

The Appointment of the Soulbury Commission

A summary of the action taken by the Board of Ministers to secure a reform of the Constitution is given in a memorandum sent to the Secretary of State for the Colonies, and signed by all the Ministers on March 19, 1937¹. The purpose of this memorandum, the first by the "homogeneous" Board of Ministers, was to reopen the question. The reply took the form of an instruction to the new Governor, Sir Andrew Caldecott, "carefully to examine the constitutional position, and when I had time to form conclusions and to acquaint myself with the views of all sections of opinion in the Island, to submit any recommendations that I might desire to make for his (Lord Harlech's) consideration."² Sir Andrew received memorials from 15 bodies and deputations from 11 and produced his recommendations. He expressed doubt whether they could be adopted "with the general consent of all important interests in Ceylon." He added that the appointment of a Commission was urged by some and deprecated by others.

"If one were appointed I would suggest that it should not invite or accept further representations, but work and find on those already received. Every opportunity has been given for the putting forward of every sort of view from every quarter, and it would be to no advantage to provide the opportunity for vain repetition; it would in fact merely add to the time and cost of a Commission."³

The Secretary of State asked that the proposals be debated in the State Council,⁴ and they were so debated.

There was apparently no further correspondence until February 1941 when the Board of Ministers asked to be informed of the position⁵. On the 1st September, 1941, the Governor communicated the text of a declaration which in effect stated that, after the war, the position would be examined by means of a "Commission or Conference."⁶ A month later the Board of Ministers protested that the procedure would involve delay, that a Commission or Conference was unnecessary because the Governor had already fully examined

1. Correspondence between the Ministers and the Governor regarding the Ceylon Constitution, March-May, 1937. (SESSIONAL PAPER XI of 1937), pp. 1-6.

2. Governor's despatch dated 13th June, 1938, and Secretary of State's despatch dated 10th November, 1938, regarding the Ceylon Constitution (SESSIONAL PAPER XXVII of 1938) p.3.

3. *Ibid.*, p.14.

4. *Ibid.*, p. 16

5. Correspondence of the Board of Ministers with the Secretary of State and the Governor, 1941-43 (SESSIONAL PAPER XIII of 1943), No. 1.

6. *Ibid.*, No. 5.

the position and had made his recommendations, and that a Commission or Conference was most undesirable because, while it was not likely to produce any fresh material, "it will undoubtedly create much bitterness and ill-will among the various sections of the people of the country."⁷ The Secretary of State replied on the 26th October that "His Majesty's Government had reluctantly reached their conclusion that on account of wide measures of local disagreement no substantial changes in the existing Constitution could be introduced without further opportunity for examination of the conflicting views of the various interests concerned, which is impracticable in war conditions. . . ." The Declaration was therefore unchanged and was communicated to the State Council on the 28th October⁸. It became known subsequently as "the Declaration of 1941." There is no reason to doubt that in October 1941 His Majesty's Government contemplated—

- (i) that there would be a commission or conference ;
- (ii) that it would meet after the war ; and
- (iii) that the conflicting views of the various interests concerned would be examined.

The third point was not specifically mentioned in the Declaration of 1941, but it was given in the reply of the 26th October.

Between 1941 and 1943, however, the situation altered. The Japanese entered the war in December, 1941 ; Malaya and Burma were over-run early in 1942 ; and the Japanese seemed to be approaching India and Ceylon. The result in India was the complete change of policy represented by the sending of the Cripps Mission. Its failure was followed by disorder and the imprisonment of the Congress leaders. In Ceylon the State Council, in March, 1942, demanded a promise of Dominion Status and requested that Sir Stafford Cripps be instructed to visit the Island. This was refused, but the State Council and the Ministers chose the course of collaboration with the Commander-in-Chief and the Imperial forces. Henceforth the Ministers made a strong point of the assistance given by Ceylon to the war effort and, rather obliquely but nevertheless clearly, drew a contrast between Ceylon and India. In the telegram of 11th January 1943⁹ in which they rejected the proposed declaration of December 1942¹⁰ the Ministers said: "Publication of your message would certainly evoke criticism that in order to obtain promises it is necessary to extort them by non-cooperation rather than to earn them by co-operation." Henceforth, too, His Majesty's Government felt it necessary to stress the assistance rendered by Ceylon, and paragraph (8) of the Declaration of 1943 was devoted wholly to this point.

7. *Ibid.*, No. 6A.

8. *Ibid.*, No. 10A.

9. *Ibid.*, No. 20.

10. *Ibid.*, No. 22A.

From the point of view of the Ministers and the majority of the State Council, the Declaration of 1941 was of no significance whatsoever. It merely said that there would be a commission or conference after the war. The Ministers must have thought this magnificent gift to be a Trojan horse. A commission (or conference) would enable the "interests" to ask for the moon in the hope of getting a star or two. In order to get a star or two they would have to blacken the face of the sun, and the sun would retaliate by swearing at the whole planetary system. Or, in the more prosaic language of the Ministers, "it will undoubtedly create much bitterness and ill-will among the various sections of the people of the country."

