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# Ivor Jennings' Constitutional Legacy beyond the Occidental-Oriental Divide

MARA MALAGODI\*

*Sir W. Ivor Jennings (1903-1965) was one of Britain's most prominent constitutional law scholars of the 20<sup>th</sup> century. He is mostly famed for his work in the 1930s on English Public Law. In 1941, Jennings, however, moved to Sri Lanka, progressively becoming involved in both an academic and professional capacity with constitutional processes across the decolonising world in the early stages of the Cold War. This essay provides an alternative account of Jennings' constitutional legacy to those of existing scholars by bringing in conversation orthodox accounts of the 'Occidental Jennings' with an analysis of the neglected 'Oriental' experiences of this influential intellectual. It examines the ambiguous relationship between constitutionalism and democracy in Jennings' constitutional work overseas, and the impact of his postcolonial work on his views on constitutionalism.*

## INTRODUCTION

This essay provides an alternative account of the constitutional legacy of the noted British constitutionalist Sir W. Ivor Jennings (1903-1965) to those that can be found in the existing literature. It does so by investigating a neglected aspect of Jennings' life and work, i.e. his extensive constitutional engagement in former British colonies. Jennings is mostly famed for his work in the 1930s on English public law, referred to here as the 'Occidental Jennings' to denote the ensemble of orthodox accounts portraying the constitutionalist's life story, work, and legacy. However, in 1941, Jennings moved to Sri Lanka – where he resided until his appointment in 1954 as Master of Trinity Hall in Cambridge – and became progressively involved in constitution-making processes in decolonising countries. I cumulatively refer to this period of Jennings's life, his academic outputs on the postcolonial world, and advisory work overseas as the 'Oriental Jennings'. Particularly in British scholarship, the 'Oriental

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\* *Department of Law, London School of Economics and Political Science, London WC2A 2AE, United Kingdom. Email: [M.Malagodi@lse.ac.uk](mailto:M.Malagodi@lse.ac.uk)*

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Jennings' has remained almost completely absent from accounts of his life and work, with the result that Jennings' attitudes and legacy have been conflated with the 'Occidental Jennings'. A number of scholarly works have explored instances of Jennings' postcolonial constitutional involvement, but these outputs have tended to result in a piecemeal examination and fragmented picture of the 'Oriental Jennings'.<sup>1</sup> Significantly, no systematic study of Jennings' constitutional legacy overseas has been produced to date.<sup>2</sup>

This article analyses Jennings' constitutional legacy in South Asia where he was involved, both academically and professionally, with most of the region's jurisdictions.<sup>3</sup> Jennings played a direct role in the constitutional frameworks of Sri Lanka (1941-1955), the Maldives (1952-1953), Pakistan (1954-1955), and Nepal (1958), and had a long-term indirect engagement with India. It is argued that South Asia represents the core of the 'Oriental Jennings' experience and work. In this respect, it is important to highlight that Jennings was involved with postcolonial constitutional processes primarily in a professional capacity. He was one of the leading Western experts in the early stages of the Cold War, instructed either by the British Government or local political leaders to dispense constitutional advice to decolonising nations.<sup>4</sup> It is in this historical context that the embattled relationship between democracy and constitutionalism in Jennings' academic and advisory work takes centre stage in the assessment of his constitutional legacy. In fact, the different ways in which Jennings articulated the relationship between democracy and constitutionalism in Britain and in South Asia illuminate the contrast between his normative stance on British constitutionalism and his work as a practitioner overseas. Ultimately, the article illuminates Jennings' progressive metamorphosis from leftist, outsider, and democrat in his portrayals as the 'Occidental Jennings', to the conservative, pro-establishment, and authoritarian 'Oriental Jennings' in the postcolonial legacy of the Cold War era.

This essay seeks to fill this void in the academic literature by drawing on an in-depth analysis of Jennings' Private Papers held at the Institute of Commonwealth Studies of the

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<sup>1</sup> A. McGrath, *The Destruction of Pakistan's Democracy* (1996); J. Fernando, 'Sir Ivor Jennings and the Malayan Constitution' (2006) 34:4 *J. of Imperial and Commonwealth History*; and K.M. De Silva, 'Ivor Jennings and Sri Lanka's Passage to Independence' (2005) 13 *Asia Pacific Law Review*.

<sup>2</sup> At the time of writing, the Institute of Commonwealth Studies (ICS) and the LSE Legal Biography Project are running a joint initiative to digitalise and publish online the most significant documents in the Sir Ivor Jennings Papers held at ICS. See also: H. Kumarasingham, *Constitution Maker – Selected Writings of Sir Ivor Jennings* (forthcoming) and H. Kumarasingham (ed.), *Constitution Making in Asia – Decolonisation and State-Building in the Aftermath of the British Empire* (forthcoming).

<sup>3</sup> The expression 'South Asia' indicates: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. During Jennings' life Pakistan still comprised the East Wing, which then seceded and became the independent Republic of Bangladesh in 1971.

<sup>4</sup> C. Parkinson, *Bills of Rights and Decolonization* (2007) 14-15.

University of London and his correspondence with the British Foreign and Commonwealth Office (FCO) held at the National Archives, alongside his published work. A deeper exploration of the ‘Oriental Jennings’ merits attention because it illustrates the ways in which early Cold War political events prompted him to abandon the implementation of some of the constitutional ideas and models he held so dear in his writings, and for which he is well known in the English-speaking world. It also adds to our understanding of the man and the transportability of his theories by revealing how at times he rigidly adhered to aspects of his constitutional positions when they were unlikely to work outside of Westminster. It is hoped that these new and alternative accounts of Jennings the man and Jennings the constitutionalist will add nuance to our understanding of the interface of theory and practice, and colonial and postcolonial constitutional realities.

### THE ‘OCCIDENTAL JENNINGS’

Jennings was born in 1903 in Bristol from a family of modest means; he was an outstanding student, and succeeded in obtaining a scholarship from the University of Cambridge, where he was awarded a degree in Law from St Catherine’s College.<sup>5</sup> In 1925, Jennings was appointed as Lecturer of Law at the University of Leeds. In the same year, he joined Gray’s Inn as a Holt Scholar – then a Barstow Scholar in 1926 – and commenced his professional legal training.<sup>6</sup> Jennings described himself as ‘a scholarship boy’, but as recorded in his memoirs, his ‘relative penury’ helped to motivate him.<sup>7</sup> In 1928, Jennings was called to the Bar of England and Wales and his practice as a barrister, while confined to opinion-writing work rather than advocacy,<sup>8</sup> acquired particular relevance to his work in Pakistan.

In 1929, Jennings was appointed as Lecturer in Law at the London School of Economics and Political Science (LSE), where he remained until his move to Sri Lanka in 1941. At the LSE, Jennings authored his most famous works on English Public Law: *Principles of Local Government Law* (1931),<sup>9</sup> *The Law and the Constitution* (1933),<sup>10</sup> *Cabinet Government* (1936),<sup>11</sup> *Parliament* (1939),<sup>12</sup> and *The British Constitution* (1941).<sup>13</sup> During this period

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<sup>5</sup> A. Bradley, ‘Sir William Ivor Jennings: A Centennial Paper’ (2004) 67:5 *Modern Law Rev.* 719.

<sup>6</sup> C.J. Hamson, ‘In Memoriam: Master Sir Ivor Jennings’ (1965) 63 *Graya* 17-20.

<sup>7</sup> Bradley, op. cit., n. 5, p. 719.

<sup>8</sup> Id. p. 723.

<sup>9</sup> I. Jennings, *Principles of Local Government Law* (1931).

<sup>10</sup> I. Jennings, *The Law and the Constitution* (1933a, 1<sup>st</sup> edn.).

<sup>11</sup> I. Jennings, *Cabinet Government* (1936).

Jennings established himself as a radical critic of A.V. Dicey's concepts of parliamentary sovereignty and the rule of law, together with his positivist method.<sup>14</sup> Loughlin describes Jennings' functionalist approach as based on an empirical orientation, a historical method, a scientific temperament, and a progressive outlook.<sup>15</sup> A reviewer of the first edition of *The Law and the Constitution* described the political orientation of the book as 'very distinctly left wing'.<sup>16</sup> Jennings was affiliated to the Labour Party; but by 1936-37 he had resigned his party membership.<sup>17</sup> In his autobiography, he wrote that political activity was not suited to an academic public lawyer, because 'it required too much simplification of the issues and too many compromises with one's conscience'.<sup>18</sup> As we shall see, Jennings adopted a different approach in his advisory work overseas, where he displayed more pragmatic, policy-oriented, and pro-establishment political attitudes towards postcolonial constitutional issues.

