

**CONSTITUTION-MAKER:
SELECTED WRITINGS
OF SIR IVOR JENNINGS**



Edited by H. Kumarasingham
CAMDEN FIFTH SERIES
VOLUME 46

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*H. Kumarasingham,
October 2014*

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INTRODUCTION

'We have the advice of the greatest living authority on Constitutional Law regarding the British Commonwealth – Dr Jennings', proclaimed the Leader of the Ceylon Senate in December 1947 in a parliamentary debate on the future constitutional design of the island.¹ So in thrall to William Ivor Jennings was the powerful and soon to be first prime minister of independent Ceylon, D.S. Senanayake, that in the same debate it was contemptuously suggested that his initials stood for 'Dominion Status Senanayake', a form of independence that Jennings advocated as Senanayake's pervasive and persuasive adviser.² Senanayake was never in doubt as to the value of Jennings and publicly expressed his gratitude by delivering to the Englishman a knighthood, on his advice, for services to Ceylon, less than six months later in the King's 1948 Birthday Honours List.

Ivor Jennings was born in Bristol on 16 May 1903. He had a remarkable career stretching across the world as a constitutional scholar in the heyday of decolonization before his death in Cambridge at just sixty-two on 19 December 1965.³ After studying mathematics and law, he obtained a first-class degree for the law tripos in 1924–1925 while at St Catharine's College, Cambridge. After a short time as a law lecturer at the University of Leeds, he went to the London School of Economics (LSE) in 1929, where he rose to become Reader in English Law. While at the LSE, Jennings published some of his most famous and influential works, including *The Law and the Constitution* (1933), *Cabinet Government* (1936), and *Parliament* (1939).

After just over ten years at the LSE and a visiting professorship (in political science) at the University of British Columbia, Jennings accepted a job in Ceylon, becoming the first vice-chancellor of the University of Ceylon once full university status was achieved in 1942

¹ *Parliamentary Debates (Hansard)*, Ceylon Senate, vol. 1, p. 172, 2 December 1947. The speaker was Sir Oliver Goonetilleke.

² *Ibid.*, p. 174.

³ For greater detail regarding information on Jennings and his background, see his autobiography, posthumously edited and introduced by H.A.I. Goonetilleke, *The Road to Peradeniya: an autobiography* (Colombo, 2005), and, especially concerning his public law contributions, A.W. Bradley, 'Sir William Ivor Jennings: a centennial paper', *Modern Law Review*, 67, no. 5 (September 2004), pp. 716–733.

(it had previously been a college with affiliation to the University of London). With characteristic ambition and formidable brio, he spearheaded the university's move in 1952 to its new site in Peradeniya.⁴ Jennings proved himself an adroit administrator and he moved from Ceylon back to Cambridge to become Master of Trinity Hall, a position that he held until his death, along with a term as the university's vice-chancellor (1961–1963) when that position rotated among the college heads.

Further academic and professional honours came his way. He was made a King's Counsel in 1949, and was elected a fellow of the British Academy in 1955. He delivered the 1949 Waynflete lectures at Magdalen College, Oxford, on the Commonwealth in Asia (later published as a book in 1951). In 1950 he held a visiting professorship at the Australian National University. He was Chairman of the Royal Commission on Common Land from 1955 to 1958. In 1958 he delivered a lecture series on 'Problems of the new Commonwealth' at Duke University (published as a book the same year) and was also made a bencher of Gray's Inn. Finally, he was appointed to the prestigious Downing Professorship in the Laws of England at Cambridge in 1962.

Jennings contributed significant international advice to universities and higher education institutions in Ceylon, Hong Kong, India, Jamaica, Kuwait, Malta, Malaya, and Uganda. Meanwhile, his publishing endeavours matched his professional ones. In addition to the books mentioned above (which have since seen multiple updated editions), came such works as *The British Constitution* (1941), *The British Commonwealth of Nations* (1948), *The Constitution of Ceylon* (1949), *Constitutional Laws of the Commonwealth* (1952), *The Queen's Government* (1954), *The Approach to Self-government* (1956), *Constitutional Problems in Pakistan* (1957), and *Party Politics* (3 vols, 1960–1962). These editions were accompanied by an almost endless succession of critical articles in leading international journals of multiple disciplines, covering subjects as diverse as English housing legislation, emergency regulations during wartime, constitutional interpretation in Canada, utilitarianism, and prime ministerial removals.⁵

⁴For Jennings' time at Peradeniya see his posthumously published *The Kandy Road*, edited and introduced by H.A.I. Goonetilleke (Peradeniya, 1993).

