'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. In addition to Ceylon,[3] 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.[4] 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'[5] at the LSE between 1929 and 1940, he had unleashed a 'flood of authorship,'[6] including two editions of *The Law and the Constitution* that would go on to become a multiple edition classic on British constitutional law.[7]

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 principal 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.[8] This entailed the physical construction of a residential campus at Peradeniya.[9] 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.[10] It has aptly been described as the 'Cambridge by the Mahaweli [river].'[11]

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[2] A.W. Bradley, '*Sir William Ivor Jennings: A Centennial Paper*' (2004) *Modern Law Review* 67(5): pp.716-733 at p.717.
[3] Throughout this paper 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.
[4] H.A.I. Goonetileke, '*Introduction*' in I.W. Jennings (2005) *The Road to Peradeniya: An Autobiography* (Colombo: Lake House): p.vii.
[5] A. Tomkins, '*'Talking in Fictions': Jennings on Parliament*' (2004) *Modern Law Review* 67(5): pp.772-786 at p.722.
[6] Bradley (2004): p.722.
[7] See partial bibliography (only book-length works) in Jennings (2005): pp.271-276.
[8] Jennings (2005): Ch.VII.
[9] Ibid: Chs.VII, XII.
[10] Ibid: Ch.XII.
[11] S. Gunasekara, '*Cambridge by the Mahaweli: Peradeniya University*', *The Island Midweek Review* (Sri Lanka), 29th April 2009.

In the context of Ceylon's war effort, Jennings also served as the Deputy Civil Defence Commissioner[12] and chaired a commission on social services.[13] 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.'[14]

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'[15] and 'a triumvirate'[16] (or less charitably, the 'Unholy Trinity'[17]) 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,'[18] 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.'[19]

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,

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[12] Jennings (2005): Ch.VIII.
[13] Ceylon State Council (1947) Sessional Paper VII.
[14] C. Jeffries (1969) *O.E.G.: A Biography of Sir Oliver Ernest Goonetilleke* (London: Pall Mall Press): p.68.
[15] Ibid: p.79-80.
[16] Ibid: p.69.
[17] Attributed to C. Suntharalingam in L. Marasinghe, '*Sir William Ivor Jennings (1903-1965)*' in Law & Society Trust (2005) *Legal Personalities of Sri Lanka* (Colombo: LST): Ch.VIII at p.284.
[18] W.I. Jennings (1953) *The Constitution of Ceylon* (3rd Ed.) (Bombay: OUP): p.vii.
[19] Ibid: p.x. See also Jennings (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 long-lost text has now been retrieved, edited, and introduced by Dr Harshan Kumarasingham, and published by the Centre for Policy Alternatives: H. Kumarasingham (Ed.) (2015) *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon* (Colombo: CPA).

he had gone native and got 'mixed up in politics';[20] 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.[21] 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 1970-2.[22] 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.'[23]

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 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.'[24]

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 communalist[25] and communist,[26] complacent students,[27] or inconsequential gadflies.[28] In his view, national independence, like any other constitutional problem, was a matter

[20] Jennings (2005): p.165.
[21] 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 p.21-22.
[22] 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 available at: http://republicat40.org/wp-content/uploads/2013/01/The-Failure-of-Jennings'-Constitutional-Experiment-in-Ceylon.pdf
[23] Cited in Marasinghe (2005): p.284.
[24] Cited in D. Cannadine (2002) *Ornamentalism: How the British Saw Their Empire* (London: Penguin): p.67.
[25] Jennings (1961): p.116; Marasinghe (2005): p.305-306.
[26] W.I. Jennings (1958) *Problems of the New Commonwealth* (Durham, NC: Duke UP): pp.77-78, 82.
[27] Ibid: p.82; Marasinghe (2005): pp.307-309.
[28] Jennings (2005): pp.90-91.

to be resolved by dispassionate and informed engagement, not by emoting irresponsibly about the multitudinous evils of imperialism.[29] While on the main issue of Ceylonese independence an indisputable and sincere progressive from a British point of view,[30] 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 Allan Rose difficult at the time.[31]

The Structure of the Discussion

This paper 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 paper 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.[32]

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.'[33] This constitutes the third theme of the paper, 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 '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

[29] Ibid: pp.162-165.
[30] 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.117-118.
[31] 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.
[32] For discussions of the executive and the judiciary under the independence constitution see, respectively, Kumarasingham (2013): Ch.6 and M.J.A. Cooray (1982) *Judicial Role under the Constitutions of Ceylon / Sri Lanka* (Colombo: Lake House): Ch.4.
[33] Kumarasingham (2013): pp.4-9.

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.

In the context of Eastminster cultural conditions, particularly in the presence of communalism, a tension between two dimensions of the functionalist tradition were accentuated: a distrust of, or at least reservations about the democratic legitimacy of the judiciary, competing with a methodological attention to social issues which demanded judicially enforceable legal safeguards. In the result, in Ceylon Jennings was more open than in Britain to contemplate normativist restraints on representative democracy; hence the special protection for minorities in Section 29 together with the inclusion of comprehensive judicial review in the independence constitution. But this did not extend to a wholesale embracing of liberal normativist ideals; hence the exclusion of a justiciable bill of rights, and the weak form of 'manner and form' entrenchment in Section 29. In this way, unlike the relative ideological clarity of the LSE phase, Jennings' approach to constitution-making in Ceylon, by not lending itself to a straightforward functionalist categorisation, further deepens and nuances our understanding of him as constitutional lawyer and theorist.

