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Constitution Drafting as Cold War *Realpolitik*: Sir Ivor Jennings and Nepal's 1959 Constitution

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

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¹ M. Malagodi 2015. 'Ivor Jennings' Constitutional Legacy beyond the Occidental-Oriental Divide' *Journal of Law and Society* 42(1): 102-126.

² The expression 'South Asia' is deployed to indicate the eight countries that are the member states of the South Asian Association for Regional Cooperation (SAARC): Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. It is important to highlight that during Jennings' life Pakistan still comprised the East Wing, which seceded and became the independent Republic of Bangladesh in 1971.

³ I. Jennings 1948. *The Constitution of Ceylon*. Oxford: Oxford University Press; I. Jennings 1950. *The Economy of Ceylon*. Oxford: Oxford University Press; I. Jennings 1953. *Some Characteristics of the Indian Constitution*. Oxford: Oxford University Press; I. Jennings 1957. *Constitutional Problems in Pakistan*. Cambridge: Cambridge University Press.

In this regard, my analysis of Jennings' work in Nepal purports to trace the 'evolutionary view' of postcolonial constitutional problems and solutions formed by Jennings through his direct South Asian experiences in Sri Lanka (1941-55), the Maldives (1952-1953), and Pakistan (1954-55), and his long-term indirect engagement with India. The essay aims to reflect upon the manner in which the various constitutional mechanisms that Jennings developed in South Asia – all instances of a modified Westminster model – have been deployed in Nepal, the last of Jennings' South Asian endeavours. The analysis is based on my reading and interpretation of the archival sources pertaining to Jennings' constitutional advisory work in Nepal – and South Asia more broadly – held at the Institute of Commonwealth Studies of the University of London,⁴ and at the British National Archives in Kew Gardens,⁵ together with Jennings' copious published work on the region. It is important to highlight that this essay provides a partial – and somehow piecemeal – account of Jennings' constitutional work in Kathmandu due to the almost complete absence of Nepali sources on his engagement and legacy in the country, aside from the few articles on the national state-owned daily newspaper, *Gorkhapatra*.

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

Nepal's third Constitution was promulgated in February 1959, but was short lived. King Mahendra suspended the document in December 1960 and promulgated a new constitution in 1962 to pave the way to the new Panchayat regime and thirty years of monarchical autocracy in the country. The 1959 Constitution is particularly important in Nepal's constitutional

⁴ See the Private Papers of Sir Ivor Jennings: <<http://archives.ulrls.lon.ac.uk/resources/ICS125.pdf>>. On Sri Lanka: ICS 125/B/iii; Maldives: ICS 125/B/xi; Pakistan: ICS 125/B/xv; Nepal: ICS 125/B/xiii.

⁵ FO correspondence with the then British Ambassador in Nepal: FO 371/135966.

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

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

1. Nepal's Historical Context

The creation of modern Nepal as the state entity we know today was initiated in the late 19th century by the military conquests of King Prithvi Narayan Shah of Gorkha – a small Hindu principality lying westward of Kathmandu. The military campaign culminated with the conquest of the Kathmandu Valley in 1769 and Gorkhali territorial expansion progressed even after the death of Prithvi Narayan, but was eventually halted by the clash with the East

⁶ Interview with Daman Nath Dhungana, Kathmandu, 9 April 2007. Interview with Surya Nath Upadhyaya, Kathmandu, 22 March 2007. Interview with Bishwa Nath Upadhyaya, Kathmandu, 16 May 2007.

⁷ M. Malagodi 2013. *Constitutional Nationalism and Legal Exclusion – Equality, Identity Politics and Democracy in Nepal (1990-2007)*. Delhi: Oxford University Press, pp. 114-115.

India Company in 1814. In 1816, the Treaty of Sagauli marked the victory of the British colonial power over the Gorkhalis with a significant territorial loss and a growing British influence over political developments in Nepal. In fact, Britain became the only country to have diplomatic representation in Kathmandu through the British Residency, and to benefit from the supply of Gurkha soldiers, although Britain was not allowed recruitment on Gorkhali territory until after supporting the East India Company in the 1857 insurrection.⁸

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

Between 1950 and 1951 an alliance between King Tribhuvan Shah and the newly created Nepali political parties succeeded in toppling the Rana regime with independent India's support and sought to transition Nepal to democracy. The years between 1951 and 1959, when the first general elections were held, were characterised by transitional politics and great instability, exacerbated by tensions between the political parties and the monarchy,

⁸ J. Whelpton 2005. *A History of Nepal*. Cambridge: Cambridge University Press, pp. 42-43.

