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'The Oriental Jennings'

An Archival Investigation into Sir Ivor Jennings' Constitutional Legacy in South Asia

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ABSTRACT

The article investigates the legacy of British constitutionalist Sir Ivor Jennings (1903-1965) in South Asia. In 1940, when Jennings moved to Sri Lanka, a new phase of prolific writing on the laws of the British Empire and Commonwealth began for him, together with a practical engagement with constitution-making experiences in decolonising nations across Asia and Africa. The archival material relating to Jennings' work on postcolonial constitutional issues forms part of the collection of Jennings' Private Papers held at the Institute of Commonwealth Studies in London. This article seeks to explain why this material has until now remained so under-researched.

INTRODUCTION

The present article explores a neglected aspect of the life and work of noted British constitutionalist Sir Ivor Jennings (1903-1965): his engagement with constitutional issues in the postcolonial world. In particular, the analysis investigates Jennings' constitutional legacy in South Asia where he was involved, both academically and professionally, with most of the region's jurisdictions.¹ Jennings played a direct role in Sri Lanka (1940-1954), the Maldives (1952-1953), Pakistan (1954-1955), and Nepal (1958), and had a long-term indirect engagement with India. In 1940, Jennings moved to Sri Lanka – where he resided until his appointment in 1954 as Master of Trinity College in Cambridge – and became progressively involved with constitution-making processes and constitutional change across the decolonising world. I refer to this period of Jennings' life experiences, to the body of literature pertaining to the postcolonial world that he produced, and to his advisory work in decolonising countries as the 'Oriental Jennings' – a body of literature largely ignored by academic scholarship.² The paper seeks to explain the reasons for this scholarly silence.

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¹ The expression 'South Asia' is deployed to indicate the nine countries that are the member states of the South Asian Association for Regional Cooperation (SAARC): Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. It is important to highlight that during Jennings' life Pakistan still comprised the East Wing, which seceded and became the independent Republic of Bangladesh in 1971.

² Two notable exceptions are Allen McGrath's 1996 book *The Destruction of Pakistan's Democracy* and Joseph Fernando's 2006 article 'Sir Ivor Jennings and the Malayan Constitution'.

THE 'OCCIDENTAL JENNINGS'

Jennings is mostly famed for his writings in the 1930s on English Public Law, which will be referred to as the 'Occidental Jennings' to denote the ensemble of orthodox accounts portraying his life story, work, and legacy. After graduating in Law at the University of Cambridge and a short stint at the University of Leeds, Jennings was appointed in 1929 as Lecturer in Law at the London School of Economics and Political Science (LSE), where he spent ten years of his academic career and authored his most famous works on English Public Law: *Principles of Local Government Law* (1931), *The Law and the Constitution* (1933), *Cabinet Government* (1936), and *Parliament* (1939). Jennings established himself as a radical critic of A.V. Dicey's concepts of parliamentary sovereignty and the rule of law, together with his method. Loughlin (2003: 167-176) describes Jennings' functionalist approach as based on an empirical orientation, a historical method, a scientific temperament, and a progressive outlook. In fact, for Jennings the main purpose of the constitution was to facilitate the efficient working of a democratic system. However, as clearly illustrated by Ewing (2004), the tension in Jennings' writings between the democratic nature of the constitution and an anxiety about democratic politics was never quite resolved. Instead, in the fourth and fifth editions of *The Law and the Constitution*, published in 1954 and 1959 respectively, at the peak of his Cold War's engagement with constitutional politics in the decolonising world, Jennings' preoccupations with the democratic potential of the constitution became more acute. I maintain that Jennings' concerns with the functioning of constitutional democracy more likely resulted from his experiences in Asia and Africa than from an implicit comparison with the USSR constitution as suggested by Ewing (2004: 751).

In 1928, Jennings was also called to the Bar of England and Wales; his practice as a barrister, while confined to opinion-writing work rather than advocacy (Bradley 2004: 723), acquired a particular relevance later on for his work and legacy in Pakistan. In 1938-1939, Jennings spent a year as Visiting Professor of Political Science at the University of British Columbia in Canada, where his interest in the laws and politics of the British colonies started to take shape as he published the book *Constitutional Laws of the British Empire* (1938). In Canada he also developed a keen interest in political science and as Bradley (2004: 725-726) records, '[Jennings] wrote: 'To be a good lawyer, one had to be a good political scientist'. Jennings' focus on the historical, social, and political context of legal institutions is what made his constitutional legacy in both Britain and abroad so distinctive and enduring.

