JUDGES AND THE BILL OF RIGHTS

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PART I.

In many ways the Bill of Rights is still a non-issue. People really are not very interested. They do not see its relevance; they have been told very little about it; intellectuals and lawyers have talked on a level far above most people; and they are suspicious of the motives and effects of such a change. In the little debate which there has been, such a vast range of theoretical issues have been raised that almost no attention has been paid to the vitally important practical questions of how those rights will be enforced and by whom, if the Bill of Rights ever does become law.

Central to those questions is the role to be played by the judiciary. In particular, we must look closely at whether the function, past performance and composition of the judiciary make them appropriate, or indeed acceptable, guardians of constitutional rights. Sadly, critical analysis of the role of the judiciary has almost always been superficial. It has rarely gone beyond their unrepresentative race, sex and class, or bias in individual cases or issues. These personalised and ahistorical accounts fail to come to grips with the crux of the issue, and lead people to seek simplistic "solutions" which really will change things very little.

In this discussion, I will point out the range of difficult questions which remain to be dealt with by whoever enforces the Bill of Rights; the problems with our present judiciary carrying out that task; and alternative models which may be available to meet those concerns.

I. PROBLEMS FOR JUDGES AND THE BILL OF RIGHTS

The White Paper on the Bill of Rights is more notable for what it fails to cover, than for what it does. Given the politics behind this Bill of Rights, it is hardly surprising that generalities abound. Sadly, it seems that the Bill needs to be vague to get anywhere near the level of support needed to make it law. What gives even greater cause for concern, however, is failure of the drafters - negligently or deliberately - to address fundamental questions affecting the scope and effect of the Bill of Rights.

The Bill of Rights is riddled with complex questions of interpretation. These are no mere matters of "correct" statutory interpretation. They involve decisions on social policy and prevailing values. Concepts such as "freedom of association", "deprivation of life", "freedom of expression" are all vague, value-laden and intensely political.

The extent to which a certain right is to be guaranteed, and how it is reconciled with a competing right, is an intensely political question. Freedom of movement or association may well come into conflict with the right of protest. Rights to free expression will clash with minority rights to be protected against discrimination.

Perhaps most importantly, judges must interpret when a limit on a constitutional right is "demonstrably justifiable in a free and democratic

society". There is no definition of such a concept. Does "freedom" mean freedom from oppression, poverty, racism? Or individual freedom to do whatever one wishes? Or some other nebulous concept? What is a "democractic" society - participatory democracy, parliamentary democracy, socialist democracy? If we plump for the rather obvious answer - that it means the status quo - what is the point of a Bill of Rights? If we are seeking new protections because our present system does not adequately provide them, surely such an interpretation will stifle any meaningful change?

It will fall to those interpreting and enforcing the Bill of Rights to provide the answers.

II. Effect of Enforcement of Rights

Is a Bill of Rights case argued before the courts merely a dispute between an individual and the state? Does it then attract an individualised remedy? Are such remedies compensatory, reparatory or exemplary? Or alternatively, is the case considered applicable to all people whose rights have been similarly violated? If so, does it completely invalidate an Act, policy or practice as affecting all people? Does any such invalidation have retrospective effect? Does a decision in one case create precedents for future enforcement of that right?

These are vitally important questions. The whole potential impact of the Bill of Rights rests upon them. Yet it seems that once more the legislators are prepared to leave the answers to them entirely up to the judicial forum.

III. Evidence

Protection of rights requires proof of their violation. As this Bill of Rights is written, violators will be public agencies. The majority of cases are likely to arise in the context of criminal cases, and involve disputes of fact between police and defendants. As most criminal cases are dealt with by a guilty plea, most violations of rights are unlikely even to be aired in the court. Even with defended hearings, experience tells us that when a dispute of fact arises, a successful challenge to police evidence almost inevitably depends on the production of strong, independent and credible evidence. In the majority of cases, especially minor criminal cases, such evidence is simply not available. Given this, most defendants and lawyers are reluctant to raise defences which directly challenge the police evidence, as it is likely to antagonise the court and hence prove counter-productive.

