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INSTITUTE OF COMMONWEALTH STUDIES

Key:

SO = Sue Onslow

YG = Yash Ghai

Commonwealth Oral History Project interview with Professor Yash Ghai, part 1

SO: Dr Sue Onslow interviewing Professor Yash Ghai at Senate House on Tuesday, 14th July 2015. Professor Ghai, thank you very much indeed for coming to Senate House to contribute to this oral history of the Commonwealth project. Please could you begin by saying how you became involved in the Commonwealth and its activities.

YG: I became involved through my work on constitutions. When I started my career as a law teacher, I was particularly interested in constitution law. This was a time when countries in East Africa were becoming independent and, indeed, when Kenya's conferences at Lancaster House took place. I was finishing doctoral work in Oxford. When they came to London, I would come and stand outside Lancaster House to watch them go inside.

SO: This was in 1961/1962?

YG: Yeah, '61/ '62. I would start talking to them asking about their progress. My thesis was on protection of minorities and so that was all very close to my interests. Then when I went to teach at the new law school in Dar es Salaam, Kenya had not actually become independent, though it did soon thereafter, as Uganda and Tanganyika had become. There was much constitutional engineering going on: Nyerere was moving towards a one party state. Uganda was struggling to define its relationship with the Buganda. And then

in 1963, December, Kenya became independent. So it was a good time to be studying constitutions.

That was my academic experience, but then I got asked to (I not quite sure of the dates) help with the drafting of the independence constitutions of Papua New Guinea and Seychelles Islands. At that stage, my bigger engagement was with the constitution of Papua New Guinea. My engagement in Seychelles was somewhat limited because I was advising the opposition. They said, "Can you come to Seychelles?" I was in Nairobi (and) Dar es Salaam so it was easy. But they didn't have the money and said, "We are holding a *fete* on Sunday and if we raise enough money, we'll send you a [*laughter*] ticket." But they were not able to raise the money [*laughter*].

I met them when they came to London (where I was on another matter) and my role as they described it was largely to look at the electoral system, which wasn't really my main expertise--they were concerned that the other side was engineering, fixing things. They were meeting in Lancaster House and we were staying in a hotel nearby. At the end of each day, we would get together and review the day's proceedings and then anticipate the following day's business.

But my own work came to an unexpected end because one evening our leader, who was Leader of the Opposition then, Albert René didn't come when we met to assess the day's proceedings. We all used to go back, have a quick wash and come down, have a drink and meal and talk over it. We waited and waited. He didn't come till quite late, so we were getting a bit worried. Well, meanwhile he and the Chief Minister had taken off to a pub on their own and they had made several agreements, including on power sharing. The Chief Minister told him, "You can be number two in the cabinet, etc. And don't worry about the electoral thing. We'll sort it out." So I had nothing more to do. I did have a note for them, which I probably have lost forever, on a fair electoral system and they did make some changes, but he lost interest. I saw them now and then, and within two days, the whole thing was wrapped up because that was the big stumbling block.

SO: Because of the private, backroom deal in a pub?

YG: Yes, exactly.

SO: But, Sir, the proposals that you'd made for the electoral system, had you been arguing for proportional representation?

YG: Yes.

SO: Had you been arguing for the block votes protection for minorities?

YG: Well, I can't really remember to be very honest, but I think I proposed proportional representation as I think that is fairer than first past the post. We also recommended an independent electoral commission. At that time they didn't have that. They were a bit afraid that when they drew the boundaries, there would be more room for manipulation in first-past-the-post system. A proportional representation system would reflect better the popular support for parties. The other thing I was working on for a while was the question of the islands on which Britain had built military installations. Their view was that the islands belonged to them. They wanted to see if there was some way to recover these. Later, I realised that Mauritius had an interest in this). So I went to the Foreign Office; they had made a treaty with the US. In fact, most of the troops were the US. They made an agreement with the US for establishing a military base there. But the Foreign Office won't give it to me. They said, "No, these are confidential documents." I said, "Come on, this is a Government. These are people who are now negotiating independence. They claim their island belongs to them." But they wouldn't show it to me. An hour later, I was at the American Embassy invoking the Freedom of Information Act of the US Congress. I said, "I'm entitled to it." "Of course you are, Sir" and they produced the treaty with Britain. But the conference ended without that being resolved and they said, "Well, we'll leave it at that" and the Seychelles people accepted that.

SO: At independence then, Britain maintained its military bases and its naval installations on the island in perpetuity?

YG: Yes, in perpetuity basically. We wanted to establish the entitlement of Seychelles Islands to that part of it as was hived off by Britain because they wanted to have a military base there.

SO: So did you look to other Commonwealth countries which had been in the same predicament at independence, such as Cyprus for instance?

YG: No, I haven't looked at that. Mauritius also had some feeling that there were some islands, but I was not involved in Mauritius, so I don't know. I am not aware of any, but they must have problems in the South Pacific where there are so many what are called 'island states' now.

SO: Sir, did you have any contact with the Commonwealth Secretariat during this time?

YG: At that time, no. I did visit them. I think both delegations made a courtesy call more than anything else, but then the next thing was Papua New Guinea. Maybe it was before Seychelles, I have to look at the dates...

