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**‘SPECIALIST IN OMNISCIENCE’?
NATIONALISM, CONSTITUTIONALISM, AND SIR IVOR JENNINGS’
ENGAGEMENT WITH CEYLON**

ASANGA WELIKALA¹

1. Introduction

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

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

environment and an auspicious beginning for the fledgling university.¹¹ It has aptly been described as the ‘Cambridge by the Mahaweli [river].’¹²

In the context of Ceylon’s war effort, Jennings also served as the Deputy Civil Defence Commissioner¹³ and chaired a commission on social services.¹⁴ His work in the Civil Defence Department brought him into contact with its head, Oliver Goonetilleke (later Governor-General), and through him with the Leader of the State Council, D.S. Senanayake, who would become the first Prime Minister of independent Ceylon. As Sir Charles Jeffries has remarked,

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

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

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

Jennings’ close involvement and common cause with Senanayake and Goonetilleke drew the displeasure of both British civil servants as well the Ceylonese Left opposed to Senanayake’s preference for a negotiated constitutional transfer of power rather than outright republican independence. For the former, he had gone native and got ‘mixed up in politics’;²¹ for the latter, he was the *éminence grise* behind the conservative political elite that desired self-government in the form of Dominion status within the British Commonwealth, which they regarded as a neo-imperialist

sham.²² While the British government came eventually to appreciate Senanayake's moderate brand of nationalism (and by implication, we must assume, Jennings' role in supporting it) as a new model of Commonwealth co-operation in the post-war decolonising world, the Left proved less forgiving and would play a leading role in dismantling the independence constitutional settlement in 1970-2.²³ Their loathing of the Triumvirate, and the multifarious roles that Jennings was called upon to play in public life as a result of his membership in it, was exemplified in the rebarbative letter to the *Ceylon Daily News* written by Dr N.M. Perera in January 1955 – as Jennings was leaving Ceylon for the last time – in which he was excoriated as 'an over advertised mediocrity' masquerading as 'a specialist in omniscience.'²⁴

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

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

This chapter focuses on Jennings' work as the constitutional advisor to the Ceylonese Ministers and his decisive influence on both the form and the deeper conceptual assumptions of the scheme that eventually became, in all significant respects, the

independence constitution of Ceylon. This instrument has become known to posterity as the ‘Soulbury Constitution,’ after Lord Soulbury, the chairman of the constitutional commission that recommended the scheme for adoption by the British government. But perhaps the more accurate sobriquet for it might have been the ‘Jennings Constitution,’ for his distinctive ideas on the full gamut of constitutional principles, doctrines, and institutions associated with the Westminster model are everywhere reflected in the independence constitution. In this chapter I will deal with the key distinctive feature of this constitution: its Section 29, a ‘manner and form’ provision for the exercise of legislative power, which sought to protect minority rights in a communally plural society.³³

In this discussion I also hope to show, as between his LSE and Ceylon phases, the continuities and the differences in Jennings’ application of a general constitutional model – the Westminster system – to different polities and cultural contexts: that of Westminster proper and that of Ceylon understood as an ‘Eastminster.’³⁴ This 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.

2. Jennings’ Approach to Self-Government in Ceylon: Normativist or Functionalist Constitutionalism?

In his theoretical elucidation of the conceptual structures that inform accounts of public law thought in the British constitutional tradition, Martin Loughlin has discerned two main ‘styles’ of approach, which he terms the ‘normativist’ and ‘functionalist’ styles.³⁵ The distinction between the normativist and functionalist styles is 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.’³⁶ Thus while an individual scholar’s work could be classified as belonging predominantly to one or other style, in reality that work would likely not fit neatly in all respects with the classification. This could be due to internal inconsistencies, or due to disagreements or differences of emphasis with other scholars of the same style, or indeed, because the work overlaps between the seemingly oppositional styles. The overlap problem, I suggest below, occurs in relation to Jennings’ work in Ceylon rather more obviously than in his work on British constitutional law, and further, that it occurs because he takes the methodology of his predominantly functionalist style seriously.