It is hard to see that this will change markedly merely by enacting a Bill of Rights, unless judges make a commitment to taking a more critical line with the police. As both are agencies of the State, this may be viewed as excessively idealistic.

IV. Standing

There is no indication of the process by which cases will be brought to court. Clearly some questions will arise in the ordinary course of criminal cases. But other cases will need to be initiated specially to challenge a policy, law or decision. What rules will they be governed by? Will people

seek a declaration, or bring some other action?

In particular, how will courts interpret the rules on standing to bring such an action? Those who most need the protection of a constitution are those who are most powerless to protect themselves and their own interests. They are also those least likely to have the knowledge, resources and credibility to bring legal action on their own behalf. This Bill of Rights fails to provide for any right of collective or class action, or for any third party to seek remedies on behalf of those unable to do so themselves. Yet, a restrictive interpretation of the rules of standing will prevent anyone seeking redress on their behalf. It may even mean that collective actions are not permitted.

In recent times we have seen a number of situations which would involve potential breaches of rights under this Bill but where victims would be unable to seek redress themselves and would be effectively denied a remedy. One example was the inquiry into the abuse of young people in Social Welfare Homes, where ACORD sought a variety of forms of action on behalf of all young people in those Homes. Ultimately, the case ended up being taken by ACORD before the Human Rights Commission, whose limited resources and jurisdiction resulted in minimal redress. Similarly, deaths caused by state agencies would have raised serious Bill of Rights questions, but would be likely to fall foul of the rules on standing. The victims are dead, and their kin have no clear right to take action on behalf of their relation or on their own behalf as affected parties.

Government has already given an indication of how they see judges interpreting *locus standi*. Rules on standing are referred to in the White Paper as "a control mechanism employed by the courts" to avoid a flood of cases. Hard questions then arise for judges. Is the primary goal to secure people their constitutional rights, or to safeguard the continued smooth operation of the courts by limiting the number of people who can obtain redress for violation of their rights? If they limit access to justice through rules on standing, are they delivering law at the price of justice?

V. Procedures

Similar barriers to securing rights are provided by the courts' procedural rules and documentary requirements. Their complexity and idiosyncracies force people to resort to lawyers before they can even contemplate taking legal action. Yet there is no provision in the Bill of Rights of free legal assistance to ensure people can seek redress for violations of their rights. Once more, those most directly affected are the poor, the illiterate, the uneducated and the demoralised. It is the responsibility of judges to demystify and humanise the legal process, and create the space for lay people to participate meaningfully in the proceedings. Unless they do, they will be entrenching inequality of access to justice, and in turn, unequal access to enforcement of constitutional rights.

VI. The Treaty of Waitangi

Under the present Bill of Rights, where a case involves rights under the Treaty of Waitangi it can only be referred to the Waitangi Tribunal by the judges, or on application of either party. In some cases that may

be quite obvious that Treaty rights are involved, especially where at least one party is Maori. In many cases, however, issues affecting rights under the Treaty will arise incidentally. Where neither party is Maori, they may be unaware of the Treaty implications, or unwilling to refer the matter to the Waitangi Tribunal for consideration. In such a case, the judge must decide first whether an issue involving the Treaty of Waitangi arises, and if so, whether it should be referred to the Tribunal. In doing so, the judge must decide which version of the Treaty takes precedence when the Maori and Pakeha versions conflict. Or is a compromise reached between the effect of the two, thereby essentially rewriting the Treaty? How will judges interpret the meaning of *tangata whenua*, or the "spirit and true intent of the Treaty". Will most judges even understand the issues? What happens if such cases arise before bodies such as the Planning or Broadcasting Tribunals?