As these preliminary observations indicate, the theoretical and even ideological dispositions of a particular constitutional lawyer are critical to a proper understanding of his approach to constitutional law, especially because these dispositions are nearly always implicit rather than explicit. In the case of Jennings and the independence constitution, this has led to imprecise assumptions and incorrect characterisations especially in the Sri Lankan literature.[34] It is useful therefore to commence discussion of Jennings' influence on Ceylonese nationhood and constitutionalism by first locating him within an identifiable tradition in British constitutional law. Hence I discuss the third theme first, in Part 2 of this paper, by drawing upon the seminal work of Martin Loughlin in explaining the deeper conceptual and ideological concerns that motivated canonical scholars of British constitutional law, and for ease of illustration, by using the example of Jennings' attitude to constitutional bills of rights, the exclusion of which from the independence constitution has been decried by some Sri Lankan liberals.[35]

On the question of the self-governing nation, or in his more rationalistic term, 'the unit of government,'[36] again the tension between functionalist ideals and methods is visible, although on this issue, he adopted an unequivocally modernist stance. While there was a concern to tailor constitutional devices to the actualities of

[34] R. Coomaraswamy (1984) *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society* (New Delhi: Vikas): pp.12-13.
[35] Ibid: pp.11-12.
[36] W.I. Jennings (1956) *The Approach to Self-Government* (Cambridge: CUP): Ch.III.

social dynamics and political practices, Jennings' overarching ideational framework reflected the usual liberal values and teleology of late-colonial and post-colonial nation-building. It was the dominant model for decolonising societies that had informed both British policy-makers and Ceylonese elites from at least the early twentieth century.[37] The main aim of this modernising project was the construction of a civic Ceylonese nation that transcended older sectional loyalties of 'race' and religion as the necessary condition of a successful representative democracy.[38] Notwithstanding a general concern for the safety and welfare of Ceylon's minority communities, it followed from this approach that pleas for especially communal representation were seen as retrograde obstacles to the progressive process of national modernity that constitutional reform must encourage, and it thus had significant implications for the way in which the institutional demands of minorities were treated in the late-colonial period.

In foregrounding this model as the foundation of the constitutional order of the future nation-state in the island's communally plural polity, Jennings added intellectual weight to Senanayake's more intuitive beliefs, and in his commentaries on Ceylon's legal, social and political structures well after independence in 1948, he continued to provide exegeses of the operation of the constitution from the standpoint of this aspirational model of nationhood. In Part 3, I will describe Jennings' views on the nation, nationalism and communalism, place them in theoretical and politico-historical context, and offer some brief reflections on this dominant consensus on Ceylonese and later Sri Lankan nationhood. I do not deal with the emergence of the Tamil claim to a distinctive nationality, and on that basis, federal autonomy, because this was not a constitutional demand on the table in the period under consideration (1943-48), although given Jennings' dim view of the Wilsonian conception of the principle of self-determination, it is unlikely for this claim to have found instant favour with him.[39]

Undergirding the hortatory rhetoric about a united Ceylonese nation was a legal safeguard for the minorities, nested within the constitutional provision for Parliament's legislative power, the initial form of which Jennings borrowed from Section 5 of the Government of Ireland Act 1920 (then in force).[40] The mechanism that found expression in Section 29, slightly altered from what Jennings had originally proposed in 1944, was the provision that distinguished the Soulbury Constitution from the orthodox Westminster model in respect of a central feature of that model, the doctrine of parliamentary sovereignty. It limited the Ceylon Parliament's legislative power by prohibiting ordinary legislation having the effect of discriminating between Ceylon's multiple ethnic and religious communities. This may have seemed an elegant constitutional solution in the

[37] M. Roberts, '*Introduction: Elites, Nationalisms and the Nationalist Movement in Ceylon*' in M. Roberts (Ed.) (1977) *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon, 1929-1950*, Vol.I (Colombo: Dept. of National Archives): pp.xxix-ccxxii.
[38] Jeffries (1969): p.68.
[39] Jennings (1956): pp.55-58. See also W.I. Jennings, '*Ceylon: Inconsequential Island*' (1946) *International Affairs* 22(3): pp.376-388 at p.388.
[40] Jennings (1953): p.202; see also *Ceylon: Report of the Commission on Constitutional Reform* [the Soulbury Commission Report] (1945), Cmd.6677: para.242(iii).