SO: Seychelles joined the Commonwealth, having become independent in June 1976. Papua New Guinea in September '75.

YG: Yes, that's right. In fact, one reason I was drawn in later in the Seychelles was because they'd heard of my work in Papua New Guinea.

SO: How did you become involved in the constitutional arrangements for devolution in Papua New Guinea?

YG: I was quite surprised. I was in exile from my country. I won't go into that unless you want to. I was teaching at the Yale Law School and got a telegram one day from Papua New Guinea [asking] whether I would go there to write the constitution for independence. I was quite surprised. I didn't know very much about Papua New Guinea. It turns out that the Australians offered them some consultants from Australia, and the local leaders felt that they may be

biased and they may be influenced by, or even directed by, the Australian Government. So they wanted input from a totally independent person. They just had established a law school and the first dean of the law school was, at one stage, my dean in Dar es Salaam. So they asked him and he recommended me because, at that time, I was doing some work for Nyerere on Tanzania's constitution. I can come to that later if you want to.

SO: Yes, please.

YG: Then there was also an Australian lawyer in the Attorney General's office who had done his PhD in this university. They asked him and he recommended me too and when I asked him years later, "Why? You don't even know me. We never met." He said, "Your book *Public Law and Political Change in Kenya* was the standard book at that time in this course we were doing, so I got to know of your work, etc." So they asked me if I would come. I was teaching and so it was hard for me to be away for long periods. What we agreed was that I would go periodically...and this was before the internet...

SO: I was going to say, travelling from Yale to Port Moresby!

YG: Yes. I said, that I would stay for as long as I could and could make return visits. In between I would keep in touch through faxes. I had loads of faxes that went both ways. At that time, the funding came from, I think, the Australian Government, or from the Papua New Guinea Government, but they were paid by the Australians for this project. On my subsequent visits, I think I was approached by the Commonwealth Secretariat to say that they were willing to support my expenses and fees, and so on. I discussed that with the Chief Minister, Michael Somare, and it was agreed that the ComSec would pick up my expenses. All together I must have made six visits, some short, some long.

SO: How contentious was the proposal for a devolved system?

YG: Well, that was quite contentious because, as in most colonies, the country was ruled under very centralised administration. Papua New Guinea had an

enormous diversity. They had 400 language groups, but some languages have died out since then. There were a lot of islands as well, so there were a lot of different identities. They didn't use that term so much as the term is used now. So the issue of power sharing was raised by some of the communities, which were mostly island communities. The most active was Bouganville; one of the major leaders (John Momis) was also the Member of Parliament and Deputy Chair of the Commission I worked with; and since Michael Somare, who was a titular Chair, was busy with routine Government business, Momis essentially became the Chair. Kaputin was the other leader who came from the northern islands. They were very anxious that there should be some form of decentralisation so that it would give them some autonomy. Some areas were not so keen because they didn't have educated people, so they were nervous about the responsibility that would come in devolution.

So I was asked to develop some ideas on devolution, which I did, taking account both of the groups that wanted it, and then those who didn't, by prescribing a number of powers for the units but giving those units who did not want some powers, they could opt out of them—or indeed rely completely on national administration. It made it difficult for the central government to manage provinces (as these units were called). I advised that it would be unwise to impose devolution on groups not ready or willing to assume responsibilities, and at that stage devolution should be established in areas where there was a demand for it—especially as they were likely to attempt secession. It would make little sense to start on independence by invading certain areas. Nor did they have the armed forces which could prevent secession. And Australians probably would not be keen to become involved in their domestic quarrels. My proposal, I thought, was fair to all groups.

Well, that was more or less accepted. I actually got a very good scholar from Canada, Ron Watts. He was, in my view, the greatest authority on federalism. He was then professor at Queens University in Canada and he subsequently became the Vice Chancellor or the President of that university. He still is active. He is now 84 and he and I had been working for the last year or so, in Solomon Islands. That's another story I'll tell you. We are supposed

to meet there in September, but I got a letter from him the other day saying, that he was not well and the doctors had advised him against travel. [Ron Watts died in October 2015]

SO: Well, he is the most extraordinary repository of knowledge.

YG: Yes. He is just fantastic, and a really nice man. So anyway, I asked if he would come. Now, I don't know whether ComSec paid for him, or we found money within our own budget. I wasn't anyway dealing with administrative matters. When we had done it, we had agreed on it, the Constituent Assembly had endorsed this and before the draft was formally adopted, there was a delegation of HABITAT, I think. Or UNEP, one or the other.

SO: My apologies, but please could you explain the first acronym, HABITAT?

YG: HABITAT. The UN body on housing. Among the three members of the delegation was a Kenyan, Philip Ndegwa, an economist, then working for the UN. Subsequently, he returned to Kenya and become a very key figure in the new public administration. He said to Sir Michael Somare, "Oh, you're stupid to have devolution. We in Kenya, in the 1963 constitution, were forced by Britain to have federalism and we abolished it within months of independence." This was true: Jomo Kenyatta said many times later that he did not want devolution but Britain insisted on it as the price of independence. He agreed to it for this reason, but intended to abolish it after the British went away. There's a very good account of this bit of history by an American historian, Robert Maxon, who has published a study of the negotiations on the basis of the British archives which were opened up a few years ago. [Kenya's Independence Constitution: Constitution-Making and End of Empire] It is a very detailed account of negotiations and it comes through in that book. We all know that Kenyatta accepted this, fully intending to demolish it, which he did on the first anniversary of independence.