II

The declaration made on the 26th May, 1943¹¹, usually known as the Declaration of 1943, is a more comprehensive and detailed document. It was not, however drafted with the precision of language that one might expect from a statement so important. It appears to have been written by several hands, a defect almost inevitable in "political" documents. It must not in fact be treated as a contract or read according to the rules of interpretation. The primary question is not what the Declaration says but what it was intended to say. What the Ministers understood it to say is expressed in the statement read to the State Council by its Leader on the 8th June 1943.¹²

The question which came in issue was a very narrow one. On the 8th June 1943 the Ministers said that the Declaration "is in essence an undertaking that if the Board (of Ministers) can produce a Constitution which, in the opinion of a commission or conference satisfies the conditions set out in paragraphs (2) to (6) thereof, and if that Constitution is subsequently accepted by three-quarters of all the members of the State Council excluding the Officers of State and the Speaker, His Majesty in Council will put that Constitution into operation." On the 2nd February 1944 the Ministers submitted a Constitution which, in their opinion, satisfied paragraphs (2) to (6) of the Declaration and asked that it be given immediate consideration.¹³ On the 5th July 1944 His Majesty's Government announced its intention to appoint a commission to examine the Ministers' proposals¹⁴. It was added, however, that "it is the intention of His Majesty's Government that (the) appointment of (the) commission should provide full opportunity for consultation to take place with various interests including minority communities concerned with the subject of constitutional reform in Ceylon and with (the) proposals which (the) Ministers have formulated." In other words, the commission was not merely to examine whether the Ministers' draft Constitution satisfied para-

11. SESSIONAL PAPER XVII of 1943, p. 3.

12. SESSIONAL PAPER XVII of 1943, p. 3.

13. SESSIONAL PAPER XII of 1944, p. 9.

14. *Ibid.*, p. 3.

graphs (2) to (6) of the Declaration but was also to undertake a general examination of constitutional proposals. The Ministers had stated in October 1941 that such a commission would "undoubtedly create much bitterness and ill-will among the various sections of the people" and had protested against a commission being entrusted with such a function. In their statement of June 1943 they had stated what they understood what the commission would do and had clearly assumed that the commission would not exercise such a function. The Ministers considered, therefore, that in July 1944 the British Government had gone back upon its undertaking.

Their case did not rest upon the language of the Declaration of 1943. It rested fundamentally on the fact that in June 1943 they stated precisely and categorically what they understood that Declaration to mean. They were nevertheless allowed to proceed; they spent eight months in drafting the Constitution; yet thirteen months after they had begun the task and five months after they had finished it they were informed that the assumption on which they had begun had been false. Their case was that, if they were wrong in June 1943 they should have been told in June 1943 that they were wrong. Nowhere in the long correspondence does the Secretary of State answer that assertion, because there is no answer. The Ministers may have misunderstood the language of the Declaration of 1943: but they had stated what they understood it to mean and had specifically asked whether their interpretation was correct. They had not begun their work until they were informed that there was "nothing fundamentally irreconcilable" between the Declaration and their interpretation. In such circumstances it is really irrelevant whether they were wrong or not. That question is, however, worthy of being examined for its own sake.

III

The Declaration of 1943 begins by quoting *in extenso* the Declaration of 1941. This contained a reference to "so little unanimity," mentioned that there would be further examination and consultation by a commission or conference, and asserted that this could not be arranged under war conditions. After further consideration, His Majesty's Government had decided to give greater precision to this statement with the object of removing any doubts as to their intention.

Ought the Ministers to have inferred from this that the position was unchanged in substance and that His Majesty's Government proposed to have a commission or conference to discuss matters with various interests? The answer, surely, is in the negative. The Ministers had rejected this proposal in 1941, and there was no reason why they should accept it in 1943. This time their acceptance was necessary for, if they accepted, they would be entrusted with the task of framing a constitutional scheme. But under the Declaration of 1941, which they had rejected, they could have argued for Dominion status,

"freedom," "independence," or any other of the slogans of the political parties. If they accepted the Declaration, they could argue only for "full self government under the Crown in matters of internal civil administration" with rigid rules, laid down in paragraphs (2) to (6), relating to defence and external affairs. In the meantime the Cripps proposals had been made, Burma had been promised Dominion status, and Ceylon had deliberately chosen the path of cooperation. Paragraph (8) of the Declaration of 1943 specifically referred to Ceylon's assistance towards the war effort. Was that assistance to be rewarded by an undertaking less generous than that of 1941? This became apparently the official interpretation, but it is incredible that intelligent men could have intended to make such a suggestion. The Declaration of 1943 would be accepted only if it was an advance on that of 1941, and it would be an advance only if, as the Ministers themselves put it,¹⁵ Ceylon would be able "to draft our own Constitution and not be compelled to accept a Constitution thrust upon us by some commission sent from overseas." If a commission sent from overseas was to consult various interests, it would be able to recommend any sort of Constitution to meet what it considered to be the needs of the various interests: and if the commission was to be sent from overseas with an open mandate, why should the Ministers bind themselves hand and foot?

