revised draft constitution.⁴⁰ This new constitution was then debated in the Malayan Federal Legislative Council and the British Parliament and came into force on 31 August 1957 as Malaya became independent.⁴¹

The constitutional documents indicate that Jennings, Reid and Hamid had a major influence on the framing of the constitution. Jennings provided the intellectual leadership for the constitutional commission by preparing most of the important working papers, which analysed major constitutional subjects (federal–state financial relations, fundamental liberties, elections, constitutional

monarchy and national development) which assisted the constitutional commission considerably to arrive at their decisions.⁴² The final draft of the constitution was largely the draft of Jennings, which provided clarity and consistency in the phrasing of the articles. Jennings' had considerable experience drafting constitutions, having been involved in the drafting of the Pakistan, Ceylon, Malta and Maldives constitutions.⁴³ Reid provided able leadership in guiding the deliberations of the commission and their discussions with political and socio-economic organisations in Malaya and particularly with his critical assessment of Jennings' and Hamid's early drafts.⁴⁴ Hamid provided an important contribution by preparing some of the early drafts of the main provisions and several working papers and in his active participation in the internal debates of the commission.⁴⁵ McKell and Malik largely played the role of critics to the working papers and drafts prepared by Jennings and Hamid. We examine now some areas of the constitution where the influence of English constitutionalism and common law principles are evident, and how some of these cardinal principles adapted to Malayan political and socio-economic realities.

Principle of equality and provision on special rights

One of the cardinal principles of constitutionalism derived from English constitutionalism and common law principles and which is found in most Commonwealth constitutions is the principle of equality before the law.⁴⁶ Equality before the law means that 'among equals the law should be equal and should be equally administered, that like should be treated alike'.⁴⁷ All citizens should be treated equally before the law regardless of their race, ethnicity, social status, sex or religious beliefs.⁴⁸ Provisions on these principles are usually found in the section on fundamental liberties in these constitutions. Article 14 of the Indian constitution states unequivocally: 'The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.⁴⁹ Art. 5(1) of the Pakistan constitution of 1956 reads: 'All citizens are equal before the law and are entitled to equal protection of law'.⁵⁰ A similar provision in the constitution of Burma (art. 13) states: 'All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another'.⁵¹

In the Malayan context, this principle of equality before the law is provided under art. 8 of the Reid draft constitution. Article 8(1) reads: 'All persons shall be equal before the law and shall be entitled to the equal protection before the law'.⁵² The difficulty in the Malayan context appears in the form of art. 153 (art. 157 in the Reid draft constitution) of the federal constitution, which provided for special treatment to a particular category of citizens. Article 153 provided for special privileges to the Malays in respect of the award of educational scholarships, business licences and reservation of jobs in the public services.⁵³ This article invariably impinged and undermined considerably the principle of equality embedded under art. 8 but has to be understood in the context of constitutional developments in Malaya.

The provision is an exception to the principle of equality and is peculiar to the Malayan conditions. At the time of the framing of new constitution for Malaya the Malay community was considerably backward economically compared to the Chinese and Indian communities, the more recent immigrants. The ruling Alliance Party hence requested that provisions be made in the new constitution according certain privileges to the Malays in the award of government scholarships, business licences and positions in the public services to enable to community to raise its social and economic status.⁵⁴ This was in fact a continuation of a similar provision in the 1948 Federation of Malaya Agreement, the earlier colonial constitution, which provided for special privileges to the Malays under art. 19 of the agreement. These provisions inserted in art. 153 (art. 157 of the Reid draft constitution) were intended as a temporary and transitional provision and the constitutional commission did not expect it to be in force beyond 30 years after independence.⁵⁵

The Reid commission recognised that the provision on Malay special privileges would be an exception to the basic provisions on fundamental rights, including the provision on equality (art. 8) in the constitution and that it was a political compromise between the three communal parties in the alliance, the UMNO, the MCA and the MIC, who represented the Malays, Chinese and Indians, respectively.⁵⁶ Hence to moderate the negative impact of this provision on the principle of equality before the law, the Reid draft constitution placed the provision in the temporary and transitional section of the constitution.⁵⁷ This provision, as agreed by the alliance parties, would be discontinued after several years.⁵⁸ Hence by placing the provision in the temporary section of the constitution, the Reid commission could ensure that the provisions on equality before the law would not be eroded in the long term. In this way, the commission had provided for the full recognition of the principle of equality in the constitution in the long term. The working party, which reviewed the Reid draft constitution, however, moved art. 153 on Malay special privileges to Part XII (General and Miscellaneous) of the federal constitution, and imposed an additional condition that changes to art. 153 should require the consent of the Yang di-Pertuan Agong, the head of state, and the Conference of Rulers. A review of the provisions on Malay special privileges after 15 years provided in the Reid draft constitution was omitted by the working party at the request of the UMNO on the understanding that the provision would be reviewed from time to time, largely to appease opposition to the time-frame from Malay opposition organisations.⁵⁹ These changes made it more difficult to fulfil the original intentions of the framers that the provision would be temporary as any constitutional amendment would require a two-thirds majority of the total members in parliament, present and voting, and the consent of the nine rulers. The changes eroded considerably the provision on equality in the constitution. Political expedience, the rush to complete the drafting of the constitution in time for the declaration of independence, invariably left a serious defect in the new constitution and undermined considerably the principle of equality embedded in art. 8.

Parliamentary sovereignty, constitutional supremacy and the constitutional sovereigns

The sovereignty of parliament refers to the almost absolute powers of parliament to make laws for a country and originates from constitutional developments in England in the sixteenth and seventeenth centuries. According to Dicey, only Parliament has the right to make or unmake laws, and 'no other person or body is recognised in the law of England as having a right to override or set aside the legislation of parliament'.^{60,61} The establishment and acceptance of parliamentary supremacy, according to Hood Phillips, was a product of the revolution of 1688.⁶²

Some Commonwealth constitutions of the post-Second World War period embraced this principle of English constitutionalism.⁶³ India, the earliest of the British colonial territories to frame a new constitution, however, followed the approach taken by the United States and embraced the principle of 'constitutional supremacy'. Constitutional supremacy means the constitution is supreme and the powers of parliament, or Congress in the United States, are to an extent limited by the constitution. Arts 13 and 254 of the Indian constitution provide that any executive or legislative Act that violates the provisions of the constitution is void.⁶⁴ As Basu has observed, a law enacted by the legislature cannot transgress or violate the provisions of the fundamental law, that is, the Indian constitution.⁶⁵ In the United States, the limitations of the federal legislature is clear as under the First Amendment Congress cannot pass laws respecting the establishment of religion, or prohibit the freedom of speech or of the press, or the right of the people to assemble peacefully.⁶⁶ The Second Amendment, further, prevents Congress from passing laws infringing the right of the people to bear arms.⁶⁷ The federal constitution is supreme and this has been entrenched by the judgement of John Marshall CJ in *Marbury v. Madison* where he noted: 'The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written'.⁶⁸

In the Malayan context, the constitutional documents indicate that the framers followed the Indian example and sought to entrench constitutional supremacy. This is evident in art. 3 and art. 75 of the Reid draft constitution. Article 3(1) provides that the constitution shall be the supreme law of the federation and provision of any state constitution or 'of any law' that is repugnant to any provision of the federal constitution shall be void.⁶⁹ This meant any law passed after independence that is deemed to be repugnant to the federal constitution shall to the extent of the repugnancy be void.⁷⁰ This is further strengthened by art. 75 of the draft constitution, which reads:

*Subject to the provisions of this Constitution, the executive authority of the federation shall extend to all matters in respect of which Parliament is empowered to make laws, and the executive authority of a State shall extend to all matters in respect of which the State Legislature is empowered to make laws.*⁷¹

The provisions of the Malayan constitution provided for the supremacy of the constitution, as did the framers of the constitution of India. A further limitation on the powers of parliament is evident in art. 13 of the Reid draft constitution on rights of property. Clause 2 of art. 13 provides that the compulsory acquisition or requisition of any property shall not be authorised by law unless such law provides for the payment of adequate compensation.⁷² Interestingly, the earlier draft of this article (drawn from the constitutions of Pakistan and India) reads that: 'Neither Parliament nor a State Legislature shall have power to make any law authorising the compulsory acquisition or requisition of any property unless the law provides for payment of adequate compensation'.⁷³ This earlier draft spelt out more clearly the intentions of the constitutional commission in limiting the powers of parliament in relation to the provision on rights of property.

Additionally, in the Malayan context, the Conference of Rulers has some influence on the process of legislation-making and arguably limits the powers of parliament to make or amend laws in certain areas. The Conference of Rulers, an extra-parliamentary body comprising the nine hereditary Malay rulers in Malaya, has some limited constitutional powers in respect of changes or amendments to provisions in the constitution relating to the status and privileges of the nine rulers, changes to territorial borders of the states, legislative changes affecting the Muslim faith, and provisions relating to the special privileges of the Malays (art. 153), and prerogative over pardon.⁷⁴ The constitutional documents indicate that the Reid commission had felt that the Conference of Rulers should not have any constitutional role in the new constitution.⁷⁵ Jennings, for example, had observed during the internal discussions of the constitutional commission that the only useful role he could see for the Conference of Rulers was for the election of the Yang di-Pertuan Agong, the supreme ruler.⁷⁶ But after an aggressive posture taken by the rulers representatives in the working party, which reviewed the Reid draft constitution, some provisions were made in the new constitution requiring the concurrence of the Conference of Rules for any amendments to certain subjects.⁷⁷ Thus art. 38 of the new constitution provided that the concurrence of the Conference of Rulers should be obtained before any amendments affecting the position and privileges of the Malay rulers and art. 153 are passed by parliament.⁷⁸ The rulers had accepted to be constitutional monarchs along the lines of the Westminster model but demanded to be consulted on several matters affecting their position and the rights of the states. Thus in the Malayan context, in addition to the constitutional limitations placed on parliament, the Conference of Rulers, further, inhibits the legislative powers of parliament.

Free and fair elections and the ethnic factor

The holding of free and fair elections is an important underlying constitutional principle in parliamentary democracy based on English constitutionalism. The modern constitution is democratic and provides for public opinion to be expressed freely at the ballot box. Political parties need to vie for public support and be able to persuade the electorate to elect them to government. Ivor Jennings

has observed that free and fair elections are a crucial part of the democratic process and that it developed gradually in Britain with the franchise reform in 1884 democratising the electoral process considerably: 'The most obvious reason for the change was the progressive extension of the franchise. People who have the vote have to be persuaded'.⁷⁹ While Commonwealth constitutions in general provide for free elections, there are some exceptions where electoral laws, crafted for political reasons, sometimes undermine the underlying constitutional principle. Provisions for communal or ethnic-based seats, disproportionate size of electoral seats, or a rural or urban bias in the delineation can influence significantly the outcome of elections in favour of certain parties or regions. One British study, the Kilbrandon Report, has noted that distribution of English, Welsh, Scottish and Northern Irish constituencies, which were bound by statutory allocation (under the House of Commons Redistribution of Seats Act, 1949, 1979) of seats and reviewed by four separate boundary commissions had resulted in Scotland being over-represented by 14 seats and Wales by five seats.⁸⁰ This was on the basis of constituencies being of 'equal average population', in Britain.⁸¹ Framers of constitutions invariably have to grapple with these political difficulties and complexities while seeking to adhere to the principle of free elections and proportional distribution of voters.

In the context of the framing of the Malayan constitution, the general principles of holding free elections are well embedded in Part VIII of the constitution.⁸² The framers borrowed considerably from the Indian and Pakistan constitutions to frame the sections on elections in the Malayan constitution, including the setting up of an independent election commission, as found in both the Indian and Pakistan constitutions. The constitutional provisions provided for the election of 100 single-member constituencies in the first post-independence general election in 1959 on the basis of the first-past-the-post electoral principle, mainly used in Britain and the Commonwealth at the time. The system of proportional representation was considered by the constitutional commission but it was felt that the system would not be suitable for Malaya as it required a more sophisticated and politically literate electorate.⁸³ One of the difficulties with the provisions on elections in the Malayan constitution was the delineation of the constituencies in the context of the multicomunal electorate. The provisions of the constitution (arts 109 to 113 of Reid draft constitution) regulating the electoral laws in general appear to subscribe to the constitutional principle of free and fair elections. A closer examination of the effect of some of the provisions, however, shows that beneath the veneer of free and fair elections, the provisions provided for an artificial majority to a particular ethnic group in parliament. Article 109(3) of the draft constitution provides certain guidelines for the election commission when drawing up the electoral constituencies.⁸⁴ This article provides that the election commission in undertaking a constituency delineation should give due consideration to, first, the distribution of population in the state; second, the 'sparsity or density' of that population in several parts of the state; third, the means of communication; and, fourth, the distribution of the different communities. What is not stated in the constitutional provisions, but are clearly

evident in the record of the deliberations of the constitutional commission, is that there was a certain 'rural bias' in-built in the constitutional guidelines inserted in the draft constitution. This was simply because the constitutional commission wanted to ensure continuation of the previous approach (that was set by the federation's constituency delineation committee for the first federal elections in 1955, which provided for a higher rural weightage) in constituency delineation that provided for the total proportion of Malay-majority seats to be significantly higher than the non-Malay majority seats. This is evidently clear in the working paper prepared by Jennings for discussion in the commission, which was used as the basis for drafting the provision in respect of elections.

Jennings in his working paper on the distribution of voters based on the 'unequal' district as the unit of representation, argued that his model would ensure a Malay majority in parliament. Jennings' justification for this approach was that in a plural society, the distribution of seats in the legislature was deemed as important as the franchise.⁸⁵ He drew a parallel with the composition of electoral seats in Ceylon to emphasise the utility of his model. He noted that in the case of Ceylon, the 1924 constitution under the Manning Reforms provided for an over-representation of Tamils by means of communal seats, while the 1931 constitution resulted in an under-representation of Tamils through the provision of roughly equal territorial constituencies.⁸⁶ In the context of Malaya, where 49 per cent of the population were Malays, 38 per cent Chinese, 11 per cent Indians, and 2 per cent others, if the principle of 'one person, one vote', was applied, he argued, the Malays would be disadvantaged. Indians in this context would hold the balance of power in a general election. Thus if the constituencies were fairly equal in proportion the Malays, who mainly inhabited the rural areas, would be overwhelmed by the urban non-Malay electorate. Jennings estimated that, on the other hand, if the unit of representation was 50,000 persons per seat, this would produce a federal legislature with 59 Malay seats and 36 Chinese seats (based on a projected total of 95 seats). This, he felt, would be more appropriate and there would be no danger of the Chinese overwhelming the Malays in electoral seats.⁸⁷

Thus the constitutional records indicate that the delimitation of constituencies were formulated, based on the district as a unit but with due consideration given to the 'rural-urban population distribution' factor, to provide for a comfortable proportion of Malay majority seats. These constitutional guidelines in effect undermined the general principle, which was also stated in the constitution, that the differences in the size of the constituencies should not be more than 15 per cent in terms of population (art. 109(3)). Thus the constitutional commission undermined the basic constitutional principle of free and fair elections, by implicitly providing for a kind of 'gerrymandering' of the electoral constituencies. While the motive of the commission in making this provision is understandable, in view of the complexity of the multi-communal Malayan electorate, it, nevertheless, undermined a basic constitutional principle on free and fair elections.