SO: So there was no moratorium on changing the constitution, as was the later case with Zimbabwe? There was no embedded clause proscribing constitutional change for a certain period?

YG: On the contrary, the entrenchment of devolution, and several other provisions, was very strong—requiring 90% votes in both Houses. The fact is that the most ardent supporters of devolution were the smaller indigenous communities who did not trust the larger communities, including Kenyatta's Kikuyu. He gave every MP, and senators, large sums of money to buy their votes. 41 Senators voted to get themselves out of business, in return for a substantial sum of money, but were granted membership of the National Assembly, without any elections.

SO: So it became a unicameral arrangement.

YG: Unicameral. +Of course, after that all the functions of the Senate were abolished. But the point of my story is that Somare accepted Philip Ndegwa's advice. He didn't consult any of us. I was not physically in the country then. People were outraged. Not everyone, but in Bouganville particularly. Eventually it led to secession by them.

SO: Sir, had the draft constitution been published before it went to the Constituent Assembly?

YG: Oh yes. It was published. It was debated in the Constituent Assembly.

SO: Was that standard practice? That a draft would be published and go to a Constituent Assembly?

YG: Well, there are different ways but that's probably the most common one. It was published and made available to everyone. We went round the island. We talked to people. We wanted to know what they were thinking. Somare consulted few members of the Constitutional Commission and to everyone's surprise, introduced the motion to delete devolution. I talked subsequently to the Ministers and Father Momis, who was the *de facto* Chairman of the

Commission - they were all surprised because [the] next day, when at the very end of the process, Somare introduced a motion to repeal the entire chapter and had enough votes. Then Bougainville said, "Okay, if that's what you want, we're leaving" just before independence. They declared secession on Independence day, led by Momis, who was the father on the constitution, we all acknowledge him as that. Some people were killed in Bougainville, by the police, sent from Port Moresby. It became very nasty. Then I was asked if I would return and help to find some settlement, because somebody like me was seen as neutral. I had become very close to Momis and have continued to be very close to him. So I mediated and persuaded the National Government to accept to restore that chapter.

SO: Sir, this really was conflict resolution?

YG: It was conflict resolution. Yes, absolutely.

SO: How did you go about that, Sir, because...excuse me, but you're a Professor of Law...?

YG: Well, that's a good question *[laughter]*. It was the question of trying to stop secession because they were afraid these other island groups would follow Bougainville's example. I mentioned earlier a politician by the name of Kaputin, who was the other major champion of autonomy and wanted it for his own area. He and Momis were also national figures, both Members of the Parliament. Kaputin was a Minister and John Momis could have been but he chose not to at that stage, so they were quite important people. Then I got the Australians to put gentle pressure on both sides. Eventually they agreed to set up a negotiating process with delegates from the two sides, with lawyers. I was first asked to be a mediator, but as the negotiations started, Bougainville had no lawyer to speak of and the Government had quite senior lawyers. Momis asked me if I would agree to be their advisor. I said, "Well, it's a bit difficult. We have started the process but we haven't gone very far and I can see that you do need backing of your legal services, but this is a matter for Somare and you to work out." So they met and they asked me to come with them. I said, "I have no objection if you are agreed and I don't have any

secrets that I've taken from the Government, which would then disqualify me." I said, "I don't see any conflict of interest." So that was agreed. I essentially became negotiator for Bougainville. The Government, of course, had economists and civil servants, and there was hardly anything on the other side.

SO: I was going to ask, "What was your administrative backup?"

YG: Oh, very little. But fortunately, all the people we were negotiating with were sort of friends because the time I had spent there working, I was seeing senior civil servants, economists because I needed to know more about the country. We were doing the finance chapter. I needed to know quite a lot about finance. We were dealing with land issues. I had to talk to the Ministry of Lands. So by the time the negotiations started, I knew most of them quite well and became good friends with them.

SO: The country would have had a relatively small pool of civil servants.

YG: Yeah. So it was, on the whole. We did resolve differences and six months or so later the first constitutional amendment was approved in the form of a long chapter.

SO: So devolution was reinstated.

YG: Yeah. Momis continued to be in Parliament and continued to work in Port Moresby, though Bougainville began to set up local assemblies and government.

SO: Sir, were the Australians providing a degree of diplomatic support and logistical support throughout the negotiations?