Jennings' political orientation and affiliation to the Labour Party are clearly reflected in the specific relationship between constitutional law and democratic politics he saw as being centred on the principle of popular sovereignty:

For Jennings the main purpose of the constitution was to facilitate the efficient working of a democratic system. The 'efficient working of the democratic system' as the term was used in the 1930s is a synonym for the idea that 'the will of the people, as expressed through their elected representatives in the House of Commons, shall prevail, without undue delay'.<sup>19</sup>

In short, he argued that 'it is the people who are the guardians of the constitution' and that this safeguard is manifest in free and fair elections and the people's consent to government: 'Parliament is the legal sovereign and the electors the political sovereign'.<sup>20</sup>

According to Jennings, the British constitutional framework is ultimately guaranteed, in Lockean terms, by the people's right to rebel against tyranny. Thus, the key British constitutional tenet of parliamentary supremacy, while a recognised principle of the common law, was not established in Britain by judicial decision; it was, instead, settled by conflict

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<sup>12</sup> I. Jennings, *Parliament* (1939).

<sup>13</sup> I. Jennings, *The British Constitution* (1941, 1<sup>st</sup> edn.).

<sup>14</sup> I. Jennings, *The Law and the Constitution* (1959, 5<sup>th</sup> edn.) v-vi.

<sup>15</sup> M. Loughlin, *Public Law and Political Theory* (1992) 167-176.

<sup>16</sup> K.D. Ewing, 'The Law and the Constitution: Manifesto of the Progressive Party' (2004) 67:5 *Modern Law Rev.* 734.

<sup>17</sup> Bradley, op. cit., n. 5, p. 724.

<sup>18</sup> Id. p. 724.

<sup>19</sup> Ewing, op. cit., n. 16, p. 735.

<sup>20</sup> Jennings, op. cit., n. 10, p. 118.

during the English Revolution and the Glorious Revolution.<sup>21</sup> His interest in democracy and liberty led him to argue that the latter in Britain is grounded in the spirit of a free people, who took up arms and fought for ‘freedom for a reformed Church, freedom from royal absolutism, parliamentary freedom’.<sup>22</sup> The first edition of *The British Constitution* (1941) was published in the backdrop of World War II and informed by the stark contraposition between liberal Britain and Nazi Germany.<sup>23</sup> Jennings clarified that the essence of British democracy does not lie simply in a wide franchise, but in regular general elections where electors can effectively exercise a free and secret choice between rival candidates advocating rival policies: ‘the symbol of liberty is His Majesty’s Opposition’.<sup>24</sup> These factors ‘differentiate British democracy from the so-called democracy of the Soviet Union and from the autocratic systems of Germany and Italy’.<sup>25</sup>

In the fifth edition of *The British Constitution* (1966), there was a shift in the countries Britain is compared to, which was consistent with the Cold War context and Jennings’ post-1941 experiences overseas. British democracy was contrasted with ‘the so-called ‘people’s democracy’ of communist countries and the autocratic systems of other authoritarian states’.<sup>26</sup> Similarly, Jennings’ argument that written constitutions do not necessarily provide better safeguards against autocracy than the unwritten British constitution is illustrated in the first edition with reference to the ill-fated Weimar Republic,<sup>27</sup> but it is exemplified in the fifth edition by a generic reference to ‘many dictators’.<sup>28</sup> This line of argument inevitably confronted Jennings with the burning questions of what kept Britain free, and what role constitutional structures played in safeguarding democracy. Jennings’ answer seems to veer towards a degree of historical and cultural determinism as he argued that ‘liberty is an attitude of the mind’.<sup>29</sup> Jennings did not attribute the success and endurance of democratic regimes solely to the genius of particular people; he argued that certain institutions – such as an independent judiciary, impartial laws, an efficient civil service, effective local government, and most importantly a freely elected, active Parliament – are clearly necessary

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<sup>21</sup> Id. pp. 34-36.

<sup>22</sup> Jennings, op. cit., n. 13, p. 226.

<sup>23</sup> Id. p. 226.

<sup>24</sup> Id. p. 226.

<sup>25</sup> Id. pp. 10-11.

<sup>26</sup> I. Jennings, *The British Constitution* (1966, 5<sup>th</sup> edn.) 9.

<sup>27</sup> Jennings, op. cit., n. 13, p. 13.

<sup>28</sup> Jennings, op. cit., n. 26, p. 11.

<sup>29</sup> Id. p. 203.

to protect liberty.<sup>30</sup> Jennings, however, remained steadfast in his assertion that ‘the source of our liberty is not in laws or institutions, but in the spirit of a free people’.<sup>31</sup>

Jennings’s pioneering acknowledgement of the contingent character of constitutions and emphasis on cultural attitudes prefigured current preoccupations with culture in comparative law and socio-legal studies.<sup>32</sup> However, Jennings’ belief that cultural attitudes were both the foundation and the “black box” of a constitution limited his faith in the exportability of constitutional democracy overseas. In fact, even with regard to Britain, the tension in Jennings’ writings between the democratic nature of the constitution and an anxiety about democratic politics remained unresolved throughout the five editions of *The Law and the Constitution* (1933; 1938; 1943; 1952; 1959) as expounded by Ewing:

The fourth and fifth editions were written during the cold war, and there is a sense that much of what is related is by way of comparison with beliefs in some quarters about how government was conducted in the USSR, to which there is a brief mention.<sup>33</sup>

In the fourth and fifth editions of *The Law and the Constitution*, published in 1952 and 1959 respectively, at the peak of Jennings’ Cold War engagement with constitutional politics overseas, his preoccupations with the democratic potential of the British constitution became more acute.<sup>34</sup> Jennings’ concerns with abuses of power were reflected in his defence of ‘manner and form’ restraints to parliamentary sovereignty,<sup>35</sup> in the even more central role accorded to constitutional conventions and their binding nature,<sup>36</sup> in greater faith in the judiciary as the guardian of the constitution,<sup>37</sup> and in his diluted critique of entrenched charters of fundamental rights.<sup>38</sup> I maintain that Jennings’ concerns with the functioning of constitutional democracy more likely resulted from his direct experiences in the postcolonial world than from an implicit comparison with the Soviet constitution as suggested by Ewing.<sup>39</sup> In fact, what transpires from Jennings’ published and unpublished work is that he never visited the USSR nor wrote anything about its legal system.

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<sup>30</sup> Id. pp. 206-208.

<sup>31</sup> Id. p. 209.

<sup>32</sup> Ironically, Jennings’ *bête noire*, A.V. Dicey, adopted the same “cultural” approach to the limits of the law in his so-called “lost lectures” on *Comparative Constitutionalism*, ed. J.W.F. Allison (2013).

<sup>33</sup> Ewing, op. cit., n. 16, p. 751.

<sup>34</sup> Id. pp. 742-743.

<sup>35</sup> Jennings, op. cit., n. 14, p. 153. ‘Manner and form’ restraints bind Parliament as to the procedure for passing future legislation.

<sup>36</sup> Id. p. 92.

<sup>37</sup> Id. p. 161.

<sup>38</sup> Ewing, op. cit., n. 16, p. 749.

<sup>39</sup> Id. p. 751.

In Jennings' view, the proper functioning of a constitution in a democratic country rests upon the acquiescence of the governed<sup>40</sup> and their recognition of political authority.<sup>41</sup> That is to say that constitutional government is based upon popular consent, and legitimate political authority is grounded in the historical, social, and political circumstances of a nation.<sup>42</sup> As a result, for Jennings 'constitutional lawyers or political scientists could not be satisfied with an Austinian-type theory based on authority because their business was to explain and justify that authority'.<sup>43</sup> Thus, his public law scholarship combined a focus on history with the study of institutions to explain the nature, powers, and working of political authorities.<sup>44</sup> It also featured a profound engagement with political theory and the philosophy of law to justify the authority that underpins the constitution and governmental institutions.<sup>45</sup> In 1938-39, Jennings spent a year as Visiting Professor of Political Science at the University of British Columbia, where his interest in the laws and politics of the British colonies<sup>46</sup> further developed from his days at the LSE.<sup>47</sup> He developed a keen interest in the study of institutions and concluded that to be a good lawyer, one had to be also a good political scientist.<sup>48</sup> The importance placed by Jennings on the political history, socio-cultural traditions, and institutional landscape of the constitutions that he studied is pivotal to his 'law in context' approach. When Jennings turned to look at South Asian jurisdiction, with which he was less familiar, he adapted his intellectual orientations and theories to the new political context of the Cold War.