Even where a case is referred to the Tribunal, the judge must subsequently decide what effect to give its report if it decides there is a breach of Treaty rights. What effect is to be given to the affirmation of the Treaty in Article 4? In particular, what use is to be made of Article 3 of the Bill of Rights when guaranteeing Treaty rights would have major implications for Pakeha economic or social interests. Are Maori rights under the Treaty only to be subordinated to Article 3, or do rights arising under other articles in the Bill of Rights also take precedence over the rights of the *tangata whenua?*

Some of the problems outlined below can be dealt with by spelling out procedures and ways of resolving conflicts which arise. Many cannot. Looking at two scenarios drawing from situations which have arisen in recent years, may help set out the problems.

Scenario 1

A sixteen year old has been approached in a local shopping centre by the police. They ask her some questions and form the belief that she is under fifteen and is truanting from school. They decide to detain her and return her to school under the Children and Young Persons Act. Her school is actually having a day off and she resists police attempts to take her into the police car. This raises the first potential breach of the Bill of Rights - that "everyone has the right not to be arbitrarily arrested or detained".

She is then charged with assault on police and resisting arrest. She is taken to the police station, and released on the condition, agreed with her parents, that she remains home after eight o'clock every night and does not associate with certain friends. These are new bail powers which will be given to police and courts under the revised Children and Young Persons Act. This curfew and non-association order raises the second breach of the Bill of Rights guarantees - that "everyone lawfully in New Zealand has the right to freedom of movement", and "the right to freedom of association".

She violates the curfew conditons, is arrested and taken to the local Social Welfare remand home. On arrival, she is strip-searched and made to delouse her hair. During the first day she is disruptive and threatens to run away. She is then placed in the secure cells where she is held in solitary confinement for twenty-two hours a day, and denied education, reading and recreational resources. They also restrict her writing of letters to one a week, which is read by institution staff before being posted and

aspects critical of the institution removed. As found by the Human Rights Commission in 1982, this form of solitary confinement in Social Welfare homes constitutes "cruel, degrading or disproportionately severe treatment or punishment" - a practice which is prohibited under the Bill. In addition, the censorship of letters infringes the "freedom of expression" guarantees.

She goes to court three days later, to plead to the assault and resisting charge - the time delay being due to the fact that the Children and Young Persons Act Court only sits twice-weekly in her area. She sees the overworked duty solicitor for less than one minute, and on his advice pleads guilty. She had no time to mention her complaints about the Social Welfare home, and the lawyer dismissed her questions about the curfew because it is allowed under law. So, another question arises under the Bill of Rights - does this form of legal advice satisfy the right to "receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance"? Even if the judge thinks twice about it, what will they see as "the interests of justice" in this case? Will the judge only look at whether a lawyer has been available to consider the chance of bringing a successful defence to the charge, or will advice leading to the possible exposure of violations of her rights be considered as well?

Her family and Social Welfare ask the judge to discharge her without conviction if they arrange to send her to her relations in Samoa - even though she is a New Zealand born citizen, has never been to Samoa and does not want to go. Again, this is directly counter to the Bill of Rights guarantee that "everyone lawfully in New Zealand has the right to residence in New Zealand". Yet she has no knowledge of this right, nor of how she could challenge the court's decision. The plan to send her to Samoa then becomes known to human rights groups who have pursued such cases publicly in the past. However, they are unable to intervene through the court, because they are not directly affected and have no legal standing.

In summary, this simple and relatively common scenario has thrown up a vast array of potential violations of rights:

- the original action of the police, which was unjustified both because she was not truanting and because she was over the age where those powers can be used, violates the right "not to be arbitrarily arrested or detained" under Article 15.
- the curfew and non-association clauses of her bail violate the right to "freedom of movement", and "freedom of association" under Articles 10 and 11.
- the strip searching and delousing in the social welfare home contravenes the right of people deprived of liberty to "be treated with humanity and with respect for the inherent dignity of the human person" under Article 15.
- the detention in solitary confinement falls under Article 20 which prohibits "cruel, degrading or disproportionately severe treatment or punishment."
- the perfunctory duty solicitor's advice raises the Article 18 right to "receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance."
- the exile to Samoa violates Article 11 right of those lawfully in this country to "residence in New Zealand"
- her practical inability to enforce any of her rights violated the provision of Article 2 which *guarantees* all those rights and freedoms against acts done by the legislature, courts or public officials.