THE 'ORIENTAL JENNINGS'

In 1940, Jennings was appointed as Vice-Chancellor of the University of Ceylon. The move to Sri Lanka inaugurated a new phase of prolific academic writing on the laws of the British Empire and then of the newly formed Commonwealth, together with a more practical engagement with decolonising nations as Jennings served as constitutional advisor in many Asian and African jurisdictions – and even acted as legal advisor for Pakistan's Governor-General in the infamous litigation over the dissolution of the country's first Constituent Assembly in 1955. The academic production of the 'Oriental Jennings' drew from both his previous research on English public law and his academic engagement and advisory work in the postcolonial world. The move to Sri Lanka does indeed represent a watershed in his writing and intellectual engagement as evident from the titles of his published work from the late 1940s onwards: *The Constitution of Ceylon* (1948), *The Economy of Ceylon* (1950), *The Commonwealth in Asia* (1951), *Some Characteristics of the Indian Constitution* (1953), *The Approach to Self-Government* (1956), *Constitutional Problems in Pakistan* (1957), *Problems of the New Commonwealth* (1958), *Democracy in Africa* (1963), and *Magna Carta and Its Influence around the World Today* (1965).

Significantly, the works of the 'Oriental Jennings', together with his constitutional legacy in the postcolonial world, have remained almost virtually unexplored in scholarly writing. A special issue of the *Modern Law Review* edited by Martin Loughlin, Professor of Public Law at LSE, was published in 2004 to collect some of the papers presented at an earlier workshop held at the LSE to mark Jennings' centenary in 2003. Notably, Loughlin acknowledges that Jennings' post-war work on the drafting of Commonwealth constitutions represents one of the most conspicuous gaps in the collection (Loughlin 2004: 715). Thus, the present paper seeks to address this scholarly silence and concentrates in particular on Jennings' publications and archival material pertaining to South Asia in the Papers of Sir Ivor Jennings held at the Institute of Commonwealth Studies (ICS) in the Senate House Library of the University of London.³ A few additional documents on Jennings' work in South Asia are held at the British National Archives in Kew Gardens.⁴

³ On Sri Lanka: ICS 125/B/iii; Maldives: ICS 125/B/xi; Pakistan: ICS 125/B/xv; Nepal: ICS 125/B/xiii.

⁴ FO 371/135966.

The breadth of the material featured in the Ivor Jennings Papers held in the ICS Archives is truly remarkable. The collection is divided into four parts: Part A pertains to 'Education' and contains documents from Ceylon, Hong Kong, Jamaica, Kuwait, Malaya, Malta, and Uganda; Part B deals with 'Constitutional Issues' and features files on nineteen countries: Australia, Canada, Ceylon, Cyprus, Eritrea, Gambia, Ghana, Gibraltar, Japan, Malaya, Maldives, Malta, Nepal, Nigeria, Pakistan, Federation of Rhodesia and Nyasaland, Singapore, South Africa, and Sudan. Part C 'Books and Other Writings' contains early drafts of Jennings' books on English, colonial, and Commonwealth laws, notes for lectures and various articles, correspondence, and also the manuscript of Jennings' autobiographical account of his experience in Sri Lanka 'Road to Peredeniya'. Part D 'Other materials' features a set of British official publications, a number of publications mostly from Sri Lanka, press clippings, and the syllabuses of Jennings' public law courses at the LSE.⁵ A perusal of the collection's catalogue reveals the complexities of Jennings' engagement with the postcolonial world and the intimate relationship between his work on constitutional issues in Britain and the post-colony.

Initially, my research on Jennings' work in the postcolonial world concentrated solely on his 1958 experience in Nepal as part of my long-term engagement with the country (Malagodi 2013). Jennings' 'Nepal file' has never been analysed or written about, not even by Jennings himself in his published work, making the discovery of the file a particularly significant advancement in the writing of both Nepal's constitutional history and Jennings' life story. However, it soon became apparent that it was more fruitful to investigate the Nepali case in a comparative perspective, especially within the context of Nepal's neighbouring South Asian jurisdictions, which Jennings had so extensively engaged with. My research hypothesis is twofold. On the one hand, the constitutional edifice that Jennings designed for Nepal directly resulted from his previous experiences and lessons learnt in Sri Lanka, India, Maldives, and Pakistan. It is argued that Jennings developed a particular constitutional model for decolonising nations informed by the Cold War imperative of delivering political stability and regime continuity to Third World countries as a way to counter the threat posed by the Soviet bloc, rather than the desire to promote constitutional democracy world-wide. On the other hand, Jennings was a constitutional lawyer trained in the British tradition and his understanding of the Westminster model profoundly shaped his work in South Asia and, at the same time, his work in the decolonising world deeply affected his understanding

⁵ See: <http://archives.uirls.lon.ac.uk/resources/ICS125.pdf>

of the British constitution – thus making the ‘Occidental-Oriental divide’ in the academic reconstruction of Jennings’ life story and work porous at best and almost completely artificial. Three research questions have been guiding this inquiry.