### THE 'ORIENTAL JENNINGS'

The 'Oriental Jennings' came into being because of a series of opportunities offered to him to influence the constitutional developments of a number of South Asian countries. In 1940, he was appointed as Principal of the University College of Ceylon. The move to Sri Lanka in early 1941 inaugurated a new phase of prolific academic writing on the laws of the British

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<sup>40</sup> Jennings, op. cit., n. 14, p. 346.

<sup>41</sup> Id. p. 335.

<sup>42</sup> I. Jennings, *Democracy in Africa* (1963) 71-73.

<sup>43</sup> J.A.G. Griffith, 'A Pilgrim's Progress: Law and the Constitution by Ivor Jennings' (1995) 22:3 *J. of Law and Society* 414.

<sup>44</sup> I. Jennings, 'The Institutional Theory' in *Modern Theories of Law*, ed. A.L. Goodheart (1933b) 69.

<sup>45</sup> Jennings, op. cit., n. 14, pp. 331-332.

<sup>46</sup> I. Jennings, *Constitutional Laws of the British Empire* (1938).

<sup>47</sup> ICS 125/D/3.

<sup>48</sup> Bradley, op. cit., n. 5, pp. 725-726.

Empire and then of the new Commonwealth, which represents a watershed in his writing and intellectual engagement.<sup>49</sup> It also led to a more practical engagement with decolonising nations as Jennings served as constitutional advisor in many Asian and African jurisdictions – and even acted as legal advisor for Pakistan’s Governor General in the infamous litigation over the dissolution of the country’s first Constituent Assembly. This section begins to explore the deepening tensions between democracy and constitutionalism in Jennings’ academic and advisory work overseas that emerged in this period.

The present essay concentrates solely on Jennings’ scholarly and professional engagement in South Asia amongst his postcolonial experiences. It is argued that his work in South Asia represents the core of the academic production and advisory work of the ‘Oriental Jennings’. In fact, Sri Lanka, India, and Pakistan are the only countries – alongside Britain – to whom Jennings dedicated entire monographs, three in the case of Sri Lanka. Moreover, in the Preface to *The Approach to Self-Government* (1956), Jennings wrote:

I believe strongly in the importance of local knowledge and experience [...] In the main I have relied upon my own experience in Ceylon, Pakistan, and the Maldiv Islands, and in seeking to draw lessons from the experience of India.<sup>50</sup>

Similarly, *The Commonwealth in Asia* (1951) examines India, Pakistan and Ceylon;<sup>51</sup> and in *Problems of the New Commonwealth* (1958), the analysis concentrates on India, Pakistan, Ceylon, and Malaya as in Jennings’ view it was India’s accession to the Commonwealth that radically changed the nature of the Commonwealth.<sup>52</sup> The works of the ‘Oriental Jennings’, together with his constitutional legacy overseas, have however remained almost virtually unexplored in academic writing.<sup>53</sup> In the special issue of *The Modern Law Review* to mark Jennings’ centenary in 2003,<sup>54</sup> Martin Loughlin acknowledges that Jennings’ post-war work on the drafting of Commonwealth constitutions represents one of the most conspicuous gaps

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<sup>49</sup> I. Jennings, *The Constitution of Ceylon* (1953a, 3<sup>rd</sup> edn.); I. Jennings, *The Economy of Ceylon* (1950); I. Jennings, *The Commonwealth in Asia* (1951); I. Jennings (with H.W. Tambiah), *The Dominion of Ceylon – Development of its Laws and Constitution* (1952); I. Jennings, *Some Characteristics of the Indian Constitution* (1953b); I. Jennings, *The Approach to Self-Government* (1956); I. Jennings, *Constitutional Problems in Pakistan* (1957); I. Jennings, *Problems of the New Commonwealth* (1958); I. Jennings, *Democracy in Africa* (1963); I. Jennings, *Magna Carta and Its Influence around the World Today* (1965).

<sup>50</sup> Jennings, op. cit. (1956), n. 49, pp. vii-viii.

<sup>51</sup> Jennings, op. cit. (1951), n. 49, pp. x-xi.

<sup>52</sup> Jennings, op. cit. (1958), n. 49, p. 4.

<sup>53</sup> Supra Note 1 and 2.

<sup>54</sup> (2004) 67:5 *Modern Law Rev.* 715–786.

in the collection.<sup>55</sup> The present essay seeks to address this scholarly silence and concentrates in particular on his published work and archival material pertaining to South Asia in the Papers of Sir Ivor Jennings.<sup>56</sup>

The Cold War context is of crucial importance in identifying the constitutional legacy of the ‘Oriental Jennings’ and understanding the political considerations and constraints informing his constitutional vision and advisory work overseas.<sup>57</sup> After Sri Lanka, Jennings was instructed as constitutional advisor in former British colonies not simply for his legal expertise, but also for the trust the British Government had placed in him not to offend British national interests and foreign policy.<sup>58</sup> In fact, Jennings deployed a ‘modified’ Westminster model overseas, ostensibly in order to better suit local circumstances, but also to strengthen particular pro-West local political actors. This proved especially important in the early years of the Cold War when Asia became a critical battleground for the two superpowers.<sup>59</sup> The tensions and discrepancies between Jennings’ normative stance and his work as a practitioner overseas that emerge from a study of the ‘Oriental Jennings’ become more apparent when we return to two of the fundamental pillars which underpin his approach to constitutional law dealing with democracy and constitutionalism.

The theories developed by Jennings in the early 1960s made little reference to his experiences in South Asia and were founded on two key arguments. First, Jennings’ approach to constitutional issues reflected his belief that law and politics are inextricably intertwined. Jennings emphasised the importance of understanding country-specific local circumstances for successfully crafting a constitution, but also acknowledged that the work of the draftsman is constrained by the political will of those instructing him.

The drafting of a constitution is a technical job, which, like many other technical jobs, is best done by those with experience of it. [...] A draftsman must however have instructions, for the essential principles of a constitution require political decisions.<sup>60</sup>

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<sup>55</sup> M. Loughlin, ‘Sir Ivor Jennings and the Development of Public Law’ (2004) 67:5 *Modern Law Rev.* 715.

<sup>56</sup> The Ivor Jennings Papers were purchased by ICS from Jennings’ widow in 1983. Access to the Papers is open, subject to the usual conditions: <<http://archives.ulrls.lon.ac.uk/resources/ICS125.pdf>>.

<sup>57</sup> R.J. McMahon, *The Cold War: A Very Short Introduction* (2003).

<sup>58</sup> Parkinson, op. cit., n. 4, pp. 13-14.

<sup>59</sup> McMahon, op. cit., n. 57, pp. 35-77.

<sup>60</sup> Jennings, op. cit., n. 42, p. 70.

For Jennings, the details of constitutional drafting follow key political decisions regarding the organisation of the polity. Thus, the relationship between law and politics in constitution-making moments is framed through a sequential argument:

The framing of a constitution for an independent country is really only the latest step in constitutional development, and before that step is taken some aspects of the development become clear.<sup>61</sup>

He contended that constitution-making requires political decisions to be made regarding essential constitutional principles before promulgation.<sup>62</sup> Jennings argued that these political decisions ought to relate to the country's specific historical, social, cultural, and economic conditions. In Jennings' view, constitutional architecture reflects the political compromise and balance of power between the various political actors.