⁵Ivor Jennings, 'Courts and administrative law: the experience of English housing legislation', *Harvard Law Review*, 49, no. 3 (January 1936), pp. 426–454; *idem*, 'The Emergency Powers (Defence) (No. 2) Act, 1940', *Modern Law Review*, 4, no. 2 (October 1940), pp. 132–136; *idem*, 'Constitutional interpretation: the experience of Canada', *Harvard Law Review*, 51, no. 1 (1937), pp. 1–39; *idem*, 'A plea for utilitarianism', *Modern Law Review*, 2, no. 1 (June 1938), pp. 22–35; *idem*, 'Removal of a premier', *Cambridge Law Review*, 21, no. 2 (November 1963), pp. 169–172.

An international constitutional authority

The above description points to a substantial and prodigious academic career. However, this does not reveal the full influence of this Cambridge public law don. Ivor Jennings commanded critical attention as an adviser beyond Britain to nations mostly of the Commonwealth, especially those emerging from imperial rule. From at least Easter 1938, when he gave advice to a Canadian Royal Commission on dominion-provincial relations, until his death, Jennings was one of the most sought-after constitutional experts in the world. He advised on great and small issues alike, and, at least as viewed from his papers, his advice was requested on specific constitutional, parliamentary, political, and legal issues by Canada, Ceylon, Cyprus, Eritrea, Gambia, Ghana, Gibraltar, Malaya, the Maldives, Malta, Nepal, New Zealand, Nigeria, Pakistan, Rhodesia and Nyasaland, Singapore, South Africa, and Sudan. The degree of involvement in the countries ranged from being a member of the Reid Commission responsible for drafting a constitution for the Federation of Malaya, through acting as unofficial adviser to D.S. Senanayake, producing memoranda on financial issues in western Nigeria, functioning as a paid advocate in a fundamentally important case for Pakistani democracy, and giving an opinion on the advisability of South Africa becoming a republic, to providing private advice solicited by the Governor-General of New Zealand on what to do in the event of a hung parliament.

Such a varied and topical agenda allowed Jennings an opportunity to engage and contribute beyond the limited confines of academic scholarship. Perhaps surprisingly, but no doubt excitingly for him, he readily and more often than not strayed beyond narrow terms of reference or questions of law. This allowed him to generate personal judgments on all manner of issues, especially political questions. As he remarked, for example, in his autobiography, about his fourteen years in Ceylon, ‘though I have often been consulted by the Government of Ceylon on matters within my field of study, I remember only one occasion on which I was asked to advise on “the law”’.⁶ As the selected documents will show, Jennings engaged in political realities (and expediencies) when dealing with the array of questions put before him and did not let academic niceties or legal minutiae restrict the expanse of his assessments or the style of his analysis.

When discussing British constitutional issues Jennings was and is still regularly cited, even if only in criticism or in reference to his

⁶Jennings, *Road to Peradeniya*, p. 70. The question was on martial law in the event of a Japanese invasion of the island, and was raised at Easter 1942, not long after he arrived.

constitutional authority. He remains on the reading list of many constitution-related courses and is supposedly read by the Prince of Wales and Buckingham Palace.⁷ Lord Butler of Brockwell, who held the constitutionally omniscient role of Cabinet Secretary from 1988 to 1998, revealed in retirement that Jennings was someone ‘on whom I was brought up’, a sentiment that was probably shared by that generation of Oxbridge civil service panjandruns.⁸ The Commonwealth scholar D.A. Low despaired that the works of Jennings were not at hand at Yarralumla⁹ before Sir John Kerr sacked Gough Whitlam as Australia’s prime minister in 1975,¹⁰ though they were used by the solicitor-general, Maurice Byers, to comprehend the Crown’s powers during this infamous crisis.¹¹