All of these are, or soon will be, violations sanctioned by legislation or long-standing official practice. In a situation such as this, no question of violation of her rights is likely to be raised by the police, social welfare,

parents or lawyer. The young person herself does not have the knowledge, credibility, resources or faith in the legal system to raise them. Even if she challenged the police or Social Welfare actions, her version of events is unlikely to be accepted.

That leaves the securing of these protections to the judge. How likely is it that the judge will question the legislative powers of the police to apprehend, the reasonableness of their belief that she was truanting, the validity of the curfew clause permitted by new legislation which they have had a hand in drafting, and which are powers they also enjoy and exercise? Will they on their own initiative raise questions about conditions of detention in Social Welfare homes, where they have probably never even set foot? Will they claim that other remedies, such as reference to the Human Rights Commission, must be exhausted first - even though the Commission does not have the resources to carry out another extensive inquiry and can only make recommendations, not findings? When faced with a guilty plea in a busy youth court will a judge even stop to think twice what processes have led to her presence in court?

If a judge does look twice at what happened, will such powers automatically be interpreted as falling within the terms of Clause 3 : "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." On first reading, that may suggest that the department concerned must positively demonstrate that such limits set down in law are justified. By contrast, however, the White Paper seems to assume that the courts will exercise "judicial restraint" and assume the legitimacy of the law. In other places, they comment, courts "do not thwart the wishes of the people's elected representatives by striking down legislation without very good reason. In fact they rarely exercise the power." "The basic test stated in Article 3 means that in most cases the courts will leave it to Parliament to define the public interest, and to enact legislation encapsulating its decision."

Assuming that a judge does consider the detention in solitary confinement in the Social Welfare home a breach of the Bill of Rights, what is the effect of that? Is it confined to the individual case before the court? Does she get an immediate order for release? Does she get awarded compensation for the time spent there? If so, what about all the others who are being confined in similar conditions? Should they all be released? Should they all be compensated? What about young people who have been held under those conditions in the past? Should they be compensated? Should Social Welfare be barred from using those secure units altogether? What remedy will judges, who have sent young people to those homes for years, consider to be a remedy which is "just and appropriate in the circumstances"?

Scenario 2:
The Treaty of Waitangi

A gold mining company is challenging the refusal of the Ministry of Mines to grant them a licence. The mining will involve a cyanide run-off, which is likely to destroy local seafood beds.

The fishery rights of the local Maori are clearly guaranteed under both Maori and English texts of the Treaty, which the Bill of Rights "recognises and affirms". This case therefore raises a potential conflict with those rights.

Yet, given that local Maori are not a party to the actual case, how are these rights to be protected?

Under the proposed Bill of Rights, a conflict such as this may be referred to the Waitangi Tribunal for a report and opinion. However, that can only be done by one of the parties to the case or by the judge. It is highly likely that neither the parties, nor the judge, will even be aware of the potential conflict with the Treaty. Even if they are, neither the mining company or the Mines Department will be keen to have the Tribunal interfere, complicating and lengthening the hearing. Should they ask for such a referral, or should the judge be aware of the likely conflict, there is still no obligation to refer the matter to the Tribunal. It is purely a matter of discretion for the judge.