1940s, but once in operation it failed to prevent discriminatory legislation against two Tamil-speaking minority communities: failures that would have enormous significance in driving Sri Lanka to civil war. Its theoretical provenance in Jennings' critique of Dicey was also, time after time, ignored or misunderstood by both the Ceylonese courts as well as the Privy Council, which led to fundamental misconceptions about the way to give it effect, and to a highly inconsistent body of case law. In the famous case of *The Bribery Commissioner v. Ranasinghe* (1964),[41] which I will use as an illustration, the Privy Council managed to hold that the Ceylon Parliament was both 'sovereign' and simultaneously restrained by 'unamendable' constitutional provisions. Aside from the obvious logical inconsistency of these two propositions taken together, they were also quite erroneous in isolation, for Jennings contemplated neither pure parliamentary sovereignty nor unamendable provisions in the Ceylonese constitution.

Despite its failure to afford protection to minority rights, from the perspective of majoritarian Sinhala-Buddhist nationalists, Section 29 also stood as an unacceptable fetter on not only their desire to provide for the pre-eminence of Buddhism in the state, but also on the sovereignty of independent Ceylon. On the latter argument, Sinhala-Buddhist nationalists were joined by the Marxist Left, who desired the severance of all constitutional links with the imperial power and for whom the limitation of legislative power was a barrier to the instrumentalisation of the state towards the goals of socialism. In Part 4, I will analyse Section 29 from the perspective of the doctrinal and theoretical dispositions of its creator, and in particular, from the perspective of Jennings' contribution to the development of the concept of 'manner and form' entrenchment. By the time Jennings came to draft the essential scheme of Section 29, within British constitutional scholarship in his previous LSE phase, he had already mounted a widely noted critique of the notion of indivisible and illimitable parliamentary sovereignty as articulated by A.V. Dicey.[42] The Diceyan view had even then become ingrained as the orthodox understanding of the British constitution, and Jennings was to return to his attack on it after his time in Ceylon, in his famous dispute with Sir William Wade.[43]

Much has been written about the operation of Section 29 elsewhere.[44] In the present discussion, all I hope to do is to more forcefully relocate Section 29 within the theoretical framework of the 'manner and form' approach championed by Jennings. As already noted, this is important from a historical point of view

[41] *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785.
[42] W.I. Jennings (1967) *The Law and the Constitution* (5th Ed.) (London: Univ. of London Press): Ch.IV.
[43] H.W.R. Wade, '*The Basis of Legal Sovereignty*' (1955) *Cambridge Law Journal*: p.172; Jennings (1967): pp.318-329; M. Gordon, '*The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade*' (2009) *Public Law*: pp.519-543.
[44] Welikala (2012); R. Edrisinha, '*Sri Lanka: Constitutions without Constitutionalism, A Tale of Three and a Half Constitutions*' in R. Edrisinha & A. Welikala (2008) *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives): Ch.I at pp.12-19; R. Coomaraswamy, '*The Sri Lankan Judiciary and Fundamental Rights: A Realist Critique*' in N. Tiruchelvam & R. Coomaraswamy (Eds.) (1987) *The Role of the Judiciary in Plural Societies* (London: Frances Pinter): Ch.6 at pp.110-111; M.J.A. Cooray, '*Three Models of Constitutional Litigation: Lessons from Sri Lanka*' (1992) *Anglo-American Law Review* 21: pp.430-448 at pp.431-437.

because part of the reason why it failed in implementation was due to an inadequate and confused understanding on the part of the judiciary of Jennings' theory that lay at the base of the provision. It is also important for more contemporary debates in two ways. Firstly, it contributes to the discussion of Jennings as part of current theoretical, doctrinal and substantive debates within the Commonwealth tradition, including those concerning parliamentary sovereignty and legislative procedure, fundamental rights and constitutional entrenchment, and legal and political constitutionalism.

Secondly, Sri Lankan minority and liberal opinion that seeks an abolition of presidentialism would likely contemplate a Section 29-style mechanism in a future return to a parliamentary system.[45] It is therefore important to be clear about what Section 29 actually meant, and the model of constitutional entrenchment it was intended by its designer to embody.

In discussing these two interconnected themes in Sri Lankan constitutional law and history, there are therefore obvious benefits to first locating Jennings within the strand of the British public law tradition to which he belonged and which coloured his approach to constitutionalism. But it is necessary to briefly restate the Ceylonese historical context in which his activities discussed in this paper took place, and I do so below before turning to the substantive discussion.

The Build Up to Independence: Proximate Historical Events

By the time Jennings arrived in Ceylon in 1941, demands for the reform of the Donoughmore Constitution, which had been in operation since 1931, had been gathering pace for a while.[46] In May 1943, in response to the stated desire for 'responsible government' by the Ceylonese Board of Ministers, the British government made a statement of policy (which came to be known as the Declaration of 1943) which announced that it was committed to granting full responsibility for government under the Crown in all matters of civil administration while reserving defence and external affairs to the Crown, after the war was over.[47] According to Jennings, Senanayake and Goonetilleke consulted his views on the Declaration on the very day it was published, and from then on

[45] The spirit of Section 29 made a strange reappearance recently in the Liberation Tigers of Tamil Eelam's (LTTE) proposal for an Interim Self-Governing Authority (ISGA). For the document and commentary, see R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA): Ch.29. See also R. Edrisinha & A. Welikala, '*The Interim Self Governing Authority Proposals: A Federalist Critique*' in Edrisinha & Welikala (2008): Ch.XII.