The Declaration of 1941 was inserted in the Declaration of 1943 as a preamble and it had the usual function of a preamble, to introduce the reader to the substance of the text. It also served to mark the change of policy which quite clearly had occurred. It was connected with the substance of the Declaration by the following passage:

"After further consideration His Majesty's Government have decided that it is in the general interest to give greater precision to the foregoing statement with the object of removing any doubts regarding His Majesty's Government's intentions."

This was quite clearly "eyewash." The statement that the post-war examination would be directed towards "full self-government in all matters of internal civil administration" was not a more precise statement of the Declaration of 1941. It was a new undertaking made not "in the general interest" and "with the object of removing any doubts," but in order to satisfy importunate Ceylonese politicians and to encourage them to continue collaboration, produce more rubber and generally assist in the war effort. The argument that the Declaration of 1943 went no further than the Declaration of 1941 was discovered *ex post facto* after the 2nd February, 1944.

The substance of the Declaration was in eight paragraphs. Paragraph (8) was commendation of Ceylon's war effort and may be omitted, remembering however that it was the real motive of the Declaration. The Ministers

¹⁵. SESSIONAL PAPER XVII of 1943, p. 4.

had hinted that, unless their request was granted, there might not be continued collaboration. The essence of the Declaration was in paragraphs (1) and (7), while paragraphs (2) to (6) contained precise conditions on which the offer in paragraphs (1) and (7) was made. Paragraph (1) gave the new undertaking that the post-war undertaking would be directed towards the grant of "full responsible government under the Crown in all matters of internal civil administration." Paragraphs (2) to (6) stated, with quite admirable precision of definition, what was to be done about defence and external affairs. Paragraph (7) was the climax:

"The framing of a Constitution in accordance with the terms of this declaration will require such examination of detail and such precision of definition as cannot be brought to bear so long as the whole energies of the Service and other departments of His Majesty's Government must remain focussed on the successful prosecution of the war. His Majesty's Government will however, once victory is achieved, proceed to the examination by a suitable commission or conference of such detailed proposals as the Ministers may in the meantime have been able to formulate in the way of a complete constitutional scheme; subject to the clear understanding that acceptance by His Majesty's Government of any proposals will depend, firstly, upon His Majesty's Government being satisfied that they are in full compliance with the preceding portions of this statement and, secondly, upon their subsequent approval by three quarters of all the members of the State Council of Ceylon excluding the Officers of State and the Speaker or other Presiding Officer."

This somewhat involved paragraph was translated by the Ministers as follows:—

"It is in essence an undertaking that if the Board (Of Ministers) can produce a Constitution which, in the opinion of a commission or conference, satisfies the conditions set out in paragraphs (2) to (6) thereof, and if that Constitution is subsequently accepted by three-quarters of all the members of the State Council excluding the Officers of State and the Speaker, His Majesty in Council will put that Constitution into operation."

Paragraph (7) does not exactly say this, but it does not say anything exactly. What is clear from paragraph (7) is—

- (i) that the Ministers may produce "detailed proposals;"
- (ii) that a suitable commission or conference will examine those proposals;
- (iii) that the proposals must satisfy paragraphs (1) to (6) or (2) to (6) of the Declaration;
- (iv) that acceptance by His Majesty's Government would depend on approval by three-quarters of the State Council.

What is not expressly stated is that His Majesty's Government would accept the proposals if the conditions were satisfied. This, however, is a reasonable inference. There is no purpose in asking for a three-quarters majority if in fact the Constitution is not to be accepted. The paragraph, further, did not say that the only function of the commission or conference would be to consider the Ministers' proposals, nor that His Majesty's Government would not consider other proposals. The proposals were "any proposals:" but it is impossible to assume that any rival proposals would obtain a three-quarters majority if the Ministers submitted proposals. The Ministers needed only two more votes to stop any other proposals from receiving the majority concerned. It may be that if the Ministers had been unable to submit proposals the commission or conference would consider any proposals: but the Ministers' statement allowed for that eventuality by the use of the word "if." Accordingly, the Ministers gave to the paragraph the only meaning of which it was reasonably capable.

The decision of His Majesty's Government in July 1944 to appoint a commission to consult "various interests" was thus in conflict not only with the Ministers' interpretation, but also with the most reasonable interpretation of the paragraph. This later interpretation by the Secretary of State could be justified only if

- (a) paragraph (7) was qualified by the Declaration of 1941; and
- (b) the Declaration of 1941 had the same meaning in a later Declaration which said something quite different in altered circumstances as it bore when it was first issued.

In other words, the argument must be that His Majesty's Government had promised nothing more in 1943 than that any proposals by the Ministers would be considered, and had at the same time limited the range of the proposals which the Ministers could put up. Under the Declaration of 1941 the Ministers could ask for Dominion status; under the Declaration of 1943 so interpreted "various interests" could ask for anything, but the Ministers had to satisfy paragraphs (1) to (6) before they could submit anything. It is an absurd argument and an incredible conclusion.