YG: Yes, they were and they were putting gentle pressure on both sides to compromise. So that was my role. Then I was asked to - by this time, I had left Yale, and was in Uppsala, Sweden - they asked me if I would take six months off and come and help to implement the constitution, including,

particularly, devolution. I suggested that they set up a ministry of devolution and, under that, a special sub-unit with responsibility for implementation. I worked *de facto* as the Chair but I didn't want that. I wanted a local person to be chair. I worked the next six months setting up the whole system and I'm glad I did, because there was stiff hostility to it from some mainlanders. There was also lack of technical knowledge. Most people had very little relevant education. I asked Somare, even in the very beginning that I would like to work with one or two young lawyers so that they would acquire knowledge and experience of the constitution and the background to its various provisions, minimizing reliance on foreign lawyers. Somare nominated Bernard Narakobi, who died recently. He became very distinguished: he became Chief Justice, then became Attorney General, then was High Commissioner to New Zealand. When I was working in Vanuatu, as it was then the Condominium of the New Hebrides, I suggested they should get this gentleman to help them because he'd gone through the whole process with me, and they did invite him. He did a good job. I wanted a Pacific Islander, so the leaders of the New Hebrides would feel empowered, and appreciate that a Papua New Guinean had helped them with the constitution. So I was very pleased when he came, and we overlapped. I would go back to do my teaching and he would stay on for a while.

The last time I met him was about eight or nine years ago, maybe less. I was invited by a university in Auckland to give some very distinguished annual lectures. Then the Governor General invited me to spend two days with him in Wellington. I knew before I went that Bernard was the High Commissioner and we would meet.

SO: This is fascinating: there you are, as a Kenyan professor of law working as an autonomous diplomat, drawing upon this global network of academics and knowledge. It seems this was not simply within the Commonwealth. It goes beyond that. And you were acting as a very important resource for developing countries moving to independence.

Another specific dimension to your work was the operation of the Kiribati Constitution provisions for the Banabans.

YG: Yes. Well, that wasn't my most important. My most important work was in Fiji and Solomon Islands. Solomon Islands was quite a big and demanding assignment. I was asked to advise the local political groups in their negotiations on independence with Britain. I was the main advisor—indeed I was the only advisor. At first the leader of the opposition refused to accept me as a general adviser, saying I could not advise both him and the Chief Minister. But after a while he accepted my credentials as an independent adviser, committed to the cause of independence and able to stand up to the pressure from Britain. Indeed at the final session of the Legislative Assembly on the adoption of the constitution, he paid high compliments to me for my work, saying that I united the country which was torn bitterly before my arrival. I was sitting in the public gallery when he said this; I was deeply moved.

At that time, I had nothing to do with the ComSec except, of course, they wondered if I could do a periodic briefing for them. At that time, Solomon Islands was, of course, British and it was the British who approached me and asked me if I would [assist]. What happened was that Britain, at that time, wanted to get out of the South Pacific. They seem to have had enough colonialism. In the Solomon Islands – like most countries that I worked in – there were deep divisions on whether they wanted to be independent or not. Britain wanted to push them towards independence. So they asked local people who they would like as adviser and they consulted the Papua New Guinea prime minister who recommended me, saying I had done a good job there!

SO: It's interesting that Britain should be pushing them so, rather than allowing these small islands autonomy with free association, say – as the Cook Islands and Niue have with New Zealand.

YG: I think there was a feeling that there was little purpose now in continuing to possess colonies in the South Pacific, as Australia would take care of strategic matters and issues of interest to Britain. At this juncture I dealt a lot with the British Foreign Office and at the same time I was advisor to the local groups. The ODM [British aid agency], whatever it was called then, was

paying my fees and expenses. By that time, I had started teaching at the University of Warwick. Solomon Islanders were deeply divided on independence issues. So I worked hard with them to build some consensus between their leaders, as later I did in New Hebrides (now Vanuatu). They trusted me, not associating me with Britain, but 'a Third World person'. In most places I worked in the South Pacific, a very important role has really been as a mediator. This relates to your question earlier: "you're a lawyer, but helping in mediation." As a constitutional lawyer, I was familiar with various forms of structures of the state and was able to make proposals to narrow their differences. There was a lot of bitterness between the Leader of the Opposition and Chief Minister. So I realised that I really had to get them together before the negotiations with Britain. I said, "You should negotiate as a united people. If you are fighting yourselves, Britain will play one against the other so you have to *do that*." And I worked on it, and worked on it. I would wear slippers and go to the Leader of the Opposition. I said, "I'm coming home to you. Do you have a free moment?" They liked that. For them, I was not a pompous civil servant coming from London. So I was able to establish a rapport. I was able to travel through the country, but not as extensively as in PNG. I accompanied their delegation to London twice, for negotiations with the British government. The Solomon Island constitution was very much my work—especially also because I got on well with the people in the British Foreign Office. Who some time later gave me a CBE!

SO: Sir, did you go in with a constitutional template of what would be appropriate? Or were you really responding with what you thought would be appropriate in each separate instance, given the local environment?

YG: I was partly responding to the local environment. A committee had been set up just before I went there, for consultation with the people, going round the country and talking to the people. I had access to the summary of their meetings and tentative conclusions/recommendations. I began my work by looking at that and commenting on the draft as well as refining it. They set up a Parliamentary Committee consisting of both sides; and I spent a fortnight or so with them, just going through what a constitution consisted of. Very basic

things, though some of them, senior civil servants or officials, were quite knowledgeable- not just people from the village.