In outline, ‘The normativist style in public law is rooted in a belief in the ideal of the separation of powers and in the need to subordinate the government to law.’³⁷ By contrast, ‘The functionalist style ... views law as a part of the apparatus of government. Its focus is upon law’s regulatory and facilitative functions.’ Functionalism therefore ‘reflects an ideal of progressive evolutionary change.’³⁸ 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’³⁹ which would become entrenched by the early twentieth century, led by Dicey but certainly not confined to him.⁴⁰ The challenge to this orthodoxy came from the new functionalist style of public law that was developed by Harold Laski, William Robson and Jennings at LSE in the inter-war years.⁴¹ 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.’⁴² 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.⁴³

In *The Law and the Constitution* – ‘a direct challenge to Dicey’s nostrums’⁴⁴ – 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.’⁴⁵ 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.’⁴⁶ 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.’⁴⁷ 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.’⁴⁸

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.’⁴⁹ 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’⁵⁰ that sought an explicit break with the prevailing orthodoxy of ‘analytical legal positivism underpinned by values of classical liberalism.’ In Loughlin’s words,

Modernists were opposed to the tenets of classical liberalism: they did not consider liberty and community to be opposing concepts and, far from viewing the extension of government into social life as a threat, they regarded it as an entirely progressive phenomenon.⁵¹

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.⁵² The Donoughmore Constitution was itself a radical example of colonial modernisation, recommended by commissioners appointed by Lord Passfield (Sidney Webb) as the Secretary of State for the Colonies in Ramsay MacDonald’s Labour government.⁵³ Webb and MacDonald were the progenitors of ‘the blueprint for a new type of state’⁵⁴ 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 1883⁵⁵ – and legislation for the functionalist was the transformative instrument of social change, unlike the hidebound common law. And there would not have been much difficulty in collaborating with Senanayake and Goonetilleke, who were notionally of the centre-right, because they were conservatives in an era before conservatism became associated with the small state. In the light of all this, Radhika Coomaraswamy’s criticism of the ‘laissez-faire structure’ of the independence constitution is possibly an overzealous characterisation.⁵⁶ On the other hand, the modernist in Jennings would have despaired of the Asian traditionalism as manifested in cultural communalism, and he wanted, like the Donoughmore commissioners, to encourage political nation-building, but unlike them, through a more conventional framework of parliamentary government.

In constitutional drafting, the functionalist influence is most visible in Jennings’ disapproval of the idea of a constitutionally entrenched and justiciable bill of rights.

While such a liberal normativist device would also be inconsistent with Diceyan normativists' commitment to parliamentary sovereignty, both schools of normativism were in general reliant on the 'common law method'⁵⁷ which entailed a prominent role for the courts in the legal and political system. Functionalists were opposed to normativism and the 'common law method' because they saw in this tradition's commitments to the property-owning values of classical liberalism a way of retarding social progress and 'Active judicial review came to be viewed as a technique for preserving the old order.'⁵⁸ Law for the modernists was not 'a repository of ancient mysteries and timeless values'⁵⁹ but a functional instrument, or 'the technology through which the modern state was to be erected.'⁶⁰ 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.'⁶¹

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.'⁶² This is a markedly more practical rationale than the ideological grounds on which he would presumably have objected to a judicially supervised bill of rights in Britain. But this is neither a helpful explanation nor a particularly coherent position given that the independence constitution provided for comprehensive judicial review, and indeed for the mechanism in Section 29, which itself had to be framed in general language, to have any use, it needed to be judicially enforceable against inconsistent ordinary legislation. Perhaps he may have calculated that the narrower scope of Section 29, in contrast to a fully formed bill of rights, would curb the litigation industry he feared.

