

Prof Yash Pal Ghai: The enigma of arrival.

By Dennis Onyango When The Sunday Standard tracked down Yash Pal Ghai a day to the referendum poll

Source www.africanewssearch.com

A week later, he was leaving Cambodia, on another constitution and human rights related work headed for South Africa on a mission he declined to discuss.

Tomorrow, Ghai will quietly jet into Kenya, where he had hoped to live, even if briefly, under a brand new Constitution.

Instead, Ghai comes back to a nation he believes the President will be spurring with a no-confidence vote in Parliament and hanging on just because of fear of losing elections.

Even by the time he left here in March 2004, he knew a new constitution would not come because he believed the government did not want it.

Yet no Kenyan ? probably living person ? has delivered as many constitutions across the world as Prof Yash Pal Ghai. Few Kenyans, if any, have carried the nation's flag as high in international academic and professional cycles as Ghai and few still have been so honoured abroad but rejected at home like Ghai.

In 1981, Britain honoured him with the Commander of the British Empire (CBE), an award he says was a result of his work on constitutional development in the South Pacific and his assistance in the preparation of several independence constitutions.

"I used to joke about this gracious award from Queen Elizabeth that I must be the only person to be given this high honour for helping to set the sun down on the British Empire," Ghai told The Sunday Standard.

About a month ago, Britain, again, honoured Ghai with the Fellow of the British Academy. The Fellowship is the highest honour that the revered Academy can confer for distinguished research.

The Academy was established by Royal Charter in 1902 as the national academy for the humanities and the social sciences. It is an independent, self-governing fellowship of more than 800 scholars, elected for distinction and achievement in one or more branches of the academic disciplines that make up the humanities and social sciences.

Among its stated goals is to give recognition to academic excellence and achievement and to support research of the highest quality.

"I believe that I am the first Kenyan to be given this award. I am very pleased ? especially as no university in East Africa has formally recognised my scholarly achievements," Ghai said.

That honour was followed by another high profile international assignment when the United Nations Secretary-General Kofi Annan appointed Ghai his Special Representative on human rights in Cambodia.

He succeeded Peter Leuprecht, a human rights specialist with the Council of Europe and a former Dean of the Faculty of Law at McGill University in Montreal, Canada, who was appointed in August 2000.

On November 28, Ghai was in Phnom Pehn, Cambodia, on his first mission where he met the King, the PM, NGOs, trade unions and others to discuss Cambodia's constitution, international human rights treaties and the centrality of freedoms of association, expression and assembly, according to a statement the government of Cambodia sent to The Sunday Standard.

On the basis of that mission, Ghai will prepare a report to be tabled at the 62nd session of the UN Convention on Human Rights in Geneva, Switzerland in April 2006.

So it has to be true that a prophet is never honoured at home as Jesus realised belatedly.

As the Chairman of the Constitution of Kenya Review Commission, Ghai, stood firm, persevering personality attacks and outright insults to at least deliver a draft constitution for Kenya, with politicians questioning his credibility and honour.

Yet the man has lived his life on a mission of making new constitutions.

In the South Pacific and Asian countries Ghai has advised all sorts of political parties, constitutional commissions and constituent assemblies, helping them to implement constitutions, negotiating and mediating in conflict resolution, facilitating discussions, and training in negotiations and conflict resolution.

In recent years both his practice and research have been on the role of constitutions in conflict situations. "I have been engaged in these tasks in over 12 countries. This year I played an active role in the drafting of the Iraqi constitution and will be assisting in its review by the National Assembly to be elected in mid December," Ghai said.

In the last few years, in between writing a constitution for Kenya and teaching in Hong Kong, Ghai spent time in Afghanistan and in Iraq while they have been making their constitutions.

"In both places I tried to encourage a participatory process, but in neither was it possible to have a process like the Kenyan one. For one thing they were both emerging from periods of violence. In the case of Iraq it really has not emerged. They had both been subject to great pressure to get the job done ? mainly for the benefit of others rather than for theirs.

But I think I was able to persuade the constitutional commissions in both places to make an attempt to seek the views of the people."

In both places, Ghai said, the people turned out to be just as enthusiastic as Kenyans to have their say.

"Perhaps I was less successful in suggestions about the content of the constitutions. But with a number of other people I think I was able to make a contribution to improving the documents that have been produced. It was really a wonderful experience to help in even a small way in these fascinating countries. And I did find my experience in Kenya was of value in these exercises," he recalls.

In Kenya, Ghai's work in these troubled lands became a reason for his vilification, not an experience the government wanted to learn from.

In the final days of the National Constitutional Conference, politicians who ended up in the beaten Banana camp pitched tent on Ghai's role in Fiji, accusing him of fomenting trouble there in the name of making a new constitution.

Ghai says his involvement in Fiji's constitutional issues goes back to the overthrow of Prime Minister Dr Bavadra by Stiveni Rabuka in 1987.