Then we looked at other examples. Of course, the Foreign Office had a lot of experience of independence colonies' constitutions. I myself had been studying independent constitutions of East Africa. But I would do it very differently today, but if you look at the Kenyan Constitution of 2010, that will give you an idea of my kind of a constitution today. But that was a more standard constitution. On the other hand, the Solomon Islands consisted of, at that time, 300,000 people spread over 11 islands, or 11 archipelagos you might almost say. There are these constraints of resources, and one has to adjust to that.

SO: Were you supported by the Legal Affairs Division at the Secretariat at all?

YG: Not really. By that time, I'd got to know them, the Director from New Zealand, Jeremy Pope and the former Attorney General of Western Samoa, Tuiloma Neroni Slade. Slade later became Samoa's Ambassador to UN. He and I became quite good friends. He would come and stay with us weekends in Warwick. He and I were both involved in Kiribati.

SO: Was this over the question of rights for the Banabans?

YG: Yeah, it definitely was. The Banabans were a group living on Rabi Island where they have been relocated.

SO: In Fiji.

YG: I went to Banaba/Ocean Island, their traditional abode. It was now like a lunar landscape. The British Mining Commission had take off the phosphate *but* they had restored nothing back as they were legally required to. Their agriculture was destroyed. It was impossible to go on living there. One solution - this was right before (Kiribati) independence - was to buy an island

in the Fiji Islands and give them the option of moving there. We also visited them there.

SO: But, Sir, on the question of the Banabans: the British had relocated most of the population in 1945. As you say, the British phosphate company had essentially stripped the island, and it was a question of right of return and compensation?

YG: Yes. Well, they could, of course, stay there. There was some compensation which they used, oddly, to buy big property in Melbourne. It went to the Kiribati Government rather than to Banabans, but I think they got a share of it also. Then most of them took the option of going to Rabi in Fiji. Some stayed on. I think what they wanted was to maintain their links with their traditional homeland, because of their strong sense of belonging to the land, as you know is the case with most pre-industrial societies. So somebody in the family stays there and then after six months, somebody else would come from Fiji and this chap would then return to Rabi.

The constitution of Kiribati, with which I had nothing to do, had provided in a separate chapter for the rights of these people. It had granted them equal rights and special programmes and so on. It was also agreed that, so many years after independence - maybe it was 5 or 10 - that there would be an independent review of those constitutional provisions to see how far the Government has kept its promise. Is there some new kind of assistance Britain and the Kiribati Government should provide for them? So I was asked by the ComSec if I would join a three person panel to investigate the situation of the Banabans. By then I had already done various consultancies for the Comsec. The original work I did with ComSec was when Ramphal was the Secretary General. Then it was the Nigerian Chief Emeka Anyaoku. The former Chief Justice of Nigeria was to chair the Panel. Neroni Slade was made Counsel assisting the Panel. We had rather judicial type of proceedings, to ensure people came and were able to make their presentations, when Slade would brief them and pose questions. So it became a very formal enquiry. Then we wrote our report. I basically wrote it and worked closely with Neroni. Our conclusion was that though promises

had been kept by the Kiribati Government and British Government, there was clearly more to be done. Some parts of the island were also not that well off. We did make four or five recommendations which, I think, were accepted, largely. So that was really all I did there.

SO: Sir, your longest involvement then seems to have been with things Fijian in the Pacific, dating back to 1987.

YG: It was after the first coup, yes. Before that, I had worked in Vanuatu and that was also a very critical role. The French and the British were there.

But let's go to Fiji. I hadn't really had many contacts in Fiji. Whenever I was going to Pacific Island states, I was almost always routed to Fiji on the international flights and then pick up a local flight. Then I would sometimes stay for one or two days, when I established some contact with the university.

SO: The University of the South Pacific?

YG: Yes. There's a New Zealander who died recently, Ron Crocombe. He ran the Institute of Pacific Studies. I had a six months' visiting professorship when I got to know more about Fiji. My contacts at that time were almost entirely indigenous Fijians. Then when the coup took place in 1987, I became very interested in Fiji's constitution. My project for the University of [the] South Pacific was a training programme for senior lawyers and public servants in senior legal and political positions. Apart from my own research, I ran a training programme because a number of new constitutions were being established and others were on the way. It involved training new Attorneys General, senior lawyers, public servants. It was a South Pacific project including Micronesia and so on. I edited a book about the constitutions of the region, in which about half the chapters were written by me. When the coup took place, I was back at Warwick and I got a phone call from a former employee of the ComSec who set up the Commonwealth of Learning in Canada. He was from the Caribbean, of Indian origin. He worked for the ComSec for a while and they set up this institute of open learning. Then he went to Fiji as the Vice Chancellor of the University of the South Pacific, so I

had met him a little bit at that time when I had this spell at the university. Then one day, after the coup, he rang me and said that Prime Minister Mara would like me to go to Fiji and help with constitutional issues. Before I could say anything, he said, “Don’t worry. We’re going to pay you very well. We are going to send you a first class ticket. I have already negotiated a lot of money for you from ComSec” and so on. I said, “Well, my question is what’s happening and what is my role?” Because I was afraid they wanted me there to and “fix it,” There had been some cases where the courts in other countries had accepted the coup as lawful. Mara’s expectation was that I would help the new regime to achieve a similar status. I had no intention to help them “fix it”—and expressed my willingness to go to help with the return to constitutionality. I suspected that Mara was in part responsible or the coup—it was not his doing, but I thought he was behind it. That person was Sitiveni Rabuka. So I said no. Then we had two or three more conversations and exchanges. I said, “No, I’m sorry, I don’t feel comfortable with this idea.” About a week or so later, Bavadra and his Attorney General, an Indo-Fijian politician...