Jennings says more about his objections to the use of bills of rights to prevent racial, religious and caste discrimination in *The Approach to Self-Government*:

one cannot change deeply imbedded social ideas by constitutional guarantees. It has been said that one cannot make people good by Act of Parliament. It should be added that one cannot overthrow a social system by drafting a Constitution.⁶³

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.⁶⁴ But it is important to distinguish between ordinary legislation and constitutionally entrenched rights, which is the key to understanding Jennings' antipathy to the latter. Legislation is a flexible policy instrument of regularly elected (and similarly disposable) governments. By contrast, constitutional entrenchment of putatively immutable values in the form of justiciable rights imposes a 'temporal imperialism'⁶⁵ 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'⁶⁶ – there was of course no choice about whether to have a written constitution. It followed logically from that, although not necessarily, that judicial review of legislation should be available, if the written constitution was to be treated as supreme law. In addition to this theoretical logic, there was moreover a crucial practical reason of law from which it followed that legislative acts should be judicially reviewable. As Jennings pointed out in a note on the Privy Council's decision in *Ranasinghe*, the Colonial Laws Validity Act 1865 applied to Ceylon at the time the independence constitution was being drafted (1943-1947), and as such, there was no possibility that it could provide for a legislature that was 'sovereign' in the same sense as the Imperial Parliament. I will discuss this case in more detail below, but Jennings was blunt when he stated that if the Privy Council had not held 'that the Ceylon Parliament was sovereign, it would be unnecessary to say that none of the draftsmen had any such intention.'⁶⁷

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 to limit it.'⁶⁸ Notwithstanding this concession to practical realities, we find his functionalism reasserting itself in not extending the scope of judicial review by way

of a justiciable bill of rights. Nevertheless, the availability of comprehensive judicial review entailed the enshrinement of an implicit but robust conception of the separation of powers in the independence constitution that is quite incongruous with the functionalist style. This led to such landmark cases as *Liyanage v. R* (1967),⁶⁹ 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.’⁷⁰

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.⁷¹ But this methodological commitment to empirical investigation led logically to a substantive requirement of constitutionally entrenched minority protections that could only be secured by the provision of constitutional review, which in turn meant that he had to concede a key tenet of liberal normativism. He explained this compromise in the following way:

a Constitution ought to be acceptable to the great mass of the people. A proposal should never be rejected on purely theoretical grounds. If there is a real demand for constitutional guarantees they ought to be inserted, and the task of the draftsman should be to make them as flexible as possible.⁷²

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 more generally, than the negative limitation of legislative power in Section 29.⁷³ 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.⁷⁴ 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 1956.⁷⁵ 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. 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.⁷⁶ 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.’⁷⁷ 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.’⁷⁸ 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.”⁷⁹

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.⁸⁰ The logic of this he set out in the following terms:

“Legal sovereignty” [i.e., parliamentary sovereignty, in Dicey's terms⁸¹] is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the [Queen-in-Parliament], will be recognised by the courts, *including a rule which alters this law itself*. If this is so, the “legal sovereign” may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.⁸²

Contrary to Dicey, therefore, for Jennings, ‘legal sovereignty is not sovereignty at all. It is not supreme power.’⁸³ 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.⁸⁴

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.⁸⁵

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.⁸⁶ 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.⁸⁷ Thus,

The only function of the courts is to determine whether legislation is within the limits of these powers, and these powers are wide general powers, which may be called powers of government.⁸⁸

These then were the instruments in Jennings’ theoretical toolbox when he commenced work on the Ministers’ Draft in June 1943. As they applied to Ceylon, they included the following propositions. Parliamentary ‘sovereignty’ was a misnomer in the sense that the legislature did not possess illimitable and indivisible power. In truth what was meant was that the courts would respect and give effect to the lawful commands of the legislature expressed in the legally accepted form. It followed from this that the equation of the ‘sovereignty’ of the legislature with the sovereignty of the state of which it was a branch was a fundamental conceptual error. The absence of a constitutionally uncontrolled legislature did not affect the independence of the state, and this in turn meant that legislative power, although limited, was ample for the effective conduct of government. Legislative power could be limited in general terms, i.e., within the terms of the power-conferring written constitution, and ordinary legislation repugnant to those terms would be void. And it could also be limited in specific terms, for example, where some measures could not be enacted by process of ordinary legislation, and would require some higher form of legislation that would require greater agreement around the measure. According to the terms of the constitution, these may have to be in the form of amendments to the constitution itself. It followed from the constitutionally limited and procedurally regulated nature of legislative power that its exercise should be policed by the courts. In doing so,

courts would seek to uphold substantive and procedural constitutionality within the law for the time being in place, although it was ultimately open to the democratic legislature to change these rules following constitutional process.

