



University of London

INSTITUTE OF COMMONWEALTH STUDIES

Key:

SO: Sue Onslow (interviewer)

YG: Professor Yash Ghai (respondent)

JG: Jill Ghai

Sue Onslow talking to Professor Yash Ghai at Senate House on Wednesday, 15th July 2015. Part 2

SO: Sir, please could we continue our discussion about your particular roles in helping to reframe constitutions in East Africa? I'd be very grateful for your insights and comments upon your work there. You mentioned that you had become involved in the revision, or the re-drafting, of the constitution in Tanzania, during the time of Julius Nyerere. What had been the political issues prompting this?

YG: Well, Nyerere decided to turn Tanzania into a one-party state. He provided quite sophisticated explanations for moving to a one-party state: primarily, that 90% of the people in Tanzania voted for TANU, his party; the Ministers and other MOs came from his party. He felt that on the assumptions of multi-party system, they all had to be supporting the Government. So there wasn't really much open debate. Whatever views people had they might express in party meetings, but they wouldn't in public. He said if they adopted a one-party state then they could have open meetings, the party could be criticised, ministers could be changed, because they did not have to worry about an opposition party taking over power. The other justification was that the one party was more akin than multi-party system to African traditions: 'We are used to working together, sit under a tree and talk until you agree.' That kind of thing. The party endorsed his proposal and proceeded to set up a

commission, chaired by the Vice President Kawawa. And then I got a letter from the Chair saying that the President would like me, and a colleague of mine, Patrick McAuslan, who died last year to make a submission on how, given a one-party system, one could still have open debates and discussions. So we did that and that paper actually has been published now, some years ago. We recommended several things, but two or three things that we recommended were adopted. One of the recommendations was the establishment of an Ombudsman, leading to the first Ombudsmen in Africa. And it continues now, and still enjoys considerable credibility in society. The second thing we proposed was to have genuinely competitive elections. We therefore suggested that the Electoral Commission in conjunction with the party should nominate three candidates. But then there should be free debates and that the Electoral Commission should be given enough funds to hold town-hall kind of meetings. So the campaign would be facilitated by an independent Commission. They would have meetings where people could come and ask questions. They would publish and print their manifestos. The idea was that a richer member shouldn't be able to have an advantage over others; we wanted a genuine debate and the resources of candidates should not determine the election results. The proposal was accepted, but the number of candidates was reduced to two. This system was used in about three or four elections. Then when Nyerere resigned, at some stage they changed this to a more traditional electoral system.

SO: Excuse me sir, what do you mean by a more traditional electoral system? Do you mean plural politics?

YG: Plural politics and your own campaign, you print your own election material.

SO: Thank you.

YG: We were also asked, on another occasion, to recommend how freedom of expression and liberty could be secured even though there was detention law under which a person could be detained without a trial. We were very worried about the law—especially the possibility of abuse. There might be some inquiry, but there was no open trial. I think that some of the opponents of the

regime had been put away. Nyerere's line was that while the Western view was that if there were 100 accused persons, it was important that no single person should be detained without trial. In other words, there should be a presumption of innocence all the time. He said, "But that doesn't work. We don't have the apparatus." The British view was even if one person in a hundred was arrested and put away, that was worse than 10 people being released, though they were guilty. He said, "We have a different philosophy. We feel we can put some innocent people in jail because we don't want to sabotage our new nation." etc. We did a paper on that, which was not in the Constitution. That was used to revise the law, which was saying you have to build-in mechanisms where there is proper inquiry where they have access to their lawyers; and, if you don't want to go to court with formal rules, with a bias in favour of the accused, you can set up a Tribunal Commission of Enquiry. But otherwise there were enormous risks; and then there must be publication. They didn't even publish who had been arrested. (Kenya had the same rule, later on, and I became victim of that.) So that was accepted.

SO: So this discussion was going on in the 1960s, or in the early 1970s?

YG: In the 1960s. '65 was when we were asked to do that. Democracy was shrinking. Independence was of course very democratic, with a constitution, but which was completely unrelated to reality. The British had ruled by the whip: with the army, police - not to protect people - but to beat them up. That was the case. Then suddenly to expect the whole system to flourish, to blossom...

SO: Constitutionalism on the Westminster model, as you say, was alien to the political culture...