SO: Jai Ram Reddy?

YG: Jai Ram Reddy. Exactly. I read in the newspaper sitting in Warwick that this group was in London to meet the Queen, who was after all the Head of State of Fiji. The British Government wasn’t so keen for them to come to London and even less keen that he should see the Queen. So they never saw the Queen, but met her Private Secretary.

SO: Michael Shea?

YG: Yeah, maybe. I wasn’t in that meeting. What I did was to call the Foreign Office, because I had friends there by then, having worked with them on some situations. I asked them if they knew where the Fiji delegation was staying. They gave me the name of the hotel, so I rang the hotel and told the receptionist I want to speak with Mr Bavadra (whom I had not met until then). He came on the phone and I introduced myself. He said, “Well, we know your name and we know that the Government tried to get you.” I said, “Well, I have

said, “No” but can I do something for you while you’re in Britain?” And they said, “Well, we are waiting to see the Queen. Two days we have been waiting.” I said, “I’ll be happy to come to London to meet you, just to chat with you if you want me to.” So he said, “Wait a minute. I’ll give the 'phone to my Attorney General.” Then Jai Ram came on the phone. It was the first time I had contact with him. He said, “Well, it would help us if you came. We don’t know what you can do. But we are very confused now.”

SO: Yes, I think they couldn’t even get into see the Commonwealth Secretary General.

YG: Yeah, that’s right. I went there, I think it was the same day or next day. Chaudry was there, Reddy was there, as were Bavadra, and two or three senior Fijian Ministers. They said, “We have been waiting and we haven’t seen the Queen. We have seen the Private Secretary. He said the Queen is very busy. We haven’t had much contact with the Foreign Office.” I was outraged when I heard that. I said, “Well, let me know...I can’t do much really. I have friends in the Foreign Office, but this kind of decision is taken at very high levels and they can’t do much either.” So then they went back to Fiji and I said, “Well, try to talk to Mara and see if you can have some dialogue with him.”

They returned home and I think they did see Mara. Mara also was finding the situation uncomfortable. They rang me and told me that they did have some discussions with Mara and there was a possibility of negotiations between their party and that of Mara. They wanted me to go to Fiji to advise them—within a week. I said, “This puts me in a difficult position because if Mara or his Permanent Secretary, that ComSec man, sees me in that room they’ll be furious. I say no to them--then I come as your advisor.” They said, “Well, what shall we do?” I said, “I can give you advice but I’m not sure taking me to the negotiating room is the best idea.” And they said, “Well, we really want to talk to you. Please come.” So I said, “I’m happy to come, of course.”

I flew to Fiji; there were soldiers everywhere. Bavadra had said he would send some people to meet and drive me to the West where Bavadra and several of

his colleagues lived; it was, as it were, their part of Fiji. I could not work out who were there to meet me—and to be frank, I was quite nervous; and instead continued the flight to Suva, the capital city where the government had firm control. I knew where Bavadra lived, took a taxi there. His wife was there. She said, “They’re all waiting for you in the west.”

SO: *[Laughter]* Where you’d just flown from, having come into Nadi.

YG: Yeah. Because at Nadi I could not see any one to meet me.

SO: I was going to say, it’s not that big an airport *[laughter]*.

YG: I then, in the end, said, “Well, maybe they’re waiting there.” I had a difficult decision to make. I didn’t have phone numbers or a mobile.

SO: *[Laughter]* Did you then have to fly back to Nadi.

YG: They said, “Just stay there. We are sending strong bodyguards to pick you up.” The soldiers didn’t know who I was. I could be a tourist, but if Rabuka had known, or Mara, I may have been in some trouble. So I stayed with his wife, who made tea for me—with biscuits. Then after about a few hours, a big van rolled up, with young, tall people like a rugby team.

SO: *[Laughter]* It probably was. Maybe it was the Sigatoka Rugby Team, or something like that. *[laughter]*.

YG: We then drove back to the west. Every few miles there was a road blockade and the soldiers saying, “Who are you?” and asking them some questions. Anyway, we got there. We had two or three days of meetings in Nadi with the ex-Cabinet. The meeting with the other side was to be at a resort not far from Suva.

SO: You’re thinking of Deuba?

YG: Yes. There is where the meeting was and the agreement was called Deuba Accord. So what we decided in the end was that I would not go into the chamber with them, but we had worked our strategy and argument by then. Each time they wanted to talk to me, they would ask for a tea break. I had told them that it was perfectly proper in negotiation to say, "We now request a break. We'll come back in two hours." If they felt they needed to talk to me, they would do that; then they would come to my room. I couldn't even leave my room lest I was seen - because most people on the Government side knew me during my work at the university and the then opposition groups...