⁹ L. Rose and M.W. Fisher 1970. *The Politics of Nepal. Persistence and Change in an Asian Monarchy*. Ithaca and London: Cornell University Press, p. 37.

¹⁰ J. Whelpton, John 1991. *Kings, Soldiers and Priests. Nepalese politics 1830-1857*. New Delhi: Manohar. P. 244.

bitter inter-party disputes and the succession of a long string of Cabinets alternated by periods of direct monarchical rule. In his Royal Proclamation of 18 February 1951, King Tribhuvan declared: ‘hereafter our subjects shall be governed in accordance with a democratic constitution to be framed by the Constituent Assembly elected by the people’.¹¹ However, the idea of a Constituent Assembly was not to be realised in Nepal until 2008 – and Nepal’s many constitutions were to be drafted by small unelected and unrepresentative Commissions for many years to come.

On 11 April 1951, the King promulgated the Interim Government of Nepal Act 1951, the first constitution ever enforced in the country – a provisional document to govern Nepal until a definitive one was drafted. The new constitutional dispensation borrowed extensively from the Government of India Act 1935, which effectively functioned as India’s Interim Constitution between 1947 and 1950. In fact, it was under the guidance of Prof. Ram Ugra Singh of Lucknow University that a small Nepali Commission prepared the document.¹² Nepal’s 1951 Interim Constitution featured a modified version of the British principle of King-in-Council as executive powers were vested in the King and the Council of Ministers. However, the King enjoyed unusually wide powers, including legislative powers through the issuing of ordinances, as the Constitution did not establish a separate and independent legislative branch. Eventually, in June 1951 the Second Amendment to the Constitution created an Advisory Assembly General, which enjoyed only limited legislative authority while the King retained ‘sovereign and plenary powers to make laws’ and the discretion to withhold royal assent. While the new dispensation introduced forms of judicial scrutiny over executive actions, these were progressively eroded through amendments to the Constitution and ordinary legislation, together with an expansive use of royal prerogative powers.¹³ The text made no explicit reference to Hinduism and left the issue of the place of Nepal’s religious tradition to the permanent constitution.

¹¹ H. B. Tripathi 2002. *Fundamental Rights and Judicial Review in Nepal*. Kathmandu: Pairavi Prakashan, p. 25.

¹² B. Khanal 2000. *Regeneration of Nepalese Law*. Kathmandu: Bhrikuti Academic Publications, p. 34.

¹³ S. Dhungel *et al.* 1998. *Commentary on the Nepalese Constitution*. Kathmandu: DeLF Lawyers Inc, pp. 22-24.

The death of King Tribhuvan in 1955 and the coronation of his son Mahendra led to a more active role of the Shah monarchy in the conduct of Nepal's turbulent political affairs. According to one analysis, King Mahendra 'aspired to exercise an active leadership in accordance with Hindu traditions and these aspirations were manifested by his refusal to hold elections for a Constituent Assembly, and the desire to write the constitution himself with no sovereignty being vested in the people'.¹⁴ King Mahendra's attitude is also evident in the amendments he made to the Interim Constitution, which instead of transferring power to the people further concentrated them in the hands of the monarch. As a result, the King continued to ignore demands for the creation of a Constituent Assembly after general elections had been postponed twice. Then, in early 1958, Mahendra made a resolute move and invited British constitutional expert Sir Ivor Jennings to guide the impending constitution-making process. Soon afterwards, he independently appointed a Commission to draft the new constitution.

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

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

First, the Cold War context was fundamental in determining the British Government's selection of Jennings and framing his mandate. In fact, throughout the 1950s South Asia represented for Britain and the Western bloc a crucial Cold War battleground. While Pakistan had become a key anti-Soviet ally in the region through the South East Asia Treaty Organization (SEATO), India had a more ambivalent position, especially since the formation of the Non-Aligned Movement of countries across Asia and Africa propelled by the 1955

¹⁴ Dhungel *et al.* 1998, p. 24.

¹⁵ ICS 125/B/xiii/4.