Let us assume that the case does get referred to the Tribunal. It reports that a licence would be a serious breach of Article 2 of the Treaty and should not be granted. The judge is still not bound but is merely required to "have regard to that opinion and report". There are no clear guidelines as to how that will be done, except that "the Treaty of Waitangi shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent". The explanatory notes provide few clues to what this means. While they say that "the voice of the Tribunal on this issue ought to be listened to with respect", and that "future legislation and policies will have to conform with the Treaty", they also say that these rights are "subject only to the limits allowed in Article 3 - limits that can be demonstrably justified in a free and democratic society".

Should the judge decide to grant the licence despite the Tribunal's opinion, the only remedy to local Maori is to apply to the court under section 25 for "such remedy as the court considers appropriate and just in the circumstances" - *after* the licence has been granted. Can people be expected to have faith in a court system which has already ignored their rights by granting the licence, and invest their time and energies in seeking such a remedy? Can the whole *iwi* apply, or does the reference in the section to "anyone whose rights or freedoms are infringed" apply only to individuals? What will it achieve for them if they do? How culturally sensitive will judges be to deciding an appropriate remedy? Will it provide a remedy just to individuals, or to the whole *iwi*? Will it take the form of monetary compensation? Will anything short of stopping the mining protect those rights? Hasn't the court already rejected that option?

To summarise on this scenario, many questions arise over:

- ignorance of the existence or applicability of rights under the Treaty of Waitangi;
- the discretion to refer Treaty issues to the Waitangi Tribunal for comment, under Article 26;
- the discretion whether to take any notice of the Tribunal's opinion, and the meaning in Article 4 of "the Treaty is always speaking and shall be applied to the circumstances as they arise so that effect may be given to its spirit and true intent";
- the right of a 'group' to take action under Article 25 when their rights have been breached;
- the likelihood of a court granting a remedy when it has already rejected arguments based on the Treaty by granting the licence;
- the total discretion of the court to decide on the availability or form of remedy under article 25;
- the effectiveness of a remedy "after the fact";
- reconciliation of these decisions with the guarantee of rights in Article 2, and specifically the "affirmation" of Treaty rights in Article 4;

— the extent of subordinating Treaty rights to the limits required in a "free and democratic society".

Effectively, in a case such as this, rights under the Treaty can only be upheld once a judge acknowledges there is a Treaty issue, refers it to the Tribunal, and agrees to be bound by the decision of the Tribunal. The filtering processes of ignorance, ambivalence, expediency, hostility, pragmatism, and a "balancing of interests" militate against effective enforcement of those rights. Can we rely on our present day judges to protect Treaty rights from such abridgments?

PART II : JUDICIAL INADEQUACIES AND THE BILL OF RIGHTS

There is a deeply rooted mistrust of the ability and commitment of judges to protect the rights of the powerless under the Bill of Rights. Only by understanding these factors can we identify the types of change which will be vital before such people will have any faith in the Bill of Rights.

I. DISTRICT COURT AS A CONSTITUTIONAL ARENA

Although it has not yet been spelt out, the framers of the Bill of Rights clearly expects the bulk of arguments to arise in criminal cases, and be dealt with in the District Court.

This in itself is cause for grave concern. District Courts are essentially a fast-track process. District Court judges simply do not have the time and resources to entertain extensive legal arguments. They deal with issues of fact, and routine application of basic legal principles, not with broad conceptual arguments. Lawyers who argue criminal cases at District Court level are frequently the less experienced members of the bar, and are under heavy workloads and intense time pressures. It is impossible to predict in how many cases lawyers will try to raise constitutional arguments. But it is very clear that when they do, the District Court will simply say it is not the appropriate arena for complex constitutional arguments to be raised, fully debated, and deliberated on in a thorough, reasoned manner.

II. JUDICIAL COMPETENCE

There already exists amongst a significant number of lawyers a serious disquiet over the inconsistent quality of legal decisions emerging from the District and High Courts. The willingness of lawyers to raise legal arguments varies widely according to the perceived receptiveness and ability of the particular Judge. Manipulation of court lists, the seeking of adjournments and the standing down of cases are frequently prompted by a desire to seek or avoid a specific judge. Should a Bill of Rights be introduced which requires complex legal argument and decisions at District and High Court levels, there is a very real danger that the enforcement of rights will be reduced to little more than a lottery, dependent on the ability of defence counsel to seek out the most favourably disposed and intellectually minded judge.