[46] 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); Edrisinha et al (2008) Ch.2; L. Marasinghe (2007) *The Evolution of Constitutional Governance in Sri Lanka* (Colombo: Vijitha Yapa): Ch.3.

[47] '*Ceylon Constitution*': War Cabinet Memorandum by Mr Oliver Stanley, Secretary of State for the Colonies, Annex: Amended Reforms Declaration, CO 54/980/13, No.8, WP (43) 204, 15th May 1943, reproduced in K.M. de Silva (Ed.) (1997) *Sri Lanka: The Second World War and the Soulbury Constitution, 1939-1945* (Part I) in S.R. Ashton (Gen. Ed.) (1997) *British Documents on the End of Empire* (London: The Stationery Office): Ser. B, Vol.2: Doc.No.169, p.262.

Jennings assumed the role of Senanayake's constitutional advisor and draftsman of all the documents the Ministers would submit to the British government pursuant to the process and parameters of the Declaration of 1943. [48] Senanayake entertained certain reservations about the content of the Declaration of 1943, but on Jennings' advice he resolved to produce a draft constitution on the basis of its principles, the actual drafting of which he entrusted to Jennings.[49] While notionally it was the Board of Ministers who were undertaking the drafting of these constitutional proposals and negotiating their acceptance with the British authorities, in reality it is clear that it was entirely the work of the Triumvirate.[50] The scheme prepared on the basis of the principles of the Declaration of 1943 by Jennings was submitted to the British government by Senanayake on behalf of the Board of Ministers in February 1944, and came to be known as the Ministers' Draft.[51]

It was one of the terms of the Declaration of 1943 that any draft constitutional scheme produced by the Ceylonese Ministers would be considered by a 'suitable commission or conference' after the war. With the presentation of the Ministers' Draft, Senanayake pressed for its immediate consideration, and the British government announced the appointment of a commission to consider constitutional reforms in Ceylon in July 1944. However, the commission's terms of reference included the consultation of 'various interests, including the minority communities concerned with the subject of constitutional reforms in Ceylon,' which seemed to expand the scope of the commission beyond that which was held out in the Declaration of 1943. In the face of rising minority anxieties, especially regarding the closed and tightly controlled manner (notwithstanding the substantive safeguards in its text), in which the Triumvirate had produced the Ministers' Draft, it is unlikely that the British government could have done any differently.[52] Senanayake took the position, in terms of the Ministers' interpretation of the undertaking given in the Declaration of 1943, that the proposed commission should be restricted to reporting on the Ministers' Draft, and that both its substantive minority protections and the three-fourths majority of the State Council (the legislature under the Donoughmore Constitution) required for its adoption taken together were more than adequate protection for minorities' concerns. The British government overruled these objections, and in September 1944, announced the appointment of the Soulbury Commission.

Senanayake responded by officially withdrawing the Ministers' Draft and announcing a boycott of the Soulbury Commission. However, when the commission visited the island for consultations between December 1944 and April 1945, Senanayake ensured through especially Goonetilleke that the commission was informally, but extensively, briefed on the details of the Ministers' position.[53] For their part, the commissioners treated the Ministers'

[48] Jennings (2005): pp.166-167.
[49] Jennings (1956): pp.197-199.
[50] Jeffries (1969): Chs.5,6; Kumarasingham (2013): pp.117-119; de Silva (1997): pp.lxix-lxxiii.
[51] Ceylon State Council (1944): Sessional Paper XIV.
[52] See the various representations on behalf of the minorities made to the British government in de Silva (1997, Parts 1 and 2); Edrisinha et al (2008): Ch.6.
[53] Jeffries (1969): pp.71-80.

Draft as the main basis of their work although they were open to wider consultations. With the prospect of some form of more or less independent status under a democratic constitutional scheme modelled on Westminster rapidly becoming a possibility, especially G.G. Ponnambalam, the leader of the All Ceylon Tamil Congress (ACTC),[54] was forceful in articulating the fears of the minorities that they would soon become swamped under a permanent domination of the Sinhala-Buddhist majority. His main constitutional proposal, known as the 'fifty-fifty' scheme, providing for 'balanced representation,' was based on an analytical understanding of the socio-political structure of the country that was fundamentally different from the mono-national 'Ceylonese' conception of national identity underpinning the Ministers' Draft (and later, the Soulbury Commission's recommendations). Ponnambalam argued that political representation should be based on the communal heterogeneity of Ceylon's society, and the notion that the people of Ceylon were a homogenous entity was firmly resisted. In substance, Ponnambalam's proto-consociational scheme sought to ensure one half of the membership of the legislative for the minorities (and commensurate representation in the political executive), thereby preventing an in-built institutional majority for the Sinhalese community.[55]

While the Soulbury Commission gave a hearing to these concerns, it was clear when its report was published in September 1945, that it had in terms of the main principles substantially endorsed the content of the Ministers' Draft. The main difference between the two lay in the Soulbury proposal for a bicameral legislature, and in the complex details of the powers of the Governor-General, especially in relation to the reserved powers concerning external matters, defence and states of emergency. In terms of the process towards independence, the Soulbury Report did not recommend an immediate grant of Dominion status, but envisaged an intermediate stage of constitutional development wherein the Ceylonese would enjoy more responsibility for self-government than what was available under the Donoughmore Constitution.