IV

The Ministers' case did not, however, rest primarily on the Declaration of 1943. It rested on the fact that this interpretation was not challenged until they actually submitted their proposals. What is more, they specifically asked whether their interpretation was correct. Their statement of June 8, 1943¹⁶, contained a general explanation, for consideration by the State Council, of the Declaration of 1943. This was telegraphed to London, and the

16. SESSIONAL PAPER XVII of 1943, pp. 4-5.

Secretary of State replied that he had read it "with great interest"¹⁷. The Ministers then asked specifically "whether our interpretation falls within the Declaration." In his reply¹⁸ the Secretary of State pointed out, in effect, that the conditions which made it impossible to examine the question of reform in detail in wartime, made it equally impossible to examine the Ministers' interpretation in detail.

"It would clearly have been impossible for His Majesty's Government to express their definite acceptance of the interpretation of those various matters which the Ministers' statement contained. (The) practical effect of such interpretation could only be seen in the detailed provisions of a new draft constitution, but the Ministers may be assured that I have not found in their statement anything which must be regarded as essentially irreconcilable with the conditions contained in His Majesty's Government's statement."

Whether there is force in this contention may be a matter of opinion; but clearly it related to the content of the draft Constitution, not to the procedure to be followed. Subsequent events suggest that the Ministers should have asked specifically whether paragraph (1) of their statement was correct; but it is probable that they had not suspected that it might be incorrect. They had given paragraph (7) of the Declaration its ordinary meaning, and they had no reason to suppose that His Majesty's Government took a different view. If in fact that Government did take a different view, however, the time for saying so was not after the draft Constitution was received, but before the procedure was begun. To allow the Ministers to start on a procedure which His Majesty's Government knew to be based on a misunderstanding would have been a shocking example of sharp practice. Except for those who believe in the tradition of *Albion perfide* the inevitable interpretation of the last document quoted is that the Ministers had correctly understood the procedure that was to be followed. That is, they would draft a Constitution: it would, after the war, be examined by a commission or conference to see if it satisfied conditions (2) to (6); if it did, it would be put to the State Council; and if three-quarters of that Council approved, it would be put into effect. The Ministers, on their side, had stated their position with complete frankness. On the 8th June 1943 they stated that they did not regard as necessarily binding the condition that the commission or conference would meet only after the war¹⁹. On this point, of course, they asked for no undertaking.

We may take it, then, that in June 1943 the Secretary of State agreed with the interpretation given by the Ministers. From June 1943 to February

1944 he gave no sign that he had changed his mind, though he had several opportunities for doing so. On the 16th November the Leader was questioned in the State Council on the procedure being followed²⁰. He explained that "a finished product" and not "an unfinished product" would come before the State Council in due course. It is clear from the context that the Ministers assumed that they would draft a Constitution, prove to a commission or conference that it satisfied conditions (2) to (6), and then submit it to the State Council for approval by a 75 per cent. majority. This was apparently received without any protest from the Chief Secretary, the Governor, or the Secretary of State. On the 12th January 1944 the Secretary of State sent two despatches²¹ in which he replied to representations received from a "Mr. X" and from the Ceylon Indian Congress. To the former he replied that it was the intention of His Majesty's Government "that the detailed proposals of any new scheme for constitutional reform formulated by Ministers should in due course be examined by a suitable commission or conference, and... I cannot anticipate such examination." In reply to the Congress he did not even mention the commission or conference "It will be appreciated that one of the conditions of acceptance by His Majesty's Government of a new constitutional scheme which may be formulated by the Ceylon Ministers, is that the scheme should eventually be accepted by three-quarters of all members of the State Council, and that I am not prepared to interfere with the discretion of Ministers as to when and in what manner they should formulate a scheme with this object."

There was not a hint that the commission or conference would do anything more than consider the Ministers' scheme or that any proposals other than those of the Ministers would be put before the State Council. In particular, it was not suggested that the Ceylon Indian Congress (in association with the Ceylon Tamils or otherwise) could formulate their own scheme and lay it before the commission or conference. This did happen in 1945, but it is clear enough that it was not contemplated in 1943. In other words, the policy was changed in 1944.

V

The Ministers submitted their scheme on the 2nd February 1944²². It was unanimous except that Mr. Mahadeva made a reservation on the representation clauses. The Ministers mentioned that they had provided in full detail for the powers referred to in the Declaration (*i.e.* Defence and External Affairs) and added "When the approval of His Majesty's Government to *these proposals* is received, the Ministers will be in a position to place *their*

17. *Ibid.*, p. 5.

18. *Ibid.*, p. 6.

19. *Ibid.*, p. 5.

20. Ceylon Hansard, 1944, pp. 2454-56.

21. SESSIONAL PAPER XII of 1944, pp. 8-9.

22. *Ibid.*, p. 9.

scheme before the State Council." In other words, when His Majesty's Government had agreed that conditions (2) to (6) had been satisfied, the Ministers would try to get the 75 per cent. majority. The Governor suggested in his reply²³ that this appeared to contemplate consideration "without previous examination by the stipulated commission or conference."