III. Composition of Judiciary

The composition and personal characteristics of the judiciary is not the major point at issue. However, it *is* an undeniable fact that our judicary is almost exclusively comprised of ageing Pakeha men, drawn from the legal and social elite. Given the whole range of screening processes which ultimately determine access to the judicial club, that has always been inevitable. It is unlikely to change significantly in the future. In itself this creates mistrust amongst those whose race, sex or class excludes themselves and their peers from those positions. As wealthy white males, judges cannot be expected to identify with, or even understand, the demands of Maori as *tangata whenua*, minority cultures, women or the poor.

Some would see the solution being appointment of a greater cross-section of race, sex and class to the bench. Undoubtedly, it would help remove one barrier to confidence in the judiciary. But criticisms that the judiciary are not to be trusted to protect the rights of the oppressed must go deeper than changing the individual class, sex and racial characteristics of judges. Argument on that level alone leads us into fruitless personalised debate, and invites simplistic solutions.

IV. Historical Dealings of Judges and the Powerless

An understanding of the depth of the problem can only be achieved by analysing the history and functions of the legal process itself.

The legal system which the English exported to this country was the product of centuries of economic, social and ideological evolution. By mid-nineteenth century, the law was developing to meet the demands of industrial expansion where the expanding interests of capitalism were paramount. It was a time of imperialism, where inter-state rivalry and belief in the invincibility of the "Mother Country" was little different from present day superpower imperialism. It was a time when men held absolute power over political, economic, social and ideological forces. Law, like all other state institutions, naturally reflected and protected these forces. In nineteenth century England, this was manifested in the economic sphere through such devices as the common employment rule, and vagrancy laws; against indigenous peoples in British colonies by claims of "discovery", of sovereign supremacy, and native imbecility; against women through laws on areas like matrimonial property, rape, and child-bearing.

Conditions in the colony certainly differed from England, demanding adaptations of those institutions to suit local purposes. But the basic driving forces of a Eurocentric, capitalist, patriarchal society remained the same. So, too, did the thrust of the law. Apparent contradictions, such as enfranchisement of women and the creation of the Maori parliamentary seats, reflected peculiar local conditions and were far from a meaningful transference of power. On the other hand, the law served the interests of Pakeha settlers exceedingly well. It constantly found reasons for refusing recognition to the Treaty of Waitangi. It seized vast tracts of Maori land not in physical occupation simply by declaring it "waste land". It imposed "martial law" on Maori in the colonisation wars, when it was inconvenient to comply with troublesome legal rules. It validated imprisonment of passive protestors from Parihaka without trial, when there were no adequate

criminal charges to warrant their detention. It imprisoned Rua Kenana from Maugapohatu for eighteen months for offering moral, but not legal resistance to police. Similar tales can be told by the Fenian rebels, the Waihi strikers, the women imprisoned under the Contagious Diseases Act.

Much of that history has been so effectively buried that many do not even know those things occurred. Amongst those who do remember, there is ingrained mistrust of the legal process, and its judicial agents. That is especially so amongst organisations which exist to protect those victims. Many of those who do not know the history nevertheless experience daily the contemporary manifestations of the same injustices. Much of their anger is geared at the personnel in the institutions, as that is the carrier with whom they have contact.

In part, understanding forces behind the development of our legal process helps explain the cynicism of many of the powerless when, if, they hear of the proposed Bill of Rights. It is foolish to expect that people who have traditionally been treated with hostility by the courts will have faith in those same courts as guardians of their fundamental rights. But more importantly, it serves to focus the fundamental problem of judges and the Bill of Rights. Even if the people operating the legal process were made more representative, the structures, procedures and ideology of the legal system will remain unchanged. They will still be geared to meeting the driving forces of the state. In this country those are still capitalism, patriarchy, and Eurocentrism. Changing the composition of the judiciary is only one simple step. Changing the structures of the law, and with it the structures of the society, is a much more complex matter.