Second, Jennings' ideal constitutional formula for aspiring democratic regimes was centred on the legislature.<sup>63</sup> Thus, in Jennings' account, the key to successful democratisation by constitutional means lies in the engineering of governmental structures informed by the principle of popular sovereignty. In particular, he placed central importance on the design, powers, and role of the legislature, as the institution most directly representative of 'the people', who are made the 'popular sovereign' by regular free and fair elections.<sup>64</sup> To sketch this normative formula in the early 1960s, Jennings appears to have drawn on his analysis of parliamentary supremacy in the British constitution, rather than on his professional authority overseas. But it is also possible to argue that Jennings' advisory work was driven by his reading of the specific socio-political circumstances of the countries where he was employed and by the political objectives of those instructing him in the Cold War context. In fact, the political considerations informing Jennings' constitutional advice often led to the marginalisation of directly elected legislative bodies, which formed the core of his second pillar, in favour of powerful, but unaccountable executives to foster the stability of the various regimes vis-à-vis external 'threats'.

With regard to representative lawmaking bodies, there is a conspicuous gap in Jennings' constitutional engineering formula: he disregarded the importance of constitution-making processes and the composition of representative bodies in crafting democratic documents. Jennings underestimated the significance of 'constitutional moments', such as those that had

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<sup>61</sup> Id. p. 73.

<sup>62</sup> Id. pp. 75-81.

<sup>63</sup> Id. pp. 71-72.

<sup>64</sup> Jennings, op. cit., n. 10, p. 118.

occurred in the United States and India, in laying the foundations of constitutional democracy and legitimacy.<sup>65</sup> He seemingly took for granted the successful historical process that established British constitutional democracy through centuries of political adjustments and legal sedimentation.<sup>66</sup> Significantly, Jennings operated almost exclusively in countries directly under British colonial rule or heavily influenced by Britain in both their legal systems and governmental frameworks.<sup>67</sup> Thus, a key issue that the present essay seeks to address is to what extent and in which areas Jennings departed from the British constitutional model in his work in South Asia – and ultimately why. This point is crucial to investigate the legacy of Jennings’ constitutional work in South Asia.

#### IVOR JENNINGS IN SOUTH ASIA

In order to better explore the claims that Jennings’ work in South Asia had a larger influence on his writing than has been acknowledged to date, it is important to look at the historical context in which Jennings’ constitutional work in South Asia took place and the specific features of his academic and professional inputs to the region’s jurisdictions. The analysis here concentrates on the way in which Jennings’ work has articulated the relationship between constitutionalism and democracy by exploring two issues across the various South Asian jurisdictions: the nature and powers of the executive; and the position of fundamental rights vis-à-vis the institutional treatment of socio-cultural diversity.

In January 1941, Jennings moved to Sri Lanka where he resided for fourteen years. The island provided him with an ideal observatory on South Asia in a phase of critical political transformations across the region. In 1947, India and Pakistan gained independence from Britain and, in 1948, so did Sri Lanka. In 1951, the success of the anti-Rana revolution in Nepal allowed for the first bout of democratisation in the country, while throughout the 1950s the British protectorate of the Maldives was affected by political turmoil. Jennings became involved, both academically and professionally, with all of these jurisdictions to different degrees. The wave of decolonisation that swept the Indian subcontinent after World War II inaugurated an era of state and nation-building across the region. As a result, all the newly independent states of South Asia sought to institutionalise radical political transformations

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<sup>65</sup> B. Ackerman, *We the People* (1993).

<sup>66</sup> P. Leyland, *The Constitution of the United Kingdom* (2007) 6.

<sup>67</sup> Jennings, *op. cit.* (1956), n. 49, p. 21.

through constitution-making endeavours. The drafting of postcolonial constitutions proved a difficult task<sup>68</sup>, not least because all the South Asian states featured clear-cut religious majorities: Hindu in India and Nepal, Muslim in Pakistan and the Maldives, Buddhist in Sri Lanka and Bhutan. With the exception of India, the majority religion played a key role across the region in state and nation-building through constitutional politics. The Herculean task of postcolonial constitution-making and forging ‘unity in diversity’ in South Asia was further complicated by the Cold War context. Pakistan was a close ally of Western powers, while India was loosely in the orbit of the Soviet Union. Thus, in the aftermath of the proclamation of the People’s Republic of China in 1949, the Indian subcontinent became a battleground for both blocs throughout the 1950s.<sup>69</sup>

Jennings’ work in South Asia took place in a formative phase of the region’s constitutional development, and his legacy in the region must be understood in this context. In the remainder of the article I explore this dynamic by reference to four important case studies: Sri Lanka, India, Pakistan, and Nepal, from which two hypotheses emerge. On the one hand, it is argued that Jennings developed a particular constitutional model for decolonising nations. This was informed by the Cold War imperative of delivering political stability and regime continuity to ‘Third World’ countries and countering the ‘threat’ posed by the Soviet bloc, rather than a political commitment to promote constitutional democracy worldwide. In this respect, Jennings’ constitutional work in South Asia built on his experiences in the region in an incremental way and reflected his view that law and politics are inextricably intertwined. On the other hand, Jennings was a constitutional lawyer trained in the British tradition. His understanding of the Westminster model, and belief in the supremacy of the legislature, inclined him to the imposition of certain aspects of this model whatever the political context. This makes it clear that the ‘Occidental’ and ‘Oriental Jennings’ can not, and should not, be viewed as distinct in his intellectual development. As we shall discover, Jennings’ confidence in certain aspects of the British constitution was to profoundly shape his work, and failures, in South Asia.

### *1. Ivor Jennings as Constitutional Advisor in South Asia*

Jennings was directly involved in the constitutional politics of Sri Lanka, Pakistan, and Nepal, but was only an observer to India’s constitutional developments. Focusing on the

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<sup>68</sup> B. Metcalf and T. Metcalf, *A Concise History of India* (2001) 218-219.

<sup>69</sup> P.M. McGarr, *The Cold War in South Asia* (2013) 21.

context of his instructions and the constitutional outcome that resulted from his advisory work, it becomes clear how the specific modalities in which Jennings articulated the relationship between constitutionalism and democracy are revealed.

In Sri Lanka, Jennings' involvement with constitution-making began two years after his arrival in the country. In 1943, the independentist political leader D.S. Senanayake unofficially enrolled him as his 'honorary constitutional adviser' until independence from Britain was obtained in 1948 in the form of Dominion Status.<sup>70</sup> Jennings' involvement in Sri Lanka initially displeased the British establishment as demands for constitutional reform were sidelined by wartime preoccupations,<sup>71</sup> but by the end of World War II British foreign policy had transformed in line with the American policy<sup>72</sup> and entailed a program of peaceful decolonisation and devolution of political power to pro-West local elites.<sup>73</sup> As a result, Jennings' work in Sri Lanka came to be recognised as valuable by the British Government: the 1946 Constitution drafted by Jennings on Senanayake's instructions had facilitated a constitutional, bloodless transition to independence.<sup>74</sup> The document reflected Sri Lanka's intention to function politically in the same way as the metropolis. It featured a Westminster-style parliamentary democracy, no Indian-style Bill of Rights, and a constitutional monarchy operating under the aegis of the Commonwealth.<sup>75</sup>

As a result of his assistance to Sri Lanka in constitutional matters, on 1 June 1948, Jennings was conferred the honour of Knight Bachelor by King George VI,<sup>76</sup> on the recommendation of Senanayake.<sup>77</sup> Then, in 1949, he was awarded the title of King's Counsel, presumably for his work in Sri Lanka.<sup>78</sup> Jennings resided on the island until 1955 and shared with the British and Sri Lankan political establishments the initial optimism about the Soulbury Constitution as a vehicle for democratisation. However, with the 1956 general elections, Sri Lanka became increasingly polarised along ethno-linguistic lines, leading to

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<sup>70</sup> Jennings, op. cit. (1953a), n. 49, p. viii.

<sup>71</sup> In his autobiography, Jennings wrote: 'I was at this stage very unpopular with the Colonial Office [...] It was said that I had been sent to Ceylon to start a University and had allowed myself to "get mixed up in politics" [...] I had of course kept entirely clear of politics. What I had done was to give technical advice to the leader of the State Council when he asked for it'. ICS125/C/xiv/1.

<sup>72</sup> McMahan, op. cit., n. 59, p. 46.

<sup>73</sup> ICS125/C/xiv/1.

<sup>74</sup> Jennings, op. cit. (1953a), n. 49, p. viii.