Conclusion

The framers of the Malayan federal constitution embraced the principles of English constitutionalism and common law apart from adopting the Westminster model of the cabinet system and bicameral legislature. The constitution provided for the recognition of constitutional principles such as the rule of law, the doctrine of separation of powers, equality before the law, independence of the judiciary and free elections, and safeguards fundamental liberties. However, as we have shown above, there are some exceptions to the recognition of these principles and they were often a response of the framers to the peculiarities of the Malayan political and socio-economic landscape at the time of the framing of the constitution. Equality before the law is embedded in art. 8 in the Malayan constitution but an exception, albeit for a temporary period, was made in the form of special privileges for the Malays in art. 153 of the federal constitution. The provisions in respect of art. 153 were intended to correct a defect that was rooted in the ethnic economic imbalance created by the colonial economy. The Malayan constitution followed the path of the Indian constitution and provided for the supremacy of the constitution as against parliamentary supremacy, which is entrenched in the British constitution. In the face of the existence of numerous state constitutions and a complex multi-communal polity, the framers felt that the supremacy of the federal constitution should be deeply enshrined and this, as we have shown, is reflected in art. 3 and art. 75. Parliament's powers to legislate are circumscribed to an extent and any law that is repugnant to the federal constitution is void to the extent of the repugnancy. The Conference of Rulers, an extra-parliamentary body, further, curbed the powers of parliament in respect of the amendments to the constitutional position and privileges of the rulers, and in regard to changes to art. 153 and several other issues. The constitution provided sufficient guarantees for the conduct of free elections but at the same time provisions on constituency delineation favoured a rural weightage that invariably provided an ethnic bias in the distribution of electoral majorities. Constitutionalism in the Malayan context, while embracing the principles of English constitutionalism and common law, was strongly shaped by the politics of constitution-making that were peculiarly Malayan in nature.

Notes

- 1 Durga Das Basu, *Commentary on the Constitution of India*, Calcutta: Sarkar and Sons Ltd., 1955, pp. 4–9.
- 2 Maung Maung, *Burma's constitution*, The Hague: Martinus Nijhoff, 1961, pp. 77–83. In Burma, a 111-member committee of the constituent assembly produced a draft constitution on 23 May 1947, less than a month after they began constitutional deliberations. A further 75-member constitution committee examined the draft constitution in several sessions from June and the new constitution of the Union of Burma was adopted on 24 September 1947.
- 3 Ivor Jennings, *Constitutional problems in Pakistan*, Westport, CT: Greenwood Press, 1972, pp. vii–11.
- 4 Ivor Jennings, *The Constitution of Ceylon*, London: Oxford University Press, 1951, p. vii.

- 5 The constitutional adviser to the Indian government, Sir B. N. Rau, provided advice to the Burmese government on the final draft of the constitution. Several members of the drafting committee visited New Delhi to gather constitutional ideas and techniques for framing a constitution. See Maung Maung, *Burma's constitution*, The Hague: Martinus Nijhoff, 1961, p. 82.
- 6 O. Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, London: Sweet and Maxwell Ltd., 1957, pp. 17–35. See F. A. R. Bennion, *The constitutional law of Ghana*, London: Butterworths, 1962 and Robert M. Maxon, *Kenya's independence constitution*, Lanham, MD: Fairleigh Dickinson University Press, 2011.
- 7 T. Olwale Elias, *British colonial law*, London: Steven and Sons Ltd, 1962, pp. 4–5.
- 8 Kenneth Wheare, *Modern constitutions*, London: Oxford University Press, 1951, p. 98.
- 9 Alfred H. Kelly, Winifred A. Harbison and Herman Belz, *The American constitution: its origins and development*, vol. I, New York: Norton and Company, 1991, p. 241. Merrill Jensen, *The making of the American constitution*, New York: Robert E. Krieger, pp. 61–65.
- 10 See Basu, *Commentary on the Constitution of India*, 1955, pp. 88–89 and pp. 143–146. Article 16(4) empowers the government to reserve in the public services positions in favour of the backward classes. See also Uma Kant Tiwary, *The making of the Indian Constitution*, Allahabad: Central Book Depot, 1967, pp. 116–121.
- 11 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, pp. 17–35. As the British constitution is unwritten, the law of the constitution comprise statute laws, case law, custom (especially parliamentary custom or rule of conduct, royal prerogative, etc.) and constitutional conventions.
- 12 Basu, *Commentary on the Constitution of India*, 1955, p. x.
- 13 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, pp. 17–35.
- 14 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 22.
- 15 *Ibid.*
- 16 Jensen, *The making of the American constitution*, pp. 147–151, and p. 185. See also Kelly *et al.*, *The American constitution: Its origins and development*, vol. I, pp. 98–100.
- 17 Kelly *et al.*, *The American constitution: Its origins and development*, vol. I, pp. 98–100.
- 18 Tiwary, *The making of the Indian Constitution*, 1967, p. 212.
- 19 A. V. Dicey, *An introduction to the study of the law of the constitution*, Hong Kong: Macmillan, 1959, pp. 337.
- 20 See, for example, Chittharanjan Felix Amerasinghe, *The doctrines of the sovereignty and the separation of powers in the law of Ceylon*, Colombo: Lake House Investment Ltd., 1970, pp. 85–274.
- 21 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 556.
- 22 C. D. Cowan, *Nineteenth-century Malaya: The origins of British political control*, London: Oxford University Press, 1961, pp. 99–212.
- 23 K. G. Tregonning, *A history of modern Malaya*, Singapore: Eastern Universities Press, 1964, pp. 162–207. See also J. S. Furnivall, *Colonial policy and practice: A comparative study of Burma and Netherlands India*, Cambridge: Cambridge University Press, 1948.
- 24 See A. J. Stockwell, *British policy and Malay politics during the Malayan Union experiment, 1942–1948*, Kuala Lumpur: Malaysian Branch of Royal Asiatic Society; and Albert Lau, *The Malayan Union controversy*, Singapore: Oxford University Press, 1991.

- 25 Joseph M. Fernando, *The making of the Malayan constitution*, Kuala Lumpur: Malaysian Branch of Royal Asiatic Society, 2002, pp. 10–32. See Anthony Short, *The communist insurrection in Malaya, 1948–1960*, London: Frederick Muller, 1975, for a discussion on the origins and development of the communist insurgency in Malaya.
- 26 Heng Pek Khoo, *Chinese politics in Malaysia*, Singapore: Oxford University Press, 1988, pp. 156–178.
- 27 Joseph M. Fernando, *The making of the Malayan constitution*, pp. 9–63.
- 28 *Ibid.*, pp. 45–58.
- 29 *Ibid.*, pp. 56–57.
- 30 *Ibid.*, pp. 66–67.
- 31 Alliance memorandum by Tunku Abdul Rahman, 1 March 1955, PH/A/008/4, Malayan Chinese Association Files. The Tunku notes in this memorandum that a commission of locals would not be qualified for the task and that it would be desirable to invite experts ‘with specialized knowledge of constitutions of federal governments’.
- 32 Basu, *Commentary on the constitution of India*, 1955, p. 1.
- 33 See CO 1030/132, Commonwealth Relations Office to UK High Commissioner in Canada, 18 January 1956 and CO 1030/129 (1), UK High Commissioner in Australia in to Commonwealth Relations Office, 25 August 1955.
- 34 See CAB 129/78 (62) for the London conference agenda. See also Macintosh’s draft cabinet paper (undated) for the London conference, CO 1030/101 (51). See also Report of the Reid Commission in *Report of the Federation of Malaya Constitutional Commission 1957*, London: Her Majesty’s Stationery Office, Colonial No. 330, p. 5 (hereafter referred as Reid draft constitution).
- 35 See CO 1030/129 and CO 1030/130 for details on the appointment of the members of the commission.
- 36 See Reid Draft constitution, p. 5.
- 37 See CO 1030/129, Minute by J. M. Martin, 27 January 1956.
- 38 See Jennings’ Diary, Sir Ivor Jennings Papers 10.7.2, Institute of Commonwealth Studies, London. See also Summary record of 11th Meeting of Reid Commission, 18 July 1956, CO 889/1.
- 39 See CO 941/85 for the minutes of the working party meetings.
- 40 See CO 1030/496 for the minutes of the London constitutional conference, 13–21 May 1956.
- 41 See Joseph M. Fernando, *The making of the Malayan constitution*, pp. 183–186, for a discussion of the parliamentary debates.
- 42 See Joseph M. Fernando, ‘Sir Ivor Jennings and the Malayan constitution’, *Journal of Imperial and Commonwealth History*, vol. 34, no. 4, December 2006, pp. 577–597.
- 43 See Joseph M. Fernando, ‘Sir Ivor Jennings and the Malayan constitution’, p. 581.
- 44 Joseph M. Fernando, *The making of the Malayan constitution*, pp. 110–111. See also CO 889/1, Minutes of the Reid Commission meetings.
- 45 See CO 889/1, Minutes of the Reid Commission meetings. See also CO 889/2, Papers for discussion prepared by the constitutional commission members.
- 46 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 493.
- 47 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 494. See also Sir Ivor Jennings, *The law and the constitution*, 1961 (6th edition), p. 49, and pp. 311–313.
- 48 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 494.
- 49 Basu, *Commentary on the constitution of India*, 1955, pp. 88–89. See also Tiwary, *The making of the Indian constitution*, pp. 116–119.
- 50 See art. 5 of the *Constitution of the Islamic Republic of Pakistan 1956*, Karachi: Government of Pakistan, 1956.

- 51 See *The Constitution of the Union of Burma*, Rangoon: Constituent Assembly of Burma, 1960, p. 3.
- 52 See Reid draft constitution, p. 3.
- 53 See Reid draft constitution, p. 59.
- 54 See alliance memorandum to the Reid commission, 27 September 1956, pp. 17–18.
- 55 See paper containing tentative draft on Malay special position by Sir Ivor Jennings dated 22 October 1956, CO 889/2, CC 2000/34. See also Reid report, p. 150.
- 56 See summary record of meeting of twenty-fourth meeting of constitutional commission, 27 August 1956, CO 889/1 (27), p. 5.
- 57 See summary record of forty-sixth meeting of constitutional commission, 9 October 1956, CO 889/1 (49), pp. 1–2. See also art. 153 in Part XIII of Reid draft constitution, p. 57.
- 58 See record of alliance meeting with Reid constitutional commission, 27 September 1956, CO 889/6, CC 2167, p. 40.
- 59 Minutes of sixth meeting of working party, 4 March 1957, CO 941/85 (15). See also minutes of alliance ad-hoc political sub-committee meeting, 2 April 1957, UMNO/SUA 154/56 and *Straits Times*, 12 March 1957.
- 60 Dicey, *An introduction to the study of the law of the constitution*, 1959, p. 39. See also Jennings, *The law and the constitution*, pp. 144–145; Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 44. See also Geoffrey Marshall, *Parliamentary sovereignty and the Commonwealth*, Oxford: The Clarendon Press, 1957, pp. 1–30 and William Geldart, *Elements of English law*, London: Oxford University Press, 1959, p. 3.
- 61 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 36. The book was titled *De Republica Anglorum*, book 2, chapter 1.
- 62 Hood Phillips, *Constitutional law of Great Britain and the Commonwealth*, 1957, p. 36.
- 63 Amerasinghe, *The doctrines of the sovereignty and the separation of powers in the law of Ceylon*, p. 71.
- 64 Basu, *Commentary on the constitution of India*, (vol. 1), p. 9.
- 65 *Ibid.*, pp. 8–9.
- 66 Jensen, *The making of the American constitution*, pp. 69–72, and p. 185.
- 67 *Ibid.*, p. 185.
- 68 Neal Devins and Keith E. Whittington (eds), *Congress and the constitution*, Durham: Duke University Press, 2005, pp. 2–3.
- 69 See art. 3 of the Reid draft constitution, p. 1. Article 3(1) of the Reid draft constitution reads:
- This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.
- 70 The provision of Clause 1 of art. 3 was amended a little by the working party to read:
- This Constitution shall be the supreme law of the Federation and any provision of the Constitution of any State or of any law which is repugnant to any provisions of this Constitution shall to the extent of the repugnancy and subject to the provisions of this Constitution be void.
- See CO 941/87, Report of the Constitutional Commission Working Party, 26 April 1957, p. 2.
- 71 See art. 75 of Reid draft constitution, p. 24.
- 72 See art. 13(2) of Reid draft constitution, p. 5.
- 73 See summary record of forty-fifth meeting of the Reid constitutional commission, 9 October 1956, CO 889/1 (48), p. 2.
- 74 See art. 153 of the Reid draft constitution, p. 57.

- 75 Summary record of the thirty-third meeting of the Reid constitutional commission, 17 September 1956, CO 889/1 (36), p. 3.
- 76 Summary record of the thirty-fourth meeting of the Reid constitutional commission, 26 September 1956, CO 889/1 (37), p. 2.
- 77 See minutes of first meeting of the working party working party, 22 February 1956 and minutes of sixth meeting of the working party working party, 4 March 1956, CO 941/85; notes of points to be raised by the rulers, 25 February 1957, CO 941/85, and final report of the working party, CO 941/87.
- 78 See art. 38, Federation of Malaya constitution 1957.
- 79 Ivor Jennings, *The British constitution*, Cambridge: Cambridge University Press, 1961 (6th edition), p. 2.
- 80 H. W. R. Wade, *Constitutional fundamentals*, London: Steven and Sons, 1980, p. 5.
- 81 *Ibid.*, p. 5.
- 82 See arts 109 to 113 of the Reid draft constitution (arts 113 to 120 of the new constitution).
- 83 See CO 889/2, CC 2000/19, Jennings' paper on state constitutions, 31 August 1956, p. 5.
- 84 See art. 109(3) of the Reid draft constitution.
- 85 CO 889/2 (1), CC 2000/5, Paper on distribution of population by Ivor Jennings, 29 June 1956, p. 1.
- 86 *Ibid.*, p. 1.
- 87 *Ibid.*, p. 2.

8 Constitution drafting as Cold War realpolitik

Sir Ivor Jennings and Nepal's 1959 constitution

Mara Malagodi

The present chapter explores the appointment, work and legacy of the noted British constitutionalist Sir Ivor Jennings (1903–1965) as constitutional advisor to the Nepal government in the late 1950s. Jennings visited Kathmandu for one month from 28 March to 24 April 1958. He was employed by the British Foreign Office (FO) upon the request of the Nepali monarch, King Mahendra Bikram Shah, to advise the small commission charged with the drafting of the *Constitution of the Kingdom of Nepal 1959* – the third constitutional document in the country's history. In 1941, Jennings had moved to Sri Lanka, where he resided until 1955. While in Sri Lanka, he became progressively involved with constitution-making processes and constitutional politics in the decolonising world. This period of Jennings' life, the body of literature pertaining to the post-colonial world that he produced, and his advisory work in decolonising countries is referred to here as the 'Oriental Jennings'.¹ It is argued here that his work in/on South Asia represents the core of the academic production and advisory work of the 'Oriental Jennings'.² Aside from Britain – Sri Lanka, India and Pakistan were the countries Jennings was most familiar with and to whom he dedicated the majority of his academic writings.³ This chapter maintains that Jennings' constitutional advisory work in Nepal is crucial to understanding the progression of his thinking on constitutional democracy in both Asia and Britain.

In this regard, my analysis of Jennings' work in Nepal purports to trace the 'evolutionary view' of postcolonial constitutional problems and solutions formed by Jennings through his direct South Asian experiences in Sri Lanka (1941–1955), the Maldives (1952–1953), and Pakistan (1954–1955), and his long-term indirect engagement with India. The chapter aims to reflect upon the manner in which the various constitutional mechanisms that Jennings developed in South Asia – all instances of a modified Westminster model – have been deployed in Nepal, the last of Jennings' South Asian endeavours. The analysis is based on my reading and interpretation of the archival sources pertaining to Jennings' constitutional advisory work in Nepal – and South Asia more broadly – held at the Institute of Commonwealth Studies of the University of London,⁴ and at the British National Archives in Kew Gardens,⁵ together with Jennings' copious published work on the region. It is important to highlight that this chapter provides a partial – and somehow piecemeal – account of Jennings'

constitutional work in Kathmandu due to the almost complete absence of Nepali sources on his engagement and legacy in the country, aside from the few articles on the national state-owned daily newspaper, *Gorkhapatra*.

The key questions that the chapter seeks to answer is to what degree Jennings departed from the British constitutional model in his constitutional advisory work in Nepal – and why. The chapter also aims to explore the extent to which Jennings' constitutional vision was tempered by the agency of the people instructing him – in the case of Nepal by both King Mahendra and the British government. In this respect, particular emphasis will be placed on the political and strategic considerations of different political actors in the Cold War context, which played a fundamental role in structuring the behaviour of all the key actors more or less directly involved in the drafting of Nepal's 1959 constitution.