SO: Professor Ghai, you were advising the Fiji Labour Party leaders then on a political accommodation with Ratu Mara's Alliance Party?

YG: Yes... The idea was to restore democracy. Number one. Then ideally, reinstate Bavadra. Then have a list of issues that they wanted to discuss, but which they would be as the dominant member of the Government.

SO: So did you address the issue of the Great Council of Chiefs?

YG: Well, I said let's avoid it. And then I said what might happen is that, Mara would suggest to you a government of power sharing. Then you take it, or not take it, depending on other terms of the agreement. It has to be a temporary arrangement and there may be some advantage in it for you. But insist, I said, that Bavadra is the Leader of the Government, and not Mara (and the exclusion of Rabuka). Mara thought he would be *Prime Minister*. Well, that was not *subject to* negotiation. That was agreed. As agreed in the negotiations, they would both be called Prime Minister but First Prime Minister, Second Prime Minister. Something like that. I have a record somewhere, but anyway, that eventually agreed. No role for Rabuka was provided. Remember, the President was also presiding at this meeting and seemed anxious to reach some settlement. As the High Chief of the community to which Rabuka belonged, he was able to dictate to Rabuka (who was not invited to the Deuba negotiations). It seemed as if politicians had got the better of the military.

The Deuba Agreement provided for the long term settlement of the differences between the parties and a review of the constitution (which was tilted in favour of the indigenous Fijians. They were anxious to find a mediator. Bavadra wanted me to be that but I told him that I was too committed to his party and position, but suggested a former Chief Justice of Tanzania, Georges, a native of the Caribbean islands.

On the successful conclusion of the negotiations, the President held a reception that night. Bavadra and Reddy asked me to accompany them to the “celebrations.” But I was still nervous about running into Mara. They thought that Mara had returned to Suva and urged me to join them—which I did. It was a great party; everyone was in a good mood and a lot of the local brew was consumed. As I was flying back to England very early the next morning, my hosts had arranged for a car to take me to Nadi. I would sleep there, then early in the morning would go to the airport. Later I received a note from Fiji that everyone had a good time and the mood was convivial. But alas soon after I got back to Warwick, Rabuka had done another coup and assumed power.

SO: He had launched the second coup.

YG: Yes. We suspected that Mara might have had a hand in it. The ‘ex-Prime Minister’ as I would call him, Bavadra, rang me and said that it seemed as if I would have to be a long term adviser to them. On the breach of the Accord, I advised him to tell Mara (who clearly had considerable influence on both the President and Rabuka) that he had to fulfil his part of the Deuba Accord. Unfortunately Bavadra died soon after this. Tensions between the two parties, Bavadra’s Labour Party, now led by Choudhry, and Reddy’s National Federation Party—relations between Choudhry and Reddy were for a long time tense. Although the coalition broke up after a short while, I persuaded both Reddy and Choudhry that the two parties should continue to work together on constitutional reform as one group. I made it clear that I would find it hard to advise one group, as I had worked with both parties. They agreed. In practice I spent more time with Reddy and his party, since I was closer to Reddy—and we were both lawyers, and the issues to be negotiated

were largely legal. I did make efforts to work with Choudhry (the secretary of his party and I got on very well). And I have to say that on questions of constitutional reform the parties were largely united. Mara was not too happy with my participation, questioning the role of foreigners, and so, continuing the Deuba meetings practice, I tended not to attend inter-party meetings.

The first major task was to agree on the modalities of the negotiations. I proposed that since there was so much distrust between the parties and their leaders, that an independent commission should be set up, with clear terms of its functions and responsibilities. And since there was so little trust between the parties, and indeed by then, between communities, I proposed that the commission should be chaired by an outsider. Mara resisted this strongly and the other party would not proceed without an independent chair from outside, with a distinguished... The stalemate lasted for six months.

Reddy took a firm position on this—the chair must come from outside, be person of great integrity and without previous engagement in Fiji. Then Mara proposed a former, British administrator, who was rejected by Reddy, claiming that he had been anti-Indian when he worked in the colony.

I contacted a number of in New Zealand and Australia to see if there were suitable candidates there. And one friend from New Zealand wrote to me and said, “Well, our former Governor General will be a wonderful person. Sir Paul Reeves had also been head of the Anglican Church, before he became the Governor General. And he’s indigenous, he’s Maori, so they can’t object.” I then wrote to some other friends, got some feedback on him and he seemed a very suitable person.

After six months of negotiations on this one point, Mara agreed to have Sir Paul Reeves (but gave him cold shoulder throughout the Commission’s tenure). The Commission included one nominee each of the two parties (Mara nominated a previous senior politician in his party, and Reddy an academic (historian) at ANU, Brij Lal, originally of Indo-Fijian origin). I thought that this was a fair composition, though we worried how [they] would get on together—as it happened, they developed a warm relationship and came to a consensus. Reeves told me that it was a pity that I was unable to advise the

commission due to my role with the other party. I know Brij Lal as an academic. So I prepared the submission for what was increasingly becoming the Indo-Fijian party (compared with the more racially mixed party under Bavadra). It took some time to develop a consensus between Reddy and Choudhury. In the end we produced a very lengthy document (*Towards Racial Harmony and National Unity*). I was then asked to present their submission, which I thought was a bad idea. Reddy would have been the ideal presenter, the most distinguished lawyer in Fiji and a good orator. The compromise was he would start by giving a summary of our proposals and then I would take over to go through the detail. He spoke for about 20 minutes, and I took about a couple of hours, followed by questions from the Commission. The session lasted until lunch time, watched by a large audience.