<sup>75</sup> H. Kumarasingham, *A Political Legacy of the British Empire* (2013a) 120-123.

<sup>76</sup> *London Gazette*, 1 June 1948, 3253.

<sup>77</sup> A. Jeyaratnam Wilson 'Sri Lanka: A Tale of Four Constitutions' (1998-1999) <<http://www.dlib.pdn.ac.lk:8080/jspui/bitstream/123456789/2997/1/Alfred%20Jeyaratnam%20Wilson%20Vol.XXIV%20%26%20XXV%201998-1999%20No.1%262.pdf>>.

<sup>78</sup> *London Gazette*, 26 April 1949, 2051.

brutal anti-Tamil riots in 1956 and 1958. Progressively, the Sri Lankan state was captured by the ethnonationalist Sinhala Buddhist majority – a process which Jennings readily admitted the constitutional structures established in 1946 proved incapable of resisting.<sup>79</sup>

Jennings' avid interest in South Asia is further evidenced by the notice he paid to India. He never lived or worked in the country, but was an attentive observer of Indian constitutional politics.<sup>80</sup> In 1949, the Indian Constituent Assembly adopted the new Constitution and proclaimed India an Independent Republic. The Constitution of India remains to this day the country's fundamental law. It is a long entrenched, written document committed to constitutional democracy and secularism, which features a republican form of state, parliamentary form of government, and federal structure. The constitution enshrines the principles of constitutional supremacy and secularism and contains extensive sections of justiciable Fundamental Rights and non-justiciable Directive Principles of State Policy. Writing in 1952, Jennings' assessment of the Indian document was rather critical:

The Constitution is far too large and therefore far too rigid. [...] The Constituent Assembly was neither content to state general principles like a Constitution in the Latin tradition, nor to establish a set of institutions in the English traditions. To the complications of federalism it has added the complications of a Bill of Rights.<sup>81</sup>

However, a decade after independence, Jennings changed his mind and commented that India had been the region's most successful constitutional experiment. In his view, India's constitutional achievements derived from the ability of its parliamentary institutions and uninterrupted rule by Congress to avoid a Balkanisation of the country, which had seemed the likely outcome at independence.<sup>82</sup>

Jennings was also involved in constitutional reform in Pakistan. Like India, Pakistan had acquired independence from the United Kingdom through legislation passed in Westminster in 1947. When the Constituent Assembly began drafting a new constitution in July 1954, Jennings was invited to visit Karachi at the invitation of the Assembly to review the draft to which he made only minor changes.<sup>83</sup> However, the growing tension between the Governor General, Ghulam Mohammad, and the Constituent Assembly, which was actively attempting to curb the Governor General's powers and establish parliamentary supremacy by codifying

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<sup>79</sup> Jennings, *op. cit.*, n. 42, p. 66.

<sup>80</sup> Jennings, *op. cit.* (1953b), n. 49.

<sup>81</sup> *Id.* p. 85.

<sup>82</sup> I. Jennings, 'India After Ten Years' (1957) 28:3 *The Political Quarterly* 236-242.

<sup>83</sup> A. McGrath, *The Destruction of Pakistan's Democracy* (1996) 121-124.

constitutional conventions into statute,<sup>84</sup> culminated in the dissolution of the Assembly on 24 October of that year. In response, on 8 November, the Constituent Assembly's President Tamizuddin Khan filed a petition in the Chief Court of Sindh claiming that the Governor's dissolution was unconstitutional. The Assembly instructed British barrister Denis Nowell Pritt QC to represent them,<sup>85</sup> while the Governor General engaged Jennings, who was also hired to prepare a draft of the constitution at the same time. Jennings' instruction in the case is significant:

While Jennings was considered an outstanding constitutional expert of the day, particularly on Commonwealth matters, he was not being retained as a scholar but as an advocate. This meant that he would not be falling back on his vast store of constitutional law and history to reach an objective conclusion on constitutional questions. Instead, he had a client, Ghulam Mohammad, and Jennings was hired to prove that Ghulam Mohammad's dissolution of the Constituent Assembly was justified under the dominion constitution and the principles of English and Commonwealth law.<sup>86</sup>

After losing at first instance,<sup>87</sup> Ghulam Mohammad appealed to the Federal Court and brought in Kenneth Diplock QC alongside Jennings QC, while the Constituent Assembly did not even have sufficient funds to agree to Pritt's offer to act pro bono upon the reimbursement of his living expenses.<sup>88</sup>

In March 1955, the Federal Court reversed the decision of the Chief Court and found in favour of the Government.<sup>89</sup> For his services, Jennings received a salary seven times that of the Pakistani Chief Justice and a generous living allowance.<sup>90</sup> Moreover, on 9 June 1955, Jennings was awarded the honour of Ordinary Knight Commander of the Civil Division of the Most Excellent Order of the British Empire (KBE) in his capacity as constitutional adviser to the government by Queen Elizabeth II on the advice of Her Majesty's Pakistan

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<sup>84</sup> Id. p. 123.

<sup>85</sup> D.N. Pritt (1887-1972) was a British barrister and left-wing politician; he was the MP for the constituency of Hammersmith North from 1935 to 1950. After his first visit to the Soviet Union in 1932 with the New Fabian Research Bureau, Pritt became – in the words of George Orwell – ‘perhaps the most effective pro-Soviet publicist in this country’. Expelled from the Labour Party in 1940, he eventually lost his seat in Parliament in 1950 due to the political changes brought by the Cold War. Between 1950 and 1960, he dedicated himself to legal work for the labour and anti-colonial movements. See: K. Morgan, ‘Pritt, Denis Nowell (1887–1972) Lawyer and Political Activist’ in *Oxford Dictionary of National Biography* (2004) <<http://www.oxforddnb.com/view/article/31570>>.

<sup>86</sup> McGrath, op. cit., n. 83, p. 120.

<sup>87</sup> *Maulvi Tamizuddin Khan v Federation of Pakistan* PLD 1955 Sindh 96.

<sup>88</sup> McGrath, op. cit., n. 83, p. 175.

<sup>89</sup> *Federation of Pakistan and Others v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240.

<sup>90</sup> McGrath, op. cit., n. 83, p. 160.

Ministers.<sup>91</sup> Jennings' services were greatly appreciated by the British Government during the Cold War. Pakistan had become a key strategic American ally in Asia through the South East Asia Treaty Organization (SEATO) against Communist China and the Non-Aligned Movement of Third World countries in which India played a key role.<sup>92</sup>

Six days after the judgment of the Federal Court, Pakistan's Governor General declared a state of emergency.<sup>93</sup> A string of constitutional cases ensued, shaking the legal and political foundations of Pakistani democracy. Eventually, on 10 May 1955, a second, indirectly elected, Constituent Assembly was summoned by the Governor General and, in June, Jennings returned to Karachi to finalise the drafting.<sup>94</sup> Pakistan's first Constitution, featuring a parliamentary form of government and a federal structure was adopted in 1956, but in 1958 the military coup by General Ayub Khan put an end to this fragile experiment in constitutional democracy and began the first of the many recurring cycles of praetorian rule in Pakistan, paving the way to a progressive Islamisation of the State.<sup>95</sup>

Jennings' influence also extended to Nepal. In 1958, he was instructed by the British FCO upon the request of Nepal's King Mahendra Shah, to visit Kathmandu to assist a small Commission in preparing a new constitution. The interest of the British Government in Nepal during the Cold War was prompted by the Himalayan country's strategic location between India and the People's Republic of China, whose invasion of Tibet had begun in 1950.<sup>96</sup> Jennings' mandate from the FCO was clear: produce a constitution strengthening political stability in Nepal.<sup>97</sup> The design of the constitution was based on Jennings' reading of Nepal's socio-political situation after the revolution of 1951 rather than the principles he argued underpinned a functioning constitutional democracy like in Britain. He identified the Shah Hindu monarchy as Nepal's only stable political institution and drafted the new document around the King. Jennings' official mandate was to craft a document within the framework of constitutional monarchy and parliamentary democracy. However, in line with the importance he had articulated in his scholarly work to placing constitutional structures within local political contexts and his Cold War political expediency, Jennings' constitution established a framework completely tilted in favour of the 'hereditary executive' element of government – the monarchy – with a very limited scope for the 'representative executive'.