PART III : ALTERNATIVE MODELS FOR A CONSTITUTIONAL COURT

Various proposals have come forward addressing one or other of these dilemma. Many such proposals have been piecemeal expedients, and have failed to tackle in any systematic way the inadequacy of the present judicial process to deal with the Bill of Rights. If we are sincere about the Bill of Rights providing an effective and enforceable protection for the powerless, we must face the reality that our present judicial process is discredited and outmoded. Various suggestions of new constitutional forums have been floated over the past couple of years.

I. CONSTITUTIONAL COURT

Some have promoted the idea of a separate constitutional court, modelled on existing courts and procedures but specialising in Bill of Rights cases. Alternatively there are suggestions for a constitutional division of the Court of Appeal. Special Constitutional Courts already operate satisfactorily in places such as Switzerland, Italy and the Federal Republic of Germany. A new jurisprudence would be developed by Constitutional Court judges, combining international and domestic law with policy determinations. Judges would still be drawn from the senior legal profession, but would be chosen for their experience in the areas of criminal and human rights law and could receive special training. Rather than being politically

appointed, they could be nominated by a specially constituted Appointments Committee of the kind recommended by the 1978 Beattie Report on the Royal Commission on the Courts.

Within such a new jurisdiction, the potential would exist to develop a new and creative jurisprudence, aimed to provide maximum access to justice and enforcement of rights. In a heartening display of judicial initiative, the Indian Supreme Court has shown that such radical moves are practical and rewarding.

Having recognised the effect of procedural technicalities in denying people access to justice, judges of the Indian Court of Appeal have creatively developed a new "epistolery" jurisdiction under Article 29A of their Constitution. Its simplicity is explained by Bhagwati J. in the landmark case of *People's Union for Democratic Rights v Union of India* [1982] A.I.R. 1473

"Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability, or socially or economically disadvantaged position are unable to approach the Court and the Court is moved for this purpose by a member of the public *by addressing a letter drawing the attention of the Court to such legal injury or legal wrong, the Court would cast aside all technical rules of procedure and entertain the letter as a writ petition on the judicial side and take action upon it.*"

In addition, Bhagwati J. confirmed a revised approach to the rules on standing:

"But the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by this Court, and the narrow confines within which the rule of standing was imprisoned for long years as aresult of inheritance of the Anglo-Saxon system of jurisprudence have been broken and a new dimension has been given to the doctrine of *locus standi* which has revolutionised the whole concept of access to justice in a way not known before to the western system of jurisprudence.

Where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bona fide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the Court." (1482)

These initiatives have only been possible because of the willingness of the judiciary to play a positive role in securing for the mass of people the protections guaranteed to them under their constitution. The leadership provided by Justice Krishna Iyer in the 1970s and now Chief Justice Bhagwati have been vital to building the core of judicial support which now exists in the Supreme and High Courts for this new jurisdiction. The chasm between the powerful and the oppressed in India also created fertile political ground for such developments. Of course, this process has had its share of problems and criticisms. Judges who sympathise with central government have been accused of reluctance to find against it in the same way they do against other state agencies and authorities. Allied to that is concern over use of cases for political purposes by social action groups and some judges. Priority given to such cases has also created a further backlog in the heavily over-burdened courts.

The Indian legal system is based on British common law. It is essentially the same as ours. So, too, are the rules which have now been adapted to meet the people's needs. Party political motivation of judges would not be a problem here. A special constitutional court would avoid problems of case overloads, and remove the need for reliance on restrictive standing rules to limit Bill of Rights cases.