These principles clearly guided the scheme of legislative power that Jennings put into the Ministers Draft.⁸⁹ This scheme provided the law-making power of the Parliament for the peace, order and good government of Ceylon, subject to two restrictions.⁹⁰ 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.⁹¹ Legislative power also included the power of constitutional amendment, provided that the amending legislation obtained a two-thirds majority in the House of Representatives and could not be presented for assent to the Governor-General unless this requirement had been met. This provision excluded judicial review of the legislative process because that would involve courts in parliamentary procedure.⁹² 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.⁹³ 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 1946,⁹⁴ 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.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸

A comparison of these two versions of the scheme shows that Jennings' draft was obviously more in line with his thinking on legislative power within the Westminster system, especially the exclusion of judicial review over the constitutional amendment procedure and the requirement of express words. Nevertheless, the eventual framework in Section 29, while providing for a stronger form of judicial review over constitutional amendments by the requirement of the Speaker's certificate rather than express words, did not categorically depart from the 'manner and form' model and this was why Jennings was able to agree to them at the time. In judicial interpretation, however, these small differences led to the transmogrification of Section 29 into an incoherent stipulation that pleased no one, and in the febrile atmosphere of nationalist politics in the 1960s, a gift for political opportunists and constitutional revolutionaries bent on doing away with the liberal democratic independence constitution. As M.J.A. Cooray has observed, 'The uncertainty which prevailed regarding the nature of the prohibition couched in section 29 (2) undoubtedly contributed to the inclination towards the replacement of the Constitution completely.'⁹⁹

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.¹⁰⁰ It appears that understanding these underlying principles of Section 29 required a capacity for theoretical sophistication that, in most cases, the judiciary did not possess. In a very early case, the decision of Basnayake, J. in *Kulasingam v. Thambiayah* (1948)¹⁰¹ suggested, as Jennings noted somewhat anxiously, that 'it is possible for a Court to take a view very different from that of the draftsman; for the draftsman knows what was intended while the Court has to interpret the letter of the law.'¹⁰²

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,'¹⁰³ 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’¹⁰⁴ 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.’¹⁰⁵ These comments appear to lack logical consistency inasmuch as they support *both* the substantive and procedural views with regard to the restrictions on legislative power, without apparent regard to the fact that if the constitution could be amended ‘only in certain respects’ (i.e., that it contained absolute limitations against its amendment), then the legislative power of constitutional amendment in Section 29 (4) could not, at the same time, extend to those absolutely entrenched provisions. There would have been no inconsistency in this position, however, if Tambiah, J. had referred to a constitutional entrenchment of certain matters against *ordinary legislation*, rather than the legislative power of *constitutional amendment*.¹⁰⁶

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.’¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹

As I have pointed out, this is not a matter in which the courts could have it both ways. Neither could either proposition – that the Ceylonese Parliament was sovereign or that the Ceylonese Constitution contained substantively and permanently entrenched provisions – stand alone, in view of the very nature of Section 29 reflecting a manner and form approach to legislative power. Lord Pearce’s comment about the inalterability of Section 29 (2) was of course *obiter*, but it did have momentous political consequences in convincing the Ceylonese Opposition about the need to establish a republic and to do so by way of a constitutional revolution, because that was the only method by which the purportedly ‘unalterable’ provisions shackling parliamentary sovereignty could be disposed of. It was ironic that his depiction of Ceylon as a sovereign state with a sovereign legislature was studiously ignored.¹¹⁰

It is perhaps appropriate to give Jennings the last word. In his note on *Ranasinghe*’s case, as noted above in the discussion on the effect of the Colonial Laws Validity Act, he strenuously maintained the Ceylon constitutional drafter’s point of view that the (Diceyan) conception of parliamentary sovereignty as applied to the British Parliament was not intended to apply to the Ceylon Parliament (although like a good lawyer he also outlined three possible ways of supporting the argument that Ceylon’s parliament was sovereign).¹¹¹ As he further argued, the Ceylon Parliament was designed by reference to the way the Westminster Parliament actually worked, in which although what was ‘sovereign’ was the ‘Queen-in-Parliament’ in theory, in practice the monarch is hardly ever present in the daily operation of the legislative process in the two Houses. The difficulty in ascribing sovereignty to a Parliament that is designed by reference to this legislative *practice* of Westminster, rather than the accident of history that produces the quasi-mystical *theory* of the ‘Queen-in-Parliament,’ is that it is impossible to locate the seat of sovereignty.