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<sup>91</sup> *London Gazette*, 9 June 1955, Supplement, 3308.

<sup>92</sup> R. McMahon, *The Cold War on the Periphery* (1994) 6.

<sup>93</sup> H. Khan, *Constitutional and Political History of Pakistan* (2001) 143.

<sup>94</sup> For a detailed scheme of Jennings' suggestions on drafting in Pakistan, see: ICS 125/B/xv/7/1.

<sup>95</sup> I. Talbot, *Pakistan: A Modern History* (1998).

<sup>96</sup> J. Kenneth Knaus, *Orphans of the Cold War* (1999) 100.

<sup>97</sup> FO 371/135966.

On the basis of the so-called ‘Pakistan formula’, Jennings’ political pragmatism, rather than reliance on British constitutional forms, ensured that executive powers were vested exclusively in the King and not in the Cabinet, while the King was also granted extensive emergency powers enabling him to suspend the Constitution. Unsurprisingly, King Mahendra suspended the Constitution less than two years after its promulgation and ushered in the ‘Panchayat regime’ – a modern monarchical autocracy cloaked in the legitimising traditional guise of the world’s only ‘Hindu kingdom’ that would last for thirty years. Thus, by the late 1950s all South Asian countries, except India, had embarked on the treacherous path of autocratic government and ethnonationalist politics. In this sense, history suggests that Jennings’ reliance on political expediency rather than political principle was to have negative long-term effects for democracy in the region.

## *2. Jennings’ Constitutional Legacy in South Asia*

In the analysis of Jennings’ constitutional legacy in South Asia, it is important to start with the recognition that none of the constitutions that he helped to draft survived in Sri Lanka, Maldives, Pakistan, and Nepal. A part from in Sri Lanka, they lasted no longer than two years. Moreover, Jennings’ professional constitutional endeavours in Pakistan, Nepal, and Maldives were followed by bouts of authoritarian rule, mostly by the actors whose status he had upheld in his constitutional advisory work, while in Sri Lanka communal violence ensued. This suggests that despite his high status in British academic and political circles, his work to implant constitutional democracy in South Asia was unsuccessful. This section seeks to investigate Jennings and other commentators’ understanding of the reasons for such constitutional failures.

Upon his move to Cambridge, Jennings clearly needed to take stock of the situation and sought to provide an explanation for the failed overseas constitutional developments he was involved in.<sup>98</sup> David Taylor recalls organising a talk by Jennings for the Trinity Hall History Society on the failure of the many postcolonial constitutions he had drafted in the early months of 1965. The argument advanced by Jennings returned to his contention that an expert could draft a constitution to order, but that the document would only work if based on social and political realities.<sup>99</sup> His argument could partly explain the Sri Lankan experience, but it

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<sup>98</sup> For the records of the Cambridge History Forum, see: <http://www.cambridgehistoryforum.co.uk/CAMBRIDGE%20HISTORY%20FORUM%20SPEAKE%20RS%20COMPLETE.pdf>.

<sup>99</sup> *Personal Communication*, Dr David Taylor, 21 August 2014.

certainly does not apply to Nepal, where the text of the Constitution significantly departed from key constitutional and democratic tenets. While sound constitutional design is not in itself sufficient to prevent constitutional failure, it remains a necessary condition for constitutional democracy to take root, develop, and function. In this respect, it seems that the legacy of Jennings' constitutional advisory work overseas was problematic for a number of reasons. First, Jennings interpreted, in an unquestioning manner, the legacy of colonial governmental institutions as tools of democratisation rather than transporters of imperial hegemony. He downplayed the importance of an inclusive and legitimate political process supporting the drafting process. Second, while Jennings sought to translate British constitutional principles to local circumstances, he had a rather limited understanding of postcolonial realities beyond the small English-speaking elite circles he moved in, as he had no training in Asian history and languages. Lastly, Jennings faced the political constraints of his instructions in the Cold War context, which determined that the primary aim of his work should be to deliver political stability at all costs, even at the expense of democracy.

In respect to the first point above, it could be argued that Jennings greatly overstated the significance of British origins of the constitutions of Sri Lanka, India, and Pakistan:

All three countries have learned the principles of democracy under British tutelage. It is unconceivable that there should be any fundamental change in this generation.<sup>100</sup>

Jennings also assumed that British colonial institutions represented the foundations of constitutionalism in South Asia. He, however, fundamentally misinterpreted the *raison d'être* of British colonial constitutional law. As Baxi observes,

Colonial/imperial power provides scripts only for governance; by definition, it is a stranger to the idea of fundamental rights of the people. [...] All this needs to be stated in order to cure the modern superstition, which suggests that constitutional forms and ideals constitute a legacy of colonialism. The reality is otherwise. Colonialism and constitutionalism were always strangers. And the very act of enunciating a constitution marks a historic rupture.<sup>101</sup>

The proclamation of a new Constitution entails two aspects: the political process through which a constitution is made, and the legal contents of the document. It is argued that the successful institutionalisation of constitutional democracy is dependent on both aspects. From

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<sup>100</sup> Jennings, op. cit. (1951), n. 49, p. 59.

<sup>101</sup> U. Baxi, 'Postcolonial Legality' in *A Companion to Postcolonial Studies*, eds. H. Schwarz and S. Ray (2000) 541.

a procedural perspective, the processes of constitution-making across South Asia in which Jennings was directly involved entailed an elitist approach to constitutional engineering. Small handpicked and unaccountable Commissions prepared the Constitutions of Sri Lanka, Nepal, and Maldives, while the courts and the executive outside of the legislature settled Pakistan's constitutional controversies.<sup>102</sup> Significantly, Jennings' failures in South Asia lie in stark contrast with the successful constitution-making process of India's Constituent Assembly, in which he was not involved. India capitalised on popular legitimacy as an inclusive legislative body representative of the Indian people. From a substantive perspective, this successful instance of postcolonial constitutional design and implementation radically departed from its colonial legacy in one fundamental aspect: Indian lawmakers engineered a constitutional edifice to make the people sovereign and guarantee equality before the law. Somewhat ironically, the problematic nature of Jennings' contribution to postcolonial South Asia is evident in both his stubborn adherence to British models regardless of the political context, and his outright subversion of British constitutional tenets. This can be seen in relation to his South Asian work in relation to: the nature of the Executive together with the limitations to its powers, and the position of Fundamental Rights vis-à-vis the protection of minorities.

#### **a. Curbing the Executive: the Role of Constitutional Conventions**

Two particular issues deserve to be analysed in more depth with regard to the treatment of executive powers because of what they reveal about the assumptions made by Jennings about the countries in which he wanted to import an English model. These are: the precarious position of constitutional conventions and the extensive nature of emergency powers. First, Jennings' legacy is detectable in the difficult translation of the informal parts of the British constitution. Royal prerogative powers and constitutional conventions were incorporated into Westminster-style postcolonial constitutions. However, these informal parts of the ancient constitution were either drafted on the basis of the assumption that they would work in the exact same fashion as in Britain as was the case in Sri Lanka, or frozen in a 17<sup>th</sup> century interpretation without including the substantive democratic transformations that had occurred in the metropolis after 1688 as happened in Pakistan and Nepal.

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<sup>102</sup> A. Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon' in *The Sri Lanka Republic at 40: Reflections on Constitutional History, Theory and Practice*, ed. A. Welikala (2012); also available at: <<http://republicat40.org/wp-content/uploads/2013/01/The-Failure-of-Jennings'-Constitutional-Experiment-in-Ceylon-How-'Procedural-Entrenchment'-led-to-Constitutional-Revolution.pdf>>.