The British journalist and political historian Peter Hennessy mockingly described Michael Heseltine as giving an impression of being a ‘Jermyn Street Sir Ivor Jennings’ on account of his appearance on *Panorama*, where he ponderously explained his dramatic resignation on constitutional grounds from the Thatcher Cabinet in January 1986.¹² In 2007, Anthony King included Jennings in his ‘Canonical Sextet’ next to Walter Bagehot, A.V. Dicey, Sidney Low, Leo Amery, and Harold Laski as authors who ‘define[d] for the British, over a long period of years, what their uncoded constitution was and what it meant’.¹³ Martin Loughlin credits Jennings as one of the pioneers of the ‘functionalist’ method and approach to public law, which, rather than viewing law and politics as separate, compartmentalized entities, understood these fields as intimately connected and complementary, and sought to reinforce the view that the constitution is merely ‘an object of description’ that could only be properly understood by an analytical study of how critical state institutions actually functioned.¹⁴ David E. Smith believes, with comparable application to other countries, that selective reference to scholars such as Jennings in

⁷D.A. Low, ‘United Kingdom’, in David Butler and D.A. Low (eds), *Sovereigns and Surrogates: constitutional heads of state in the Commonwealth* (London, 1991), p. 15.

⁸Lord Butler of Brockwell, review of Nevil Johnson, *Reshaping the British Constitution: essays in political interpretation*, *English Historical Review*, 121, no. 490 (February 2006), p. 265.

⁹The Governor-General of Australia’s official residence in Canberra.

¹⁰D.A. Low, ‘Introduction: Buckingham Palace and the Westminster model’, in D.A. Low (ed.), *Constitutional Heads and Political Crises: Commonwealth episodes, 1945–85* (London, 1988), p. 18.

¹¹Paul Kelly, *November 1975: the inside story of Australia’s greatest political crisis* (Sydney, 1995), pp. 212–213.

¹²Peter Hennessy, ‘Motttram’s law and the efficiency of cabinet government’, *Political Quarterly*, 57, no. 2 (April 1986), p. 137.

¹³Anthony King, *The British Constitution* (Oxford, 2007), p. 15.

¹⁴Martin Loughlin, *The British Constitution: a very short introduction* (Oxford, 2013), p. 37, and Martin Loughlin, *Public Law and Political Theory* (Oxford, 1992), pp. 167–176.

Canada is done to employ his arguments on British practices for local objectives.¹⁵ Dennis Kavanagh, in a recent well-regarded collection devoted to British politics, places Jennings as one of the 'founding fathers of British political science'.¹⁶

Sir Roy Welensky happily interpreted a 1960 opinion from Jennings to mean that, constitutionally speaking, the politically complex 1953 Federation of Rhodesia and Nyasaland he led was essentially 'indestructible' (though it was, in fact, ultimately doomed). The Monckton Commission's ideas on any 'secession' were supposedly 'unsound' according to Jennings, which was music to Welensky's ears.¹⁷ The historian Joseph Fernando persuasively reasons that the Malaysian constitution was effectively drafted by one man – Ivor Jennings;¹⁸ while A.G. Noorani and Allen McGrath strongly claim that Jennings had a not insubstantial role in the demise of democracy in Pakistan before the advent of military rule in 1958.¹⁹ Even today, his name is seldom out of the Sri Lankan newspapers, either in commendation or condemnation.²⁰ Few would disagree with Asanga Welikala's assessment that Jennings' role must get 'the weight it deserves' in the constitutional set-up of independent Ceylon.²¹

Historical influence

For historians of Britain, empire, decolonization, and Commonwealth, the benefits of examining Jennings and his work are threefold. First, Jennings is particularly useful for his guidance on the existence of conventions. He asked three questions: were there any precedents for these conventions; did the actors in those precedents believe they were bound by them; and what was the reason behind such conventions?²²

¹⁵David E. Smith, *The Invisible Crown: the first principle of Canadian government* (Toronto, 2013), p. 18.