Nepal's third constitution was promulgated in February 1959, but was short lived. King Mahendra suspended the document in December 1960 and promulgated a new constitution in 1962 to pave the way to the new Panchayat regime and 30 years of monarchical autocracy in the country. The 1959 constitution is particularly important in Nepal's constitutional history because it was explicitly used by the drafters of the 1990 constitution as the main template and model for constitution-making after Nepal's second democratisation, as revealed in the interviews I conducted with them in 2007.⁶ Indeed, Nepali constitution-makers in 1990 sought to improve on the 1959 document, especially with regard to the institutional boundaries and limitations to the powers of the king.⁷ It also seems plausible that the 1959 document had inspired the 1962 Panchayat constitution and had a lasting impact on Nepal's constitutional developments, especially with regard to the piecemeal constitutionalisation of the Shah monarchy. In fact, Jennings had sought to introduce a 'modified' Westminster model in 1950s Nepal, but the central issue the present analysis seeks to address is the extent to which the 1959 constitution deviated from the British model and the long-term impact of such 'modifications' on democratic politics in Nepal.

The chapter is divided into four parts. The first section provides a brief historical background to Nepal's political circumstances at the time of Jennings' visit to Kathmandu in the late 1950s at a crucial stage of the Cold War. The second part analyses the process by which Jennings was selected as the constitutional advisor to Nepal by the British FO in agreement with the Nepali government. The third section investigates the details of Jennings' work in Kathmandu and his relationship with the Nepali actors he most closely engaged with. The final part of the chapter seeks to reflect on the long-standing legacy of Jennings' constitutional advisory work and its impact on democratic politics in Nepal.

1 Nepal's historical context

The creation of modern Nepal as the state entity we know today was initiated in the late nineteenth century by the military conquests of King Prithvi Narayan Shah of Gorkha – a small Hindu principality lying westward of Kathmandu. The

military campaign culminated with the conquest of the Kathmandu Valley in 1769 and Gorkhali territorial expansion progressed even after the death of Prithvi Narayan, but was eventually halted by the clash with the East India Company in 1814. In 1816, the Treaty of Sagauli marked the victory of the British colonial power over the Gorkhalis with a significant territorial loss and a growing British influence over political developments in Nepal. In fact, Britain became the only country to have diplomatic representation in Kathmandu through the British Residency, and to benefit from the supply of Gurkha soldiers, although Britain was not allowed recruitment on Gorkhali territory until after supporting the East India Company in the 1857 insurrection.⁸

Two features of Nepali political history are central to the present analysis. First, the Kingdom of Nepal, while entertaining close diplomatic ties with London, especially after the establishment of direct Crown rule over the Indian subcontinent in 1858, never became a British colony and preserved its independence. Second, the institution of the Shah monarchy, which maintained dynastic continuity until 2008 when the constituent assembly declared Nepal to be a republic, played a critical role in the country's processes of state formation and nation-building. In fact, in 1846, when a young aristocrat, Jang Bahadur Kunwar, successfully carried out a coup and captured state power, he retained the Shah monarch as head of state and even reinforced the aura of sanctity of the king.⁹ The monarch, while placed at the centre of the political legitimacy of the Nepali state, remained devoid of any effective power under the newly established Rana regime – an arrangement that remained in place for over a century. In this respect, it has been convincingly argued that the preservation of the Shah monarchy under the Rana rule provided ideological continuity with the previous regime, leaving the path fully prepared for the Shah kings to resume effective power after the Rana autocracy was overthrown.¹⁰

Between 1950 and 1951 an alliance between King Tribhuvan Shah and the newly created Nepali political parties succeeded in toppling the Rana regime with independent India's support and sought to transition Nepal to democracy. The years between 1951 and 1959, when the first general elections were held, were characterised by transitional politics and great instability, exacerbated by tensions between the political parties and the monarchy, bitter inter-party disputes and the succession of a long string of cabinets alternated by periods of direct monarchical rule. In his Royal Proclamation of 18 February 1951, King Tribhuvan declared: 'hereafter our subjects shall be governed in accordance with a democratic constitution to be framed by the constituent assembly elected by the people'.¹¹ However, the idea of a constituent assembly was not to be realised in Nepal until 2008 – and Nepal's many constitutions were to be drafted by small unelected and unrepresentative commissions for many years to come.

On 11 April 1951, the king promulgated the Interim Government of Nepal Act 1951, the first constitution ever enforced in the country – a provisional document to govern Nepal until a definitive one was drafted. The new constitutional dispensation borrowed extensively from the Government of India Act 1935, which effectively functioned as India's interim constitution between 1947 and 1950.

In fact, it was under the guidance of Prof. Ram Ugra Singh of Lucknow University that a small Nepali Commission prepared the document.¹² Nepal's 1951 interim constitution featured a modified version of the British principle of King-in-Council as executive powers were vested in the king and the Council of Ministers. However, the king enjoyed unusually wide powers, including legislative powers through the issuing of ordinances, as the constitution did not establish a separate and independent legislative branch. Eventually, in June 1951 the Second Amendment to the constitution created an Advisory Assembly General, which enjoyed only limited legislative authority while the king retained 'sovereign and plenary powers to make laws' and the discretion to withhold royal assent. While the new dispensation introduced forms of judicial scrutiny over executive actions, these were progressively eroded through amendments to the constitution and ordinary legislation, together with an expansive use of royal prerogative powers.¹³ The text made no explicit reference to Hinduism and left the issue of the place of Nepal's religious tradition to the permanent constitution.

The death of King Tribhuvan in 1955 and the coronation of his son Mahendra led to a more active role of the Shah monarchy in the conduct of Nepal's turbulent political affairs. According to one analysis, King Mahendra

aspired to exercise an active leadership in accordance with Hindu traditions and these aspirations were manifested by his refusal to hold elections for a Constituent Assembly, and the desire to write the constitution himself with no sovereignty being vested in the people.¹⁴

King Mahendra's attitude is also evident in the amendments he made to the interim constitution, which instead of transferring power to the people further concentrated them in the hands of the monarch. As a result, the king continued to ignore demands for the creation of a constituent assembly after general elections had been postponed twice. Then, in early 1958, Mahendra made a resolute move and invited British constitutional expert Sir Ivor Jennings to guide the impending constitution-making process. Soon afterwards, he independently appointed a commission to draft the new constitution.

2 Selecting Jennings for the 'Nepal Mission' (11 May 1956–1 February 1958)

This section investigates the circumstances and negotiations surrounding Jennings' selection and appointment as the constitutional advisor to the government of Nepal between 1956 and 1958. The analysis relies on the correspondence between Jennings and FO officials held in Jennings Private Papers.¹⁵ The British FO played a key role in selecting Jennings, in shaping the instructions and terms of reference of his mission to Nepal, and in organising and funding the trip in its entirety. In this respect, two key points ought to be emphasised.

First, the Cold War context was fundamental in determining the British government's selection of Jennings and framing his mandate. In fact, throughout the

1950s South Asia represented for Britain and the Western bloc a crucial Cold War battleground. While Pakistan had become a key anti-Soviet ally in the region through the South East Asia Treaty Organization (SEATO), India had a more ambivalent position, especially since the formation of the Non-Aligned Movement of countries across Asia and Africa propelled by the 1955 Bandung Conference.¹⁶ The British government's interest in Nepal also resulted from the Himalayan country's geopolitical and strategic location between two key global players, India and the Popular Republic of China, whose invasion of Tibet had begun in 1950 and culminated with the capture of Lhasa in 1959 – very close to the Nepal border. Since his accession to the throne, King Mahendra had pursued a programme of diversification in his foreign policy with the intent of involving major outside powers to counteract its immediate neighbours, India and China.¹⁷ This resulted in a number of countries establishing embassies in Kathmandu, and the strengthening of Nepal's relationships with Britain. As a result, Jennings's instructions from the FO for his Nepal mission were clear, although never spelt out in any of the letters exchanged between him and the Ministry. In line with India's policy over Tibet, the aim was to produce a constitution capable of fostering political stability and consolidating Nepal's position as a buffer zone against expanding Communist China.¹⁸

Second, the chapter seeks to highlight the agency exercised by Nepali political players in the selection and support to the constitution-drafting work carried out by Jennings during his visit to Kathmandu in 1958. As clearly illustrated by the correspondence analysed below, King Mahendra and his political advisors were keen to secure Jennings' services; it is crucial to highlight that in no way was Jennings an imposition of the British government on the Nepali government. In fact, by 1956, Jennings was a well-known constitutional actor in South Asia as he had both published extensively on constitutional developments in the region and been an active player in constitutional politics in Sri Lanka, Maldives and Pakistan. Thus, the Nepali King and his advisors most likely had a sense of the kind of 'modified Westminster model' Jennings could devise for Nepal in light of his previous work in other South Asian jurisdictions, where he had fostered strong but ultimately unaccountable executives.

On 11 May 1956, Jennings was first approached by the FO with a proposal from the Nepali prime minister and the minister of education to set up a new residential university in Nepal and assist in the drafting of a new constitution.¹⁹ The elections for a constituent assembly, promised by King Tribhuvan Shah in 1951, were still on the cards a little over a year after King Mahendra's accession to the throne in March 1955. In fact, in August 1955, after the political parties put pressure on him, King Mahendra had announced that the elections for the constituent assembly would finally take place in October 1957.²⁰ On 13 May 1956, Jennings replied to the FO letter illustrating two concrete options for constitution-building in Nepal: 'settling a constitutional draft with the Government would take only a few months, while getting a draft through a Constituent Assembly would take much longer'. Jennings also informed the FO that he was unavailable for two years until mid-1958 and recommended Sir Robert Drayton QC in his stead.²¹

On 3 July 1956, the FO again contacted Jennings with an invitation from the Nepali prime minister for Jennings to visit Kathmandu between August and September 1956 to advise the Nepali government on the general elections, at the time still scheduled for October 1957. In particular, Jennings' opinion was sought with regard as to whether the elections should be held for a constituent assembly or only for an elected parliament.²² Significantly, in January 1957 the king had formed a new cabinet and appointed the Praja Parishad's leader Tanka Prasad Acharya as prime minister, who soon after started agitating for

a Parliament with limited powers operating under a Constitution granted by the King [on the basis that] there could not be two sovereigns in the country at the same time, and that the people of Nepal were not quite prepared for a full-fledged democracy.²³

The new position of the Praja Parishad alienated the party from the democratic movement in Nepal, and made it increasingly isolated, while political tension kept mounting in the country. As a result, the invitation to Jennings was followed by delays and nothing eventually came of it. In a letter dated 29 January 1957, the FO stated that it was a 'disappointing outcome' as 'the Nepalese are not quite sure about what they want'.²⁴

Political machinations and manoeuvring continued in Kathmandu as the monarchy progressively became increasingly active in the political sphere and tensions with the democratic political parties more acute. Significantly, on 18 February 1957 Jennings was visited at Trinity Hall in Cambridge by Lok Darshan, King Mahendra's personal secretary, who was travelling the United Kingdom as part of a one-month-long world tour to study electoral, parliamentary and constitutional practice and procedure.²⁵ A couple of months later, on 26 April 1957, the FO contacted Jennings to inform him that his services were no longer required in Nepal.²⁶ A letter of the UK ambassador to Nepal dated June 1958 later explained that Jennings' first invitation to Nepal was dropped due to Indian pressures:

I have no sympathy with the Indians on this. They have only themselves to blame if by their actions they compelled the Nepalese to act surreptitiously in order not to be bullied out of asking for Jennings' services, as they were at an earlier stage.²⁷

India has historically exercised a dominant influence in Nepali political affairs, and did not take kindly to Britain's efforts to exert sway in Kathmandu through its offer of constitutional advice.

The new cabinet's failure to hold its first general elections in October 1957 was followed on 14 November by King Mahendra's Royal Proclamation summarily dismissing the government and announcing 18 February 1959 as the new date for the general elections.²⁸ Shortly afterwards, on 13 December 1957, the FO again contacted Jennings encouraging him to accept King Mahendra's

renewed invitation to visit Nepal to strengthen the goodwill between the United Kingdom and Nepal and ‘straighten the confusion of ideas now disturbing the Nepalese political scene’.²⁹ On 7 January 1958, the FO followed up with Jennings further detailing that the visit to Kathmandu would have been for only one month.³⁰ On 14 January 1958, the FO again contacted Jennings to relay the information gathered by the UK ambassador to Nepal that King Mahendra was now thinking of granting a constitution himself. At this point, the FO put further pressure on Jennings to accept the instructions by saying that his visit would have been most valuable and that much would depend on the king having sound advice at such a time. Moreover, the FO letter specified that King Mahendra would have issued a formal invitation to Jennings only when sure of his availability and that the king wished to make a public announcement about Sir Ivor’s visit to Kathmandu.³¹ On 19 January 1958, Jennings eventually accepted the instructions from the FO and his honorarium was agreed ten days later.³²

As a result, on 1 February 1958, King Mahendra issued a Royal Proclamation to serve as the roadmap for Nepal’s constitution-making process where the king blamed the lack of progress on Nepal’s political instability.³³ King Mahendra also announced the establishment of a five-member Constitution Drafting Commission to prepare a new constitution, which was to form the basis for holding the elections of a bicameral parliament. The commission was to include five members: the chairman, Bhagvati Prasad Singh (chairman of the Public Service Commission); three ordinary members, Ramraj Panth (principal of the Law College), S. P. Upadhayaya (Nepali Congress), Randhir Subba (Gorkha Parishad); and the secretary, Hora Prasad Joshi.³⁴ King Mahendra stated that the new constitution was to answer the needs of the country, time and circumstances and that the scope of the document was to protect primarily Nepal’s sovereignty and independence.³⁵ The emphasis placed by the king on the importance of preserving Nepal’s national unity implied that the Shah monarchy was to play a central role in the new constitutional edifice. In fact, the focus on the monarchy operating a parliamentary system of government within a unitary state entirely side-lined the debates over a republican form of state and federal restructuring already present in Nepal. At the same time, the constituent assembly option had been completely discarded in favour of a small unelected commission, selected by the main political forces and devised to function under the guidance of a foreign expert, who had been equally handpicked and agreed upon by both the Nepali and British governments.

3 Jennings in Nepal (28 March–24 April 1958)

The 1 February 1958 Royal Proclamation provided the blueprint for Nepal’s efforts in constitution-drafting:

there shall be a commission to prepare a draft for a new constitution ... on the basis of the present Interim Constitution, according to necessity foreign experts will be co-opted to aid and advise the commission; on the basis of

the constitution thus prepared, General Elections shall be held for Parliament; this Parliament shall consist of two Houses and all possible provisions shall be made to safeguard the country's sovereignty, independence and people's rights.³⁶

Jennings' mandate was to help create a constitution within the parameters of constitutional monarchy and parliamentary democracy.

On 28 March 1958, Sir Ivor Jennings landed in Kathmandu on his way from London via Delhi to assist the Nepali government in the drafting of the new constitution as announced by the local daily.³⁷ On 31 March, the first meeting with the commission was held; as Jennings recorded in his diary, the discussion revolved around parliament's second chamber, which both Upadhyaya and Subba opposed, but feeling that the king was pledged they agreed to a second chamber based on the Ceylon model. Jennings reflected on the first day:

Nothing else of any significance was said, and it was plain that I would have to submit a draft for discussion, as in fact I had assumed (and I had already drafted eight or ten articles, which had to be revised after the discussion). There were no papers before the meeting except the Constitution of 1948 and the Interim Constitution. I asked for copies of the Citizenship Act and the Representation of the People Bill, and they were promised for 1 April.³⁸

On 2 April, a short meeting of the commission took place to inform Jennings that there was no Regency Act, which he had anticipated, and a superficial discussion was held on Jennings' rough draft, which he completed on 3 April; it was later typed and returned to Jennings for corrections on 7 April.

In the afternoon of 7 April, Jennings had an audience with King Mahendra, who had however not yet received a copy of the draft:

He gave me a lead, and I gave him a lecture, with apologies, about the constitutional problems of Nepal. Occasionally he made encouraging noises, but he said nothing, and at the end of the lecture he indicated, by asking me about Sital Nivas, that the audience was at an end.³⁹

Later that day Jennings met with the chairman of the Election Commission to receive the report of the Delimitation Commission; he also made an appointment with the secretary of the Law Ministry and obtained the *Citizenship Act*, the *Citizenship Bill* (of which he was not aware), the *Civil Liberties Act* (which he termed 'a piece of eyewash'), the *Interpretation Act*, and a set of rules on government procedure (clearly borrowed from India). The *Representation of the People Bill*, instead, was only received on 11 April.