An Act of the Ceylon Parliament is not passed by the Queen in that Parliament; it is approved by the House of Representatives and the Senate and then assented to by the Governor-General, wherever he happens to be – possibly on an elephant in his home town, or in a boat above the singing fish in Batticaloa.¹¹²

As he wryly concluded, ‘it would have been better if the Judicial Committee had simply dismissed Dicey, with costs.’¹¹³

4. Conclusion

In this chapter I have attempted to shed some further light on Jennings' contribution to Commonwealth public law and constitutional theory through his work in Ceylon. The discussions about the nation and nationalism and about central concerns of constitutionalism in a communally plural democracy will have, I hope, relevance for constitutional reform debates in Sri Lanka, which continues to grapple with many of the same questions that Jennings and his colleagues dealt with at the moment of independence. More broadly, I hope the discussion of his work in Ceylon is useful in some way to the renewed interest 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.¹¹⁴

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.'¹¹⁵ 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'¹¹⁶ – 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.

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

² A.W. Bradley, 'Sir William Ivor Jennings: A Centennial Paper' (2004) *Modern Law Review* 67(5): pp.716-733 at p.717.

- ³ See Y. Ghai, 'A Journey around Constitutions: Reflections on Contemporary Constitutions' (2005) *South African Law Journal*: pp.804-31 at p.805.
- ⁴ Throughout this chapter I use 'Ceylon' instead of 'Sri Lanka' except where the context requires because this was the name of the country during the events addressed in this discussion.
- ⁵ H.A.I. Goonetilleke, 'Introduction' in W.I. Jennings (2005) *The Road to Peradeniya: An Autobiography* (Colombo: Lake House): p.vii; H. Kumarasingham (Ed.) (2015) *Constitution-Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: CUP): pp.1-19.
- ⁶ A. Tomkins, 'Talking in Fictions': Jennings on Parliament' (2004) *Modern Law Review* 67(5): pp.772-786 at p.722.
- ⁷ Bradley (2004): p.722.
- ⁸ See partial bibliography (only book-length works) in Jennings (2005): pp.271-276.
- ⁹ Jennings (2005): Ch.VII.
- ¹⁰ Ibid: Chs.VII, XII.
- ¹¹ Ibid: Ch.XII.
- ¹² S. Gunasekara, 'Cambridge by the Mahaweli: Peradeniya University', *The Island Midweek Review* (Sri Lanka), 29th April 2009.
- ¹³ Jennings (2005): Ch.VIII.
- ¹⁴ Ceylon State Council (1947) Sessional Paper VII.
- ¹⁵ C. Jeffries (1969) *O.E.G.: A Biography of Sir Oliver Ernest Goonetilleke* (London: Pall Mall Press): p.68.
- ¹⁶ Ibid: p.79-80.
- ¹⁷ Ibid: p.69.
- ¹⁸ 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.
- ¹⁹ W.I. Jennings (1953) *The Constitution of Ceylon* (3rd Ed.) (Bombay: OUP): p.vii.
- ²⁰ 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 will now be published for the first time on the 50th anniversary of his death on 19th December 2015 in H. Kumarasingham (Ed.) (2015) *Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: CPA).
- ²¹ Jennings (2005): p.165.
- ²² See W.I. Jennings (1961) *The British Commonwealth of Nations* (London: Hutchinson): p.28. On the decision of the Soviet Union in December 1948 to veto Ceylon's application for membership of the United Nations, see W.I. Jennings, 'The Dominion of Ceylon' (1949) *Pacific Affairs* 22(1): pp.21-33 at p.21-22.
- ²³ See A. Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution' in A. Welikala (Ed.) (2012) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Colombo: CPA): Ch.3. Also available at: <http://republicat40.org/wp-content/uploads/2013/01/The-Failure-of-Jennings'-Constitutional-Experiment-in-Ceylon.pdf>
- ²⁴ Cited in Marasinghe (2005): p.284.
- ²⁵ Cited in D. Cannadine (2002) *Ornamentalism: How the British Saw Their Empire* (London: Penguin): p.67. See also H. Kumarasingham (2013) *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I.B. Tauris): pp.133.
- ²⁶ Jennings (1961): p.116; Marasinghe (2005): p.305-306.
- ²⁷ W.I. Jennings (1958) *Problems of the New Commonwealth* (Durham, NC: Duke UP): pp.77-78, 82.
- ²⁸ Ibid: p.82; Marasinghe (2005): pp.307-309.
- ²⁹ Jennings (2005): pp.90-91.
- ³⁰ Ibid: pp.162-165.
- ³¹ Kumarasingham (2013): pp.117-118.
- ³² Attorney-General (1947-1951), Chief Justice (1951-1956). See A.R.B. Amerasinghe (1986) *The Supreme Court of Sri Lanka: The First 185 Years* (Colombo: Sarvodaya): pp.222-223.
- ³³ For discussions of the executive and the judiciary under the independence constitution see, respectively, Kumarasingham (2013): Ch.6 and M.J.A. Cooray (1982) *Judicial Role under the Constitutions of Ceylon / Sri Lanka* (Colombo: Lake House): Ch.4.
- ³⁴ Kumarasingham (2013): pp.4-9.
- ³⁵ M. Loughlin (1992) *Public Law and Political Theory* (Oxford: OUP): Ch.4.
- ³⁶ Ibid: p.59.
- ³⁷ Ibid: p.60.