¹⁶Dennis Kavanagh, 'Antecedents', in Matthew Flinders, Andrew Gamble, Colin Hay, and Michael Kenny (eds), *The Oxford Handbook of British Politics* (Oxford, 2009), pp. 29–30.

¹⁷J.R.T. Wood, *The Welensky Papers: a history of the Federation of Rhodesia and Nyasaland* (Durban, 1983), pp. 838 and 842.

¹⁸Joseph Fernando, 'Sir Ivor Jennings and the Malayan Constitution', *Journal of Imperial and Commonwealth History*, 34, no. 4 (2006), pp. 577–597.

¹⁹A.G. Noorani, 'Court martial: the great betrayal', *Dawn*, 27 October and 1 November 2008; Allen McGrath, *The Destruction of Pakistan's Democracy* (Karachi, 1996).

²⁰A recent article by Rajan Philips gives a good overview of the issues: 'From Jennings to Geneva: Sri Lanka's tortuous decline', *The Island*, 15 March 2014.

²¹Asanga Welikala, 'The failure of Jennings' constitutional experiment in Ceylon: how "procedural entrenchment" led to constitutional revolution', in Asanga Welikala (ed.), *The Sri Lankan Republic at 40: reflections on constitutional history, theory and practice* (Colombo, 2012), p. 194.

²²Ivor Jennings, *The Law and the Constitution*, 5th edition (London, 1959), p. 136.

Though there are limitations to this assessment as identified by scholars including Turpin and Tomkins in their recent edition of *British Government and the Constitution*,²³ the 'tripartite specification' of testing the establishment of conventions has nonetheless been utilized by British and Commonwealth courts, including in a case from 2012 investigating the constitutional influence of the Prince of Wales.²⁴ Jennings' analysis of the observance of conventions, as Bradley and Ewing acknowledge, was in favour of political realities over legal shibboleths.²⁵ Conventions were, as Jennings famously proclaimed in *Law and the Constitution*, 'the flesh which clothes the dry bones of the law'.²⁶ The documents selected in this volume clearly show his predilection for 'the flesh'.

Secondly, an area of particular interest for imperial and political historians is Jennings' observance of the Crown and Cabinet and their political prerogatives. His work has clearly aged; in particular, his conception of party government and parliament is, as Bogdanor argues, 'out of date'.²⁷ Nonetheless, as Brazier notes, despite the separation from events, Jennings' work has historical value. Its utility is its inventory and deployment of constitutional precedents from at least the seventeenth century.²⁸ In fact, arguably Jennings' most preferred source for his writings were historical – the memoirs of political and constitutional practitioners. Waiting for a train in York he bought for 5 shillings the reminiscences of Sir Almeric Fitzroy, the Clerk of the Privy Council from 1898 to 1923, and thus began his massive thirst for historical precedents and ideas: 'From it I discovered the immense volume of Constitutional Law which was not in the books but which yet regulated the whole practice of government. I went round to the best second-hand bookshop in Leeds next day and ransacked it for political biographies.'²⁹

Cabinet Government is clearly a work that relies on these biographies. Echoing Loughlin's comment above about Jennings being descriptive and practical, Herman Finer, the eminent scholar of government, commented in his review of the 1936 first edition: 'As a result of Dr Jennings' work, there is a code available for Prime Ministers

²³Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 7th edition (Cambridge, 2011).

²⁴Geoffrey Marshall, *Constitutional Conventions: the rules and forms of political accountability* (Oxford, 1986), p. 10; *Evans v. Information Commissioner* [2013] UKUT 313 (AAC) (18 September 2012).

²⁵A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 15th edition (Harlow, 2011), p. 24.

²⁶Jennings, *Law and the Constitution*, p. 81.

²⁷Vernon Bogdanor, *The Coalition and the Constitution* (Oxford, 2011), p. 142.

²⁸Rodney Brazier, *Constitutional Practice: the foundations of British government*, 3rd edition (Oxford, 1999), pp. 3–4.