On 10 April, Jennings met with the commission's secretary, Hora Prasad Joshi, and discussed the parallel draft prepared by him, which had been circulated amongst the commission's members. In his confidential notes to the FO, Jennings commented on Joshi's draft as follows:

It was, technically, a pathetic document, and the claim of Hora Prasad Joshi, the Secretary of the Commission, that it was all of his own work, seemed superficially to be justified. It was a collection of bits from other constitutions strung together amateurishly. On the other hand, Randhir Subba, another Member, said that it came from the Palace, but not from the King. This is probably a guess, founded on the suspicion which the Gorkha Parishad has of His Majesty. My own guess is that Joshi is an ambitious young man who took this opportunity to bring his merits to His Majesty's attention (copies of both were supplied to His Majesty). However, the draft was never circulated in the Commission.⁴⁰

On 11 April, Jennings met with the commission for the third time to discuss his first draft; the main point of contention regarded the extensive powers granted to the king.

The lead was taken by Subba [Gorkha Parishad], who obviously had some major criticisms of the powers suggested for the King, but did not put them with the force I had expected. Afterwards I gave a general exposition of the draft, pointing out the controversial positions (mostly those relating to the powers of the King), and asking for decisions.⁴¹

In the morning of 12 April, Jennings met privately with Subba, who explained to him that the members could not speak frankly in the commission for fear of leakages:

Evidently both he and Upadhyaya [Nepali Congress] are in favour of cutting the powers of the King to a minimum, but dare not say so. . . . Never once did he mention the public interest nor – unlike most of those who have spoken to me – did he say anything against India. He did mention the danger from the North.⁴²

Subba talked about the financial circumstances of the Nepali political parties and said that the Communist Party was entirely dependent on funds from Russia and China – and that it was unlikely that such funds would be received as China was more focused on India and on pacifying Tibet. The Nepali Congress and the Gorkha Parishad, instead, allegedly had approximately one million rupees each as they were funded by Class C Ranas and Class A Ranas respectively.

On 13 April, Jennings met with the commission for the fourth time. He put forward a number of arrangements to strengthen the constitutional position of the king. The first proposal was to 'put teeth' into parliament's upper House, the senate (*Maha Sabha*), by giving a majority of nominated members and having them nominated at the king's discretion; but the commission opted for the innocuous Ceylon senate. The upper House was composed of 36 members, 18 elected by the lower House and 18 nominated by the king, making it easy for parliamentary proceedings to reach an impasse in a bicameral system.

The second proposal was to devise a Council of State (*Rajya Parishad*, a consultative body for the king to receive advice) on the model of the old British Privy Council.

I said that the powers of the King were very heavy, and they might have to be borne by a not very experienced King or by a Queen regnant. He (or she) would have to consult somebody, and if no formal consultative body was constituted he would necessarily consult members of his Household. I mentioned that after the death of the Prince Consort Queen Victoria had been accused of consulting 'irresponsible advisers', and that it was far better that the King should consult a body, which included the Prime Minister and the other Ministers. This argument was accepted together with an idea suggested by Panth that the Speaker and Deputy Speaker and the President and the Deputy President of the Senate should also be members. This of course would do no harm whatever, because the King can add as many as his own nominees as he wishes.⁴³

Jennings saw the Council of State as a buffer for the king against popular discontent.⁴⁴ Moreover, Jennings explained further on the issue of the king's extensive powers:

On the question of the King's discretionary power to refuse Royal Assent, I carried the draft by pointing out that it would be difficult [for the king] to refuse unless he had the Council of State with him. Kings, like politicians, have to keep their popularity.⁴⁵

On other aspects of the king's powers, Jennings felt he had to compromise a little, but not as much as he had expected. The question of the emergency powers vested in the king also emerged.

Subba put to me point-blank the question what would happen if the King's powers to dispense with Cabinet Government were removed. I replied that in such a case the King would suspend the whole constitution, as had been done in Pakistan. That convinced him, since he realised that a power to suspend the constitution must be included in the difficult conditions of Nepal. (I had at the previous meeting emphasised that Nepal lay between two very powerful neighbours). On the emergency power itself, I agreed to make separate provisions for war, etc., one the one hand and breakdown of constitutional machinery on the other, mentioning that this had been done in India. There was also objection to the power to remove difficulties. Since this was not important, I suggested the Indian provision, though I think in drafting it, I will give it more teeth.⁴⁶

By 15 April Jennings had prepared the second constitutional draft; he deemed it satisfactory:

It will provide adequate means for direct rule if democratic government breaks down (or becomes corrupt, though I did not mention that), and on the other hand it would not enable the King to play fast and loose with democracy.⁴⁷

On 19 April, the commission met without him and, on 20 April, Jennings completed the third draft. On 21 April, Jennings met again with the commission and the drafting of an explanatory memorandum was agreed, which Jennings prepared that day.

When I asked whether it should be in my own name or theirs, they preferred the former because it would be in the name of an ‘expert’, though I expect they thought it better for me to take responsibility if opposition developed.⁴⁸

On 23 April, Jennings held the sixth and final meeting with the commission to finalise the draft and the memorandum; he then left Kathmandu the following day.

The meetings of the commission in which Jennings took part were characterised by a circumspect attitude of the members for fear of leakages and by complex negotiations between competing agendas. As a result, many exchanges between Jennings and commission members took place behind the curtains as private and unofficial one-to-one meetings, revealing the importance of brokering deals through backdoor negotiations, notwithstanding the fact that Jennings effectively led the deliberations of the commission. Writing in June 1958, the British ambassador to Nepal reported the difficulties encountered by the commission after Jennings’ departure, especially with the translation of the draft from English into Nepali, and the preoccupation that amendments to the draft could still be made.⁴⁹

The draft constitution was first approved by the coalition cabinet and then submitted to King Mahendra for promulgation. Since Jennings’ departure from Kathmandu in late April 1958, it took over eight months for the king to promulgate the new constitution.⁵⁰ King Mahendra, however, chose to do so only one week before the scheduled general elections, on 12 February 1959, leaving the political parties contesting the elections in the dark about the powers and functions of the government they were hoping to form:

It is unclear whether this was an example of their political naïveté, or whether the provisions of the Constitution, as drafted by the Commission, were revised in the Royal Palace without the knowledge of the parties that had been represented in the Commission. In any case, by the time the Constitution was promulgated, it was too late for the parties to do anything about it. Several parties, and notably the Communist party, criticised the new Constitution for its feudal character, but, like the others, they continued to contest the election in a spirit of political resignation.⁵¹

A perusal of Jennings' third draft reveals that substantive additions were made to the text, most likely by the king and his entourage, especially with regard to the ethnocultural elements of the document, after his departure from Kathmandu.⁵² In particular, the clauses pertaining to the Shah monarchy were expanded to include extensive cultural, religious, and historical references supporting the king. A constitutional ban on conversion was inserted under art. 5, Freedom of Religion, for the first time in Nepali constitutional history. However, the framework devised by Jennings in his drafts regarding the 'efficient' part of the constitution with a central role of the Crown was preserved intact in the promulgated version of the dispensation.

4 The 1959 constitution and Jennings' legacy in Nepal

The 1959 constitution has been a landmark document in Nepal's constitutional history for two reasons: first, from a substantive point of view, it entrenched the dominance of an unaccountable executive under a nominally democratic framework. Second, from a symbolic point of view, it gave prominence to the historical ethnocultural nationalist narratives legitimising the wide powers of the king: the historical dynastic continuity of the Shah monarchy as the symbol of the unity of the nation, Hinduism, and the Nepali language. A perusal of Jennings' three constitutional drafts in the archival material demonstrates that no ethnocultural references were included in the constitutional text during his visit.⁵³ Therefore, it is logical to infer that the Nepali Drafting Commission, possibly under more or less direct instructions from King Mahendra, inserted that constellation of 'symbolic' provisions into the final document after Jennings' departure. However, Jennings was implicated with the symbolic dimension of the new constitution. It was the substantive institutional choices of a constitutional framework tilted in favour the monarchy that allowed for the symbolic ethnocultural elements to find a place in the constitutional text, even if at a later stage.

In his confidential notes to the FO, Jennings explained the reasons for the centrality of the Shah monarchy in the design of Nepal's 1959 constitution. He commented that the meaning of drafting a 'democratic constitution' in Nepal was to prepare a document 'designed to vest power in a middle class, usually English-speaking oligarchy which was to pay attention to the needs of the hoi polloi because they have the vote ... but the difficulty in Nepal was to find the oligarchy'.⁵⁴ Thus, in light of the Cold War context, Jennings was instructed to devise a constitutional framework capable of delivering political stability in the strategically located Himalayan kingdom. As a result, the design of Nepal's new constitution was based on Jennings' reading of the country's political situation, and he identified the Shah monarchy as the only stable political element and institution in Nepal. He, however, noted three main problems in this respect: first, King Mahendra was popular, but 'obstinate and lacking character' – and he was devoid of a court party he could rely on. Second, there was an unofficial Indian influence against the monarchy, mostly channelled through the Nepali Congress, whose politicians he unceremoniously described as 'lesser [Indian]

Congress *wallahs*'. Third, Jennings felt that it was crucial to separate the person of the king from the institution of the Crown: 'one must not presume too much of the King's personal popularity and make him too obviously responsible for the efficiency of government. Whatever happens, the Government is going to be pretty inefficient and (I suspect) corrupt'.⁵⁵

Jennings saw no correspondents in Nepal for parties like the Indian Congress or the Pakistan Muslim League, or charismatic personalities like in Sri Lanka with D. S. Senenayake. As a result, Jennings contemplated the idea of instigating the formation of a political party around the authority of the king, composed of feudal local leaders, but then discarded it. He concluded that there existed 'a number of Kathmandu groups miscalled "parties", rather like the present situation in Pakistan'. However, Jennings opted not to devise a constitutional machinery designed for groups

for no such machine would function properly unless there was a strong public service ... so I have tried to strengthen the ties between the public service and the Crown, but the former seems to me to be excessively weak and indolent,

and instead designed a constitution based on the prominence of the Crown.⁵⁶ As a result, the preamble of the 1959 constitution ended up vesting state sovereignty solely in the king:

I, King Mahendra Bir Bikram Shah Deva in the exercise of the sovereign powers of the Kingdom of Nepal and prerogatives vesting in US in accordance with the traditions and customs of our country and which devolved on US from Our August and Respected forefathers, do hereby enact and promulgate this fundamental law entitled The Constitution of the Kingdom of Nepal.⁵⁷

Moreover, for the first time in Nepali constitutional history, the centrality of the monarchy within the constitutional edifice was legitimised in ethnocultural nationalist terms, as clearly stated in the preamble, which was however inserted after Jennings' departure:

His late Majesty King Tribhuvan Bir Bikram Shah Dev, Father of the Nation and revered descendant of the illustrious King Prithvi Narayan Shah, adherent of Aryan Culture and Hindu religion, having led a Great revolution for the rights and welfare of His subject, earned immortal fame in the history of the world and was firmly resolved to establish real democracy in Nepal by giving fundamental rights to the people.⁵⁸

Jennings sought to devise a constitutional system in which the king had extensive powers without jeopardising the position of the Crown. Therefore, he sought to enshrine in the document a sort of Privy Council (Council of State) to insulate

the institution of the monarchy from the unpopularity of an individual King under art. 11.

The 1959 constitution only nominally institutionalised the regime change of 1951 and the process of democratisation that was expected to follow suit. Instead, it established a framework completely tilted in favour of the 'hereditary executive' element of government (the monarchy) with very limited scope for the 'representative executive' (the cabinet arising from, and responsible to, a directly elected parliament). Modern constitutions have historically emerged as restrictions on arbitrary power featuring mechanisms to ensure limited government (e.g. in Britain to limit the powers of the monarch). In Nepal, however, the democratic representative element of government was entirely thwarted already at the stage of constitution drafting by allowing the unelected element of government to legally prevail over the elected one. Nepal's 1959 constitution exemplifies an instance of what Okoth-Ogendo has described as 'constitutions without constitutionalism'.⁵⁹

Nepal's new document did not institutionalise the transition from sovereignty from above to sovereignty from below in the country, as clearly illustrated in the preamble, in which 'the people' were still paternalistically treated as 'subjects' rather than rights-bearing 'citizens':

We also being firmly resolved to help our subjects to attain all round progress and achieve the fullest development of their personality; to ensure to them political, social and economic justice; and cement the unity of the nation by bringing about political stability through the establishment of an efficient monarchical form of government responsive to the wishes of the people.

It is also important to note that there is no mention of democracy as a goal of the new constitution either in the preamble or in any part of the document. The prominence of 'hereditary executive' over the 'representative executive' is well illustrated in a number of constitutional provisions.

First, art. 10 defines executive power and vests it exclusively in the king, not in the cabinet:

The executive power of the Kingdom of Nepal is vested in His Majesty, extends to the execution and maintenance of this Constitution and the laws of Nepal, and shall be exercised by Him either directly or through Ministers or other officers subordinate to Him, in accordance with the provisions of this Constitution and of any other law for the time being in force.

Second, the British convention by which the king shall act on the advice and recommendation of the prime minister was completely diluted and distorted by the combination of art. 10(2):

Where under this Constitution His Majesty is not specifically empowered to act in His discretion or on the recommendation of a specified person,

He shall act on the recommendation of the Cabinet conveyed by the Prime Minister or on the recommendation of the Minister of the Crown authorised by the Prime Minister to deal with the matter in question’.

With art. 10(3)

Except on the ground of urgency, no recommendation in any matter specified by His Majesty shall be made to His Majesty until His Majesty has been informally consulted, and His Majesty may refer any recommendation for consideration by the Cabinet, whether or not it has already been considered by the Cabinet.

And art. 10(5) of the 1959 document

If any question arises whether any matter is or is not a matter in respect of which His Majesty in His discretion shall be final, and the validity of anything done by His Majesty shall not be called in question of the ground that He ought or ought not to have acted in His discretion.

Third, art. 13(1) undermined the British convention regulating the monarch’s prerogative power of appointing as prime minister the leader of the political party commanding the majority in Parliament’s lower House. An element of royal discretion was injected in the provision by adding the words ‘in the opinion of His Majesty’:

The Prime Minister shall be appointed by His Majesty, acting in His discretion and shall be a person who will be able in the opinion of His Majesty, to command a majority in the House of Representatives, either immediately or at the meeting of Parliament after the next general election.

In fact, art. 13(3) included the following clause:

Provided that if His Majesty in His discretion is satisfied that no such person will be able to command a majority in that House in accordance with clause (1), He may appoint as Prime Minister a person who is not a member of that House, but no person shall hold office as Prime Minister for more than four months unless he is a Senator or a member of the House of Representatives.

In this respect, it is interesting to look at the formulation of cabinet’s collective responsibility in Jennings’ third draft where the role of the monarch in Nepal is wider than in Westminster: ‘The Council of Ministers shall be collectively responsible to the King and the Parliament’.⁶⁰

Fourth, the long-standing British convention by which the monarch shall not withhold royal assent to a bill passed by Parliament was overtly subverted in art. 42, which explicitly provided for the king to be able to withhold royal assent

at his discretion. As commentators highlighted, if a prime minister was independent-minded, then cabinet government was destined to fail under such a constitutional framework.⁶¹

Lastly, Jennings was aware of the precarious position of cabinet government under the new dispensation, thus he devised a series of mechanisms to preserve a cloak of legality in emergency circumstances. He concluded that his draft constitution was indeed a compromise featuring cabinet government as long as practicable. Ample powers were given to the king to suspend cabinet government under art. 55 based on the so-called 'Pakistan formula' or even the constitution under art. 56, and assume direct powers under art. 77, the power to remove difficulties. Ultimately, this scheme was backed by the fact that the constitution gave the king exclusive control over the Royal Nepal Army under art. 64 and did not bring the armed forces under parliamentary control. Jennings also argued that a Chapter on Fundamental Rights – based on the Indian model, which he disliked⁶² – was forced upon him by the commission, but that it would have been easy for the king (but not for the politicians) to suspend them if they proved too restrictive. Jennings commented about the scheme in the following terms:

The King can always appeal to the people and prove to the politicians whether or not they have popular support; and if the electorate does not produce a stable government, the fault will lie with the politicians. The Commission took to this scheme quite well and I had not to compromise it much.⁶³

The last statement about the alleged acquiescence of the Nepali Drafting Commission to Jennings' designs points towards two considerations. First of all, the commission was heavily influenced by the will and vision of King Mahendra. The representation of various political forces within the commission was skewed and unequal, featuring a clear majority of royalist members. In direct connection to this, the king had specifically selected Jennings to provide an institutional solution to his political vision for Nepal, and legitimise it through the authority of the foreign expert. In this sense, Jennings' advisory work and the FO agenda ended up being mediated and moulded by the agency of local Nepali actors.