Bandung Conference.¹⁶ The British Government's interest in Nepal also resulted from the Himalayan country's geopolitical and strategic location between two key global players, India and the Popular Republic of China, whose invasion of Tibet had begun in 1950 and culminated with the capture of Lhasa in 1959 – very close to the Nepal border. Since his accession to the throne, King Mahendra had pursued a programme of diversification in his foreign policy with the intent of involving major outside powers to counteract its immediate neighbours, India and China.¹⁷ This resulted in a number of countries establishing embassies in Kathmandu, and the strengthening of Nepal's relationships with Britain. As a result, Jennings's instructions from the FO for his Nepal mission were clear, although never spelt out in any of the letters exchanged between him and the Ministry. In line with India's policy over Tibet, the aim was to produce a constitution capable of fostering political stability and consolidating Nepal's position as a buffer zone against expanding Communist China.¹⁸

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

On 11 May 1956, Jennings was first approached by the FO with a proposal from the Nepali Prime Minister and the Minister of Education to set up a new residential university in Nepal

¹⁶ R.J. McMahon 2003. *The Cold War: A Very Short Introduction*. Oxford: Oxford University Press, p. 71, 108-111.

¹⁷ L. Rose 1971. *Nepal: Strategy for Survival*. Kathmandu: Mandala Book Point, pp. 217-218.

¹⁸ P.M. McGarr 2013. *The Cold War in South Asia*. Cambridge: Cambridge University Press, p. 90.

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

On 3 July 1956, the FO again contacted Jennings with an invitation from the Nepali Prime Minister for Jennings to visit Kathmandu between August and September 1956 to advise the Nepali Government on the general elections, at the time still scheduled for October 1957. In particular, Jennings' opinion was sought with regard as to whether the elections should be held for a Constituent Assembly or only for an elected Parliament.²² Significantly, in January 1957 the King had formed a new Cabinet and appointed the Praja Parishad's leader Tanka Prasad Acharya as Prime Minister, who soon after started agitating for 'a Parliament with limited powers operating under a Constitution granted by the King [on the basis that] there could not be two sovereigns in the country at the same time, and that the people of Nepal were not quite prepared for a full-fledged democracy'.²³ The new position of the Praja Parishad alienated the party from the democratic movement in Nepal, and made it increasingly isolated, while political tension kept mounting in the country. As a result, the invitation to Jennings was followed by delays and nothing eventually came of it. In a letter

¹⁹ ICS 125/B/xiii/4, FO letter to Jennings dated 11/05/1956.

²⁰ Joshi and Rose 1966, p. 185.

²¹ ICS 125/B/xiii/4, Jennings letter to FO dated 13/05/1956.

²² ICS 125/B/xiii/4, FO letter to Jennings dated 03/07/1956.

²³ Joshi and Rose, 1966, p. 190.

dated 29 January 1957, the FO stated that it was a ‘disappointing outcome’ as ‘the Nepalese are not quite sure about what they want’.²⁴

Political machinations and manoeuvring continued in Kathmandu as the monarchy progressively became increasingly active in the political sphere and tensions with the democratic political parties more acute. Significantly, on 18 February 1957 Jennings was visited at Trinity Hall in Cambridge by Lok Darshan, King Mahendra’s Personal Secretary, who was travelling to the UK as part of a one-month-long world tour to study electoral, parliamentary, and constitutional practice and procedure.²⁵ A couple of months later, on 26 April 1957, the FO contacted Jennings to inform him that his services were no longer required in Nepal.²⁶ A letter of the UK Ambassador to Nepal dated June 1958 later explained that Jennings’ first invitation to Nepal was dropped due to Indian pressures: ‘I have no sympathy with the Indians on this. They have only themselves to blame if by their actions they compelled the Nepalese to act surreptitiously in order not to be bullied out of asking for Jennings’ services, as they were at an earlier stage’.²⁷ India has historically exercised a dominant influence in Nepali political affairs, and did not take kindly to Britain’s efforts to exert sway in Kathmandu through its offer of constitutional advice.

The new Cabinet’s failure to hold its first general elections in October 1957 was followed on 14 November by King Mahendra’s Royal Proclamation summarily dismissing the government and announcing 18 February 1959 as the new date for the general elections.²⁸ Shortly afterwards, on 13 December 1957, the FCO again contacted Jennings encouraging him to accept King Mahendra’s renewed invitation to visit Nepal to strengthen the goodwill between the UK and Nepal and ‘straighten the confusion of ideas now disturbing the Nepalese political scene’.²⁹ On 7 January 1958, the FCO followed up with Jennings further

²⁴ ICS 125/B/xiii/4, FO letter to Jennings dated 29/01/1957.

²⁵ ICS 125/B/xiii/4, Cambridge Note to Jennings dated 18/02/1957.