²⁹Jennings, *Road to Peradeniya*, p. 69.

and Ministers, the Crown and the people – a veritable treasury for constitutional lawyers and political scientists.³⁰ Jennings harnessed examples from courtiers and counsellors around sovereigns including Queen Victoria and George V to assert judgements on less than clear-cut topics such as the personal prerogatives of the Crown to dissolve Parliament, refuse assent, and sack ministers, and the exercise of patronage.³¹ For Jennings, the Queen and her realms and responsibilities could never be treated as an academic legalistic case to ‘be read like metaphysics’, however great the temptation.³² In his view these powers were important. The renowned Canadian constitutional expert Eugene Forsey was convinced that Jennings believed that even the perceptive Bagehot had ‘certainly underestimated the real power of the Crown’.³³ Even in republican India, Jennings’ work on the Crown and the historical precedents that he disseminated were cited, for example, by the attorney-general and other Indian constitutional luminaries to diminish the political aspirations of the president vis-à-vis the prime minister and Cabinet in 1951.³⁴

The third area where Jennings was arguably at his most influential was in the shaping of constitutions in the Commonwealth and beyond, owing to his being the most physically and intellectually available expert on constitution-making during the high tide of decolonization of the British Empire. As a study of democracy and responsible government in Asia and the Pacific concluded, individuals such as ‘Ivor Jennings’ were ‘important at the inception of Westminster’, as the British system is heavily reliant on the first two of Jennings’ contributions outlined above – conventions and the powerful personalities who exercise them.³⁵ Jennings was seen as the man who could get things done. He was even supposedly sought by a movement that wanted Natal to secede from South Africa in the 1960s.³⁶ Related to this broader point is the fact that Jennings was also the authority who directly drafted (or at least recommended to the states he advised) a Westminster constitutional system – a system readily exported,

³⁰ Bradley, ‘Sir William Ivor Jennings’, p. 716.

³¹ Ivor Jennings, *Cabinet Government*, 3rd edition (Cambridge, 1959), pp. 394–450.

³² Ivor Jennings, *The Queen’s Government* (London, 1954), p. 37.

³³ Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto, 1943), p. 109.

³⁴ H. Kumarasingham, *A Political Legacy of the British Empire: power and the parliamentary system in post-colonial India and Sri Lanka* (London, 2013), p. 83.

³⁵ Haig Patapan and John Wanna, ‘The Westminster legacy: conclusion’, in Haig Patapan, John Wanna, and Patrick Weller (eds), *Westminster Legacies: democracy and responsible government in Asia and the Pacific* (Sydney, 2005), p. 255.

³⁶ *The Times*, 10 October 1960.

easily manipulated, and evasive of comprehensive description.³⁷ As he commented in *The Approach to Self-government*, 'wherever Britain has ruled, her constitutional ideas prevail, and [...] our [Britain's] task is eased because we have to adapt those ideas to local conditions'.³⁸ Jennings, as I have argued elsewhere, was seen, and saw himself, as a spiritual guide and guru advocating 'Eastminster', an experiment of the Westminster-derived model in Asia, for territories emerging from British rule in the region.³⁹

Jennings functioned in an era of elites, both British and indigenous, and operated if not at their behest then comfortably from their verandas. This gives a certain understanding to his famous statement that the 'people cannot decide until someone decides who are the people'.⁴⁰ Jennings advised and was employed by those who made those decisions and he was their expert. As Andrew Harding argues about Jennings in Malaya, though he was the 'dominant intellectual force in the drafting process', recognized for his 'unique blend of academic brilliance, leadership, practical wisdom, and sheer hard work', the method of constitution-making by experts was 'surprising' compared to the elected Indian Constituent Assembly only a few years earlier.⁴¹ Although Jennings consulted, travelled, and read widely, and was an adviser to assemblies, his preferred method was cloistered hard work following a perceived or real legal brief. As his obituary in *The Times* noted, 'he never spared himself' and operated with 'unusual powers of clear thinking, concentration [and] logical analysis'. Perhaps this was due to his having little time for anything but work: the dedicated don recorded his only recreation as 'books'.⁴² Though frequently mentioned in the press either as author or subject, his inclination and skills tended to lend themselves to private rather than public constitutional assignments.