YG: So those constitutions were extremely democratic, but in Tanzania, the only country I know in the region, which was really able to argue against the British [model]. "We don't need a Bill of Rights. We have a traditional system, we have openness," and Britain agreed. Nyerere was such a dominant leader, so there was no opposition saying, "No, no, no, wait a minute. We want a Bill of Rights." But in other countries, Uganda, Tanzania, Zambia, Malawi,

everywhere, there was a Bill of Rights based on the European Convention, which your government is now trying to destroy *[laughter]*.

SO: Indeed.

YG: These were some of the things I was involved in, in Tanzania.

SO: But you'd been involved recently, advising on the draft of the new constitution of Tanzania, just to bring it more up to date, with the Chairman of the Commission...

YG: Yes. As you know the Commission was set up three years ago, I guess now, by the Government, to review the whole Constitution. There'd been so many changes since they did the last constitution. It had become a multi-party system; the relationship with Zanzibar had become a bit more fraught, and they just felt that it was time to review it. They set up a Commission consisting of an equal number of members from the mainland and from Zanzibar. The Chair, Joseph Warioba (who had been Prime Minister at one time, was a judge, then Attorney General, so a very eminent person) asked me if I would spend a day and a half with them, first answering any questions and then maybe discussing the process of constitution-making, particularly consultation, and issues of electoral system. They of course had already, by that time, seen our Kenyan constitution. So I spent a day and half discussing the questions they had and gave them my views on different matters, such as the relationship with Zanzibar, because I had been writing a paper on that, anyway, for another purpose; and the Bill of Rights and Participation. I gave them of course a copy of our Constitution, and they also had a conversation with Chief Justice Willy Mutunga. If you look at the Tanzanian draft Constitution it draws very heavily upon the Kenyan Constitution. But as you know, the Government has rejected it, more or less.

SO: Please, if I could ask you now about your involvement, your 'stint in Kenya' as you say. Obviously your professional and personal experience in Kenya is considerable, having been born there, but then you spent time in exile. How were you invited back? Were you based

back in Nairobi by the time you were asked to assist with the redrafting of the constitution?

YG: No, not really. I was teaching then in Hong Kong. I taught at Warwick, and then I moved to Hong Kong because I was very interested in the change of sovereignty and the basic agreement which had been made. At the University of Hong Kong a very rich man, funded a Chair on comparative public law to promote discussion and debates on Hong Kong's forthcoming status as part of China but with a considerable degree of autonomy or self-government. British public law which was taught in Hong Kong provided little guidance on how the new constitution order would operate. I applied and was duly appointed the first Sir YK Pao Chair of Public Law. When I was approached to be the Chairman of the Constitution of the Kenyan Review Commission, I had actually been teaching in Hong Kong but was on that occasion on sabbatical at the University of Madison, Wisconsin. The [Kenyan] Attorney General rang Hong Kong to talk to me, but discovered that I was in Madison and contacted me there, asking me if I would return home as President Moi had wanted an opinion on constitutional law. I said, "Well, I've been out of touch. Anyway, send me what questions you have." But he said no, they wanted me there in person. I was teaching two courses on a very intensive basis at Madison, because I didn't stay the full semester time; and I said there was just no way I can be away for more than two days at a time, going to Nairobi from America.

SO: It really is rather a long trip [laughter].

YG: Instead, he showed up at our door, and stayed three days, persuading me to return to Nairobi. It turned out that the President wanted me to chair the Kenya constitution making process. Wako had been my former student in Dar es Salaam. I said then in the end, "Okay, I don't want to take any commitments. I want to consult my friends, especially civil society. Why is a government now starting this process?" Of course this was after the end of the Cold War so pressure was building on African states to democratise. So that was one reason why in Kenya, there was a lot of pressure from Britain and United States. I said I would like to go back for a short while, talk to different groups, see the President and then I would let them know if I will take

it or not. So I did that. There were two problems: one was my own decision. Secondly, what had happened over the years, civil society had built certain competence and Moi kept on postponing constitutional reform. He had said, "Well, I'll bring some British and American and Indian lawyers. They'll write the constitution. We don't have any expertise here." He just kept postponing, so civil society set up its own commission under the chairmanship of Oki Obama, a very good lawyer.