This appears to be a misunderstanding. The function of the commission or conference, in the Ministers' view, was to examine whether the five conditions were satisfied and to report to His Majesty's Government accordingly. It was after acceptance by His Majesty's Government that the scheme would be put before the State Council. The Ministers certainly asked for immediate consideration, for the reasons which they stated more fully in their reply of 9th February²⁴. For the reasons given, immediate consideration of the proposals was necessary. "This may be done in whatever manner (as suggested in the Declaration or otherwise) His Majesty's Government may consider to be the best." In August, 1944, the Secretary of State used this phrase²⁵ to suggest that the Ministers had no objection to such a Commission as was eventually decided upon. It is clear that the phrase carried no such implication. What was to be considered, by a commission, a conference, or otherwise, was the Ministers' scheme, not the proposals of "various interests." The purpose of the consideration was to ascertain whether the scheme satisfied the five conditions.

In his letter of the 3rd February, 1944²⁶, the Governor also alleged that "the Ministers have not formulated a complete constitutional scheme and have left crucial questions regarding the form of the legislature, franchise and representation to be considered otherwise than by the commission or conference required by the Declaration." This apparently referred to (1) the Ministers' statement that they had decided upon a unicameral system but had empowered the new legislature to establish a bicameral system if it so desired; (2) their statement that the representation clauses would be put separately, and that they would put alternative proposals if the requisite majority could not be obtained; and (3) the omission of franchise clauses. The Ministers had no difficulty in answering this criticism²⁷; but what is interesting is that this point was never followed up. The appointment of the Soulbury Commission was not justified on the ground that the scheme was not complete and crucial questions left unanswered, but on the ground that the Declaration of 1941, repeated in the Declaration of 1943, justified it. It is even more interesting that on the 3rd February 1944 the Governor should complain that there

was not a complete constitutional scheme to be considered by a commission or conference; for, if the Declaration of 1941 was to apply, the point was quite immaterial. Any proposals by the Ministers within the Declaration, as well as any proposals of any "varied interest," could be considered by a commission or conference. Though he did not specifically exclude any other proposals, the Governor on the 3rd February 1944 seems to have assumed that the function of the commission or conference was to consider a complete constitutional scheme formulated by the Ministers. On the other hand, the Governor's comment might be held to imply a belief that the commission or conference might consider "the form of the constitution" (the Ministers' phrase on the 2nd February) and not merely the question whether the five conditions were satisfied.

VI

There was an interlude between the 3rd February and the announcement of the 5th July that a commission would be appointed. There was, however, correspondence in which Mr. G. G. Ponnambalam was involved. On the 17th February he complained²⁸, on behalf of most of the minority members, that the Ministers' scheme had not been disclosed to them and that the Ministers' procedure prevented the Secretary of State from learning the minorities' point of view: he asked that the Ministers' proposals be submitted to the State Council before being considered. If the Declaration of 1941 held the field, the answer was simple: the minorities were among the "various interests" whose views would be examined by a commission or conference. In fact, however, the Secretary of State merely repeated the substance of paragraph (7) of the Declaration of 1943 and added that he could not interfere with the Ministers' procedure²⁹. Since the Ministers had already, in their statement of June 8, 1943, stated what they understood by this paragraph, and since that interpretation had apparently been accepted by the Secretary of State, there was for them nothing of special significance in this reply. There may, however, be something significant in the fact that it took the Secretary of State three weeks to reply to Mr. Ponnambalam's telegram. Sir Andrew Caldecott kept the reply for a week and summoned a conference of Ministers on the 14th March. He then explained that the telegram "could only mean that the minorities need not be apprehensive because the contents of the Ministers' scheme would be examined by a commission or conference which would ascertain their views and that any Constitution that might emerge from His Majesty's Government's consideration would still require acceptance by 75 per cent of the State Council."³⁰

23. *Ibid.*, p. 10.

24. *Ibid.*, p. 11.

25. *Ibid.*, p. 5.

26. *Ibid.*, p. 10.

27. *Ibid.*, p. 11.

28. *Ibid.*, p. 12.

29. *Ibid.*

30. *Ibid.*, p. 6.

This is the Governor's version, given through the Secretary of State, and we do not know what the Ministers understood him to say. The text of the reply follows almost verbally paragraph (7) of the Declaration, which had been interpreted by the Ministers in paragraph 1 of their statement of June 8, 1943. There was nothing in it to suggest that the Secretary of State was now repudiating that interpretation. That the Ministers did not understand that there had been such a repudiation seems clear from their protest of 11th July 1944³¹ after the announcement of the functions of the commission—in which they quote the reply to Mr. Ponnambalam to show that, at its date, the Secretary of State had *not* changed his mind. They had every justification for so understanding. Apart from the fact that the language was almost the same, the repetition of the requirement of a 75 per cent. majority seemed to show that it was the Ministers' scheme which was to be put to the State Council. If His Majesty's Government was to produce its own scheme after consulting the minorities, the requirement was absurd, for it would be quite impossible to get such a majority.