Ponnambalam was aghast, but all his strenuous attempts to influence the British government to reject the Soulbury proposals were unsuccessful. For Senanayake, the challenge now was to press for full Dominion status (i.e., without the imperial control over external affairs and defence), and for its grant sooner rather than later. To make his demand more palatable to Whitehall, again with the befit of Jennings' advice, he proposed that both the new constitution and Dominion status could be effected by the more expedient method of Order-in-Council, together with two binding agreements between the British and Ceylonese governments to deal with defence matters and external affairs.[56]

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[54] Edrisinha et al (2008): Ch.6. See also A.J. Wilson (2000) *Sri Lankan Tamil Nationalism: Its Origins and Development in the 19th and 20th Centuries* (New Delhi: Penguin): Ch.5.

[55] The main features of Ponnambalam's scheme are reproduced in Edrisinha et al (2008): p.190.

[56] The Order-in-Council would be issued pending the enactment of an Act of the Imperial Parliament to transfer power to the new Ceylon Parliament and the amendment of the Statute of Westminster to include Ceylon: see K.M. De Silva (2005) *A History of Sri Lanka* (Colombo: Vijith Yapa): p.566; Jennings (1953): p.13 et seq. See also H. Kumarasingham, '*The 'Tropical Dominions': The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Sri Lanka*' (2013) T*ransactions of the Royal Historical Society* 23: pp.223-245; N. Mansergh, '*Commonwealth*

The British Cabinet was not inclined to grant full Dominion status for Ceylon ahead of India and Burma. The White Paper of October 1945[57] embodying its reception of the Soulbury recommendations did no major revisions to the latter in terms of constitutional content (thus signifying that the new constitution would be substantially what was proposed in the Ministers' Draft), but adopted an open ended form of words with regard to the question of Dominion status which, while noting the anxiety of the people of Ceylon for Dominion status, and assuring them of the British government's sympathy with that desire, nonetheless stated that the actual period of evolution towards independence depended on the success of the people in the operation of the new constitution. Senanayake was disappointed but not disheartened, and successfully moved the State Council to accept the White Paper, and the initial Order-in-Council enacting the new constitution was promulgated in 1946. Then with elections to the new Parliament scheduled for August-September 1947 and the announcement of partition and independence in India, Pakistan and Burma, Senanayake secured from Whitehall the official declaration in June 1947[58] that Ceylon would receive 'fully responsible status within the British Commonwealth of Nations,' which duly occurred on 4th February 1948, presided over by the Duke of Gloucester.[59]

Compared to other processes of African and Asian decolonisation, the Ceylonese experience has been noted for its smooth, constitutional, and peaceful nature. As John Darwin observed, 'With its Westminster-like constitution and its eagerness for British friendship, Ceylon indeed seemed the very model for the successful creation of new Asian dominions.'[60] It is not inappropriate to recall here that this display of constitutional *élan* in Ceylon's path to independence was made possible by the individual talents of political leadership, negotiating skill, and outstanding legal expertise that Senanayake, Goonetilleke, and Jennings, respectively, brought to their successful collaboration in the Triumvirate.[61] We should also, however, remember that this tranquillity was deceptive, and that the Triumvirate's triumph would within a generation turn to a tragedy of ethnic fratricide and authoritarianism.[62]

Membership' in N. Mansergh, R.R. Wilson, J.J. Spengler, J.L. Godfrey, B.U. Ratchford & B. Thomas (Eds.) (1958) *Commonwealth Perspectives* (Durham, NC: Duke UP): Ch.1.

[57] Colonial Office (1945) *Ceylon: Statement of Policy on Constitutional Reforms*, Cmd.6690 (London: HMSO).

[58] See also 'Ceylon Constitution': Cabinet Memorandum by Mr Arthur Creech Jones, Secretary of State for the Colonies, on the Message to Mr Senanayake and the Announcement by HMG, Annex I: Communication to Mr Senanayake, Annex II: Draft Announcement by HMG, PREM 8/726, 1st June 1947, reproduced in de Silva (1997, Part II): Doc. No.395, p.296

[59] The new Dominion was governed by the following constitutional instruments: the Ceylon (Constitution) Order-in-Council of 1946 (as amended), the Ceylon Independence Order-in-Council of 1947, the Ceylon Independence Act of 1947 and the Ceylon Independence (Commencement) Order-in-Council of 1947.

[60] J. Darwin (1988) *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (London: Macmillan): pp.101-106 at p.102.

[61] Jeffries (1969): pp.79-80.

[62] H. Kumarasingham, '*The Jewel of the East yet has its Flaws': The Deceptive Tranquillity surrounding Sri Lankan Independence*' (2013) Working Paper No.72, Heidelberg Papers in South Asian and Comparative Politics (Heidelberg: University of Heidelberg).