So I thought if the Government was going to set up a Commission, it should be merged with this one. Otherwise we would be in constant fight, and no party will have a majority to change the constitution. I said I would only take the job if I was able to bring about this merger. In the beginning President Moi was very upset. He said, "I didn't call you for this." I said, "I explained to you that I was coming on an exploratory trip and I wanted to talk to you, see your ideas and I wanted to suggest some kind of a process." So anyway, my arrival had been announced in the media, that he had invited me; and he had indeed invited me. Then he was a bit cross. I was prepared to walk out. So he then said, "Okay, you try to bring everybody together." Then my civil society friends gave me some conflicting evidence: "They're using you and you will be co-opted. I said, "No, this is the best chance we have had since independence to make a change." Consequently in the end I decided to talk to everyone important. I talked to church leaders, I talked to religious groups that formed an association called Ufungamano. I was given the mandate to negotiate with civil society. So I was seeing these bishops and cardinals every second day, then rushing to the Government side, and they wouldn't come together. They would not sit together; there was so much anger, bitterness and nastiness.

I succeeded in bringing them together, after a lot of effort. Within both circles there was deep, deep anger by some at us, but I brought them together and Moi had to accept it. Then I went back to Hong Kong.

SO: So did you have any support from Chief Emeka and the Commonwealth Secretariat in any of this work? Or was this very much you flying solo?

YG: No. It was very much a local thing. It had nothing to do with ComSec. Then I took two years' leave from Hong Kong University to go to Nairobi, in December 2000. And that's where I started this process. I was first Chair of the Commission and then Chair of the Kenya National Constitutional Conferences (often referred to as Bomas because of its venue). Two years were extended into nearly three and a half. And then at that time there had been elections. I had advised Moi to give us enough time to complete the draft and to take it to the National Conference. He said, "Well, I have to stick within the current Constitution, because I don't want to be accused that I'm extending the life of Parliament because I want to stay on as President." I said, "No." I gave him an interpretation of the law as to when elections have to be held. Traditionally they were held in December. There was no reason for that, other than maybe it was holidays. When Parliament met for the first time after elections, they had five years from that date. So I said, "You can go until March. That's all we need. We will finish it by then." He agreed and then we informed the Constituent Assembly. We had done our own draft; it had been publicised, and people were reading it and commenting on it, and then we invited all the members to Nairobi for one week of briefing, before we started the formal work. Everybody had come and on the Friday we were supposed to start giving them introduction to the draft, asking questions as to the draft, they could start reading it, thinking about it. We brought experts supporting us, experts opposing us, so they could get all the perspectives.

Well, at lunchtime, my secretary rings me and says, "Have you heard the midday news?" I said no. She said, "The President has dissolved Parliament." So we had to go on recess, because MPs were also members. There were members of the Assembly there, we wouldn't have a quorum. So we suspended our work until after the elections. And in the elections Moi couldn't stand again; he had enough terms. Then Kibaki won. Kibaki was my great supporter, because in the process Moi and I had a lot of bad [feelings]. He was angry, in public and in our meetings. He tried to undermine me in all the ways he could do. And Kibaki would have a press conference to defend me. This happened three or four times. And Kibaki said, "Ghai drafted this wonderful [document]. We will take it as it is, without any change." But when he became President he reneged on that, because we had provided for a

Parliamentary system, rather than a Presidential system, and he wanted himself to be the President. We had the British-like system where there's a lot of accountability and you can't just do what you want, as Presidents often do. So he arranged a case - that is, we think he arranged a case - where the validity, legality, of the entire process was called in question, because there was no referendum. We never had a referendum, ever. No country in East Africa had a referendum. So I did a quick research on the Commonwealth constitutions at that time: 60- 70% of Commonwealth countries did not have a referendum. But, suddenly the courts said, "Well, how can you have a constitution without a referendum?" and they declared the whole process unconstitutional.

SO: So it was declared null and void, and swept off the table?

YG: Yes. So Kibaki continued under the old constitution. By that time I had finished and gone back to Hong Kong.

SO: Had you received vocal support from Raila Odinga, and also from Ken Matiba?

YG: Yes, very strong support from Raila Odinga; but of course at that time, in one sense, Raila was very close to Kibaki. Because Kibaki won the elections substantially, because of the Luo vote which Raila mobilised, and he was under the agreement they made. He was supposed to be a Prime Minister and Head of Government in Parliament. Kibaki reneged on that, which created a lot of problems in the Constituent Assembly, because Raila was counting on the very solid majority and they were split very badly. So then in fact Raila left the government...