It is also to be noted that the reply to Mr. Ponnambalam on March 7th was almost the same as the reply to "Mr. X" on January 17th. The Governor did not summon the Ministers to interpret the latter to them but he did summon them to explain the former. The only inference to be drawn is that in the interval some proposals had been made, and perhaps some decision had been reached, which had not been made or reached on January 17th.

On the 4th April the minority members replied to the Secretary of State³² protesting strongly "against your appointing a commission or conference to consider only the constitutional scheme framed by Ministers . . ." In other words, the minority members understood the reply as the Ministers understood it, as a mere affirmation of the Declaration of 1943 as interpreted by the Ministers. Instead of passing on the message, Sir Andrew Caldecott took up this point, and on the 20th April the repudiation was for the first time put into writing³³:

"I have been unable to discover anything in the Declaration of His Majesty's Government or in the message from the Secretary of State . . . which would justify an inference that the promised examination by a suitable commission or conference of the Ministers' constitutional scheme will be without consideration of the position generally or without opportunity being afforded for examination of the conflicting views of the various interests concerned."

It will be noticed that this letter not only repudiates the Ministers' interpretation of the Declaration of 1943: it also makes plain that the commission

31. *Ibid.*, p. 4.

32. *Ibid.*, p. 12.

33. *Ibid.*, p. 13.

would examine the position generally and actually uses for the first time since the 26th October 1941 the phrase "various interests" which appeared later in His Majesty's Government's Declaration of the 5th July 1944. It cannot be doubted that on the 20th April, 1944, Sir Andrew Caldecott knew that the Soulbury Commission was to be appointed with wide terms of reference, though of course a decision of the War Cabinet was still required to give effect to the decision.

The correspondence was circulated to the Board of Ministers on the 2nd May³⁴. This curious procedure needs to be explained. The practice is to send a document to the relevant Officer of State or Minister, to send copies for information to the other Officers of State or Ministers likely to be interested, and to circulate one copy in a folder to the whole Board of Ministers. There is usually a mass of such documents in each folder, and every Minister has already seen every document in it which specially concerns his Ministry. If he has not seen the document already it is of no particular importance to him. It may therefore be assumed that the contents of folders are not studied with very great care and that folders are often in circulation for a long period. The Ministers do not explain what happened to this particular document, but it may perhaps be guessed from the pained surprise with which the Declaration of 5th July 1944 was received that none of the Ministers had realised that, mixed up, perhaps, with memorials from eccentric citizens, petitions for increased pay, telegrams giving information about the availability of materials and the visits of distinguished officials, and the rest of the miscellaneous despatches and telegrams of an ordinary folder, were the terms of reference of the Soulbury Commission. It was a queer way to inform the Ministers that paragraph 1 of their statement of June 8, 1943, was no longer accepted. The Secretary of State remarked in August, 1944³⁵:

"If the Ministers did not accept that interpretation of the commission's functions or found any divergence between it and the 1943 Declaration of His Majesty's Government I should have expected them to bring the matter to the immediate attention of His Majesty's Government."

The Ministers might have replied (but did not):

"If the Secretary of State did not accept the interpretation of the commission's functions given in our statement of June 1943, or found any divergence between it and the 1943 Declaration, we should have expected him to bring the matter to the immediate attention of the Ministers—and not left the denial to be expressed by the Governor in a paper circulated twelve months later with a mass of miscellaneous documents."

34. *Ibid.*, p. 6.

35. *Ibid.*, p. 6.

Since it is quite impossible to assert that the correspondence was in accord with the Declaration of 1943 as interpreted by the Ministers, Sir Andrew Caldecott must have thought that at the conference of March 14th the Ministers had acquiesced in the repudiation of their own document. The Ministers themselves say that they were not informed of the change of plan until the 5th July³⁶. It follows that this correspondence of April was unknown to them in July.

On June 16, too, they were misled by a "secret and personal" letter from Sir Andrew Caldecott to Mr. D. S. Senanayake³⁷ stating the "His Majesty's Government have decided to accede to the Ministers' request for an immediate examination of their constitutional scheme by appointment of a commission which, it is hoped, will visit Ceylon at the end of the year. This step does not of course involve any qualification of the conditions set forth in the Declaration made by His Majesty's Government in May, 1943, as to eventual approval by His Majesty's Government of any new Constitution." These conditions were, that the Constitution satisfy the preceding provisions of the Declaration—*i.e.* paragraphs (2) to (6)—and that the Constitution be subsequently accepted by 75 per cent. of the State Council. This was precisely what the Ministers had asked for. When the official statement was received on July 5,³⁸ however, contained the addition:

"It is the intention of His Majesty's Government that (the) appointment of (the) commission should provide full opportunity for consultation to take place with various interests including minority communities concerned with the subject of constitutional reform in Ceylon and with (the) proposals which (the) Ministers have formulated."