5 Conclusions

To conclude, when Jennings returned to the United Kingdom, he sent a report dated 27 April 1958 to the FO, in which he stated that he felt reasonably satisfied that the draft would 'work', even if he could not guarantee he had properly seized the local situation.⁶⁴ It remains unclear what were Jennings' parameters in assessing the success of his constitutional work in Nepal. In fact, in December 1960 King Mahendra carried out a 'royal coup' by suspending the 1959 constitution and sacking the B. P. Koirala Nepali Congress government, a little over a year after Nepal's first general elections. Jennings readily admitted that the 1959 Nepali document granted unusually wide powers to the king and knew that it

would have been criticised as ‘undemocratic’. But he justified it as a necessary measure to prevent the complete breakdown of the governmental machinery in Nepal.⁶⁵ King Mahendra ushered in the so-called ‘Panchayat regime’, a form of neo-traditionalist autocratic system centred on the Shah King, who was heavily implicated in all the branches of government. Thus, the 1959 constitution can be interpreted as the progenitor of the 1962 Panchayat constitution in light of the substantive and symbolic centrality accorded to the monarchy in both dispensations. Thus, if the contiguity between the two constitutions is accepted, it can be argued that they saw Nepal through the Cold War. From this perspective, then perhaps Sir Ivor Jennings did help Nepal secure political stability, but certainly at the expenses of constitutional democracy.

In this respect, the long-term impact of Jennings’ advisory work on constitutional democracy in Nepal merits further attention. Jennings’ outright subversion of key Westminster principles exposed the frailty of constitutional conventions and the difficulty of transposing them from one context to another. In this respect, the Hobbesian understanding of governmental authority that Jennings implanted in Nepal through non-existent checks on the executive, especially in its ‘hereditary’ manifestation, and draconian emergency powers took root in Nepal’s constitutional culture. Signs of Jennings’ legacy are indeed visible even in the text of the 1990 constitution and its implementation. On the one hand, tensions between the elected government and the king remained a constant feature of the 1990 constitutional experience. On the other hand, the symbolic centrality accorded to the monarchy and its legitimising ethnocultural nationalist features in the 1990 constitution further reinforced the hegemony of the dominant upper-caste Pahari groups and their hold on state power. Somehow Nepal has been unable to this day to constitutionalise the executive branch of government – that seems to be the area in which Ivor Jennings’ constitutional legacy is most palpable.

Notes

- 1 M. Malagodi (2015). ‘Ivor Jennings’ Constitutional Legacy beyond the Occidental-Oriental Divide’ *Journal of Law and Society* 42(1): 102–126.
- 2 The expression ‘South Asia’ is deployed to indicate the eight countries that are the member states of the South Asian Association for Regional Cooperation (SAARC): Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. It is important to highlight that during Jennings’ life Pakistan still comprised the East Wing, which seceded and became the independent Republic of Bangladesh in 1971.
- 3 I. Jennings 1948. *The Constitution of Ceylon*. Oxford: Oxford University Press; I. Jennings 1950. *The Economy of Ceylon*. Oxford: Oxford University Press; I. Jennings 1953. *Some Characteristics of the Indian Constitution*. Oxford: Oxford University Press; I. Jennings 1957. *Constitutional Problems in Pakistan*. Cambridge: Cambridge University Press.
- 4 See the Private Papers of Sir Ivor Jennings: online, available at: <http://archives.uhrls.lon.ac.uk/resources/ICS125.pdf>. On Sri Lanka: ICS 125/B/iii; Maldives: ICS 125/B/xi; Pakistan: ICS 125/B/xv; Nepal: ICS 125/B/xiii.
- 5 FO correspondence with the then British ambassador in Nepal: FO 371/135966.
- 6 Interview with Daman Nath Dhungana, Kathmandu, 9 April 2007. Interview with

- Surya Nath Upadhyaya, Kathmandu, 22 March 2007. Interview with Bishwa Nath Upadhyaya, Kathmandu, 16 May 2007.
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 - 15 ICS 125/B/xiii/4.
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 - 18 P. M. McGarr 2013. *The Cold War in South Asia*. Cambridge: Cambridge University Press, p. 90.
 - 19 ICS 125/B/xiii/4, FO letter to Jennings dated 11 May 1956.
 - 20 Bhuvan L. Joshi and Leo E. Rose 1966. *Democratic Innovations in Nepal*. Berkeley: University of California Press, p. 185.
 - 21 ICS 125/B/xiii/4, Jennings letter to FO dated 13 May 1956.
 - 22 ICS 125/B/xiii/4, FO letter to Jennings dated 3 July 1956.
 - 23 Joshi and Rose, 1966, p. 190.
 - 24 ICS 125/B/xiii/4, FO letter to Jennings dated 29 January 1957.
 - 25 ICS 125/B/xiii/4, Cambridge note to Jennings dated 18 February 1957.
 - 26 ICS 125/B/xiii/4, FO letter to Jennings dated 26 April 1957.
 - 27 FO 371/135966, British ambassador J. A. Scopes letter to FO dated 16 June 1958.
 - 28 Joshi and Rose, 1966, p. 204.
 - 29 ICS 125/B/xiii/4, FO letter to Jennings dated 13 December 1957.
 - 30 ICS 125/B/xiii/4, FO letter to Jennings dated 7 January 1958.
 - 31 ICS 125/B/xiii/4, FO letter to Jennings dated 14 January 1958.
 - 32 ICS 125/B/xiii/4, Jennings letter to FO dated 19 January 1958.
 - 33 Joshi and Rose, 1966, pp. 212–214.
 - 34 ICS 125/B/xiii/2/iv, Jennings Explanatory Memorandum.
 - 35 ICS 125/B/xiii/1/iv, H. P. Joshi 1958, *The Way to Political Stability – An Analysis*. Kathmandu: Mercantile Corporation of Nepal, pp. 24–27.
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 - 39 *Ibid.*
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 - 41 ICS 125/B/xiii/5/i.
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- 49 FO 371/135966, British ambassador J. A. Scopes letter to FO dated 16 June 1958.
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- 51 Ibid., p. 292.
- 52 ICS 125/B/xiii/2/iv.
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- 56 Ibid.
- 57 See: online, available at: www.ccd.org.np/resources/1959%20Constitution%20English.pdf.
- 58 Ibid.
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9 Sir William Ivor Jennings

A centennial paper

*A. W. Bradley**

Preface

‘Human beings are too important to be treated as mere symptoms of the past. They have a value which is independent of any temporal processes – which is independent, and must be felt for its own sake’.

It was with this quotation from the preface to Lytton Strachey’s iconoclastic *Eminent Victorians* that Professor Gwynedd Parry recently began a thought-provoking discussion of the question, ‘Is legal biography really legal scholarship?’¹ Her answer to the question was that legal authors have mistakenly tended to avoid biography as a form of scholarship, with a few notable exceptions that include Nicola Lacey’s life of H. L. A. Hart, the pre-eminent British legal philosopher of the twentieth century.² Parry’s insightful analysis suggests reasons for this neglect of the potential value of legal biography ‘in deepening our understanding of the human context of legal phenomena’.

The present chapter contains a biographical sketch of Sir Ivor Jennings (1903–1965), the British constitutional lawyer whose work as author, commentator, constitutional draftsman, legal and political adviser and scholar affected in various ways the constitutional development of several Asian countries in the post-imperial period after the Second World War. His most successful books on the British constitution, first published in the 1930s, were read by generations of law students. Some of the work is now dated, but by no means all: one of his best-known passages, concerning the three questions that must be answered when it has to be decided whether a constitutional convention exists, has been cited by courts in several Commonwealth countries.³

The main text of this chapter was written for a centennial seminar at the London School of Economics in 2003, which sought to assess the significance of Jennings’ contribution to public law scholarship in the twentieth century. This biographical sketch was first published in the *Modern Law Review*,⁴ together with three papers that focussed respectively on Jennings’ short but influential *The Law and the Constitution*, his book *Cabinet Government*, and his study *Parliament*, each of which broke new ground in the study of public law.⁵ Two other papers given at the seminar, but not subsequently published, dealt with Jennings’

role in the development of administrative law and his work in the evolution of Commonwealth constitutions, including the key role that he played in securing the granting of independence to the then Ceylon. The structure of the LSE seminar explains why the present chapter says rather little about these five major areas of Jennings' work.

Fortunately, several chapters in the present volume cast light upon the work and influence of Jennings in the constitutional development of Asian countries. They make a valuable addition to recent historical work that has examined the path of Ceylon to independence and the consequences of the constitution granted to Ceylon in 1948.⁶ Ideally, I should myself have added to the paper published in 2004 an assessment based on further research. However, that work has already been begun by the present generation of scholars,⁷ although inevitably more remains to be done. Accordingly, with the approval of the editor of this volume, this chapter contains the biographical sketch as it was published in 2004, with no alteration.⁸

I record my thanks to Professor Martin Loughlin, editor of the *Modern Law Review*, for having organised the centennial event in 2003 and for having confirmed that permission of the *Review* was not needed for inclusion of this sketch of Jennings in this volume. I must add, as a sad reminder of Lytton Strachey's 'temporal processes' that affect us all, whether we like it or not, that several of those whose help I acknowledge in the opening endnote have died since 2003.

Sir William Ivor Jennings: a centennial paper

As a result of Dr Jennings' work, there is a code available for Prime Ministers and Ministers, the Crown and the people – a veritable treasury for constitutional lawyers and political scientists.

(Herman Finer, *The Listener*, review of *Cabinet Government*,
2 December 1936)

This book takes its place at once as the standard and indispensable work on the subject; it has indeed been done with a thoroughness so complete, and a distinction so admirable, that it has the field to itself ... It has about it what William James called 'the pungent sense of effective reality'.

(Harold Laski, *New Statesman*, review of *Cabinet Government*,
5 December 1936)

It is amusing that the appearance of this extremely useful book should coincide with the abdication crisis. The forcible substitution of Edward VIII by his brother ... showed us Cabinet Dictatorship in Action ... All Communists, workers and trade unionists can learn a lot from *Cabinet Government*. Its price is prohibitive, but all public libraries will have copies.

(*Daily Worker*, review of *Cabinet Government*,
6 January 1937)

500 million people are today submitting to British rule. This immense and varied population is governed with reasonable ease. Dr Jennings shows how it is done.

(*New York Times*, review of *Cabinet Government*, 13 June 1937)

... a brilliant and incisive capacity for detailed research, synthesized into what will remain a definitive digest of parliamentary practice under Cabinet leadership...

(*American Bar Association Journal*, review of *Cabinet Government*,
September 1937)

Sir Ivor Jennings makes it clear that he writes as a constitutional lawyer, not as a historian. His concern is to discover what parts of British experience are relevant in modern conditions, not to trace in detachment how these modern conditions have been arrived at ... Party is a mysterious subject, and deserves all the three volumes which [he] is devoting to it.

(A. J. P. Taylor, *TLS*, review of *Party Politics: vol. 1, Appeal to the People*,
14 October 1960)

The volume gives the impression that Sir Ivor Jennings had no clear picture of what he intended to do when he set out to write it ... In the last resort political ideas are more important than money, organization or leadership. Perhaps, therefore, Sir Ivor Jennings will escape from his present gloom about the future of parties when he comes to consider political ideas in his third volume.

(A. J. P. Taylor, *TLS*, review of *Party Politics: vol. 2, The Growth of Parties*, 3 February 1961)

This third volume has now appeared. It is a great disappointment ... Sir Ivor Jennings has never claimed to be an historian. He is a constitutional lawyer who takes his history from the books of others ... He is a political sceptic, doubting the reality of the great issues over which men have fought ... Sir Ivor always knows better than the men of the past: they were wasting their time in sham fights, and blundering even in their tactics ... After a lifetime spent in studying the history of the British constitution, Sir Ivor Jennings reaches the despairing conclusion: 'Whate'er is best administered is best'. He promised to show us that ideas were the stuff of politics. He reduces them to stuff and nonsense.

(A. J. P. Taylor, *TLS*, review of *Party Politics: vol. 3, The Stuff of Politics*,
26 January 1962)

It is much easier to draw a formal constitution putting into words the outline of the Westminster model than it is to create the environment and the complex of personal relationships which make the Westminster model work. Indeed, it is to be expected that where democratic government works well it

will work with a different set of political conventions from those observed in Westminster ... Variations from the Westminster model must be expected; what one hopes is that they will be variations which do not infringe fundamental principles ... Where 'judicial review' does exist in the United States and the Commonwealth it is particularly effective because the Constitution and the common law speak the same language and in large measure have a common content.

(I. Jennings, *Magna Carta and its Influence in the World Today*, 1965, 35, 36, 43)

Introduction

If there is a modest hall of fame reserved for writers on law and the British constitution during the last 150 years, there can be no doubt that Sir Ivor Jennings occupies one of the more exalted places by reason of the originality of his work during the 1930s and the influence that this has had on succeeding public lawyers.⁹ In 1992, Ferdinand Mount opened his book *The British Constitution Now* with the reflection that: 'The last book which attempted with any distinction to argue its way through the morass engulfing the law and the Constitution' was Jennings' *The Law and the Constitution*, first published in 1933. Yet Mount's appraisal of Jennings (whom he grouped with Bagehot and Dicey as 'the three simplifiers') was not clear-cut. On the one hand, 'it is, above all, the fluidity, the incessant evolution of practice, which Jennings exposes so brilliantly' (65); and Mount acknowledged Jennings' 'deadly' attacks on the wilder statements of Dicey (71). On the other hand, Mount concluded, '[t]here is a kind of unashamed bureaucratic slurring of all barriers, structures and distinctions in Jennings' description of the Constitution' (68) and Jennings was taken to task for 'his benevolence towards the rise of corporatist collectivism' (71).¹⁰ In fact this should not surprise us, since, as Martin Loughlin has pointed out, 'There is no neutral language of public law. We can understand what a writer is saying only if we understand the political tradition within which the writer works'.¹¹

For the first five years in which I taught public law, I was a very junior colleague of Ivor Jennings while he was master of Trinity Hall, Cambridge. Two contrasting snapshots of his life may serve as an introduction to this biographical sketch. The first is of his work in the 1930s, which culminated in the brilliant success of *Cabinet Government* (1936), followed up by the companion volume *Parliament* (1939). The second is of the virtual failure of his three-volume study of *Party Politics* (1960–1962), a failure that was not offset by his brief tenure of the Downing Chair of the Laws of England at Cambridge (1963–1965).

In this chapter, I have drawn on my own memories of Jennings during the last five years of his life as well as the recollections of others who knew him in Cambridge.¹² For earlier periods, I have depended on access to the Jennings archive in the Library of the Commonwealth Studies Institute, London, which includes an unpublished autobiography that is the source of information about the earlier periods of his life.¹³

Jennings' life spanned the first two-thirds of the twentieth century. This sketch is in five sections, dealing with his family background and schooling; his introduction to the law and law-teaching; his great contribution to legal scholarship while he was at the LSE; his period as vice-chancellor in Ceylon; and finally his return to Cambridge.

Family, childhood and schooling, 1903–1922

William Ivor Jennings was born in Bristol on 16 May 1903, his father being a joiner and trade unionist, and his mother (from a Welsh family) being a machinist in a corset factory. Jennings described his father as a skilled worker, living in a perceptibly better house and street than the unskilled workers. The indicators of respectability were an area in front of the terrace house, an inner door, a bow window and a lace curtain. Jennings was an only son (eight years older than his sister) and would be reproved by his mother if he 'spoke common'.¹⁴ His father had been to night school and after work as a carpenter came to an end, taught woodwork in local schools. A liberal in politics, he served in the Royal Flying Corps during the First World War as a flight sergeant, and was killed in June 1918 when a bomb he was trying to defuse exploded.