SO: Excuse me sir, this was very much an internal Kenyan political discussion. Were there external Commonwealth elements...?

YG: It was very Kenyan. In fact this process was the most indigenous that I have worked in anywhere, I think. Every member of the Assembly was Kenyan, every member of the Constitution Commission was a Kenyan. We rejected

money. Ambassadors used to ring me and say, “We have money.” I was very upset because they messed us up, they had money but we don’t want money, they kept on bringing money and the Commission wanted it, to pocket it or to go to abroad to study foreign systems. It was a very hard battle against the UNDP; who wanted to arrange foreign trips which I opposed. The head of one institution, which I don’t want to mention by name, came to see me and said to me, “Look, we specialise in constitutions. I have talked to some governments in Europe and they say “We can just take over and we will give you a Draft Constitution, like this turnkey projects.” And I looked at him and I said, “But I am a constitutional lawyer. I’ve written Constitutions for other countries. I don’t need your help.” He said, “Don’t worry, money is there.” I almost had to throw him out of my office.

SO: The arrogance of his attitude is extraordinary, and must have been deeply insulting.

YG: The arrogance, absolutely. Anyway, it was a very Kenyan process. We did consult some people when we wanted advice. We wanted very much to look at the Ugandan and the South African experiences. I had always been very inspired by the South African constitution so we invited a number of South Africans. We ran a few workshops for the CKRC and the Commission, mostly for the Commission, on the drafting process and we also, [involved] the person I mentioned yesterday in relation to Papua New Guinea, Professor Ron Watts. He is the only person who actually sat with us when we were discussing devolution and answered our questions. Otherwise there were seminars. I might ring them and say, “This thing has cropped up. What’s your experience?” and we found that very useful. But it was purely home-grown, the most home-grown I had been involved in. We had a lot of Kenyans who are educated and my deputy, who was the head of the civil society I mentioned earlier, he was a very bright public lawyer. So we felt we could handle it and if we need it, so many embassies came. “We have this great expert, we have this adviser” and I just politely got them coffee and showed them the door. So I am very proud of that, that it was such [a home grown affair], and we travelled round the country, twice: once to tell people about the process and the issues, and the second time to go and ask their views. We

gave them enough money to meet periodically in the district to have their own internal debates. So Kenyans do feel very much that it is their document.

SO: So what was the eventual fate of that document? You said that Mwai Kibaki pushed it off the table?

YG: Yes, he pushed it out and there was still pressure for the Constitution from the people. So then what we did was to get the Attorney General to take out aspects of the Constitution that he did not like. Two things he particularly didn't like (although there was other things too): one was the system of government. He wanted to retain the Presidential system. And the other was the effective removal of devolution, a system in which districts would have significant power—he wanted to retain the centralisation of power brought about under the regimes of Kenyatta and Moi. People did not like these changes, and defeated the revised draft in a referendum.

SO: The executive powers of the President?

YG: For us that was a critical issue. And secondly, he didn't want devolution, which Kikuyus have always opposed. So that was done. These two things were taken out. There were a few other matters and it was rejected in the Referendum. I don't know exactly why, I was not in the country then. But the one thing that people liked was the proposal for devolution. Some tribes had been victimised by Moi, or by Kenyatta and so on, so people wanted more powers at the local level. And over the years, even local government had been made ineffective, with hardly any funds from the central Government. So that was taken out completely even though they kept the title of the chapter called 'Devolution', there was nothing about devolution in the Constitution. So then they continued with the old Constitution until the elections of 2007. By that time of course Raila and Kibaki had become bitter enemies. Well, that's Kenyan politics: today you're in bed, tomorrow you're in the divorce court, and the third day you're back in bed. *[Laughter]*

You probably know what happened in December 2007, the rigging I'm sure. Kibaki was declared the winner. It was challenged by Raila. Then of course at

that time Luo and Kalenjin were working together, and that's when a lot of violence was used. I don't know what the figures are, but a large number of people were killed, half a million were displaced.

SO: The official figures are over 600,000 were displaced, and approximately 1,200 killed.

