Discussion paper: considering a bill of rights

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Rights and their legal protection

Rights are not an easy concept to define, and we might in this context make do with a somewhat practical definition. Human rights are entitlements, belonging to individuals or groups, that we value greatly and protect as the highest ideals of our society. They are, as Amartya Sen puts it "primarily ethical demands". (Sen, 2004).

Very often, we think of rights as existing to protect groups that might be vulnerable—perhaps minority groups that might be intentionally or unintentionally neglected. However, rights protection is not limited to such defined groups, and can be invoked by anyone who feels their rights are jeopardised. We generally think of rights as being asserted by individuals or groups against the state, but it is possible to have "horizontal rights" that are protected for individuals and groups against other individuals or groups.

The formal legal protection of rights in a bill of rights transforms these ethical demands into something that the law recognises and protects. Historically, this legal recognition has often followed a conflict or accompanied a new constitutional settlement, but in recent decades the UK and New Zealand, amongst others, have chosen to introduce legal protection for rights without such circumstances in response to various domestic political concerns. Legal protection of rights in a particular place often echoes, draws on, or builds upon prominent international rights instruments.

Legal protection of rights can be "entrenched" or "unentrenched". Entrenched bills of rights cannot be changed easily, usually requiring some legislative super-majority or other extraordinary requirement. The strength or extent of entrenchment varies with the ease or difficulty of amendment of the bill. Unentrenched bills of rights are subject to change or override in the same manner as any other law. However, by virtue of their political significance or public recognition, it may be more difficult in practice to amend them than the formal rules of legal amendment would suggest; such a move might attract great political criticism.

Legally defending a bill of rights puts a legal obligation on someone—the state, citizens, both—to respect and uphold these rights, and expects that they will honour this. It is possible that this obligation will not be directly overseen or enforced save through ordinary political action (this is often known as "political constitutionalism"). However, this is seen by some as inadequate, as it provides no specific way of highlighting failures of the political system to protect rights, and drawing attention to such failures through the ordinary political process may be difficult or impossible for marginalised or vulnerable groups. Therefore, almost all

contemporary bills of rights provide for or envisage *some* mechanism of oversight and enforcement that can highlight when there is a failure to respect the rights in question, and perhaps require or recommend some steps to address this. This oversight is often done by the judiciary, but does not have to be. This is discussed further below.

As such, a legal protection of rights in a bill of rights is aptly summed up by Klug as: "Part symbolism, part aspiration and part law ... fundamentally a set of broadly expressed entitlements and values." (Klug, 2007).

What's in a name?

The term "Bill of Rights" is used in the Belfast/Good Friday Agreement, but this phrase does not have any specific legal meaning.

Though often associated in rights discourse with the first ten amendments to the US Constitution, which in turn is associated with very strong rights protection by judges and strong rights entrenchment, these are not *per se* features of a bill of rights. The concept is older and more diverse than this. The first example of the use of the term is the Bill of Rights of 1689 in England, which was not intended to be judicially enforced or entrenched but rather *politically* enforced and defended. Even the US Bill of Rights may not have been envisaged as a measure to be judicially enforced, as argued by US scholar Larry Kramer. (Kramer, 2004).

Nor are all contemporary Bills of Rights entrenched. The New Zealand Bill of Rights, contained in a 1990 Act, is statutory in nature and not entrenched; the Bill expressly denies that it takes supremacy over other legislation, and while there is some judicial oversight, courts cannot interfere with the validity of laws because of inconsistency with the Bill of Rights. The Canadian Bill of Rights of 1960—later replaced with an entrenched Charter of Rights—was similar. The UK Human Rights Act 1998 is referred to, by government and others, as a bill of rights despite lacking the name.

In the same way, other similar terms, such as a "charter of rights", do not imply many essential features. They might be entrenched or not, judicially enforceable or not. A Declaration or Covenant of rights might have some more specific meaning, the former being likely to be largely declaratory rather than directly legally binding, and the latter likely to be a formal multi-party agreement. Therefore, there is not much that we can tell about a rights instrument from the fact that it is called a bill of rights. It is for those who would adopt a such a bill to decide what it should be.

Who would a bill of rights be for?

A bill of rights, then, can be conceived of as a statement and repository of values, a way to set out clearly entitlements that must not be forgotten or neglected. Crucial to determining

what a bill of rights should do, and what rights it should include, in decide *whom it is for*—whose interests are we particularly concerned about and seeking to protect?