JENNINGS AND THE ‘MODIFIED’ WESTMINSTER MODEL

First, Jennings advocated for a ‘modified’ Westminster model to be implanted in Nepal (Dhungel *et al.* 1998: 25) and in other jurisdictions, but to what extent did he depart from the British constitutional model – and why? The design of Nepal’s constitution was based on Jennings’ reading of the country’s socio-political situation after the democratisation of 1951, and he identified the Shah monarchy as the country’s only stable political institution around which he drafted the new document. As a result, the 1959 Constitution that Jennings drafted established a framework completely tilted in favour of the ‘hereditary executive’ element of government – the monarchy – with a very limited scope for the ‘representative executive’ as executive powers were vested exclusively in the King and not in the Cabinet.

In his Confidential Notes to the British Foreign and Commonwealth Office (FCO), Jennings commented that the meaning of drafting a ‘democratic constitution’ in Nepal was to prepare a document ‘designed to vest power in a middle class, usually English-speaking oligarchy, which was to pay attention to the needs of the *oi polloi* because they have the vote [...] but the difficulty in Nepal was to find the oligarchy [...] the only stable element is the monarchy’.⁶ Jennings was unimpressed by Nepali political parties and politicians and thus designed a constitution that revolved around the Crown. He stated that his draft was a compromise: ‘it provided for Cabinet Government as long as it was practicable, but gave the King ample powers to suspend Cabinet Government; or even the whole Constitution, if it proved unworkable. To give the King a buffer against popular discontent, I invented a Council of State’.⁷ In this regard, the British constitutional convention by which the King shall act on the advice and recommendation of the Prime Minister was completely diluted and distorted.⁸ Similarly, the long standing British convention that the monarch shall not withhold Royal Assent to a Bill passed by Parliament was overtly subverted in the Nepali document, which explicitly allowed the King to withhold Royal Assent at his discretion.⁹ The

⁶ ICS 125/B/xiii/5/2.

⁷ ICS 125/B/xiii/5/2.

⁸ Constitution of the Kingdom of Nepal, 1959, Article 10.

⁹ Constitution of the Kingdom of Nepal, 1959, Article 42.

Nepali monarch was vested with unusually wide powers in stark contrast with the British principles of parliamentary sovereignty, constitutional monarchy, and limited government.

Significantly, in the first edition of *The Law and the Constitution* (1933), Jennings had attacked Dicey for his understanding of British constitutional conventions as belonging solely to the realm of politics, rather than that of law, arguing that the nature of conventions does not differ substantially from positive law as they are binding. However, Jennings' focus on Nepal's historical and political context – as mediated by his instructions from the British FCO that footed the bill for his advisory work in Kathmandu – took precedence over enshrining in a clear cut manner constitutional guarantees as developed in the British tradition. As illustrated by Harding (2004: 156), constitutional conventions – essentially a form of customary law – are a key feature of the Westminster model, but one particularly difficult to export: 'conventions have to be not only written into the constitution but also drafted very clearly to avoid confusion in the minds of actors who would naturally look to the wording of the constitution rather than the extensive and sometimes debatable constitutional history and understanding that led to it'. Reflecting upon Jennings' *The Law and the Constitution*, Sartori (1962: 854) sagaciously commented: 'English scholars understate their constitution [...] and leave the alien reader with the feeling that the British constitution really amounts to the fact that, in the final analysis, the British people are clever and fine people who know how to go about in politics'. With regard to the form/substance dichotomy of constitutional implants, Kumarasingham (2013: 7) draws a key distinction between the 'Westminsters': Sri Lanka adopted the symbolic, ceremonial culture of the 'dignified' part of the British constitution, operating in an anachronistic 18th century manner – I argue that Pakistan and Nepal followed the same approach; in contrast, India adopted the 'efficient' values and attitudes of the British system, featuring the substantive guarantees of Westminster. While Jennings' functionalist approach produced a compelling analysis of the British constitution, in its practical application to South Asian postcolonial realities it led to modifications of the Westminster model that did not serve the cause of constitutional democracy.

JENNINGS' LEGACY IN SOUTH ASIA

Second, what was the impact of Ivor Jennings' previous South Asian constitutional experiences on the work he conducted in Nepal, and, in this regard, what can be properly identified as Jennings' constitutional legacy in South Asia in the Cold War era? Jennings had been heavily involved in Sri Lanka's constitutional politics throughout the fourteen years he

resided in the country developing a close relationship with D.S. Senenayake, leader of the independence movement and the first Prime Minister of independent Sri Lanka. Jennings' experience in Pakistan as counsel for Governor-General Ghulam Mohammad in the infamous litigation over the dissolution of the first Constituent Assembly in 1955 was of paramount importance for his later work in Nepal, especially with regard to constitutionalising what Carl Schmitt termed as 'the exception'. As a result, Jennings devised for Nepal a series of constitutional mechanisms to preserve a cloak of legality in emergency circumstances. He concluded that his draft constitution featured Cabinet Government as long as practicable. Ample powers were vested in the King to suspend Cabinet Government on the basis of the so-called 'Pakistan formula',¹⁰ or even the entire Constitution,¹¹ and assume direct powers under the power to remove difficulties.¹² Finally, Jennings argued that a Chapter on Fundamental Rights – based on the Indian model, which he studied and disliked – was forced upon him by the Commission, but that it would have been easy for the King (not for politicians) to suspend them if they proved too restrictive.¹³