YG: Over nearly half million, figures vary, but anyway then at that time Kofi Annan and other African leaders came and started mediating. And one of the terms of the Agreement was that they would revive what was called, 'the Ghai Draft.' But they set up a committee of experts - none of our members could be members of that - just to have another look at it and get some more views. This committee was given about a year, something like that, to review the Constitution, to consult people, to consult parties and then to present a revised version, if needed, to Parliament. That was done.

People often ask me how much of the draft that was given to Parliament, and then the referendum, how much was it the Bomas Draft, and how much totally new. I often say 80% is probably taken from our draft, but the 20% is the important part. Devolution was reinstated, in a slightly different format from what we would have done. They moved back to the Presidential system. There were some other changes too, I'm sure. So that was then put to a referendum and adopted on 27th August. Nearly five years ago now.

SO: Sir, please could I ask you about your involvement in the Commonwealth Human Rights initiative? I know that you are now Chair of the International Advisory Board? How did you come to be involved in CHRI?

YG: There were a number of Commonwealth-wide civil society institutions, which actually set up this body.

SO: Yes, I know there was a group of you. Richard Bourne has written on this.

YG: Has he? I don't think I've seen it. I was, at that time, Chair of the Commonwealth Legal Education Association. So in that capacity, I became involved in setting this up. But I didn't play any very critical role in this. And then when they set up their first advisory body, other people nominated people; two or three were co-opted; I think not every institution nominated their President, but they did nominate me. So I served for about two or three years on the board.

SO: Sir, in your view, what is the impact of the CHRI on Commonwealth diplomacy, on human rights discourse...?

YG: I don't know, you probably know better than I. At that time we were very much setting it up. Richard and I have a little bit of a history. The very first report that we produced was largely done by [my wife], Jill and me, and that was quite influential. It was used in the heads'- meeting in Harare [in 1991], shortly after the report came out. We were in part aiming for that meeting. You should ask Richard, he probably knows a lot more than I do. Then somebody has written up, what was the title of that book?

JG: *Put our World to Rights.*

YG: Yes, *Put our World to Rights*. So I was told that that document summary was made available to the Heads of Government. They were impressed by that, and the Harare Declaration borrowed a little bit from that. One or two members were briefed in advance. At that time the Chair of the CHRI was a former foreign minister of Canada, Flora MacDonald, and through her we had opportunities to influence the Heads of Government.

SO: Sir, this was the report 'Put Our World to Rights', written by a non-governmental Advisory Group, chaired by Flora MacDonald, which reported to the Harare?

YG: Flora MacDonald was at that time the Chair of CHRI.

SO: Yes. I have a list here of the Advisory Group members: Flora MacDonald, Dr George Barton, yourself, Billie Miller, John Morton, Dr Beko Ransome-Kuti and George Verghese.

JG: The initial writing was done by quite a variety of experts.

YG: Yes, that's true.

JG: You edited it.

YG: We edited it. We added things.

JG: They were quite distinguished.

YG: Then we were running out of time, so Jill found a very fast printer, 'Fast Printers', in Hong Kong. *[Laughter]* We were in Hong Kong that time and he lived up to his name, as we said in the preface.

SO: Did you meet the heads privately, to put your particular views, or this was a written document?

YG: I wasn't in Harare, but there was a delegation from CHRI, and I think they lobbied some heads. And having of course this Canadian Chair helped a lot.

SO: It would have done, as Flora MacDonald was a former foreign minister herself.

YG: Yes. But after that I've had prepared some other annual reports.

SO: You were also author of the report on Rwanda and Human Rights in the run up to the Port of Spain Heads of Government meeting?

YG: Yes, that's right. I was asked by the CHRI Board if I would go to Rwanda. There was an Australian, or British, woman who was working in CHRI and she was supposed to help me, so she came too.

SO: The background of that was Rwanda's bid to join the Commonwealth?

YG: And the question was whether the political culture, the political practice and governance of Rwanda met the extremely high Commonwealth standards of decent government *[laughter]*: which was a bit of a joke in a way. So then we went to Kigali. I read a bit about the Rwanda background. There was some quite interesting work by Belgium and French scholars. Then we went for a week to Rwanda and we met a number of people. The British, then Ambassador, now you call High Commissioner, and the Head of DfID. They gave us a lot of their time, but they were all apologists for the President. Then journalists, both BBC and foreign journalists and local reporters, and some Ambassadors and some academics. But everyone said: "Do not, please, mention my name. Do not quote me."