²⁶ ICS 125/B/xiii/4, FO letter to Jennings dated 26/04/1957.

²⁷ FO 371/135966, British Ambassador J.A. Scopes letter to FO dated 16/06/1958.

²⁸ Joshi and Rose, 1966, p. 204.

²⁹ ICS 125/B/xiii/4, FO letter to Jennings dated 13/12/1957.

detailing that the visit to Kathmandu would have been for only one month.³⁰ On 14 January 1958, the FCO again contacted Jennings to relay the information gathered by the UK Ambassador to Nepal that King Mahendra was now thinking of granting a constitution himself. At this point, the FCO put further pressure on Jennings to accept the instructions by saying that his visit would have been most valuable and that much would depend on the King having sound advice at such a time. Moreover, the FCO letter specified that King Mahendra would have issued a formal invitation to Jennings only when sure of his availability and that the King wished to make a public announcement about Sir Ivor's visit to Kathmandu.³¹ On 19 January 1958, Jennings eventually accepted the instructions from the FCO and his honorarium was agreed ten days later.³²

As a result, on 1 February 1958, King Mahendra issued a Royal Proclamation to serve as the roadmap for Nepal's constitution-making process where the King blamed the lack of progress on Nepal's political instability.³³ King Mahendra also announced the establishment of a five-member Constitution Drafting Commission to prepare a new constitution, which was to form the basis for holding the elections of a bicameral parliament. The Commission was to include five members: the Chairman, Bhagvati Prasad Singh (Chairman of the Public Service Commission); three ordinary Members, Ramraj Panth (Principal of the Law College), S.P. Upadhyaya (Nepali Congress), Randhir Subba (Gorkha Parishad); and the Secretary, Hora Prasad Joshi.³⁴ King Mahendra stated that the new constitution was to answer the needs of the country, time and circumstances and that the scope of the document was to protect primarily Nepal's sovereignty and independence.³⁵ The emphasis placed by the King on the importance of preserving Nepal's national unity implied that the Shah monarchy was to play a central role in the new constitutional edifice. In fact, the focus on the monarchy operating a parliamentary system of government within a unitary state entirely sidelined the debates over

³⁰ ICS 125/B/xiii/4, FO letter to Jennings dated 07/01/1958.

³¹ ICS 125/B/xiii/4, FO letter to Jennings dated 14/01/1958.

³² ICS 125/B/xiii/4, Jennings letter to FO dated 19/01/1958.

³³ Joshi and Rose, 1966, pp. 212-214.

³⁴ ICS 125/B/xiii/2/iv, Jennings Explanatory Memorandum.

³⁵ ICS 125/B/xiii/1/iv, H.P. Joshi 1958, *The Way to Political Stability – An Analysis*, pp. 24-27.

a republican form of state and federal restructuring already present in Nepal. At the same time, the Constituent Assembly option had been completely discarded in favour of a small unelected Commission, selected by the main political forces and devised to function under the guidance of a foreign expert, who had been equally handpicked and agreed upon by both the Nepali and British Governments.

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

The 1 February 1958 Royal Proclamation provided the blueprint for Nepal's efforts in constitution-drafting: 'there shall be a commission to prepare a draft for a new constitution [...] on the basis of the present Interim Constitution, according to necessity foreign experts will be co-opted to aid and advise the commission; on the basis of the constitution thus prepared, General Elections shall be held for Parliament; this Parliament shall consist of two Houses and all possible provisions shall be made to safeguard the country's sovereignty, independence and people's rights'.³⁶ Jennings' mandate was to help create a constitution within the parameters of constitutional monarchy and parliamentary democracy.

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

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

³⁶ ICS 125/B/xiii/1/iv, H.P. Joshi 1958, *The Way to Political Stability – An Analysis*, p. 25.

³⁷ *Gorkhapatra*, 16 Caita 2014 BS (29 March 1958).

Citizenship Act and the Representation of the People Bill, and they were promised for 1 April.³⁸

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

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

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

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

On 10 April, Jennings met with the Commission's Secretary, Hora Prasad Joshi, and discussed the parallel draft prepared by him, which had been circulated amongst the Commission's Members. In his Confidential Notes to the FCO, Jennings commented on Joshi's draft as follows:

It was, technically, a pathetic document, and the claim of Hora Prasad Joshi, the Secretary of the Commission, that it was all of his own work, seemed superficially to be justified. It was a collection of bits from other constitutions strung together amateurishly. On the other hand, Randhir Subba, another Member, said that it came from the Palace, but not from the King. This is probably a guess, founded on the suspicion which the Gorkha Parishad has of His

³⁸ ICS 125/B/xiii/5/i.