However, the stumbling block in this country would be the absence of a judiciary prepared to take such initiatives. Awareness of disparities in power is far less advanced in this country than in India, especially amongst the legal elite. Further, developing a radical new jurisprudence implicitly acknowledges the defects in the existing legal process. Judges operating within those courts are unlikely to engage in this level of self-criticism. It is hard to imagine that specially appointed constitutional courts would be much more receptive to such a role.

Further, while a separate constitutional court would deal with the logistic problems of using the existing venues, the problems of access to justice would arguably be greater. It would require lodging separate actions specifically based on the Bill of Rights, instead of such arguments being raised incidentally in a case already before the District Court. Composition of the judiciary would only be marginally more appropriate, as they would still reflect the unrepresentative nature of the legal profession. Hopefully the quality of legal analysis would be high, but serious doubt would remain over the ideological basis from which policy decisions would be made. Given the essentially traditional nature of such a constitutional court, it would be unlikely that it would attract much more confidence in the long run than the present courts could achieve.

II. LAY PARTICIPATION

One possibility is a constitutional body comprised of lay participants as well as lawyers. Lay judges are by no means unusual in international constitutional forums. We already have a combined lay and legal body in the Waitangi Tribunal. There, legal expertise is acknowledged as only one of the skills needed to decide on basic questions of Maori constitutional rights guaranteed under the Treaty of Waitangi.

The same combination of social and legal experience would seem to apply to the proposed Bill of Rights. Given that changes to the composition of the legal profession are unlikely in the near future, this would seem to be the only way of ensuring a constitutional forum in which the powerless could have some faith.

II. BICULTURAL FORUM

The remaining dilemma is to ensure that any such forum can be relied on to ensure that Maori rights under the Treaty of Waitangi are not routinely subordinated to Pakeha claims based on the Bill of Rights. History tells us that Pakeha judges in Pakeha courts are not worthy of that trust.

One possibility is to adopt the Canadian approach where protection of indigenous rights is provided for in a separate part of the Constitution Act, and is not therefore subject to the broad proviso of "limitations demonstrably justifiable in a free and democratic society".

Some have suggested the alternative remedy of vesting the Waitangi Tribunal with jurisdiction to deal with all issues involving the Treaty of Waitangi, either by reference of the court or on its own motion. Already the Waitangi Tribunal is providing us with a positive and creative model of bicultural justice.

For several years various Maori have been proposing a bicultural "senate" which would oversee legislation and government policy to ensure that they are consistent with the Treaty of Waitangi. It would act as a second chamber of the legislature, between the House of Representatives and the Governor-General. Judicial decisions involving the Treaty would be referred to the Waitangi Tribunal. That then raises questions about the present function of the Tribunal as a recommendatory body only, and a process for appeal from Tribunal decisions. Various possibilities exist. A two-tier Tribunal system, regional and national, would allow for appeals. Empowering the Tribunal to make decisions would place control over decisions on the treaty within a bicultural sphere. Alternatively, a bicultural constitutional court combing lay and legal judges could provide an appropriate forum.

The ultimate dilemma is that this country is not yet ready to accept the need for such a forum. It will be difficult enough to get a separate Constitutional Court. It will be more difficult to obtain representative lay participation. At present, the goal of biculturalism within such a forum would seem unattainable.

PART IV : CONCLUSIONS

Where does this leave us? In essence it gives us three choices. First, we can reject a Bill of Rights, and retain the status quo. On the above thesis, that means accepting continuing dominance of certain values, priorities and peoples, and seeking change through other non-legal or extra-legal channels.

Secondly, we could endorse the current Bill of Rights proposal, in the hope that a new framework for jurisprudence may signal a new willingness of judges to strive for delivery of a better quality of justice. This will only result where judges bring to their work a commitment to wide-ranging structural change - unlikely given their characteristics, function and history.

The third option is to delay any action on the proposal until these vital questions can be given proper consideration. That would also allow time to create the climate for establishing a new constitutional structure which monitors and enforces compliance with the Bill of Rights.