Ivor's great-grandfather was an illiterate railway porter, but his grandfather went to work in a cotton factory as a boy, studied the bible as a member of the Plymouth Brethren and read *The Times* as he worked in the factory. He opened a general store in the slum district of Barton Hill, making it pay through the poor law relief ticket system used by many of his customers. Later, he sold out to buy a cottage in the country where the extended family (Ivor being the oldest grandson) gathered each year for a prolonged Christmas celebration. After the war, Ivor's mother opened a small corner shop.

Jennings' parents attached much store by education and later, when assessing the virtues of educational systems, he described himself as a scholarship boy. His schooling started at the Victoria Park and Redfield council schools. When aged ten, he came second in Bristol in winning a scholarship to Queen Elizabeth's Hospital, a Blue Coat school, with boarding, clothing, food and books provided by the charitable foundation. The school had a special tradition for mathematics and Jennings states that he found that he could stay at the top and was determined to put in the 'extra ounce of energy' that would keep him there.¹⁵ At 14 he left for Bristol Grammar School, having come top in an examination open to all in Bristol for the award of four entrance exhibitions. After his father's death nine months later, his mother was dependent on a widow's pension. Jennings later commented that the 'relative penury' was good for him, and that never thereafter did he take 'the slightest trouble' to keep up with the Joneses.¹⁶ In 1921–1922, Jennings, who was active in rugby, cricket and athletics, was head prefect; in the following year, this position was held by Oliver Franks.¹⁷

Both Jennings and Franks succeeded in getting scholarships to Oxbridge at the second attempt, Jennings to read Mathematics at St Catharine's College, Cambridge and Franks to read Greats at Oxford. Jennings claimed that he had

found in the scholarship examinations that he could, while answering one question, train his mind to solve other questions yet to be attempted. But the mathematics curriculum did not inspire him. Against the advice of his college, and taking the risk that he would lose his scholarship, he changed to law after getting a first in Part I Maths.

Introduction to law: Cambridge and Leeds, 1922–1929

Although Jennings played rugby for the college and became president of the JCR, it appears that as an undergraduate he tended to be a solitary individual. He records that he was ‘little accustomed to mixing with people of my own age’.¹⁸ As a schoolboy, he had done much reading of newspapers, classic reprints, and popular encyclopaedias and was an assiduous user of public libraries. His close friend as a student (and possibly his only close friend at any time) was A. D. Hargreaves, with whom he shared college rooms. Dale Hargreaves became a solicitor, an authority on land law¹⁹ and Barber Professor of Law at Birmingham University. Later in life, Jennings appeared to lack a gift for making close personal relationships, and some who came into contact with him have described him as cool or aloof.²⁰ He himself wrote that, as vice-chancellor in Ceylon, he was described as ‘distant and correct’,²¹ commenting that this was the right attitude for a vice-chancellor and also a reasonably accurate description of him.

With his skill in solving mathematical problems, Jennings would have found that the Cambridge Law Tripos made no serious demands, in an era when law teaching did not aim to achieve a great intellectual level. He gained first classes in both parts of the Law Tripos, and was awarded the Whewell scholarship in international law at his second attempt. He continued in the same vein after graduating, becoming Holt Scholar at Gray’s Inn in 1925 and Barstow Scholar in 1926. Jennings later recorded (possibly for the benefit of youngsters in the University of Colombo) a complete list of his academic successes, all obtained by examination and being first classes, distinctions and the like, along with the prizes and scholarships that they earned him.²²

The area of law he found most difficult as an undergraduate was, it appears, constitutional law. The texts that he read were Dicey’s *Law of the Constitution*, Volume 1 of Anson’s *Law and Custom of the Constitution* (on Parliament) and Chalmers and Asquith’s *Leading Cases*. Jennings referred to his lecturer, D. T. Oliver (Fellow of Trinity Hall, whose son was to become Lord Oliver of Aylmerton) in these words: ‘Dear old Oliver, whom we all loved, was hopeless in Constitutional Law’.²³

His undergraduate successes carried Jennings directly after graduation into a lectureship in law at Leeds University in 1925, where he intended to concentrate on international law. At this time one function of a small provincial law school, by arrangement with the Law Society, was to teach the elements of law to solicitors’ articled clerks. At Leeds, as one of a very small lecturing staff, Jennings had to teach a wide variety of subjects, including constitutional, international and commercial law. The late Sir William Dale remembered Jennings lecturing

to articulated clerks (of which he was one) at York on subjects that included equity and Roman law, and was not impressed by his abilities in these subjects.²⁴

While lecturing in Leeds, Jennings ate dinners at Gray's Inn and was called to the Bar in 1928, marrying Helena Konsalik in the same year. There was a honeymoon weekend in Buxton, but his unpublished autobiography contains nothing of how Jennings met her, how they decided to marry or the wedding itself, nor of the birth of two daughters to the marriage. In his final undergraduate year, Jennings had been a member of the committee of the *Cambridge Law Journal*, founded in 1921 by A. L. Goodhart, and he had contributed two short case-notes to the journal.²⁵ His first published article was in the journal for 1927, a discussion of the Crown's prerogative right of angary.²⁶ In the same year, as an external student he sat for the Cambridge LLB examinations.²⁷ The examiners told him that his essay on dominion status within the British Empire was 'almost good enough for publication'. He replied that it was in the course of appearing in the *Revue de Droit International*.²⁸

Jennings found the first years of his teaching at Leeds very dull, although two of his students were to have distinguished academic careers in law – B. A. Wortley and Julius Stone. During this period, Jennings records that he made two discoveries that were to have a significant influence on his intellectual development. He wondered why it was that his class of articulated clerks was so bored by an 'excellent lecture' on the royal prerogative. He realised that in solicitors' offices in Yorkshire the students would have had no practical exposure to the royal prerogative, but they would have come across local government law. He decided that this was where the real significance of the constitution lay: 'Now local government law was not merely irrelevant to Dicey's theory, it was actually inconsistent with it; and so in setting out to study local government law, I was, without knowing it, setting out to criticise Dicey'. The passage continues:

It was this experience (and not the influence of Harold Laski and the left-wing tradition [of LSE]) which led me to produce *Law and the Constitution* in 1933. Laski helped, because I discussed these things with him over coffee and he referred me to some significant material: but Leeds, not Laski, was the *causa causans*.²⁹

It was the field of local government law that was to occupy his attention in what became an extensive series of books. Jennings' first book arose out of the Local Government Bill 1929: 'So far as I could see, only Neville Chamberlain himself, Sidney Webb, and Susan Lawrence really knew what it was all about; but so did I. Very soon I decided to write a commentary on the Act'.³⁰ One consequence of this conversion, although there must also have been a need to undertake remunerated work, was that the bulk of Jennings' publications during much of the 1930s concentrated on statute-law. A ready understanding of legislation and its potential as an instrument for achieving desirable public policies remained with him, and this must have assisted him in his later work in drafting constitutions after 1945. He certainly had a greater affinity to the use of legislation than to the judicial process.³¹

The second chance discovery took place on York station while he was waiting for a train. He bought from a bookstall a copy of the two-volume *Memoirs* of Sir Almeric Fitzroy, who had been clerk of the Privy Council from 1898 to 1923. Jennings wrote:

From it I discovered the immense volume of constitutional law which was not in the books but which yet regulated the whole practice of government. I went round to the best secondhand bookshop in Leeds next day and ransacked it for political biographies. Gradually I accumulated an almost complete collection.³²

Jennings' reliance on this historical source is seen at its best in *Cabinet Government*.³³

Not enjoying Leeds, Jennings applied without success for a lectureship at Liverpool and the chair of public law at Melbourne, but he turned down the offer of a lectureship at Manchester. His opportunity came with a move to the London School of Economics in 1929.

LSE and the flood of authorship, 1929–1940

Lecturer in law in 1929, reader in public law one year later – this was a heady time to be able to take part in the remarkable rise of a law department that matched the strength and vitality of LSE generally.³⁴ Jennings later recalled:

LSE was definitely the place for me. It had the only good library of public law in England. Its Senior Common Room was a lively place ... Morning coffee, usually begun by Laski and me, was an institution at which the day's news was dissected.³⁵

As we have seen, his work on local government began with the book, *Officials and Councillors' Guide to the Local Government Act 1929* (1929), and in 1930 he became legal editor of the *Local Government Chronicle*. A year later came *Principles of Local Government Law* (1931), a lucid, readable and scholarly guide to the 'juristic and constitutional principles' underlying local government.³⁶ This was followed by a succession of works for the practitioner on specialised aspects of local government law, mostly prompted by the legislative reforms and consolidation in the 1930s. Now largely forgotten, in their quantity and extent they could have been produced only by a prodigiously hard worker.³⁷ In 1935, *A Century of Municipal Progress 1835–1935*, commissioned by the National and Local Government Officers Association and edited jointly with his LSE colleagues, Harold Laski and W. A. Robson, would have been a stimulating contrast to the task of producing lengthy commentaries on complex statute law.

Jennings had his name up as a barrister in Lincoln's Inn, but his practice was limited to opinion work. He appears never to have attempted advocacy, and we

do not know how he would have fared in exchanges with the King's Bench judges who sat in the 1930s. Later, he admitted to making 'a substantial income from local government law'.³⁸ All his practitioners' works 'sold well'. He lived in St Albans throughout the 1930s, moving to a bigger house as his income and his family grew.³⁹

In 1933 came *The Law and the Constitution*, a provocative book, which in later editions was widely recommended for students of constitutional law.⁴⁰ Some 20 years later, Jennings commented:

I was a young man of 30 and I was attacking, not always very politely, ideas which had been not merely held but cherished for 50 years. When I prepared the 4th edition recently, I thought it was all rather obvious, but opinion has moved on since 1933.⁴¹

In 1933, LSE changed its jurisprudence syllabus, adding to it 'a good deal of legal theory'. Jennings gave one of the courses and wrote: 'I found my way through in the end without using all or any of these theories'.⁴² This is possibly an over-modest disclaimer: it should certainly not be taken as indicating that he had no interest in contemporary questions of legal theory, or that he was incapable of discussing them. He edited a collaborative publication, *Modern Theories of Law*, that came directly out of the LSE⁴³ and, during the 1930s, he produced some original and hard-hitting articles that brought a rigorously realist approach to the common law and to the judicial process.⁴⁴ In this same period, *Parliamentary Reform* was written for the New Fabian Research Bureau, which he had joined in 1932. He became known in left-wing circles for his widely circulating pamphlet, *The Sedition Bill Explained*, with an introduction by J. B. Priestley and a cartoon by Low, that protested against the Incitement to Disaffection Bill.

At the age of 18, Jennings had realised he supported the Labour Party, of which he later became a member. In St Albans, he stood unsuccessfully as a Labour candidate for the Hertfordshire County Council in 1934, and was appointed a JP and a school governor. But he dropped out of the party in 1936 or 1937. He was one of the first vice-presidents of the National Council for Civil Liberties (NCCL). But he later regretted this decision and resigned over a leaflet about Ceylon, considering that the NCCL, 'like most well-intentioned bodies which did not enquire into political affiliations, [had] got into the hands of communists'.⁴⁵ He was to form the view that research for political parties might be acceptable for an academic public lawyer, but not political activity as such, which required too much simplification of the issues and too many compromises with one's conscience.⁴⁶

His unpublished autobiography (that was not published in his lifetime) includes a revealing chapter headed 'Public Service', to which he later added several hand-written pages in which he distanced himself from Laski, stating that although he was a Fabian in outlook he never joined the Fabian Society and had not much sympathy with Beatrice and Sidney Webb. He commented that Sidney Webb in particular

had desiccated the process of government. There is a good deal more mysticism in it than he would ever appreciate. What is more, I believed profoundly in the personal factor. I did not find anything very odd in Ramsay MacDonald's behaviour. His thrust for admiration from the duchesses was a very human trait, to which we are all subject, except oddities like Sidney Webb.⁴⁷

In some ways, Laski's views on constitutional matters came close to those of Jennings,⁴⁸ but Laski's were based on a commitment to Marxist theory that Jennings never shared. In handwritten pages added to his autobiography, Jennings quotes what Laski is reported to have said on a visit to Moscow: 'The British Constitution works according to rules, but when it does not work to suit the gentlemen of England, the gentlemen of England change the rules'.⁴⁹ Jennings did not agree with Laski that the 1931 crisis could be explained in Marxist terms. He stated that he was not good at arguing with Laski – 'he was far too articulate for me to keep pace with him' – and added: 'My task, as I saw it, was to study not only politics but also politicians, and very odd people they were'.⁵⁰

Jennings refers to the calls for assistance in the law made on him during the 1930s by many poor people (because he was a barrister and an 'approachable person becoming known'),⁵¹ saying that this confirmed the need for poor man's lawyers and the Citizens' Advice Bureaux. He believed that there was a place in every pressure group and research organisation for a constitutional lawyer 'with interests as wide as mine, somebody who had a nodding acquaintance with all the social sciences and a full knowledge of the process of government'.⁵² In his view, a constitutional lawyer could put almost any scheme into operation if the politicians and experts wanted it. However, he said, he was not anxious to be involved 'in too much of this work' because writing *Cabinet Government* and *Parliament* was a full-time commitment.

Cabinet Government was published in the autumn of 1936 and was a huge success.⁵³ There must be few living writers on public law and government who have received such a brilliant constellation of reviews.⁵⁴ Admittedly, an element of good fortune was involved in that neither Jennings nor the Cambridge University Press could have arranged for the abdication crisis to be nearing its climax when the book was published. In 1939, the companion volume, *Parliament*, appeared.⁵⁵ By then, Jennings had begun research for his third study of political institutions, *Party Politics*.

During 1938–1939, he had a sabbatical year as a visiting professor of political science in the University of British Columbia, giving lectures in Canada and the United States. He was conscious that his academic and professional grounding had been in the law but that he had moved across the border into the study of politics, for, he wrote: 'I was studying not merely the rules which regulated the institutions but the institutions themselves'.⁵⁶ He argued that it was impossible to study the rules that regulate institutions 'unless one knows something about the modus operandi and even the inarticulate major premises of the people who act in their name'. Taking the point further, he concluded that to be a good lawyer, one had to be a good political scientist.⁵⁷

Other books from the years at LSE included *Constitutional Laws of the British Empire* (1938), a book of cases, materials and commentary edited by Jennings and C. M. Young.⁵⁸ *A Federation for Western Europe* (1940) was written on the instigation of a body known as Federal Union, and published at an inopportune time, after the onset of the Second World War. It contains a crisp analysis of federalism and a 'rough draft' constitution for Western Europe that would pour oil on the flames of the current European debate if published today. His first book for the general reader, *The British Constitution* (1941), became the fare of generations of students of British politics and government at home and abroad. Its illustrations included a striking picture of the clock tower at Westminster commonly known as Big Ben, from the face of which hung a pendulum, tracing the 'swing of the pendulum' in the form of government majorities at elections since 1832. Jennings used the diagram to make the point that:

With us, the majority is not permanent. . . . Not only do opinions fluctuate, but they fluctuate sometimes violently, and the 'Swing of the pendulum' is a familiar feature of British politics. Consequently, parties can and do appeal to reason. Majorities are unstable, and the Opposition of to-day is the Government of to-morrow.⁵⁹

He explained how the political education of the people had developed since 1832 with the widening franchise:

Great Britain is a small island with a very homogeneous population. People do not think of themselves primarily as English, Scots or Welsh. The sting has long ago been taken out of religious controversy. . . . There are class divisions, but they are not wide or deep. We are a closely-knit economic unit, with a large measure of common interests and a long patriotic tradition. . . . There is always a common public opinion which has agreed about principles, and the divergences are more about methods than about objects.⁶⁰

This rosy view of British society and the parliamentary system may have owed something to wartime conditions,⁶¹ but an emphasis on the homogeneity of the British people was often made by Jennings. The future draftsman of constitutions drew an important conclusion from his view of British political behaviour. 'A constitution is not a framework of laws, but a tissue of dynamic relationships'.⁶²

In this book there is only a passing reference to the courts. In a section entitled 'Democracy and Liberty', Jennings paid tribute to the integrity of the judges, and their independence from political control and influence, but he added that their decisions were often mistaken: 'their interpretations may sometimes be warped by the narrow groove in which they have been trained' and their remedies were often unavailable to poor men because they were too costly.⁶³ But impartiality was needed in the laws, and the application of the laws could often not be left to the courts. 'Judges cannot administer the law of education'.⁶⁴ Judicial control of public authorities 'cannot be praised without qualification', since

the methods were dilatory and expensive, and control over central institutions had always been inadequate. 'The law is what Parliament provides and it is in Parliament that the focus of our liberties must be found. . . . The symbol of liberty is His Majesty's Opposition'.⁶⁵

The Second World War and Ceylon, 1940–1955

Jennings learned of the outbreak of the Second World War somewhere in the Pacific, when he and his family were on their way back to England after his sabbatical year in British Columbia. The journey home had included a month's holiday in Japan and they were to have returned to Southampton on a German liner. The onset of war meant that they had to leave the *Scharnhorst* at Manila and take a British freighter going round Borneo. At Singapore, Jennings offered his services as a lawyer to the attorney-general of the colony, but the offer was not accepted.