"I refused the request of Sir Ratu Mara who headed the government which replaced Bavadra's, to find ways to legitimise it, in return for a large fee. Instead, I accepted Bavadra's request to become his legal and constitutional adviser, and acted free of charge, and worked with him until he died."

Ghai continued his association with Bavadra's party and other progressive groups to re-establish the rule of law.

"I advised opposition groups in the negotiations on the new constitution which came into force in 1997, ending nearly 10 years of military or military backed government.

The government, which won elections was also overthrown, with some assistance from the army, and I assisted in the litigation which challenged the coup. We won, about the only time a sitting government has been replaced through a court decision."

The military later sought Ghai's advice on its responsibilities in view of the court decision and acting on it, restored the democratic constitution. Some years ago Ghai again assisted in the drafting of legislation in Fiji for affirmative action, based on need rather than ethnicity.

Once upon a time, there lived a man called Pol Pot, in Cambodia. Born May 19, 1925, he took over the country with his terror gang, Khmer Rouge in 1975 and instituted a reign that killed 1.5 million in the next four years. In 1979, Pol Pot went into hiding after the Vietnamese invasion of Cambodia. He died in April 1998 in a Cambodian jungle.

The world was shocked and angry with death when it took away Pol Pot. Time magazine was particularly surprised that death could do that. It lamented that "Cambodia's ruthless dictator cheated justice", dying before he could answer for the atrocities committed during his "unrelenting quest to create a rural Utopia".

And that is how Cambodia ended up in the human rights and constitutional crisis Yash Pal Ghai has been called upon to help rectify.

In fact, Ghai was part of the UN team that helped in the establishment of a new constitution and new state institutions after the overthrow of Pol Pot and his associates.

Not that things got much better after Pol Pot's exit. Ghai says his principal task in Cambodia will be to keep under review the state of human rights and democracy and to assist the government and people to promote human rights and democracy.

"I shall report annually to the UN Commission on Human Rights and the General Assembly. I shall not live in Cambodia, but visit for a few weeks three or four times a year."

"The first is the pervasive impunity over political murders, disappearances and reprisals for those who speak out against the government.

"Secondly, the alienation or leasing of land to foreign companies, especially in areas inhabited by indigenous peoples, leading to massive de-forestation and in some instances the displacement of the original inhabitants."

The third human rights issue in Cambodia, Ghai says, is the lack of the rule of law, especially in the absence of a proper legal framework for government accountability and of legislation in many areas. There is also an incompetent judiciary, which is subject to government or party direction.

Ghai says Cambodia's modern history is "too complicated to explain in a few words".

A number of foreign powers were involved in arming one group or another, and many deaths were due to foreign intervention, "including Henry Kissinger's policies."

"Suffice it to say that the Khmer Rouge regime was one of the most brutal the world has ever known and was responsible for genocide as appalling as Hitler's. A whole generation was wiped out, the principal target being people with education and professional skills.

The economy was completely destroyed. The weapons with which foreign powers armed the Khmer Rouge overcame any resistance the people might have been able to offer. Eventually, every one lived in fear," Ghai said.

He concedes though, that the situation in Cambodia is now much better than 15 years ago when the UN went there to re-establish the state.

There is a popularly elected government, although the legal system, including courts, remains weak. Some economic development has taken place, although as in globalisation policies in many countries, the poor have done badly out of the marketisation of the economy.

"Shortly, and belatedly, trials will start of a few, now elderly, Khmer Rouge leaders for their genocidal acts."

Ghai was born in Kenya on October 20, 1938 and studied in Nairobi. He left Nairobi in 1958 to study law at Oxford, graduating in 1961.

He was called to the English Bar in 1962 then preceded for his masters at Harvard Law School before returning to East Africa to teach at the Law Faculty at the University Dar es Salaam.

In Dar es Salaam he taught both current Chief Justice Evan Gicheru and Attorney General Amos Wako "and a whole generation of East African lawyers."

When the University of East Africa was breaking up, the then Principal of the University College, Nairobi, asked Ghai to move to Nairobi to start a law faculty.

Unfortunately a senior minister did not like Ghai's criticism of the government's violations of human rights and the denial of the rule of law. The government promptly ordered that Ghai be detained without trial.

"Warned by a former student who had heard of the detention order, I left Kenya and worked abroad (in the US, Sweden and UK). I was able to return only when that minister fell from political grace."

By the time the minister was going down, Ghai was steadily on his way up. "I was professor at Warwick University. I did consider teaching in Nairobi and the University of Nairobi kindly offered me a job, but for a variety of reasons, I decided to stay on at Warwick where I taught a number of East Africans at both undergraduate and graduate levels," Ghai said.

"I have continued to research and publish on Kenya, although it has not been the primary focus of my research since I left Dar es Salaam in the early 70s. I have kept up with several friends, among whom are former students. I have assisted some NGOs in their work. I have trained some Kenyan PhDs."