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.[63] Classifying public law scholars in terms of his or her '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.'[64] 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.'[65] It is important to emphasise the Weberian influence here, because although each style has its distinctive identity (an 'ideal-type'), that identity is likely to be of a complex nature: 'Styles are amalgams of a number of forces, are constantly being developed and are likely to exhibit internal tensions.'[66] Thus while an individual scholar's work could be classified as belonging predominantly to one or other style, and this sharpens our understanding of that work, 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. This style highlights law's adjudicative and control functions and therefore its rule orientation and its conceptual nature. Normativism essentially reflects an ideal of the autonomy of law.[67]

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 and therefore is orientated to aims and objectives and adopts an instrumentalist social policy approach. Functionalism reflects an ideal of progressive evolutionary change.[68]

[63] M. Loughlin (1992) *Public Law and Political Theory* (Oxford: OUP): Ch.4.
[64] Ibid: p.58.
[65] Ibid: p.59.
[66] Ibid.
[67] Ibid: p.60.
[68] Ibid.

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'[69] which would become entrenched by the early twentieth century, led by Dicey but certainly not confined to him.[70] 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.[71] 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.'[72] 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.[73] Loughlin has argued that, among the functionalist lawyers, Laski's 'clearest influence is to be found in Jennings,'[74] a claim however that is directly controverted by Jennings. In *The Road to Peradeniya*, Jennings records how an interest awakened in local government law – which in his view was not merely irrelevant to, but actually inconsistent with Dicey's theory – during his time lecturing at Leeds University led him to the critique of Dicey: 'Leeds, not Laski, was the *causa causans*.'[75]

In *The Law and the Constitution* – 'a direct challenge to Dicey's nostrums'[76] – 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.'[77] 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.'[78] 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.'[79] 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.'[80]

[69] Ibid: p.140.
[70] Ibid: pp.139-165.
[71] Ibid: pp.175-176.
[72] Ibid: p.165.
[73] Bradley (2004): pp.724-725.
[74] Loughlin (1992): pp.171-172, fn.143.
[75] Jennings (2005): p.66.
[76] M. Loughlin, '*Modernism in British Public Law, 1919-1979*' (2014) *Public Law*: pp.56-67 at p.63.
[77] Loughlin (1992): p.167; see also Jennings (1967): 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.
[78] Loughlin (1992): p.167.
[79] Ibid.
[80] Jennings (1963): p.68.

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.'[81] 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.'[82] In Loughlin's words,

> Modernist thinking in public law sought an explicit break with the prevailing legal philosophy of the latter half of the 19th century, that of analytical legal positivism underpinned by values of classical liberalism. This orthodoxy, it was claimed, was unequal to the legal challenges of the positive state. The world was changing through industrialization and urbanisation, new models of social and economic ordering were emerging and a new jurisprudence of public law was required. 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.[83]

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.[84] The Donoughmore Constitution was itself a radical example of colonial modernisation, recommended by commissioners appointed by Lord Passfield (Sydney Webb) as the Secretary of State for the Colonies in Ramsay MacDonald's Labour government. Webb and MacDonald were the progenitors of 'the blueprint for a new type of state'[85] 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 1883[86] – 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

[81] Loughlin (2014): p.57.
[82] Ibid.
[83] Ibid: p.59.
[84] 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.
[85] Loughlin (2014): p.56.
[86] See generally, G.L. Peiris (1999) *General Principles of Criminal Liability in Sri Lanka* (Colombo: Stamford Lake): Ch.1.

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 an overzealous characterisation.[87] 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. Functionalists were opposed to the Diceyan normativists and their 'common law method'[88] because they saw in this tradition's commitments to the property-owning values of classical liberalism a way of retarding social progress: 'Active judicial review came to be viewed as a technique for preserving the old order.'[89] Law for the modernists was not 'a repository of ancient mysteries and timeless values'[90] but a functional instrument, or 'the technology through which the modern state was to be erected.'[91] 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.'[92]

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.'[93] 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.

[87] Coomaraswamy (1984): p.13.
[88] Loughlin (2014): p.60.
[89] Ibid: p.63.
[90] Ibid: p.60.
[91] Ibid.
[92] W.I. Jennings (1931) *Local Government in the Modern Constitution* (London: Charles Knight): p.3.
[93] Jennings (1953): p.77.

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.[94]

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.[95] 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 putative immutable values in the form of justiciable rights imposes a 'temporal imperialism'[96] 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' – there was of course no choice about whether to have a written constitution. It followed from that that judicial review of legislation should be available. 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.'[97] 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*: 'it 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

[94] Jennings (1956): p.110.
[95] Loughlin (1992): pp.133-137.
[96] A. Norton (1993) *Republic of Signs: Liberal Theory and American Popular Culture* (Chicago: Chicago UP): p.124.
[97] W.I. Jennings, '*Limitations on a 'Sovereign' Parliament*' (1964) *Cambridge Law Journal*: pp.177-180 at p.177-178.

to limit it.'[98] 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 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 *Liyanage v. R* (1967),[99] 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.' [100]

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.[101] 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 embrace 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.[102]

From his work in Ceylon then, we can see that when the circumstances demanded it, Jennings could be flexible about ideological and theoretical preconceptions, 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

[98] Jennings (1953): p.79.
[99] *Liyanage v. R* (1967) AC 259.
[100] S.A. de Smith, '*The Separation of Powers in a New Dress*' (1966) *McGill Law Journal* 12: p.491-496 at pp.492-493. See also Jennings (1967): pp.280-304.
[101] Jennings (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.'
[102] Jennings (1956): p.110.

more generally, than the negative limitation of legislative power in Section 29.[103] 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.[104] 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. 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 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.