Back in London, Jennings learned that LSE was to be evacuated to Cambridge, as its premises were needed for government offices. He made inquiries of the Cabinet Office about war-time work, but he declined an invitation to join the Ministry of Food to 'do something about potatoes'.⁶⁶ Although paid by LSE to give a weekly lecture in Cambridge and evening courses in London, Jennings felt under-employed in the summer of 1940 while writing *The British Constitution* and continuing research for *Parties and Politics*. He saw an advertisement for the post of principal in the University College of Ceylon, in Colombo, offered on a five-year contract. The college was intended to become Ceylon's first university and to move to a new campus at Peradeniya, near Kandy, 70 miles from Colombo. The plan seemed to him to be a constructive one. Jennings realised that he already knew something of the constitutional problems of Ceylon, commenting that he was probably the only person in the world who was lecturing on them.⁶⁷

In accepting the appointment, he insisted that his wife and daughters should accompany him. In fact, he left in January 1941 and the journey took him ten weeks.⁶⁸ His wife and daughters travelled separately and were less fortunate. Their ship, the *Staffordshire*, was bombed at sea south of Iceland, and the younger daughter was injured; the ship limped back to Scotland and the family spent the rest of the war, first in Scotland and later in England. It was to be 1947 before they joined him in Ceylon.

The move from the LSE to be head of a government college in Ceylon was a remarkable career decision, even during a world war. Prodigious worker as Jennings was, while at the LSE he does not appear to have undertaken many managerial chores. Later he admitted to having latent administrative instincts of a Benthamite kind,⁶⁹ but it does not follow that a brilliant scholar will make a fine administrator. In Jennings' case, any doubts about his capacity for administration must have disappeared soon after he arrived in Ceylon, where he was to remain until 1955. During this period, he applied much of his energy to creating and leading a new university, initially at a time when Ceylon was facing the

prospect of a Japanese invasion.⁷⁰ He undertook many public service tasks, most notably as deputy civil defence commissioner⁷¹ and, although confined to materials that were available in Colombo, he continued to write. From 1943, he acted as unpaid adviser to the first minister in Ceylon (D. S. Senanayake) in the negotiations with the British government that led peacefully to independence in 1948. The Colonial Office, having initially appointed him principal of the University College, were displeased by his role in constitutional affairs as adviser to the local ministers. Jennings justified his role by saying that what he had done was 'in strict accord with the university tradition',⁷² but he later accepted that he 'went a little further' than merely giving technical advice when the first minister asked for it.⁷³

His university work acquired for him a reputation as an expert on higher education in the Commonwealth after 1945, and he contributed to reviews of higher education in Hong Kong, Malta and India.⁷⁴ But of greater significance was his work with Mr Senanayake, which led to many demands for constitutional advice during the post-war years in which the British Empire became the Commonwealth. While still in Ceylon Jennings undertook the drafting of the short-lived constitution of Pakistan⁷⁵ and constitutional developments within the Commonwealth prompted many of his later books.⁷⁶

On arrival in Colombo, Jennings found a government college preparing 600 students for external London University degrees. He left behind him a university of 2,500 students in a unique site near Kandy, that he modelled on the pattern of universities in Britain. Jennings drafted all the regulations and ordinances and commented that, while he found plenty of problems at the college, this made the work interesting. Ordinary administration, he wrote, would bore him: 'an intelligent person can do all these things with half a mind, but the other half must be engaged in something creative'.⁷⁷

Administrative lawyers remember his brief appearance in the law reports in *Ceylon University v. Fernando*,⁷⁸ where the Judicial Committee held (reversing the Supreme Court of Ceylon) that a university commission that Jennings chaired into alleged cheating did not breach natural justice when it questioned witnesses in the absence of the accused student and without his being able to question them. His energy took him into all manner of commissions in Ceylon. Soon after his arrival, he dissented from a government report that favoured universal free education, taking the view that this was an extravagant use of resources and that for the foreseeable future secondary, further and higher education would remain a privilege for a small elite – those who were fortunate enough to have had their schooling in the English language.⁷⁹ He encouraged the students to play sports and to develop all-round interests and skills, but was not tolerant of student politicians. He was not popular with everyone when he remarked at a school speech day that Ceylon was a cultural desert, and his university colleagues may not have warmed to him when he pointed out that while vice-chancellor he had published more work than anyone in Ceylon.⁸⁰ Research for *Party Politics* had remained on hold, but a succession of books on local and regional subjects appeared,⁸¹ as well as a short account of the machinery of

British democracy.⁸² Before his departure, the university commissioned an oil painting (by David Paynter) of its first vice-chancellor. In 1991, 50 years after his arrival in Colombo, the Republic of Sri Lanka issued a 75 cent stamp bearing his portrait.⁸³

Return to Cambridge – the last years, 1955–1965

Jennings was elected master of Trinity Hall, Cambridge in June 1954, but was given leave of absence until April 1955. His predecessors in a college that had been founded in 1350 for the study of civil and canon law included Dr John Cowell (1598–1611) and Sir Henry Maine (1877–1888).⁸⁴ Without university teaching duties, Jennings would have received only a modest stipend, from a small college without great endowments. In the 1950s and 1960s, heads of Oxbridge colleges were not expected to be experts in fund-raising, and most undergraduate matters were entrusted to the senior tutor. Jennings was well placed to continue both his writing, preparing new editions⁸⁵ as well as new books,⁸⁶ and also meeting calls for constitutional advice within the Commonwealth, often in relation to the negotiations and conferences that preceded the conferring of independence upon a colony.⁸⁷

In returning to England, he joined the ‘great and the good’.⁸⁸ In 1955, he agreed to chair the Royal Commission on Common Land, but early in 1956 he was nominated as UK representative on the Federation of Malaya Constitutional Commission, chaired by the judge, Lord Reid. Before accepting the nomination, Jennings raised the issue of his availability with the colonial secretary and the minister of agriculture: they agreed that the problems of common land could wait while Jennings served on the commission in Malaya.⁸⁹ Reid, who was then 66 years old, went to Malaya by boat accompanied by Lady Reid. Once there, he wished to work at a more leisurely place, while Jennings, who was prepared to travel by air, wished to get it over with more quickly and get on to other things.⁹⁰ The commission prepared and published a draft constitution, but this was thoroughly re-worked by the Whitehall draftsman. The colonial secretary had to explain to Parliament that the many revisions to the draft did not imply any criticism of the outstanding work done by the commission.⁹¹ In 1958, the Royal Commission on Common Land reported: except for an appendix on the history of the law that he contributed with the help of his old friend, Dale Hargreaves, Jennings for once restrained his own enthusiasm for drafting and left preparation of the report to the capable secretary of the commission, G. L. Wilde.⁹²

Publication of his study of political institutions was completed with three volumes of *Party Politics: Appeal to the People* (1960); *The Growth of Parties* (1961); and *The Stuff of Politics* (1962). They did not receive good reviews, being criticised both by historians and political scientists.⁹³ At the end, the anonymous reviewer in the TLS (now known to have been the Oxford historian, A. J. P. Taylor) was savagely dismissive of the entire enterprise.⁹⁴ The contrast with the acclaim given to *Cabinet Government* and *Parliament* must have been deeply disappointing for Jennings. For a variety of reasons, I expect that the

three volumes of *Party Politics* will remain unread, except possibly for the racy historical account of elections in *Appeal to the People*.

Jennings carried out his college duties (including a revision of the college statutes that paved the way for the admission of women to the college) with efficient and humane professionalism, and he was a skilful and fair chairman of governing body meetings. But college administration took up only a small part of his time. From 1961 to 1963, he was vice-chancellor of the university. These duties, too, he appears to have carried out with complete efficiency. It was a familiar sight in Trinity Hall to see him walking in his black cassock and white bands to a university meeting in the Old Schools.

His period as vice-chancellor coincided with the retirement of E. C. S. Wade (a constitutional lawyer of a very different character from Jennings) from a long tenure of the Downing Chair of the Laws of England. The board of electors to the chair would in the ordinary course of events be chaired by the vice-chancellor. It was believed in the law faculty that the electors would have to choose between two strong internal candidates – R. M. Jackson, reader in public law, and Glanville L. Williams, reader in English law. But after some delay, the electors posted the notice (signed by a pro-vice-chancellor) declaring that Jennings had been elected to the chair.⁹⁵ He was aged 59 and still had to complete his vice-chancellorship. So it was not until October 1963, aged 60, that he took up the chair that the great Maitland had held from 1888 until his death in 1906.

Jennings carried through his duties as vice-chancellor at honorary graduations and made speeches at college feasts with courtesy and charm. But he seemed ill at ease in his professorial duties in the Faculty of Law. He delivered his inaugural lecture, 'Due Process of Law', on 5 November 1963 in one of the law faculty's smaller lecture-rooms. It was a low-key, sombre and in retrospect a sad occasion. As well as a handsome appreciation of the work of E. C. S. Wade and some comments on the trial of Guy Fawkes, it included a discussion of chapter 39 of Magna Carta, that probably derived from an unfinished book, *The Laws and Liberties of England*.⁹⁶ Interest would today lie in some brief, agnostic observations regarding the law that lies above both the legislation of Parliament and the decisions of the judges. As professor, he took his share of graduate and undergraduate teaching, but the undergraduates much preferred the stimulating and sparkling lectures given by Geoffrey Wilson to the parallel course that was shared by Jennings, possibly the most distinguished constitutional lawyer in the Commonwealth at that time, and myself, a raw assistant lecturer.

Jennings' first term as Downing Professor was followed by an event that came close to bringing his tenure to an end. In December 1963, Jennings, with his wife and his elder daughter, Mrs Claire Dewing, sailed from Southampton on the Greek liner, the *Lakonia*, to spend Christmas and the New Year in Tenerife. The ship had recently been re-furbished (or was meant to have been), but the Jennings' cabins had no heating and the air-conditioning did not work. Late at night, on 22 December, the *Lakonia* caught fire and all on board had to take to the lifeboats before it sank. The Jennings family were dropped to the water in lifeboat 21, and Claire joined in rowing through the night until it was rescued by

a Spanish immigrant ship, bound for Argentina: 95 passengers and 33 crew members were drowned. It was the second time that Lady Jennings and Claire were saved from a ship at sea, the first time being in 1941 when the *Staffordshire* was bombed.⁹⁷

Jennings' tenure of the Downing chair was visibly marred by illness, which was initially misdiagnosed as 'colitis caused by overwork'⁹⁸ but was, too late, found to be cancer of the bowel. When the Society of Public Teachers of Law met for their annual conference in September 1965 under their president, Professor Ben Wortley (who had been Jennings' student at Leeds), the University of Manchester conferred honorary doctorates on Lord Radcliffe and Jennings. Jennings walked in the procession in evident pain, and a special cushion was provided on which he could sit during the ceremony.

He died on 19 December 1965 in Cambridge. During that year there had been celebrated both the 750th anniversary of Magna Carta and the 700th centenary of Simon de Montfort's parliament. Jennings' last publication to appear in his lifetime was an illustrated booklet, commissioned by the Central Office of Information and called *Magna Carta and its Influence in the World Today*. As well as the passage quoted at the opening of this paper, it contains the following remark when Jennings is discussing the influence of Magna Carta on American bills of rights: 'Most of the provisions in the Bills of Rights derive from [the] common law and therefore they never were mere paper propositions. They are peaks of high mountains, not clouds in the air'.⁹⁹ I find this a moving image from the pen of someone who must have been aware that what he had drafted had often become 'mere paper propositions'.

Although many of both his strengths and weaknesses as an individual may be evident from this account, and his close family must have suffered from his prodigious industry, I record that among the fellows of Trinity Hall in the 1960s several have very positive memories of acts of kindness on the part of Jennings.¹⁰⁰ Two instances must serve for them all. Professor Geoffrey Harcourt recalls the robust support that Jennings gave him when a headmaster complained that Harcourt (director of studies in economics) had shown political bias during an admissions interview with a sixth-former (whose admission Harcourt had in fact recommended).¹⁰¹ And I remember that when Jennings as vice-chancellor had chaired a university committee that promoted me to a lectureship, he went out of his way to deliver the news to me in person, adding (with a disarming sense of humour that he often displayed) that I was the first member of the university staff who would not have to retire until the twenty-first century.

The biographer of Oliver Franks described him as 'one of the founding fathers – who were the modellers, patterns and creators of the post-war world'.¹⁰² With some adjustment, the same applies to Jennings. If we confine the assessment to public law, and this (as we have seen) was not the whole of his achievement, his best work had an immense influence not only in introducing generations of law students to key constitutional concepts, in putting them on their guard against a total belief in the dogmas of Dicey, and (more broadly) in demonstrating that, in matters of politics and government, law has meaning only

if it is studied in its social context.¹⁰³ And there is no doubt that this work was directly influential upon the LSE-based group of scholars, among whom I include J. A. G. Griffith, J. D. B. Mitchell and S. A. de Smith, as they made their own notable contributions to public law in the post-war years.

Notes

- * Institute of European and Comparative Law, University of Oxford. Emeritus Professor of Constitutional Law, University of Edinburgh. My thanks for their assistance are due in particular to the late Mrs Claire Dewing and staff of the Library, Institute of Commonwealth Studies; also to the following: A. T. Alwis (University of Peradeniya Library), the late Charles Arnold-Baker, Geoffrey Best, Anne Bradley (Bristol GS), C. P. Brand, the late Neville Brown, the late William Cochran, the late Sir William Dale, Alex Danchev, Keith Ewing, the late John Griffith, Geoffrey Harcourt, Chris Himsworth, Peter Hunt, the late J. A. Jolowicz, Gareth Jones, J. C. Laidlaw, Andrew Le Sueur, Martin Loughlin, the late Geoffrey Marshall, Vanya Murray, John Nurser and the late Geoffrey Wilson. I must also thank the British Academy for having suggested that I should write about Jennings. I bear sole responsibility for all errors and omissions.
- 1 R. G. Parry, 'Is Legal Biography Really Legal Scholarship?' (2010) 30 *Legal Studies* 208.
 - 2 N. Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (2004).
 - 3 The three questions are: 'first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?' (*The Law and the Constitution*, 5th edition, (1959), p. 136). See, e.g. *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1 and, on the constitutional position of the Prince of Wales, *Evans v. Information Commissioner* [2012] UKUT 313 (AAC), paras 64–75.
 - 4 'Sir William Ivor Jennings: A Centennial Paper' (2004) 67 MLR 716.
 - 5 K. D. Ewing, 'The Law and the Constitution: Manifesto of the Progressive Party' (2004) 67 MLR 734; C. Foster, 'Cabinet Government in the 20th Century' (2004) 67 MLR 753; A. Tomkins '“Talking in Fictions”: Jennings on Parliament' (2004) 67 MLR 772.
 - 6 See in particular A. Welikala (ed.), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (2012), vols 1 and 2; H. Kumarasingham, *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-colonial India and Sri Lanka* (2013).
 - 7 See J. Fernando, 'Sir Ivor Jennings and the Malayan Constitution' (2006) 34 *Journal of Imperial and Commonwealth History* 577 and M. Malagodi, '“The Oriental Jennings”: An Archival Investigation into Sir Ivor Jennings' Constitutional Legacy in South Asia' (2014) 14 *Legal Information Management* 33. See also H. Kumarasingham (ed.), *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: CUP, 2014) (vol. 46 in the Camden Fifth Series for the Royal Historical Society, London) and H. Kumarasingham (ed.), *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: CPA, 2015).
 - 8 My former references to *The Road to Peradeniya* were to the unpublished typescript held in the Library of the Institute of Commonwealth Studies, London. For the published text, together with further autobiographical chapters, see now W. I. Jennings (ed. H.A.I. Goonetilleke), *The Road to Peradeniya: An Autobiography* (Colombo: Lake House Investments, 2005). The book is cited in the text that follows as *Road to Peradeniya* and references will, where possible, be to the published text.