Of course, on one level, it is for everyone, but this does not help us in narrowing down the array of rights that we might include within it. For this, we must consider what, fundamentally, we owe to others; what sort of interests might be placed under threat; whose entitlements might be vulnerable. In this, as with so much else, context is key: history and experience and our expectations for the future can tell us what our obligations towards one another are, and should be, and what groups might be vulnerable and in need of additional protection. From this we can establish what protections and rights might be needed.

Rights discourse often focuses on groups that are minorities along some axis, e.g. ethnic, racial, religious, sexual, etc. It is useful to consider: what minority communities or groups might need protection, and along what axes are these communities defined? Are these minorities vulnerable such that they might additional protection and can rights help with this?

However, given that a bill of rights is a forward-looking document, we must also consider are there groups that might be not be vulnerable *now*, but might be in future due to a change in circumstance? Can rights ensure this group would be protected in that scenario?

Another way of looking at this question is to think of rights as "representation re-enforcing": that they are designed to counteract the fact that some group are not well represented in ordinary politics, or that some kinds of entitlements are not well protected. (Ely, 1980). Rights can stand as reminders to lawmakers and policymakers to remember these groups and their interests, and these fundamental entitlements, and/or offer some oversight of the lawmaking and policymaking to make sure they are not overlooked. We could thus consider what rights might be needed by asking if there are groups that are not, or in future may not be, represented adequately in politics, or what entitlements are most likely to be forgotten.

<u>Who does a Bill of Rights address?</u>

A related question is: who are we speaking to in a bill of rights? Who is the audience? There will be, of course, more than one group to whom it is addressed. Such a bill has to clearly communicate to these groups, and speak in a language which they will understand and take seriously.

Members of the executive and legislators will be a key audience, as rights are perhaps most often threatened by the significant public power that these persons wield. Relatedly members of the administrative state—civil servants, regulators, other state actors—can greatly affect rights by their actions and inactions. A bill of rights should highlight to these actors the values and groups that they must not disregard in using state power. This should also inspire and motivate *positive* attitude towards vindicating rights, rather than just a fear of violating them.

Rights should, ideally, infuse political discourse. No enforcement mechanism to redress breaches of rights will be as effective as a political culture that takes rights seriously in all its actions.

The bill may also speak to the judiciary, if judicial enforcement is favoured, or some other investigation/enforcement body that will have regard to possible infringement of rights. This may involve instructions on how enforcement should be done, how determinations of rights violations should be made, and what remedies may be given for this.

Finally, the public are a crucial audience for a bill of rights. Rights are protected for the sake of the people, and there must be a robust social understanding of which rights matter to the society and why they are protected. This can have real effects in terms of holding political and governmental actors to account: people will be more aware when their own rights are threatened and speak out; and claims of rights violations will be taken more seriously by the public, leading to more political pressure for rights compliance. Moreover, we might want people to respect the rights of others (as noted above, this is call horizontal applications of rights) and so people must understand what these rights entail.

The bill of rights needs to communicate with all of these audiences. This may require language that is nuanced and yet accessible. The core points to communicate to all these groups, however, are probably the same:

- What is the bill of rights for? What are its core aims and purposes?
- Which rights and values are protected?
- Do these rights require positive state action to vindicate, or are they more things that require the state to *refrain* from action?
- What limitations of rights are allowed? When can rights be limited and taken away in the common good or for the sake of other social interests?
- What happens when rights are not respected?

We might need to communicate these latter points in some detail and with some legal nuance to political actors and rights enforcers, but they should still be broadly understood by the public so that people understand how rights work in practice.

<u>Who should enforce a bill of rights?</u>

There is no one answer to the question of who should enforce a bill of rights. There are many possible approaches, and many of these approaches might be combined rather than taken alone.

- *Political enforcement* – enforcement of rights is for the legislative, executive and administrative branches of government, and it is their responsibility to abide by these protections. A sense of duty to respect rights might be sufficient, or public pressure

and opprobrium may compel action if mistakes are made. This would be considered a weak form of protection on its own, as it gives no external remedy for political neglect and potentially no remedy at all for wilful disregard.

- *Judicial enforcement* – the judiciary are empowered to hear complaints about rights breaches and to make determinations as to whether they have taken place. The powers of the judiciary can be significant—with the ability to invalidate or remedially interpret laws to remedy rights violations—or limited to something more akin to an oversight role.
- *Enforcement by specialised bodies* – in addition or in the alternative, there might be oversight from parliamentary committees, a human rights commission, or an ombudsman receiving complaints about violations of rights after the fact, and/or receiving reports about rights concerns that arise in policymaking or implementation. Moreover, a parliamentary committee, or a law officer such as the Attorney General, might have a duty to investigate and report on the likely rights-infringing effects of proposed legislation and key state actions. Review of legislation and key state actions for rights compliance is envisaged in the Belfast/Good Friday Agreement.