Later the Chair of the Commission told me that they wished they could adopt all our proposals, but that would be resented by Mara and his party. The Commission's report was itself very lengthy. The report and recommendations were excellent—but too long which would have meant that not many read it. However, there was a useful and accessible summary.

When all the parties began to negotiate on the basis of the Reeves Commission, through a committee of parliamentarians drawn from both houses of the legislature, they decided to keep their advisers out. The time had come for horse trading. Consequently I decided to return to Warwick. When the negotiations were concluded, I received a long note from Jai Ram Reddy including the draft agreement and request to return to Fiji for consultation before the final discussion and decision by the Assembly. I read most of the draft on the long journey to Fiji. The draft agreement was without doubt a great improvement on earlier constitutions, with a clear orientation towards non-racialism and social justice. But there were several features which I feared would be unworkable.

SO: With your proposals for the draft constitution, were you addressing key issues such as access to land?

YG: Well, yes, everything. Access to land, the voting system, structure of government, human rights, everything. On land, in the end, we didn't resolve the problems. I said to Jai Ram Reddy, for whom I was working very closely and was staying at his house, that we should try to resolve the land question. He thought differently, saying, "Land is a very complicated issue and it could tie us down for a long time." By this time, he had established quite a good relationship with Rabuka. Rabuka had been full of contrition, saying, "It was a mistake on my part. I will seek forgiveness of Indo-Fijians" and so on. Saying that he had a good rapport with Rabuka, he thought that they would together win a majority and form a government. This was not to be so. Their parties did poorly. Chaudhry's Labour Party got a majority and formed a government with the Fijian party which got substantial number of seats. The result was a surprise and a great blow to plans that Rabuka and Reddy made to move towards a non-racial political system.

The electoral result reflected the vicissitudes of the electoral system, which was designed by a US professor, a great authority on ethnicity, from Duke University who was on sabbatical in New Zealand. [Added after the interview: The new constitution did not last very long. The new coalition did not work at all well, leaders on both side were rather opinionated, with few reform initiatives. In the next elections, the balance between the two parties in the cabinet changed, with Chaudhry in the minority. It proved difficult to agree on the terms on which Chaudhry would join the government, as a junior partner. The new government was largely drawn from Fijian and European ministers. Eventually it was overthrown by the military which took over the government. Though its intention was to return government to civilians under a new constitution (and I was approached then to help with the drafting of it—but was unable to go there), in the end the military regime stayed on for a long time. When it did address the question of civilian rule, I was again asked if I would chair the process to make the new constitution—this time I accepted it and spent six month (in the first half of 2012) in consultations etc. before a constitution was drawn up.]

When I went back in 2012, that [the electoral system] was clearly something we had to resolve. We put a lot of effort into that. We arranged seminars for

ourselves and leaders of organisations, including political parties. We talked to academics. I read books. I got to know a little bit of the problems. And again, we came to a very definitive solution, we had, I thought, a good scheme. I talked a lot with chiefs. I talked a lot with Indian businessmen. In fact I talked to all the key interests, including the Ministry of Indigenous Affairs. In the end, I thought we had got some sort of consensus. I was very much a pro-Fijian on this issue. I thought, "This is their land and the Government can't just take it away, and give it to others. They have to be more involved, but there are also questions on the economy. Let's look at creating a framework where everybody can take part. "Come, let's do more negotiations." In the end, our provision in my draft - they all call it 'the Ghai Draft' - was a consultative process to follow after the constitution within certain fundamental principles that we laid down. Again, postponing...but we had not that much time. About six months altogether for this huge process, which included other consultations.

The position taken by the Prime Minister and the Attorney General was that all land now belonged to the people. I said, "How can you get away with that? It's impossible." But this time I was not talking to the Government.

SO: I know, from looking at the news reports, that your relations did break down.

YG: Yeah, they broke down completely. But I had great rapport with almost every other group. So land has never been resolved, I'm afraid, and it's going to be a continuing problem. I thought we had worked out something good and I took it to some experts. They said, "Well, it's ambitious. It's contingent on many circumstances, but this is the best thing we have seen on the subject." Anyway, the land issue is still unresolved. If you read this blog by Victor Lal, called 'Fijileaks', there are a lot of stories about land being grabbed and so on, but he, of course, is a little biased about Brij Lal. But he is extremely well informed. He does all the written copy. He has a spy in every ministry! I'm very impressed by him *[laughter]*.

SO: Well, he's got a great track record as an investigative journalist.

YG: Yeah. He has been very good. He was, of course, angry when I took this post, but I said, "Well, I've taken this post because I've been given an open..."

SO: Sir, I think we should stop there, but thank you very much.

[End of first transcript]