In other words, it was not the Declaration of 1943 but the Declaration of 1941 as interpreted on the 26th October, 1941. Mr. Senanayake protested, but Sir Andrew Caldecott stated that it was too late for representations to be made³⁹. In the correspondence which ensued, the Secretary of State relied on the Declaration of 1941 and made no attempt to meet the Ministers' main point, that the terms of reference were quite inconsistent with paragraph 1 of their statement of June 8, 1943, on the basis of which the Ministers had prepared their scheme.

VII

The Soulbury Commission threw some light on the subject by stressing the secrecy in which the Ministers' draft had been prepared⁴⁰:

36. *Ibid.*, p. 4.

37. *Ibid.*, p. 14.

38. *Ibid.*, p. 3.

39. *Ibid.*, p. 4.

40. Ceylon: Report of the Commission on Constitutional Reform. Cmd. 6677, p. 30 (para 91) Present writer's italics.

"The Ministers were aware that protests had been made against the secrecy with which they had prepared their scheme, and they knew that His Majesty's Government had from the beginning of the discussion of reforms been concerned about the lack of unanimity on the subject. A complete answer to the suggestion that the Commission should hear the submissions of the minority communities would have been that the Ministers had themselves already ascertained their views; but this they had failed to do, although *such a course would clearly have been the best way of assuring the necessary support in the State Council.* To enquiries we made in Ceylon why the Ministers proceeded as they did, those concerned to defend their attitude invariably replied that the Secretary of State had asked the Ministers and the Ministers only, to prepare a constitutional scheme, and that he had given no directions as to consultation with the minorities, who were fully safeguarded by the stipulation as to the three-fourths majority. This explanation has only to be stated for its adequacy to be obvious. There can in our view be no doubt that the Ministers deliberately avoided consultation with the Minorities because they knew that the latter would not agree to go as far in the direction of Dominion status as the Ministers desired. Little progress can be made in public affairs by *strict adherence to the letter of documents* and complete neglect of the spirit of compromise."

This somewhat sententious paragraph for the first time disclosed the source of the disagreement. In his arguments in Sessional Paper XII of 1944, the Secretary of State had tried to show that the Ministers had misinterpreted the Declaration of 1943, and that a commission to consult minorities was implicit in it. The Soulbury Commission, on the other hand, accused the Ministers of the apparently heinous offence of "strict adherence to the letter of documents." The Ministers were thus right in their belief that there was nothing in the Declaration to justify the terms of reference of the Soulbury Commission. His Majesty's Government, not the Ministers, had departed from the Declaration. All the arguments in Sessional Paper XII were special pleading: the lawyers had been put to the task of proving that a departure from the Declaration was not a departure.

The reason for the departure was that the Ministers had not come to a preliminary understanding with the minorities. Evidently it had been assumed that they would get their 75 per cent. majority by agreeing with the Tamils. The purpose of that unusual requirement was to force an inter-communal agreement. This demand for agreement is, of course, traditional British policy. In Great Britain itself there is fundamental agreement about the Constitution. The Palestine problem would solve itself if the Arabs and the Jews would agree. The problem of India would be easy if the Hindus and the Muslims would agree. Even the (later) White Paper on Burma stipulates

for an agreed Constitution. The only innovation in Ceylon was to demand a 75 per cent. majority instead of an intercommunal agreement: it was still thought that the one implied the other.

This interpretation is supported by paragraph 12 of the White Paper⁴¹. The requirement of a 75 per cent. majority was inserted "because the 1943 Declaration contemplated the adoption of a constitution worked out by the Ministers and did not specifically require that they should consult minority interests." The key word is "specifically." It had been assumed that the requirement of the 75 per cent. majority would compel such consultation, and so the Ministers were not ordered specifically to consult the minorities.

In fact, however, the Ministers did not read the Declaration in this sense at all. On the contrary, they thought that the 75 per cent. majority was a device to overcome the old dilemma. To insist on agreement is to compel the majority to agree with the minority, not to force a compromise. So long as Great Britain holds the ring, the minority can go on fighting until it gets what it wants: the majority has either to give way or to give up a constitutional advance. It must have appeared to the Ministers that His Majesty's Government—which really meant Sir Andrew Caldecott, a Governor with profound knowledge of recent Ceylon politics—had realised that preliminary agreement was not possible, but that if the Ministers produced a Constitution which swept away most of the limitations of the Donoughmore Constitution, which went a long way towards meeting the claims of the minorities, and which gave them all possible protection short of communal representation, they could get a very substantial measure of support. The extremists on both sides might vote against; but there would be a very large central bloc, communally mixed in composition, upon which a new Constitution could successfully be founded.

Whether all the Ministers thought of the proposal in these terms is not known; it was certainly the interpretation given by detached observers. It is reasonably certain, too, that the Ministers' draft would have received the necessary majority. The Soulbury scheme, with a Second Chamber, might not have done: but when the White Paper went further there was never any doubt about the result, and only three members were prepared to vote against it. This incidentally disproves the Soulbury allegation that the Ministers knew that the minorities "would not agree to go as far in the direction of Dominion status as the Ministers desired." The minorities were as anxious for Dominion status as the Ministers; what they wanted was Dominion status on their own terms. When they found that they could not get it on those terms, most of them accepted it on the White Paper terms.