³⁹ ICS 125/B/xiii/5/i.

Majesty. My own guess is that Joshi is an ambitious young man who took this opportunity to bring his merits to His Majesty's attention (copies of both were supplied to His Majesty). However, the draft was never circulated in the Commission.⁴⁰

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

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

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

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

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

On 13 April, Jennings met with the Commission for the fourth time. He put forward a number of arrangements to strengthen the constitutional position of the King. The first proposal was to 'put teeth' into Parliament's Upper House, the Senate (*Maha Sabha*), by giving a majority of nominated members and having them nominated at the King's

⁴⁰ ICS 125/B/xiii/5/ii.

⁴¹ ICS 125/B/xiii/5/i.

⁴² ICS 125/B/xiii/5/i.

discretion; but the Commission opted for the innocuous Ceylon Senate. The Upper House was composed of 36 members, 18 elected by the Lower House and 18 nominated by the King, making it easy for parliamentary proceedings to reach an impasse in a bicameral system. The second proposal was to devise a Council of State (*Rajya Parishad*, a consultative body for the King to receive advice) on the model of the old British Privy Council.

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

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

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

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

Subba put to me point-blank the question what would happen if the King’s powers to dispense with Cabinet Government were removed. I replied that in such a case the King would suspend the whole constitution, as had been done in Pakistan. That convinced him,

⁴³ ICS 125/B/xiii/5/i.

⁴⁴ ICS 125/B/xiii/5/ii.

⁴⁵ ICS 125/B/xiii/5/i.

since he realised that a power to suspend the constitution must be included in the difficult conditions of Nepal. (I had at the previous meeting emphasised that Nepal lay between two very powerful neighbours). On the emergency power itself, I agreed to make separate provisions for war, etc., on the one hand and breakdown of constitutional machinery on the other, mentioning that this had been done in India. There was also objection to the power to remove difficulties. Since this was not important, I suggested the Indian provision, though I think in drafting it, I will give it more teeth.⁴⁶

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

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

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

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

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

The meetings of the Commission in which Jennings took part were characterised by a circumspect attitude of the Members for fear of leakages and by complex negotiations between competing agendas. As a result, many exchanges between Jennings and Commission Members took place behind the curtains as private and unofficial one-to-one meetings, revealing the importance of brokering deals through backdoor negotiations, notwithstanding the fact that Jennings effectively led the deliberations of the Commission. Writing in June 1958, the British Ambassador to Nepal reported the difficulties encountered by the

⁴⁶ ICS 125/B/xiii/5/i.

⁴⁷ ICS 125/B/xiii/5/i.

⁴⁸ ICS 125/B/xiii/5/i.

Commission after Jennings' departure, especially with the translation of the draft from English into Nepali, and the preoccupation that amendments to the draft could still be made.⁴⁹

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

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

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

⁴⁹ FO 371/135966, British Ambassador J.A. Scopes letter to FO dated 16/06/1958.

⁵⁰ Joshi and Rose, 1966, p. 285.

⁵¹ Joshi and Rose, 1966, p. 292.

⁵² ICS 125/B/xiii/2/iv.

4. The 1959 Constitution and Jennings' Legacy in Nepal

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

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

⁵³ ICS 125/B/xiii/2/ii, iii, iv.

⁵⁴ ICS 125/B/xiii/5/ii.

Congress, whose politicians he unceremoniously described as ‘lesser [Indian] Congress *wallahs*’. Third, Jennings felt that it was crucial to separate the person of the King from the institution of the Crown: ‘one must not presume too much of the King’s personal popularity and make him too obviously responsible for the efficiency of government. Whatever happens, the Government is going to be pretty inefficient and (I suspect) corrupt’.⁵⁵

Jennings saw no correspondents in Nepal for parties like the Indian Congress or the Pakistan Muslim League, or charismatic personalities like in Sri Lanka with D.S. Senenayake. As a result, Jennings contemplated the idea of instigating the formation of a political party around the authority of the King, composed of feudal local leaders, but then discarded it. He concluded that there existed ‘a number of Kathmandu groups miscalled “parties”, rather like the present situation in Pakistan’. However, Jennings opted not to devise a constitutional machinery designed for groups ‘for no such machine would function properly unless there was a strong public service [...] so I have tried to strengthen the ties between the public service and the Crown, but the former seems to me to be excessively weak and indolent’, and instead designed a Constitution based on the prominence of the Crown.⁵⁶ As a result, the Preamble of the 1959 Constitution ended up vesting state sovereignty solely in the King:

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

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

‘His late Majesty King Tribhuvan Bir Bikram Shah Dev, Father of the Nation and revered descendant of the illustrious King Prithvi Narayan Shah, adherent of Aryan Culture and

⁵⁵ ICS 125/B/xiii/5/ii.