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- ³⁸ Ibid.
- ³⁹ Ibid: p.140.
- ⁴⁰ Ibid: pp.139-165.
- ⁴¹ Ibid: pp.175-176.
- ⁴² Ibid: p.165.
- ⁴³ Bradley (2004): pp.724-725.
- ⁴⁴ M. Loughlin, 'Modernism in British Public Law, 1919-1979' (2014) *Public Law*: pp.56-67 at p.63.
- ⁴⁵ Loughlin (1992): p.167; see also W.I. Jennings (1967) *The Law and the Constitution* (5th Ed.) (London: Univ. of London Press): pp.305-315; W.I. Jennings, 'The Institutional Theory' in W.I. Jennings (Ed.) (1963 [1933]) *Modern Theories of Law* (London: Wildy & Sons): Ch.V at pp.70-71.
- ⁴⁶ Loughlin (1992): p.167.
- ⁴⁷ Ibid.
- ⁴⁸ Jennings (1963): p.68.
- ⁴⁹ Loughlin (2014): p.57.
- ⁵⁰ Ibid.
- ⁵¹ Ibid: p.59.
- ⁵² 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.
- ⁵³ 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.
- ⁵⁴ Loughlin (2014): p.56.
- ⁵⁵ See generally, G.L. Peiris (1999) *General Principles of Criminal Liability in Sri Lanka* (Colombo: Stamford Lake): Ch.1.
- ⁵⁶ R. Coomaraswamy (1984) *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society* (New Delhi: Vikas): p.13.
- ⁵⁷ Loughlin (2014): p.60.
- ⁵⁸ Ibid: p.63.
- ⁵⁹ Ibid: p.60.
- ⁶⁰ Ibid.
- ⁶¹ W.I. Jennings (1931) *Local Government in the Modern Constitution* (London: Charles Knight): p.3.
- ⁶² Jennings (1953): p.77.
- ⁶³ W.I. Jennings (1956) *The Approach to Self-Government* (Cambridge: CUP): p.110.
- ⁶⁴ Loughlin (1992): pp.133-137.
- ⁶⁵ A. Norton (1993) *Republic of Signs: Liberal Theory and American Popular Culture* (Chicago: Chicago UP): p.124.
- ⁶⁶ 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.6, esp. p.190; Welikala (2012): p.155-7.
- ⁶⁷ W.I. Jennings, 'Limitations on a 'Sovereign' Parliament' (1964) *Cambridge Law Journal*: pp.177-180 at p.177-178.
- ⁶⁸ Jennings (1953): p.79.
- ⁶⁹ *Liyanage v. R* (1967) AC 259.
- ⁷⁰ 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.
- ⁷¹ 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.'
- ⁷² Ibid: p.110.
- ⁷³ 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.
- ⁷⁴ 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.