<u>What values or principles underlie the protection of rights in Northern Ireland?</u>

Legal scholar Mark Tushnet observed that "to say that some specific right is (or ought to be) recognised in a specific culture is to say that the culture… ought to recognise what its deepest commitments are" (Tushnet, 1984). The most crucial step, therefore, is to identify the values that might underlie any bill of rights, which will in turn be a starting point for identifying what substantive rights should be protected. These might be included in a preamble or recital of a bill of rights, or might simply inspire the contents of the bill but not be included explicitly.

These values will differ from place to place, and must be formulated with special regard to the context that brought about a bill of rights and the perceived need for it. The following are values are commonly present in international human rights instruments or domestic bills of rights of other jurisdictions, and might be suitable foundational values for a bill of rights:

- Dignity
- Fairness
- Freedom and democracy
- Peace and justice

Dignity, fairness, freedom and justice are very commonly found as foundational principles in human rights instruments around the world. Dignity is perhaps the most common founding principle—it can be found in the German basic law, the South African constitution, the Indian Constitution, the UN Declaration of Human Rights, amongst many others—but also the most disputed as to its meaning and content. Fairness, though again a deeply disputed and contextual concept, can also serve as a foundational value. The ideals of freedom and democracy are common touchstones found in the ECHR and the Canadian Charter, as are

justice and peace, particularly in "post-conflict" bills of rights (see the UN Declaration, and the Constitutions of Bosnia and Herzegovina and the Democratic Republic of Congo, amongst others.)

Looking at the Belfast/Good Friday Agreement—in particular at the Constitutional Issues section—there are several espoused values that might help our thinking about a bill of rights. They might stand alone, or help to augment the principles discussed above to give them more specific meaning in the Northern Ireland context:

- Parity of Esteem;
- Rigorous impartiality;
- Community;
- Respect for culture, diversity of identities and traditions;
- Respect for identity, ethos, and aspirations.

Several questions arise for consideration here:

- Which of these values would be the most appropriate foundations for rights in Northern Ireland?
- Are there other values might be used alongside or instead of those listed here?
- What experiences and context should we use to give these values life and reality in the political context of Northern Ireland? What experiences *show* us the importance of these values in the lived experiences of people here?
- Following this, what sort of rights *flow* from those most appropriate values?
- Do these principles and values suggest specific state obligations, such as those that might demand protection of economic, social, and cultural rights? Would they suggest the protection of rights to housing, healthcare, social protection, fair working conditions, language protection, cultural participation?
- What international rights instruments or other bills of rights might provide useful inspiration, being founded on similar or cognate principles?

Finally, it is worth considering if there are principles that should guide the *limitation* of rights. How do we establish when and on what basis rights may justifiably be limited or taken away in the interest of the general welfare or the rights of others? Values commonly used for this include a limitation necessary/justified in a free and democratic society; a "proportionate" limitation; or limitation in accordance with "the principles of fundamental justice".

<u>Can public engagement help?</u>

Finally, it is worth considering how and to what extent public engagement and consultation should shape any process of deciding to protect rights. Some bills of rights are decided upon and adopted without much participation, but most contemporary efforts in this vein involve some substantial engagement.

There are two main modes of public engagement of this sort: consultative or deliberative. Consultative engagement would seek views, outlooks, ideas and reaction from members of the public or interest groups to inform and shape the understandings of those making decisions or drawing up proposals. This might be done by polls, surveys, the hearing of evidence, etc. It is largely passive, hearing the ideas that people might have, and its usefulness and influence on the process will vary depending on how people engage with it.

Deliberative engagement involves some more substantial role for people in shaping the proposal itself while engaged in a more discursive forum, where ideas are shared and debated before proposals are recommended. (Generally, the conclusions of deliberative for are mediated by some other process, not directly binding). This citizen deliberation may provide more nuanced and thoughtful suggestions and proposals than a simple consultation, and there is a greater expectation that this deliberative input will be influential. Citizens assemblies are a popular tool of deliberative engagement with the public on issues of major public importance. (Doyle and Walsh, forthcoming).

Public engagement can have several different purposes: raising awareness of the issue; raising understanding of the issue; and seeking input on the issue. Deciding between consultative and deliberative engagement will largely turn on the extent and nature of the *input* sought, since the deliberative process will involve people more in the shaping of proposals and involve different people or groups debating this before input is made.

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