⁵⁶ ICS 125/B/xiii/5/ii.

⁵⁷ See: < <http://www.ccd.org.np/resources/1959%20Constitution%20English.pdf>>.

Hindu religion, having led a Great revolution for the rights and welfare of His subject, earned immortal fame in the history of the world and was firmly resolved to establish real democracy in Nepal by giving fundamental rights to the people'.⁵⁸

Jennings sought to devise a constitutional system in which the King had extensive powers without jeopardising the position of the Crown. Therefore, he sought to enshrine in the document a sort of Privy Council (Council of State) to insulate the institution of the monarchy from the unpopularity of an individual King under Article 11.

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

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

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

⁵⁸ Ibid.

⁵⁹ H.W.O Okoth-Ogendo 1993. 'Constitutions without Constitutionalism' in *Constitutionalism and Democracy*, D. Greenberg et al. (eds.) Oxford: Oxford University Press, pp. 65-83.

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

First, Article 10 defines Executive Power and vests it exclusively in the King, not in the Cabinet:

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

Second, the British convention by which the King shall act on the advice and recommendation of the Prime Minister was completely diluted and distorted by the combination of Article 10(2):

Where under this Constitution His Majesty is not specifically empowered to act in His discretion or on the recommendation of a specified person, He shall act on the recommendation of the Cabinet conveyed by the Prime Minister or on the recommendation of the Minister of the Crown authorised by the Prime Minister to deal with the matter in question’.

With Article 10(3)

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

And Article 10(5) of the 1959 document

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

Third, Article 13(1) undermined the British convention regulating the monarch’s prerogative power of appointing as Prime Minister the leader of the political party commanding the

majority in Parliament's Lower House. An element of royal discretion was injected in the provision by adding the words 'in the opinion of His Majesty':

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

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

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

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

Fourth, the long-standing British convention by which the monarch shall not withhold Royal Assent to a Bill passed by Parliament was overtly subverted in Article 42, which explicitly provided for the King to be able to withhold Royal Assent at his discretion. As commentators highlighted, if a Prime Minister was independent-minded, then Cabinet Government was destined to fail under such a constitutional framework.⁶¹

Lastly, Jennings was aware of the precarious position of Cabinet Government under the new dispensation, thus he devised a series of mechanisms to preserve a cloak of legality in emergency circumstances. He concluded that his draft constitution was indeed a compromise featuring Cabinet Government as long as practicable. Ample powers were given to the King to suspend Cabinet Government under Article 55 based on the so-called 'Pakistan formula' or even the Constitution under Article 56, and assume direct powers under Article 77, the power to remove difficulties. Ultimately, this scheme was backed by the fact that the Constitution

⁶⁰ ICS 125/B/xiii/2/iv.

⁶¹ Joshi and Rose, 1966, p. 290.

gave the King exclusive control over the Royal Nepal Army under Article 64 and did not bring the armed forces under parliamentary control. Jennings also argued that a Chapter on Fundamental Rights – based on the Indian model, which he disliked⁶² – was forced upon him by the Commission, but that it would have been easy for the King (but not for the politicians) to suspend them if they proved too restrictive. Jennings commented about the scheme in the following terms:

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

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

5. Conclusions

To conclude, when Jennings returned to the UK, he sent a report dated 27 April 1958 to the FO, in which he stated that he felt reasonably satisfied that the draft would 'work', even if he could not guarantee he had properly seized the local situation.⁶⁴ It remains unclear what were Jennings' parameters in assessing the success of his constitutional work in Nepal. In fact, in December 1960 King Mahendra carried out a 'royal coup' by suspending the 1959 Constitution and sacking the B.P. Koirala Nepali Congress Government, a little over a year

⁶² I. Jennings 1953. *Some Characteristics of the Indian Constitution*, Oxford: Oxford University Press, p. 85.

⁶³ ICS 125/B/xiii/5/ii.

⁶⁴ FO 371/135966.

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

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

⁶⁵ Ibid.