SO: Oh really?

YG: Yes. Even the British High Commissioner and the head of DfID. They were helpful, they gave us some contacts and so on. But they were saying no. The other funny thing when we're leaving the head of DfID said, "I told you this is all off the record so don't mention me. But if you want to say something good about the country, you could attribute it to me." *[Laughter]* Anyway, I got very quickly a sense of the place and I went to the BBC. They had banned BBC for the whole week because there was some programme in which some critic, a local person, had spoken something very innocuous about the President. We studied what he had said, but I can't now remember. So for the whole week the BBC was not broadcasting, so they were very nervous but they did talk to us. Our conclusion was that Rwanda did not satisfy the Harare and other Declarations.

SO: I have a quote here: "an ill-advised membership bid." That is what you concluded in your report to the Port of Spain heads meeting.

YG: Yes, it is a very detailed report, have you seen it?

SO: I have, yes. It's available on the internet.

YG: I did a first draft, which was not as hard-hitting as the one that was published. Because what happened was, I was in London then. I don't think I came especially for that, but then they organised a meeting and there was this Baroness, she was quite radical, then she became a member of House of Lords. She arranged a room in Parliament for our meeting. So we had a preliminary meeting, partly to get some feedback and we got about 50 people, including people from the Rwandese Embassy and the British Foreign Office and a number of people interested in Africa. Quite a few people, we didn't realise then, were working for the Rwanda Government, like the Chief Government Scientist. So they became very critical of my report which had been distributed in advance. I was given about 20-30 minutes to explain, and suddenly this flurry of criticism came at me. Even the woman who had given us a room: a very nice person, I'd known her, not very well, but on and off for a while. They all said, "You're being unfair. You don't realise the difficulties they have had doing the wonderful things they have done." And two people from the Embassy were very diplomatic. They said, "Professor, we know you've done great work in Africa," then started to launch a swear attack on me: "What is your evidence? You're making these allegations." These were very senior British former civil servants, all advisers were getting huge fees from the Rwandan Government. So then I really got annoyed, very upset. I said, "Well, I've taken down your comments. As for evidence concerned, I have a lot of evidence and I shall put it in the Appendix to my report. Reports from UN and other sources. I will expand my paper, to give more details." Which is what I did. And then you can see half of it is quotes from UN and other committees, allegations of corruption against the President, which have never been answered. I didn't see these people afterwards, but it was summarised in one of the Kenyan papers; and again I was attacked by the Rwandan Government. And of course they were welcomed with open arms into the Commonwealth.

SO: Because of regional politics...

YG: Of course. But since then people have been telling me that, "Of course everything you said in the report has now been vindicated. All the evidence has come out. He can't deny it, he can't defend himself." But then the other thing was that the [Rwandan] Ambassador in Nairobi, called a friend of mine and said, "I want to see Professor Ghai. Can you arrange a meeting?" So that was done and then he said to me, "Your report is unfair" etc. etc. This was, I think this was after the event. But he said, "My Government has asked me if you would agree to be a consultant to us on human rights." *[Laughs]*. I looked at him, and I said, "Well, that's very kind of you, but you don't need me as a consultant. You have my report." *[Laughter]*

SO: "You already have my reviews, on the record."

YG: So I turned down this lucrative offer.

SO: Sir, please could I ask you your view of the proposal for a Commonwealth Human Rights Commissioner? This suggestion came out of the Eminent Persons Group. I know that obviously, the CHRI has published its report 'The Missing Link'. But I wondered if you could summarise your views on that. You wrote the Forward for this report, which is available on the internet.

YG: Yes. CHRI had been saying for some while, that there should be such a Commissioner, even before this report by the Eminent Persons was written; and we were very pleased to see it was strongly endorsed by Michael Kirby, the main person on that. My view was that there are so many institutions on human rights.

SO: And you yourself are a special representative on Cambodia...

YG: Reports have been done, etc. But there was a feeling that partly too, it will give more visibility to the notion of rights. It's a commitment to the Commonwealth, and so on.

SO: You don't feel it would be duplicating the work of the UN Human Rights Commissioner?