[103] N. Chandhoke, '*Individual and Group Rights: A View from India*' in Z. Hasan, E. Sridharan & 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.

[104] 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 & M.M. Feeley (Eds.) (2012) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: CUP): Ch.2.

In both these respects, the text of the independence constitution of Ceylon was completely silent; partly the result of the process of its creation described above, 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.[105] 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.[106] 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.

All this has been abundantly documented elsewhere and need not be recapitulated here.[107] 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.[108] Again, there is no space 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.'[109] While his functionalist method helped him to incorporate the issue of communalism into constitution-making, it is clear that in his view these were concessions to context, in the nature of exceptions, to a heuristic model of modern nationhood that decolonising constitution-making must not only reflect but also actively promote. In this he was, not only a man of his time, but as I have already noted, 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

[105] 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.
[106] See A. Welikala, '*Constitutional Form and Reform in Sri Lanka: Towards a Plurinational Understanding*' in M. Tushnet & M. Khosla (Eds.) (forthcoming in 2014) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge: CUP).
[107] Kumarasingham (2013): Ch.7; N. DeVotta (2004) *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford: Stanford UP).
[108] Jennings (1951) *The Commonwealth in Asia* (Oxford: Clarendon Press); Jennings (1956); Jennings (1958); Jennings (1961).
[109] A.D. Smith (1998) *Nationalism and Modernism: A Critical Survey of Recent Theories of Nations and Nationalism* (London: Routledge): pp.1-24.

modernity.'[110] Proponents of the model sought to 'build,' 'forge,' 'mould' and 'construct' 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.'[111] As he further notes,

> It was a question of institutionalisation, so as to create good copies of the Western model of the civic participant nation. This became a technical question of appropriate recipes for national development, […] well organised and responsive publics, and mature and flexible elites. This was the way to replicate the successful model of the Western nation-state in the ex-colonies of Africa and Asia.[112]

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'.'[113] Secondly,

> '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.'[114]

While it may be that in the world of social science scholarship the model 'achieved its canonical formulation in the 1960s'[115] in the context of the proliferating processes of decolonisation in Asia and Africa, in Ceylon, it was being applied from the late colonial period, which by the 1940s, was considered the constitutional 'pioneer of the non-European dependencies' and the 'senior colony of the new empire.'[116] 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'.'[117] 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.'[118] In the mid-nineteenth

[110] Ibid: p.3.
[111] Ibid.
[112] Ibid.
[113] Ibid: p.20.
[114] Ibid.
[115] Ibid: p.3.
[116] Wight (1946): p.74.
[117] Jennings (1961): p.21.
[118] R. De S. Wijeyeratne (2013) *Nation, Constitutionalism and Buddhism in Sri Lanka* (London: Routledge): p.99.

century debate between Mill and Acton on the concept of nationality,[119] it was Mill's view that prevailed insofar as imperial policy and ideology with regard to Ceylon was concerned. 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 inclusive, civic nation.[120]

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.'[121] 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 identities[122]), 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.'[123] 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 Ponnambalam (see above).

> 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.[124]

In these views of Jennings we can see clearly reflected practically every precept of classical modernist nation-building as delineated by Smith, underlying which

[119] 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.
[120] Roberts (1977); Jennings (1956): p.35.
[121] Jennings (1956): pp.39-40.
[122] Jennings (1961): p.20.
[123] Jennings (1956): pp.29-33.
[124] Ibid: p.97. For a much more strident statement of these views, see Jennings (1946): p.388.

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.[125] 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.[126] 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.[127]

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.'[128] Moreover, 'It required D.S. Senanayake's enormous personal prestige and consummate statecraft to make it viable.'[129] 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,[130] and for many liberals and moderates in Sri Lanka, it still serves as the aspirational model of 'Sri Lankan' identity.[131] 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.[132]

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[125] Kymlicka (1995): Ch.4.
[126] Loughlin (2014): p.58.
[127] Smith (1998): p.9.
[128] De Silva (2005): p.609.
[129] Ibid.
[130] Smith (1998): pp.2-4; Kumarasingham (2013): pp.171-182.
[131] See e.g., G. Moonesinghe (Ed.) (n.d.) *Nation Building Priorities for Sustainability and Inclusivity* (Colombo: Shramaya); D. Jayatilleka (2013) *Long War, Cold Peace: Conflict and Crisis in Sri Lanka* (Colombo: Vijitha Yapa); H. Rambukwella, '*Reconciling What? History, Realism and the Problem of an Inclusive Sri Lankan Identity*' (2012) ICES Research Paper No.3 (Colombo: ICES).
[132] I discuss these issues at length in Tushnet & Khosla (2014, forthcoming).