⁷⁵ N. DeVotta (2004) *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford: Stanford UP).

⁷⁶ *R (on the application of Jackson) v. Attorney General* (2005) UKHL 56; *Thoburn v. Sunderland City Council* (2002) EWHC 195.

⁷⁷ Jennings (2005): p.68.

⁷⁸ A.V. Dicey (1915) *Introduction to the Study of the Law of the Constitution* (8th Ed.) (London: Macmillan): pp.37-38.

⁷⁹ N. MacCormick (1999) *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP): Ch.6 at p.80.

⁸⁰ Jennings (1967): pp.149-153.

⁸¹ *Ibid*: p.149.

⁸² *Ibid*: pp.152-153, emphasis in original.

⁸³ *Ibid*: p.149.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*: p.151.

⁸⁶ *Ibid*: pp.150-151.

⁸⁷ For a recent judicial assessment of the competing issues in relation to the amenability to ‘constitutional’ review of legislation of an elected ‘national’ legislature of limited competence in the UK and Scotland, see: *AXA General Insurance Ltd and Ors. v. The Lord Advocate and Ors.* (2011) UKSC 46: para.49 per Lord Hope. See also C.M.G. Himsworth, ‘*The Supreme Court reviews the Review of Acts of the Scottish Parliament*’ (2012) *Public Law*: pp.205-13.

⁸⁸ Jennings (1967): p.150.

⁸⁹ 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.

⁹⁰ There were a number of other restrictions as well but most ceased to have effect after independence: see Jennings (1953): pp.70-79.

⁹¹ 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.

⁹² Jennings (1964): p.178.

⁹³ 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.55-6.

⁹⁴ The original version of Section 29 as reflected in the Ceylon (Constitution) Order in Council (1946) read as follows. The amendments made by ss.2 and 3 of Act No 29 of 1954 to s.29(1) are not relevant to the present discussion and are not included (but see fn.123, *supra*).

29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall –

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not make liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) alter the constitution of any religious body except with the consent of the governing authority of that body.

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

(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or any other Order of Her Majesty in Council in its application to the Island: Provided that no Bill for the amendment or repeal of any provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

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

⁹⁵ Section 29 (2) and (3).

⁹⁶ Jennings (1964): pp.178-179.

⁹⁷ Ibid.

⁹⁸ Ibid: p.197; Jennings (1953): pp.201-203.

⁹⁹ Cooray (1982): p.67.

¹⁰⁰ M. Gordon, '*The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade*' (2009) *Public Law*: pp.519-543 at pp.542-3; 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.

¹⁰¹ *Kulasingham v. Thambiayah* (1948) 49 NLR 505. This case did not involve Section 29.

¹⁰² Jennings (1953): p.x.

¹⁰³ *The Queen v. Liyanage* (1962) (1962) 64 NLR 313 at 350.

¹⁰⁴ *Piyadasa v. The Bribery Commissioner* (1962) 64 NLR 385 at 387, emphasis added.

¹⁰⁵ Ibid: 388, emphasis added.

¹⁰⁶ See also the discussion of this case, *contra* the argument in this chapter, in C.F. Amerasinghe, '*The Legal Sovereignty of the Ceylon Parliament*' (1966) *Public Law*: pp.65-96 at pp.77-79. Perhaps Dr Tambiah could have benefitted from closer study of the works of his co-author in I. Jennings & H.W. Tambiah (1952) *The Dominion of Ceylon: The Development of its Laws and Constitution* (London: Stevens & Sons).

¹⁰⁷ *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 792.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid: p.789.

¹¹⁰ I have addressed these issues extensively elsewhere: Welikala (2012).

¹¹¹ Jennings (1964): pp.179-180.

¹¹² Ibid: p.179.

¹¹³ Ibid: p.180.

¹¹⁴ Bradley (2004): p.732.

¹¹⁵ Ibid: p.733.

¹¹⁶ Jeffries (1969): p.10.