YG: Yes, it could be. But then also you see, what does the UN do with the report? Nothing. And when I was the UN Secretary General's Representative on Human Rights in Cambodia, I used to go twice a year to Geneva to make a report. The Human Rights Council was most reluctant to make any resolutions against the government. Towards the end I didn't expect any justice from that body. I said at least if we had a really good person as a Commonwealth Human Rights Commissioner, who had time for detailed investigation and who was firm, someone like Kirby, for example, that may make a difference. And there was no harm, people were saying, in having an extra officer, emphasising constantly Commonwealth commitment to human rights.

SO: Surely that's the role of the Secretary General?

YG: Sure, but the Secretary Generals have always been very poor on questions of human rights, lest they offend members states. Sharma has been a disaster. When the CHRI was established, we had good co-operation from the ComSec. And when there was some big meeting they would invite us and even, I think once or twice, meetings have been held abroad, they have said, "You come. We'll pay your ticket." etc. because there's some small fund for NGOs. Then I don't know what happened. By that time I was no longer on the Advisory Council relations had broke down-- something happened but I don't really know what. These days I get the impression from the Director of CHRI, that relations are quite tense.

SO: Sir, as my last question: what do you feel about the Commonwealth going forward? Are you reasonably confident in its efficacy? Do you think that its principal energies and impact are going to come from civil society, rather from governmental level?

YG: It won't come from governmental level, that's pretty clear. Look at the last conference in Sri Lanka. The campaign to boycott: they didn't achieve

anything out there. Maybe one person didn't go, the Canadian Prime Minister, out of principle.

SO: The Indian Prime Minister stayed away, as well as Steven Harper.

YG: Who wants Harper for a friend? So I think I don't really have much confidence in the Commonwealth promoting human rights. Like the African Union it is rapidly becoming the union of dictators and tyrants. I use this word very advisedly: the killings that go on and so on. There are some technical committees. I have followed very little, but there is a Commonwealth Electoral Group and I have looked at the way they did their observation in Fiji and then we had a meeting in Kenya. It happens that the Chair of the Kenyan Electoral Commission is also a Chair of this Commonwealth Association of Electoral Commissions. And my friend Amitav [Banerji] came and it was all big praise for the Chair of Kenya: "Oh, this wonderful elections you had." I mean! So there's no hope from the Commonwealth at all, at all. And now China coming out the wood and everything changing, everybody's nervous. Britain doesn't want to know; so I have no hopes at all. Civil society yes, I think they are doing good things. They are doing lobbying. Whether they have made any fundamental difference, is another question. In Kenya I would say 'not much;' they may have made a major difference in the last years of Moi's rule. At the end of the Cold War, the West started saying, "Okay, now we can afford to have a democratic system in Africa." And then there was some pressure and they did get support from civil society. I think the role was positive, but it is very opportunistic as well. I now speak as somebody from civil society, dealing with the embassies. There is almost no local funding in Kenya, anywhere in Africa I would think, most of the money comes from embassies basically, which means they're aid agencies.

SO: Yes, and that's problematic in itself.

YG: Yes. They have their own politics; sometimes our interest as civil society coincides with the interest of the donors. If not, we don't get the money. Civil society has become rather, I won't say 'complacent', but they've got into a routine; they are well paid, they have cars, they have expense accounts. They

are of course very active in Kenya: there's a press statement every week by one or the other and there are meetings held. But I'm not so impressed by what's going on.

SO: You make it sound a little bit like a benefit system.

YG: Well, in a way it is. It is also like there's Foreign Office staff, there is the Treasury staff, there is the staff for NGOs. So they move from one to the other...

SO: They do.

YG: In Kenya we have as good a civil society as others. South Africa is an exception, where civil society is well organised, from apartheid times—and effective to an extent. But they are pessimistic about the future. So I don't know what the answer is. I think people say "Commonwealth? That body with great standards and commitment? Forget about that." They may do some good, I know they have done some good in their work for small states, especially Ramphal who himself comes from the Caribbean. That emphasis was good because people were not showing much interest in small states, in the South Pacific and so on. Nobody was showing that much interest, except Australia and New Zealand. But the Commonwealth put a focus on that and did reports and provided consultancies. So that was good; but whether they continue that I don't know. These countries are now no longer new infants, they have matured.

SO: Professor Ghai, thank you very much indeed.

[End of recording]