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.[133] 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.'[134] 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.'[135] 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."[136]

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.[137] The logic of this he set out in the following terms:

> "Legal sovereignty" [i.e., parliamentary sovereignty, in Dicey's terms[138]] 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

[133] *R (on the application of Jackson) v. Attorney General* (2005) UKHL 56; *Thoburn v. Sunderland City Council* (2002) EWHC 195.
[134] Jennings (2005): p.68.
[135] A.V. Dicey (1915) *Introduction to the Study of the Law of the Constitution* (8th Ed.) (London: Macmillan): pp.37-38.
[136] N. MacCormick (1999) *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP): Ch.6 at p.80
[137] Jennings (1967): pp.149-153.
[138] Ibid: p.149.

> sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.[139]

Contrary to Dicey, therefore, for Jennings, 'legal sovereignty is not sovereignty at all. It is not supreme power.'[140] 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.[141]

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.[142]

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.[143] 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. Thus,

[139] Ibid: pp.152-153, emphasis in original.
[140] Ibid: p.149.
[141] Ibid.
[142] Ibid: p.151.
[143] Ibid: pp.150-151.

> 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.[144]

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 posses 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.[145] This scheme provided the law-making power of the Parliament for the peace, order and good government of Ceylon, subject to two restrictions.[146] 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.[147] Legislative power also included the power of constitutional amendment, provided that the amending legislation obtained a two-thirds majority and could not be presented for assent to the Governor-General unless this requirement had been met. This provision excluded judicial

[144] Ibid: p.150.

[145] See Articles 7 to 11 of Ministers' Draft, and Explanatory Notes, reproduced in the Soulbury Report (1945): pp.170-171, 165. See also Jennings (1953): pp.vii-ix.

[146] There were a number of other restrictions as well but most ceased to have effect after independence: see Jennings (1953): pp.70-79.

[147] Later amended by Act No. 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.

review of the legislative process because that would involve courts in internal parliamentary procedure.[148] 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.[149] 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, 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.[150] 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.[151] 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.[152] Thirdly, 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.'[153]

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 it 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

[148] Jennings (1964): p.178.
[149] This was intended to avoid the problem encountered in *McCawley v. The King* (1920) AC 691: see Jennings (1964): pp.178-179; G. Marshall (1971) *Constitutional Theory* (Oxford: Clarendon Press): pp.
[150] Section 29 (2) and (3).
[151] Jennings (1964): pp.178-179.
[152] Ibid.
[153] Ibid: p.197; Jennings (1953): pp.201-203.

regarding the nature of the prohibition couched in section 29 (2) undoubtedly contributed to the inclination towards the replacement of the Constitution completely.'[154]

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.[155] It appears that understanding these underlying principles of Section 29 required a capacity for theoretical sophistication that, in most cases, the judiciary did not posses. In a very early case, as Jennings noted, the decision of Basnayake, J. in *Kulasingam v. Thambiayah* (1948)[156] suggested 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.'[157]

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,'[158] 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'[159] 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.'[160] 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

[154] Cooray (1982): p.67.
[155] Gordon (2009): pp.54-543; 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.
[156] *Kulasingam v. Thambiayah* (1948) 49 NLR 505. This case did not involve Section 29.
[157] Jennings (1953): p.x.
[158] *The Queen v. Liyanage* (1962) 64 NLR 313 at 350.
[159] *Piyadasa v. The Bribery Commissioner* (1962) 64 NLR 385 at 387, emphasis added.
[160] Ibid: 388, emphasis added.

constitutional entrenchment of certain matters against *ordinary legislation*, rather than the legislative power of *constitutional amendment*.[161]

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.'[162] 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.[163]

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.[164]

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

[161] See also the discussion of this case, *contra* the argument in this paper, 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 & H.W. Tambiah (1952) *The Dominion of Ceylon: The Development of its Laws and Constitution* (London: Stevens & Sons).
[162] *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 792.
[163] Ibid.
[164] Ibid: p.789.

be disposed of. It was ironic that his depiction of Ceylon as a sovereign state with a sovereign legislature was studiously ignored.[165]

It is perhaps appropriate to give Jennings the last word. In his note on *Ranasinghe*'s case, like a good lawyer he outlined three possible ways of supporting the argument that Ceylon's parliament was sovereign.[166] Yet as he pointed out, the difficulty in ascribing sovereignty to a Parliament that is designed by reference to the 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.[167]

As he wryly concluded, 'it would have been better if the Judicial Committee had simply dismissed Dicey, with costs.'[168]

5. Conclusion

In this paper 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 continue 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 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.[169]

[165] I have addressed these issues extensively elsewhere: Welikala (2012).
[166] Jennings (1964): pp.179-180.
[167] Ibid: p.179.
[168] Ibid: p.180.
[169] Bradley (2004): p.732.

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.''[170] 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'[171] – 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.

[170] Ibid: p.733.
[171] Jeffries (1969): p.10.