In Sri Lanka, the Soulbury Constitution established a constitutional monarchy, in which the Governor General was the Head of State as the direct representative of the Crown in the Dominion, and Cabinet government. Thus, governance heavily relied on British constitutional conventions, some of which had been drafted into the constitutional text by Jennings. However, conventions proved to be the most difficult area of the constitution to interpret and apply.<sup>103</sup> For instance, in 1952 upon D.S. Senanayake's death, his son Dudley replaced him as Prime Minister without observing the Westminster litmus test of demonstrating he retained the confidence of the Lower House and passed over his cousin who was senior to him in the Cabinet and the leader of the Party.<sup>104</sup> Jennings' expectation that the British colonial legacy could ensure that constitutional conventions worked in Sri Lanka in the same way as in Britain proved mistaken. The difficult translation of the customary, unwritten, and non-justiciable parts of the British Constitution, together with the uncertainty surrounding their enforcement, progressively undermined both the country's rule of law and democratic process. Harding illustrates the difficulty in exporting British constitutional conventions:

Conventions have to be not only written into the constitution but also drafted very clearly to avoid confusion in the minds of actors who would naturally look to the wording of the constitution rather than the extensive and sometimes debatable constitutional history and understanding that led to it.<sup>105</sup>

In this respect, Jennings' constitutional legacy in Pakistan is most clearly identifiable in the litigation over the dissolution of the first Constituent Assembly in 1955. In September 1954, the first Assembly had passed the 5<sup>th</sup> Amendment to the *Government of India Act* to restrict the wide and ambiguous powers of the Governor General by codifying a number of constitutional conventions relating to governmental formation and working in a parliamentary system, to which the Governor General responded with a Dissolution Order. In court, Jennings advanced the argument that since Pakistan was a Dominion, the Amendment Acts were invalid because they did not receive the assent of the Governor and the dissolution was lawful as a result. One of the key points raised by Jennings was that all legislation passed by the Constituent Assembly, not just ordinary legislation but also constitutional legislation, necessitated the Governor General's assent to be legally valid under English law as he

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<sup>103</sup> Kumarasingham, op. cit., n. 75, p. 146.

<sup>104</sup> H. Kumarasingham, 'The Jewel of the East yet has its Flaws' (2013b) <[http://archiv.ub.uni-heidelberg.de/volltextserver/15148/1/Heidelberg%20Papers\\_72\\_Kumarasingham.pdf](http://archiv.ub.uni-heidelberg.de/volltextserver/15148/1/Heidelberg%20Papers_72_Kumarasingham.pdf)>.

<sup>105</sup> A. Harding, 'The Westminster Model Constitution Overseas' 4:2 *Oxford Univ. Commonwealth Law J.* (2004) 156.

represented the British monarch.<sup>106</sup> Jennings argued that Pakistan's Dominion Status required that the constitutional basis of the country, the *Government of India Act* and the *India Independence Act*, be interpreted in light of the English common law position on prerogative powers.<sup>107</sup>

The Federal Court's decision to accept Jennings' submissions did not engender political stability. Indeed it undermined the sovereignty of Pakistan's constitution-making body, questioned the country's political basis of independence, and threw the nation into legal uncertainty by invalidating much of the legislation previously passed by the Assembly. The Court's decision also gave a cloak of legality to what was effectively a coup d'état by the Governor General. In fact, he had intended to take control of the constitution drafting process since the beginning of the court proceedings, which he was in any case prepared to ignore had the Court ruled against him:

One point that would have to be decided is whether a new Constituent Assembly should be summoned or whether a new constitution should be brought in operation by a Governor General's Ordinance.<sup>108</sup>

As Chief Justice Munir recalled later in his memoirs, the President of Pakistan's first Constituent Assembly had lost his case even before entering the courtroom.<sup>109</sup>

Jennings' work in Nepal, like that in Pakistan, turned its back on the principles he had developed in his scholarly work when in Britain. In his Confidential Notes to the British FCO, he commented that 'in Nepal [...] the only stable element is the monarchy'.<sup>110</sup> Unimpressed by Nepali political parties and politicians, he designed a constitution centred on the Crown. He stated that his draft was a compromise:

It provided for Cabinet Government as long as it was practicable, but gave the King ample powers to suspend Cabinet Government; or even the whole Constitution, if it proved unworkable. To give the King a buffer against popular discontent, I invented a Council of State.<sup>111</sup>

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<sup>106</sup> Section 6(3) *India Independence Act* 1947.

<sup>107</sup> *Federation of Pakistan and Others v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240.

<sup>108</sup> ICS 125/B/xv/7/1.

<sup>109</sup> McGrath, op. cit., n. 83, pp. 216-217.

<sup>110</sup> ICS 125/B/xiii/5/2.

<sup>111</sup> ICS 125/B/xiii/5/2.

As a result, the British constitutional convention by which the King shall only act on the advice and recommendation of the Prime Minister was completely diluted and distorted.<sup>112</sup> Similarly, the long-standing British convention that the monarch shall not withhold Royal Assent to a Bill passed by Parliament was overtly subverted in the Nepali document, which explicitly allowed the King to withhold Royal Assent at his discretion.<sup>113</sup> In the end, the Nepali monarch was vested with unusually wide powers in stark contrast with the British principles of parliamentary sovereignty, constitutional monarchy, and limited government Jennings had long espoused in his home jurisdiction.

Second, Jennings' strengthening of unconstrained and often unaccountable executives is also clearly identifiable in his treatment of the 'state of exception' at the constitutional level.<sup>114</sup> For instance, in Nepal Jennings devised a series of constitutional mechanisms to preserve a cloak of legality in emergency circumstances and concluded that his draft featured Cabinet Government as long as practicable.<sup>115</sup> Ample powers were vested in the King to suspend Cabinet Government on the basis of the so-called 'Pakistan formula', or even the entire Constitution, and assume direct powers under the power to remove difficulties.<sup>116</sup> The subversion of key British constitutional principles in South Asia allowed for authoritarian political moves to go legally unchallenged.

### **b. Courts, Fundamental Rights, and the Protection of Minorities**

In other contexts, Jennings' insistence on the adoption of Westminster-style principles served to damage the enjoyment of political rights by the people of South Asia in ways that are now considered problematic. His dislike of Indian-style entrenched charters of Fundamental Rights patrolled by courts with extensive judicial review powers entailed severe limitations on formal constitutional guarantees across the South Asian jurisdictions he worked in. He disregarded the dangers of the ethnonationalist propaganda of authoritarian regimes and the importance of a strong incorporation of Fundamental Rights for the protection of minorities.

In Sri Lanka, in line with the Westminster model, Jennings did not include an Indian-style Bill of Rights featured in the 1946 Constitution. Only Section 29 contained limitations

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<sup>112</sup> Article 10, *Constitution of the Kingdom of Nepal*, 1959.

<sup>113</sup> Article 42, *Constitution of the Kingdom of Nepal*, 1959.

<sup>114</sup> Agamben had characterised emergency rule as a 'state of exception' drawing on Carl Schmitt's definition of the sovereign as 'he who decides on the exception'. It is an exceptional juridical measure because it entails the suspension of the law by legal means. G. Agamben, *State of Exception* (2005) 1.

<sup>115</sup> ICS 125/B/xiii/5/2.

<sup>116</sup> Articles 55, 56, 77, *Constitution of the Kingdom of Nepal*, 1959.

on legislative activity on the basis of religious and communal freedom and non-discrimination on the basis of religion and community.<sup>117</sup> Moreover, the Constitution set up a centralised system of government without the benefit of well-established party machineries.<sup>118</sup> In this context, the rejection of substantive forms of recognition through communal representation and territorial devolution was further complicated by an overestimation of the political elites' nationalist appeal vis-à-vis the emerging Sinhala-Buddhist nationalism. Ultimately, the urban-based nationalist parties failed to take root amongst the illiterate masses in the countryside, which rapidly fell under the control of communal political organisations.<sup>119</sup>

Jennings' insistence on the Westminster model in Sri Lanka was to lead to violence. In 1956, the Sri Lanka Freedom Party led by Bandaranaike won the general elections on the basis of a Sinhalese-Buddhist ethnonationalist platform. The new government launched the divisive agitation for 'mother tongue' and passed the controversial *Official Language Act* 1956, which made Sinhala the only official language in a country where a sizeable segment of the population spoke Tamil as their mother tongue. The weakness of constitutional review mechanisms in the 1946 document made it difficult to mount a challenge to the legal validity of the Act in the courts, and the streets became the main theatre for identity politics. Sri Lankan society increasingly polarised along ethnic lines, leading to the vicious anti-Tamil pogroms of 1956. In the early 1960s, Jennings reflected on his work in Sri Lanka in light of the recent political developments and wrote:

The policy of 'one citizen, one vote' has been adopted, though [...] some modifications were made in constituencies in order to achieve a balance of representation. [...] In Ceylon the devices used were only partially successful. Those of us who helped to frame the constitutional and electoral laws did not fully appreciate the strength of communalism between the illiterate and semi-literate electorate. We did provide for something like proportional representation of minorities, but we did not provide them with sufficient protection against communal legislation, and ambitious politicians made full use of their ability to appeal to the communal sentiments of the majority.<sup>120</sup>

It is important to emphasise that towards the end of his life, Jennings expressed regret for not having institutionalised in Sri Lanka stronger constitutional limitations to authoritarian

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<sup>117</sup> Welikala, op. cit., n. 102.