- 9 A separate chapter would be required to explore this fully, but the influence of Jennings is evident in, for instance, the work of J. A. G. Griffiths, the red light/green light analysis of public law made by C. Harlow and R. Rawlings, *Law and Administration* (London: Butterworths, 2nd edition, 1997) chs 2 and 3, and the identification of the normativist and functionalist styles in public law made in M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992). See further A. Tomkins, ‘“Talking in Fictions”: Jennings on Parliament’ (2004) 67 MLR 772.
- 10 F. Mount, *The British Constitution Now* (London: Mandarin, 1993) 74: ‘Jennings, like all constitutional writers, was a man of his time, and his time was a time of managerial government’.
- 11 Loughlin, Note 9 above, 230.
- 12 See the starred note above.
- 13 The archive includes: (a) an unpublished autobiography in typescript, *The Road to Peradeniya*, written in 1950 while Jennings was vice-chancellor of the University of Ceylon, with later additions (some hand-written, some typed) dating possibly from the 1960s. This text is now published – see Note 8. *The Kandy Road* by Jennings (edited by H. A. I. Goonetilleke and published in 1993 by the University of Peradeniya) describes the journey which Jennings made many times by car between Colombo and the new university site near Kandy; (b) material relating to constitutional and legal issues in which he was involved – e.g. as a member of the Reid Commission on the Malayan constitution (1956–1957) and as adviser on the drafting of constitutions (including those of Ceylon, Malta, Nepal and Pakistan); (c) manuscript of an unfinished work, *The Laws and Liberties of England*; and (d) many occasional papers, lectures and letters, a leather-bound scrap-book of reviews of *Cabinet Government*, and six scrapbooks of constitutional press cuttings from June 1937 to May 1939.
- 14 *Road to Peradeniya*, 13. Jennings stated that at some point in his academic career his Bristol accent ‘glided imperceptibly into the accent of the upper middle classes’: *ibid.*, 14.
- 15 *Ibid.*, 24.
- 16 *Ibid.*, 30.
- 17 The biography of Lord Franks makes plain how different were the family circumstances of the two boys, Franks’ father being a theologian and principal of a congregational college in Bristol; this middle-class home was full of books, and here in a large family, lively conversation on issues of the day took place at every meal. See A. Danchev, *Oliver Franks: Founding Father* (Oxford: Clarendon Press, 1993) ch. 1.
- 18 *Road to Peradeniya*, 45.
- 19 See A. D. Hargreaves, *An Introduction to the Principles of Land Law* (London: Sweet & Maxwell, 1936) and later editions.
- 20 Charles Arnold-Baker, who was a member of the royal commission on common land chaired by Jennings in 1955–1958, described him to me as being both the cleverest and the coolest man that he had met.
- 21 *Road to Peradeniya*, 45. The typescript also contains the following passage:
- Throughout my adult life I have been reserved and self-sufficient. I have had few friends because I have never been a friendly person. On the other hand I have had few enemies, though plenty of critics. Perhaps the paucity of enemies is due to the fact that I have seldom worried about criticism.
- (*Road to Peradeniya*, typescript, page 27)
- 22 *Ibid.*, 62.
- 23 *Ibid.*, 57.
- 24 Personal communication to the author.
- 25 (1925) 2 CLJ 229, 237.

- 26 'The Right of Angary' (1927) 3 CLJ 49.
- 27 Later transformed into the LLM degree, the LLB degree could be taken externally by those who had graduated in the Law Tripos.
- 28 See 'Le Statut des Dominions et la Conférence impériale de 1926' (1927) 8 *Revue de Droit International et de Legislation comparée* (Brussels) 397–406. An article on a related theme in volume 9 (1928) of this journal is 'La Personnalité Internationale dans l'Empire Britannique' 438. Both articles were translated into French for publication.
- 29 *Road to Peradeniya*, 66. See also the preface to Jennings, *Principles of Local Government Law* (London: University of London Press, 2nd edition, 1939).
- 30 *Road to Peradeniya*, 69.
- 31 See the second and third articles cited in Note 44 below; and the text at Notes 63–65 below.
- 32 *Road to Peradeniya*, 53. After Jennings' death in 1965, his collection of political biographies was purchased by the Squire Law Library in Cambridge.
- 33 Jennings' later work was criticised for its selective use of historical sources: see reviews by A. J. P. Taylor, Note 94 below. See also the review by H. Pelling at [1961] *Public Law* 114.
- 34 Many references to the law department are in R. Dahrendorf, *LSE – A History* (Oxford: OUP, 1995).
- 35 *Road to Peradeniya*, 67.
- 36 The first edition contained a chapter on the theory of constitutional and administrative law that did not appear in later editions, mainly because the same ground was covered by Jennings in *The Law and the Constitution* (see preface to *Principles of Local Government Law*, Note 29 above).
- 37 The list includes (later editions are not mentioned) *The Poor Law Code* (London: Knight, 1930); *The Law Relating to Town and Country Planning* (London: Knight, 1932); *The Law Relating to Local Authorities* (London: Knight, 1934); *The Law of Housing* (London: Knight, 1935); *The Law of Public Health* (London: Knight, 1936); *The Law of Food and Drugs* (with G. J. Cole) (London: Knight, 1938); *Local Authorities in War-Time* (London: Knight, 1940).
- 38 *Road to Peradeniya*, 68.
- 39 His daughter, Mrs Claire Dewing, remembered that in the garden of the new house there was a former ball-room; this was used by Jennings as his library and study, with the immense advantage that the rest of the family could carry on their activities without any sound of these reaching him.
- 40 See K. Ewing, 'The Law and the Constitution: Manifesto of the Progressive Party', (2004) 67 *MLR* 734.
- 41 *Road to Peradeniya*, 68.
- 42 *Ibid.*, 71.
- 43 To this volume (Oxford: OUP, 1933) Jennings contributed a chapter, 'The Institutional Theory', which discussed the work of leading European legal theorists.
- 44 See in particular 'In Praise of Dicey 1885–1935' (1935) 13 *Public Administration* 123; 'The Courts and Administrative Law' (1936) 49 *Harvard LR* 426; and 'Judicial Process at its Worst' (1937) 1 *MLR* 111. A later article, 'In Praise of Utilitarianism' (1938) 2 *MLR* 22, contains a succinct statement of Jennings' approach to the study of law as an historical and social phenomenon, to the judicial process and to the art of legislation. In his view, the 'primary need' in relation to the academic study of jurisprudence was to take the subject out of its Austinian rut.
- 45 *Road to Peradeniya*, 83.
- 46 *Ibid.*, 80.
- 47 *Ibid.*, 77.
- 48 See Loughlin, Note 9 above, ch. 4.
- 49 *Road to Peradeniya*, 76.

- 50 *Ibid.*, 78.
- 51 *Ibid.*, 79.
- 52 *Ibid.*, 81.
- 53 See Sir Christopher Foster, 'Cabinet Government in the Twentieth Century', (2004) 67 *MLR* 753.
- 54 They are carefully gathered together in a leather-bound scrap book in the Jennings archive: see Note 13 above.
- 55 See Tomkins, Note 9 above. In *Road to Peradeniya*, 70, Jennings commented:
- Cabinet Government* suffers a little, I think, because I was afraid of an accusation that I was trespassing on the close of the political scientist ... I prefer *Parliament* because I had lost this inferiority complex and could therefore study *Parliament* in all its aspects.
- 56 *Road to Peradeniya*, 69.
- 57 *Ibid.*, 70.
- 58 A second edition appeared in 1952 entitled *Constitutional Laws of the Commonwealth*; volume I of a third edition appeared in 1957 over Jennings' name alone.
- 59 *The British Constitution*, 32. In *A Federation for Western Europe*, at page 19, he wrote: 'The democratic system works best where the two-party system operates in such a way that a slight change in public opinion produces a change in government'.
- 60 *The British Constitution*, 8–9.
- 61 'The German citizen can reach Herr Hitler only through an immense bureaucracy. Any British subject can reach the Cabinet at once through his member', *ibid.*, 36.
- 62 *Ibid.*, 36.
- 63 *Ibid.*, 223.
- 64 *Ibid.*, 224.
- 65 *Ibid.*, 226.
- 66 *Road to Peradeniya*, 89. This experience contrasts with that of Oliver Franks, who in 1938 (while professor of philosophy at Glasgow) accepted a government invitation sent to chosen dons to go wherever they might be needed in the event of war: Danchev, Note 17 above, 39. In September 1939, Franks was assigned to the Ministry of Supply, where he became permanent secretary in 1945.
- 67 *Road to Peradeniya*, 90.
- 68 He was irritated to learn on board that other men were accompanied by their wives and families, which the Colonial Office had told him was not possible.
- 69 If I find something going wrong somewhere, my mind goes casting round for remedies, and often I have to restrain myself from butting in to get the defect remedied. This is, of course, the mind of the administrator, but he must beware of meddling in things which do not concern him.
- (*Road to Peradeniya*, page 31 of original text, later struck out in ink)
- 70 An informative appraisal by H. A. I. Goonetilleke of Jennings' work in Ceylon is in *The Kandy Road*, Note 13 above, ix–xxvi. See also *Road to Peradeniya*, ch. 7, and the text of a radio talk that he gave on leaving Ceylon (Jennings archive, file A.1.8.4).
- 71 This required at least 18 hours of unpaid work each week on top of his university duties: *Road to Peradeniya*, ch. 8.
- 72 *Ibid.*, 165.
- 73 *Ibid.*, 165. In his radio talk (Note 70 above), Jennings said that in May 1943, Mr Senanayake, Sir Oliver Goonetilleke and Jennings had adopted a 'grand strategy' for the independence of Ceylon, a strategy that was achieved over nearly five years, a period during which Jennings 'drafted all the documents'. See generally *Road to Peradeniya*, ch. 11.

- 74 See e.g. W. I. Jennings and D. W. Logan, *A Report on the University of Hong Kong* (Hong Kong: University of Hong Kong, 1953). Jennings later chaired a commission on the University of Malta.
- 75 See his *Constitutional Problems of Pakistan* (London: Cambridge University Press, 1957). Other constitutions with the drafting of which he was concerned were those of the Maldives (1954), the Sudan (1958) and Nepal (1956–1959).
- 76 Including *The Commonwealth in Asia* (Oxford: Clarendon Press, 1949); *The Constitution of Ceylon* (London: Oxford University Press, 1949); *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1952); and *The Dominion of Ceylon – Development of its Laws and Constitution* (with H. W. Tambiah) (London: Stevens, 1952).
- 77 *Road to Peradeniya*, 105.
- 78 [1960] 1 All ER 631.
- 79 See *Road to Peradeniya*, ch. ix.
- 80 Radio talk, Note 70 above, 6.
- 81 See Note 76 above.
- 82 *The Queen's Government* (London: Penguin, 1954).
- 83 For the painting and the stamp, see *The Kandy Road*, Note 13 above.
- 84 See C. W. Crawley, *Trinity Hall – The History of a Cambridge College 1350–1975* (Cambridge, for the College: 1976) for brief accounts of Cowell and Maine.
- 85 *Parliament* (Cambridge: CUP, 2nd edition, 1957); *Constitutional Laws of the Commonwealth*, vol. 1 (Oxford: Clarendon Press 3rd edition, 1957); *Cabinet Government* (Cambridge: CUP, 3rd edition, 1959); *The Law and the Constitution* (London: University of London Press, 5th edition, 1959); *The British Commonwealth of Nations* (London: Hutchinson, 4th edition, 1961).
- 86 *The Approach to Self-Government* (Cambridge: CUP, 1956); *Problems of the New Commonwealth* (Durham, NC: Duke University Press, 1958); *Democracy in Africa* (Cambridge: CUP, 1963).
- 87 An appraisal of this work would require research into the documentary records regarding the passage to independence of countries such as Cyprus, Malta, Nigeria and Singapore. Where Jennings' advice was sought in this process, this would have been done by a political party or by ministers in the colony, not by the Colonial Office. Jennings was never instructed by the Colonial Office to advise or to draft new constitutions (personal communication of Sir William Dale to the author) and his name is not mentioned by Dale in 'The Making and Re-making of Commonwealth Constitutions' (1993) 42 *ICLQ* 67.
- 88 His honours included a knighthood in 1948, QC in 1949, KBE 1955 and FBA 1955.
- 89 Jennings archive, B.10/7.1. The colonial secretary's letter of 23 March 1956 referred to Jennings' 'unique' qualifications for the Malaya commission as being 'his standing as a constitutional lawyer, his experience of the problems of transition in the Commonwealth, his reputation in Asian countries and his personal friendship with the Chief Minister of the Federation (they were undergraduates together at Cambridge)'.
- 90 A hand-written diary of his work on the commission (some 60 foolscap pages) is in the Jennings archive, B.10/7.2. It is now in H. Kumarasingham (ed.), *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: CUP, 2014), pp. 57–76.
- 91 See HC Deb vol. 573 col. 633 (12 July 1957). Speaking in the second reading debate of the Federation of Malaya Independence Bill, HL Deb vol. 205 col. 245 ff. (29 July 1957) Lord Reid paid tribute to the expertise in drafting constitutions of his commission colleagues.
- 92 Information from Charles Arnold-Baker, a member of the commission. The report is Cmnd 462 (1958).
- 93 See e.g. H. Pelling [1961] *Public Law* 114; H. R. G. Greaves [1962] *Public Law* 249; M. Beloff (1961) 39 *Public Administration* 284; P. Bromhead (1962) 40 *Public Administration* 452.

- 94 Taylor's reviews of the three volumes appeared respectively in the *Times Literary Supplement* 14 October 1960, 653; 3 February 1961, 67; and 26 January 1962, 51. Extracts from these reviews follow the preface to this chapter, above.
- 95 cf. the account of the election given in A. W. B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths, 1984): entry for Jennings by H. H. Jones, 279.
- 96 Typescripts of the inaugural lecture (C.16/14) and *The Laws and Liberties of England* (C.11) are in the Jennings archive. It is possible that Jennings resumed work on the latter text while Downing Professor. In another document (C.10/1B) written in 1963, Jennings explains, referring particularly to the Indian constitution, why his original criticisms of judicially enforceable bills of rights had been misconceived.
- 97 On the *Lakonia* disaster, see G. Bond, *Lakonia* (London: Oldbourne Press, 1966) and D. Marchbanks, *The Painted Ship* (London: Secker and Warburg, 1964). Remarkably, no inquiry into the disaster was held. The late Mrs Claire Dewing disputed the accuracy of the report in *The Times* (27 December 1963) concerning her father's role in the rescue.
- 98 According to Mrs Dewing, this was an absurd diagnosis as her father was incapable of overworking.
- 99 The booklet *Magna Carta* was cited to the Divisional Court by Sir Sydney Kentridge QC in the Chagos Islands case, (*R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067) to rebut the government's woefully erroneous argument that Magna Carta had never been approved by Parliament.
- 100 And see C. Crawley, *Trinity Hall – The History of a Cambridge College 1350–1975*, Note 84 above, 208–209.
- 101 Personal communication to the author.
- 102 Danchev, Note 17 above, 197.
- 103 Dahrendorf (Note 34 above, 205) records that it was only in the 1930s and 1940s that the LSE law department acquired its distinctive character 'as one where lawyers were not ashamed to describe themselves as social scientists'.

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