While he was not their creature, the sultans and the Savile Row-suited could expect a sympathetic ear, as Jennings often looked to traditional rulers and the surrounding elites as a substitute for perceived democratic deficits, in the hope that they might eventually conform to British ideals. In Nepal, for example, Mara Malagodi reflects that 'Jennings was convinced that a modified Westminster

³⁷H. Kumarasingham, 'Exporting executive accountability: Westminster legacies of executive power', *Parliamentary Affairs*, 66, no. 3 (2013), pp. 579–596.

³⁸Jennings, *Approach to Self-government*, p. 20–21.

³⁹Kumarasingham, *Political Legacy of the British Empire*; H. Kumarasingham, 'Constitution making and decolonisation in the Eastminsters', in H. Kumarasingham (ed.), *Constitution Making in Asia: decolonisation and state-building in the aftermath of the British empire* (London, 2015).

⁴⁰Jennings, *Approach to Self-government*, p. 56.

⁴¹Andrew Harding, *The Constitution of Malaysia: a contextual analysis* (Oxford, 2012), p. 31.

⁴²*The Times*, 20 December 1965.

model would be easy to transplant in Nepal assuming that the Nepali constitutional edifice would revolve around the principles of constitutional monarchy as expounded in the UK.⁴³ This is not to say that he was always appreciated. The Governor of Ceylon, Sir Andrew Caldecott, told London in 1944 that, 'however great an authority on the British constitution', Jennings had limited knowledge of Ceylon and was 'not a legal draftsman'.⁴⁴ Meanwhile, the formidable Kenneth Roberts-Wray, legal adviser at the Colonial Office, thought in late 1945 that Jennings' draft for Ceylon 'would be quite useless as a Constitution' and 'must be started *de novo*', which did not happen.⁴⁵

As a scholar of English public law, Jennings is still quoted, critiqued, and drawn upon by public law scholars. His famous critique of Dicey having too narrow and conservative a view of the constitution is still utilized.⁴⁶ He encouraged generations of his students and colleagues to look beyond narrow legal definitions. As the principled public law scholar John Griffith explained, recalling lectures by his old teacher at the LSE from decades before, 'He taught me to see the important distinction between definition and description'.⁴⁷ This was a clear Jennings axiom, which he employed constantly in practice with his constitution-making and advice. It sometimes put him at odds with legal doctrines and their associated luminaries, but it also helped promote a career beyond the legal-academic parapet. Perhaps most prominently, Jennings' place in public law was illustrated by a special centenary issue of the *Modern Law Review* in September 2004, entitled 'Sir Ivor Jennings and the development of public law'. The articles in this special issue of a journal for which Jennings had been a regular contributor and editor covered many areas, including Cabinet, Parliament, public law as a discipline, his academic career, and his major English law publications.⁴⁸

As Loughlin commented in his introduction, the issue served not to celebrate Jennings' career but instead to assess his significance

⁴³Mara Malagodi, 'Constitutional developments in a Himalayan kingdom: the experience of Nepal', in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (New Delhi, 2013), p. 93.

⁴⁴Sir Andrew Caldecott to G.E.J. Gent, 6 February 1944, CO 54/986/5/1, no. 104, in K.M. de Silva (ed.), *Sri Lanka, Part I: the Second World War and the Soulbury Commission 1939-1945*, British Documents on the End of Empire, Series B, vol. II (London, 1997), p. 282.

⁴⁵Note by J.B. Sidebotham, 14 November 1945, CO 54/986/6/4, in K.M. de Silva (ed.), *Sri Lanka, Part II: towards independence 1945-1948*, British Documents on the End of Empire, Series B, vol. II (London, 1997), p. 164.

⁴⁶For example, see J.W.F. Allison, 'Editor's introduction', in A.V. Dicey, *The Law of the Constitution*, vol. I, The Oxford Edition of Dicey (Oxford, 2013), p. xxviii.

⁴⁷John Griffith, 'A pilgrim's progress', *Journal of Law and Society*, 22, no. 3 (September 1995), p. 411.

⁴⁸See *Modern Law Review*, 67, no. 5 (September 2004).