With regard to Jennings' constitutional legacy in South Asia, none of the constitutions that he helped drafting survived in Sri Lanka, Maldives, and Nepal; and the draft produced by Pakistan's first Constituent Assembly was never enacted. All of his constitutional endeavours in South Asia were followed by bouts of authoritarian rule, mostly by the actors whose position Jennings had propped up in his constitutional advisory work. For instance, in Nepal the 1959 Constitution was suspended by the King less than two years after its promulgation as King Mahendra Shah ushered in the so-called 'Panchayat regime' – a modern monarchical autocracy cloaked in a legitimising traditional guise. With regard to Pakistan, McGrath (1996) saw in the dissolution of the country's first Constituent Assembly in 1955 and the litigation surrounding it (in which Jennings played a key role) the roots of 'the destruction of democracy' in the country. Thus, it seems that Jennings' legacy in South Asia is clearly identifiable in three areas: first, in the difficult translation of the informal parts of the British constitution – such as royal prerogative powers and constitutional conventions – which were extensively incorporated into Westminster-style postcolonial constitutional frameworks, but frozen in a 17th century interpretation, without incorporating the substantive democratic

¹⁰ Constitution of the Kingdom of Nepal, 1959, Article 55.

¹¹ Constitution of the Kingdom of Nepal, 1959, Article 56.

¹² Constitution of the Kingdom of Nepal, 1959, Article 77.

¹³ ICS 125/B/xiii/5/2.

transformations that had occurred in the metropolis over the last three centuries. The second consideration about Jennings' legacy flows from the first: his almost Hobbesian understanding of state authority in postcolonial realities is clearly articulated through his institutional design supporting unaccountable executives and his treatment of the 'state of exception' at the constitutional level. Finally, Jennings' dislike of Indian-style entrenched charters of fundamental rights patrolled by courts with extensive judicial review powers entailed severe limitations on formal constitutional guarantees across the South Asian jurisdictions he worked in. In the Cold War context, where the role of the foreign constitutional expert in decolonising countries was primarily to deliver regime stability to counter Soviet influence, Jennings did perhaps help counter the Communist 'threat' in South Asia, but at the expenses of constitutional democracy.

FOREIGN ADVISOR, LOCAL AGENCY, AND THE COLD WAR ERA

Third, to what extent has Sir Ivor Jennings' constitutional vision been tempered by the agency of the people instructing him – whether it was Pakistan's Governor-General or the British FCO? In his capability as a foreign constitutional advisor, Jennings was employed by one particular party and as such he had specific instructions he had to act within. For instance, in the Pakistani litigation, Jennings was employed by the Governor-General, for a salary seven times higher than that of the Pakistani Chief Justice and a generous living allowance (McGrath 1996: 160) to put the Governor's case before the Sindh High Court, and then the Federal Court, that his dissolution of the Constituent Assembly was within his powers, hence constitutional. In Nepal, Jennings was employed by the British FCO to assist with constitution-drafting to support the country's political stability with respect to Nepal's strategic position between India and China, especially after the Chinese invasion of Tibet. In a letter to Jennings, the FCO encouraged him to accept King Mahendra's invitation and assignment in order to 'straighten the confusion of ideas now disturbing the Nepali political scene'.¹⁴ But both the Pakistani Governor-General and the Nepali monarch expressly asked for Jennings' services. In my view, they were both aware of Jennings' constitutional work in other neighbouring jurisdictions and consciously selected him for the kind of approach they expected him to adopt – and in the end they were not disappointed by the outcome.

CONCLUSIONS

¹⁴ ICS 125/B/xiii/5/4.

To conclude, why has such rich and precious archival material pertaining to Jennings' constitutional engagement in decolonising nations remained under-researched for almost fifty years since Jennings' demise? Like with most archival sources, the extent of their use is often due to a circumstantial mix of research trends, accessibility, and copyright issues. On a more substantive note, however, an investigation into Jennings' constitutional engagement with the postcolonial world does not reveal a story of efforts to promote democratisation and constitutional stability, but a complex one of Cold War *realpolitik* conducted through shrewd constitutional design and interpretation with long-standing consequences.

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