<sup>118</sup> Kumarasingham, op. cit., n. 75, pp. 131-136.

<sup>119</sup> Jennings, op. cit., n. 42, p. 66.

<sup>120</sup> Id. p. 66.

government and to prevent discrimination against minorities – most likely in the form of an entrenched Bill of Rights. Jennings accepted that he had misread the socio-political circumstances of Sri Lanka and assumed that communalism was much more of a threat to India and Pakistan.<sup>121</sup> It is significant to compare the Sri Lankan Constitution with the diametrically opposite approach taken by the Indian Constitution in dealing with the protection of minorities through entrenched and justiciable Fundamental Rights. India's secular federal constitution, devoid of almost any explicit cultural reference except special provisions for Scheduled Castes, Scheduled Tribes, and Other Backward Classes, incorporated a strong notion of positive equality and successfully combined the principles of recognition and redistribution. In fact, India's Constitution, imbued with the principles of civic nationalism and accommodation of diversity, has been at the core of India's statecraft.<sup>122</sup> India's Constitution represented a sharp break with the British colonial legacy because it adopted the essential practice of the Westminster parliamentary model over the colonial mixed parliamentary-bureaucratic system, extensive justiciable Fundamental Rights, and universal suffrage.<sup>123</sup> It was because of this rupture with its colonial past through the establishment of democratic institutions that the Constitution acquired such a central position in India's state and nation-building.

With regard to Pakistan, in 1954 Jennings expressed his scepticism about entrenched Fundamental Rights; he stated that Bills of Rights ought be accompanied by wide emergency powers, because in times of crisis it is necessary to suspend liberties. To avoid this conundrum, he argued that it was preferable to avoid including altogether a Bill of Rights in a constitution: 'it is in time of emergency that fundamental liberties need protection. It is, therefore, far better to establish a tradition of liberty by firm and stable government and by impartial administration of the law'.<sup>124</sup> Similarly, Jennings stated that in Nepal the Commission forced upon him a Chapter on Fundamental Rights based on the Indian model. However, he made sure in his drafting that it would have been easy for the King (but not for politicians) to suspend them if they proved too restrictive.<sup>125</sup>

Jennings' focus on the imperative of 'political stability' can be read as a diktat of Cold War politics, where the interests of the British Government overlapped with those of local elites. In 1964, Patrick McAuslan, reviewing Jennings' *Democracy in Africa*, commented:

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<sup>121</sup> Jennings 1958: 17-18.

<sup>122</sup> Jennings, op. cit. (1953b), n. 49, p. 35.

<sup>123</sup> P. Brass, *The Politics of India since Independence* (1994) 2-4.

<sup>124</sup> ICS 125/B/xv/7/1.

<sup>125</sup> ICS 125/B/xiii/5/2.

Sir Ivor Jennings is the Ramsay Macdonald of the academic world; in his youth a radical, debunking the myths and shibboleths of the preceding age; now in a position of great eminence, he has become a paternal conservative [...] and a cold war warrior to boot.<sup>126</sup>

In the Cold War context, where the role of the foreign constitutional expert in the delicate phase of decolonisation was to deliver regime stability and counter Soviet influence, Jennings did perhaps help battle the Communist ‘threat’ in South Asia, but at the expenses of constitutional democracy.

## CONCLUSIONS

This essay sought to address the scholarly silence on the constitutional work and legacy of the ‘Oriental Jennings’, and bring it in conversation with the more orthodox accounts of the ‘Occidental Jennings’. In particular, the analysis has concentrated on Jennings’ deployment of the ‘Westminster export model’ overseas and the impact of the Cold War on his advisory work. Towards the end of his life, Jennings betrayed a degree of pessimism about the implantation of constitutionalism in the former British Empire, but remained steadfast in asserting his belief in the primacy of culture in determining constitutional developments.

A constitution is a means to an end; and the end is good government. The quality of government depends upon the people who exercise it, not upon the constitution.<sup>127</sup>

This point, however, leaves unanswered the question about the role and responsibility of constitutional structures in the conduct of democratic politics. While Jennings convincingly interpreted constitutional frameworks as the product of the history and genius of a particular people, his analysis of the impact of constitutional structures on political conduct remained deeply unsatisfying, especially with regard to postcolonial constitutions. Jennings’ functionalist approach produced a compelling analysis of the British constitution, but in its practical application to South Asian realities it led to substantive modifications of the Westminster model – often an outright subversion of its key tenets like in Pakistan and Nepal – that neither served the cause of constitutional democracy, nor explained the different constitutional trajectories of the region’s jurisdictions.

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<sup>126</sup> P. McAuslan, ‘Sir Ivor Jennings’ Democracy (for Africa)’ 13 *Transitions* (1964) 13.

<sup>127</sup> Jennings, *op. cit.*, n. 42, p. 82.

Conversely, over two decades of direct experience of South Asian constitutional politics contributed to Jennings' rethinking of key issues pertaining to constitutionalism. First, with regard to constitutional entrenchment and the binding nature of constitutional conventions, especially those surrounding Royal Prerogative powers, the various South Asian experiences had exposed the frailty of conventions and the difficulty they pose for constitutional drafting and interpretation.<sup>128</sup> In particular, the Sri Lankan experience demonstrated how misguided was the expectation that constitutional conventions were to function in Colombo just like in London. The Pakistani court cases revealed the inner ambiguity of their implantation overseas, and the Nepali constitution-making process exposed how easily they could be subverted.

Second, by the end of his career, Jennings developed a more positive attitude towards Bills of Rights and judicial review. It is argued that this shift in Jennings' views resulted from both the shift in the Colonial Office's position on Bills of Rights,<sup>129</sup> and the comparison of the outbreaks of communal violence in Sri Lanka with the relatively successful management of socio-cultural and religious diversity in India. India's radical departures from the Westminster model in terms of secularism, federal restructuring along linguistic lines, entrenched fundamental rights, and a strong notion of positive equality succeeded in rebuffing centripetal forces and creating a sense of national belonging. Most importantly, India exemplified a concrete and compelling institutional alternative to Westminster.

To conclude with a reflection on the scholarly silence over the 'Oriental Jennings', it seems that the implicit 'Occidental-Oriental' dichotomy prevalent in the analysis of Jennings' life and legacy can be framed through the concept of Orientalism elaborated by Edward Said.<sup>130</sup> Orientalism is a way of making sense of the Orient, epistemologically based on the distinction between East and West, in which the Occident is in a structurally hegemonic position vis-à-vis the Orient. Thus, the long-standing academic silence about the 'Oriental Jennings' – in my view more unwitting than deliberate – reflects this epistemological asymmetry. The existing scholarly accounts of the 'Occidental Jennings' have never been conceived as partial, defective, or fundamentally incomplete – notwithstanding the fact that they did not analyse half of Jennings' academic writings and twenty years of his life. The 'Oriental Jennings' has been regarded as peripheral, disconnected, and marginal – just as the countries and constitutional experiences that the 'Oriental Jennings' encompasses. This

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<sup>128</sup> Jennings, *op. cit.*, n. 14, pp. 92-103.

<sup>129</sup> Parkinson, *op. cit.*, n. 4.

<sup>130</sup> E. Said, *Orientalism* (1978).

conclusion mirrors Sujit Choudhry's broader assessment of the academic field of comparative constitutional law as 'narrow' with regard to the relatively limited set of standard Western jurisdictions that command central attention and from which South Asia has been largely excluded.<sup>131</sup> It is to be hoped that academic research and dialogue will lead to a less Eurocentric approach to this field of study.

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<sup>131</sup> S. Choudhry, 'Managing linguistic nationalism through constitutional design: Lessons from South Asia' 7:4 *ICON* (2009) 577.