41. Ceylon: Statement of Policy on Constitutional Reform. Ceylon Government Gazette No. 9480 (October, 31, 1945), p. 1386.

What the Ministers knew in 1943 was that they could not get agreement on representation.

The Soulbury reference to ascertaining the views of the minorities is another example of "eyewash." After twelve years of discussion the views of every member of the State Council were known. What the Soulbury Commission really meant was that the Ministers ought to have got the minority leaders round a table and tried to hammer out a compromise. The insistence on this point indicates a high probability that there was a suggestion on these lines in the secret despatches, which would of course have been seen by the Commission but were not available to the Ministers. The Ministers did not do anything of the kind: they produced their own idea of a compromise with the intention of offering it to the State Council when it was agreed by His Majesty's Government. The Soulbury Commission's lecture on compromise was therefore misconceived. Subject to minor modifications, they accepted the Ministers' scheme of representation, and, subject to the addition of a Second Chamber, they accepted all the main lines of the draft Constitution; the inference therefore is that it was a reasonable compromise.

VIII

The documents may now be reinterpreted on this basis. Until the 2nd February 1944 it was hoped that there would be a compromise. When the scheme was submitted, Sir Andrew Caldecott did his best to suggest that it was not a complete scheme. This line of argument was not followed up because, on the 17th February, Mr. Ponnambalam's complaint enabled another line to be followed. There was delay while London was consulted. An innocuous reply was sent, but Sir Andrew Caldecott explained that it meant a commission to consult minority interests. The Ministers had their own interpretation so firmly fixed in their minds, and the reply itself was so innocuous, that they did not understand the implications. The minority members understood the reply in the same sense as the Ministers until, on the 20th April, the Governor explained that it meant something quite different. This reply did not become known to the Ministers because it was circulated to them in the most casual way. Not until July 5 did they discover that the Commission was not to examine the Ministers' draft only. Then came a correspondence in which the Ministers sought to prove that the appointment was a breach of the Declaration of 1943, while Secretary of State sought to prove that it was not. His Majesty's Government now admits, thought not in so many words, that it was. Where the Ministers went wrong was in not understanding the *unexpressed* intention that they should produce a compromise scheme agreed by the minority leaders, or some of them.

The attempt to prove by quasi-legal argument that the Declaration meant something different from what it was clearly intended to mean was an unfortu-

nate episode. It gave an impression of duplicity if not dishonesty. There is a substantial section of the more or less politically-minded in Ceylon (as elsewhere) for whom the Colonial Office is a gang of "imperialist exploiters" anxious to keep the Ceylonese in "slavery." For them the phrases about leading colonial peoples to self-government, Great Britain's "sacred trust," and the rest, are merely insulting hypocrisy. Even a slight acquaintance with British politics would dispel this illusion; but it has strong psychological foundations which forbid any study of the subject outside Lenin's pamphlet on *Imperialism*. The correspondence gave an air of plausibility to the assertion that Colonial Office policy was to "divide and rule," a policy which has never been followed by the Colonial Office—at least since 1840, and even Durham's allegation was false. British sensitiveness to minority opinion is in fact at worst a foible and at best a virtue, for it arises out of a sense of justice. His Majesty's Government is His Majesty's Government; and it is improper for any act to be done in the King's name which may result in oppression, discrimination or injustice to his people. There may be argument as to the manner in which this principle has been applied, but the principle itself is clear. If the Ceylon Tamils assert that self-government for the Ceylonese will mean discrimination by the Sinhalese, the question must at least be investigated. Having failed to compel the Sinhalese and the Tamils to agree, and disagreement having in fact become more evident, it was decided to appoint a Commission to investigate the matter notwithstanding the terms of the Declaration of 1943. A frank avowal of the reasons would have evoked protests, and would even have brought out the allegations of "divide and rule"; but a Government that is honest in its statements can ignore perversion of its motives. Unfortunately the statements on this occasion were not honest.

Subsequently, however, the situation was retrieved. The Soulbury Commission having found for the Ministers, the White Paper went further than the Declaration of 1943. It did not go as far as Mr. Senanayake asked, for the Declaration was not concerned only with the minority problem. The creation of a new international unit and the vesting of uncontrolled power over defence and external affairs in Ministers hitherto unconcerned with them, would be a serious step. Even if the Colonial Office were willing to try the experiment, and even if the Service Departments were satisfied with Mr. Senanayake's proposals for an agreement about defence, the Foreign Office and the India Office might still raise difficulties. One of the main obstacles to Dominion status, the minority problem, has been removed: the problem of the defence of Ceylon could almost certainly be solved on the lines suggested by Mr. Senanayake; the Foreign Office would not be seriously concerned unless Ceylon's trade policy began to have serious international repercussions; there would remain the problem of relations with India.

W. IVOR JENNINGS.