Framing a Bill of Rights: some issues for consideration

Dr David Kenny FTCD,
Associate Professor of Law, Trinity College Dublin

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I have watched with great interest the work of the Committee since I spoke with you last in September. The witnesses you have heard from, and the robust discussions you have engaged in, have produced many fascinating insights, and suggested many directions for this next stage of your work. I hope that we will have the opportunity to have talk about any issues of interest to you. From my observation of your work, there were several points that stood out to me as potentially important, and I will briefly comment on those in this paper.

1. Preambles and values

An interesting recurring theme throughout your work has been the importance of values to a bill of rights, and in articulating these values clearly at the heart of that document. I read with great interest the summary of your stakeholder engagements. It was interesting—though perhaps unsurprising—that human dignity was the most frequently chosen value; as we discussed before, it is also the one most commonly found in human rights instruments, and certainly dominant in public discourse these days. Other popular values—such as mutual respect, justice— are worthy commitments to undergird a bill of rights. The most obvious way in which that might be done is in a preamble. Preambles to bills of rights or constitutions are fascinating and diverse things. There is a spectrum along which they can sit in terms of their status as an articulation of values or an actionable part of the document.

<u>Three approaches to preambles:</u>

Aspirational preamble/Statement of values

The first form of preamble would be some that is aspiration or rhetorical, designed to set out a clear statement of the values that underlie the bill of rights and its making, and state at the forefront of that document its purpose. It can also serve to define the core identities of the society that the bill is to serve. This is rhetorical—and I use that term without any negative connotation—in the sense that it is not designed to have any bearing on the meaning or content of the rights protected in the Bill. It might inspire politicians or the people, guide policy or lawmaking, but this effect is simply that it is generally persuasive in shaping people's opinions rather than it have any effect in the concrete enforcement of rights. All premables (other than the most perfunctory) will perform this punction aspirational, and will identify the nature of the bill of rights and help people identify with the rights included. The other functions, discussed below, will always be in addition to this.

Indirect effect/Interpretive effect

A second form of preamble is one that is designed to have some effect on the content and meaning of the bill of rights, but *indirectly*. It is supposed to inspire and guide the interpretation of the document that follows, and to give direction to those tasked with interpreting/applying/enforcing those rights. When facing some ambiguity in the text of the bill of rights—trying to extrapolate the meaning of some provision—these values can and should be used as core interpretive values, and the rights in the text should be interpreted in a manner that is consonant with them. This is particular true in systems where bills of rights or constitutional documents are read holistically, where all the provisions must be considered in context of each other.[1] This indirect effect on interpretation is common in many legal systems. For example, the Preamble to the Constitution of Ireland 1937 is used to interpret the rights and other provisions in that document. It matters what the values expressed in the preamble *are*: some are more likely to feed into rights interpretation than others. In Ireland, the values of "the dignity and freedom of the individual"[2] and "justice" have had a more important interpretive role than other, less rights-salient values. As Cliteur et al. put it, preambles "set the tone for the subsequent … text" and are "a framework for interpretation".[3]

Enacting of enforceable rights

It is also possible—though very rare—for preambles themselves to enact rights, to be directly enforceable. One of the very small number of examples is the Constitution of Cameroon, which states that "The Preamble shall be part and parcel of this Constitution"[4] and indeed the Preamble contains the most important rights guarantees in the document.[5] However, this approach is extremely unusual, and "most preambles lack legal status".[6]

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[1] This is a very common tool of interpretation, but some instruments—the German basic law, say—see this technique used more centrally.

[2] See e.g. *NHV v Minister for Justice* [2017] IESC 35 on dignity and work; *State (Healy) v Donoghue* [1976] IR 325, 348, on the constitutional value of justice and the provision of free legal aid.O ther values, like "true social order", have seen less use. See G. Hogan, G. Whyte, D. Kenny, R. Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018), [2.1.21]-[47].

[3] P. Cliteur, M. Stremler, W. Voermans, *Constitutional Preambles: A Comparative Analysis* 90. They note that this is sometimes stated in the text, as in the Constitution of Tuvalu, but this is not common.

[4] Article 65, Constitution of Cameroon, 1972.

[5] The Preamble read, in part:

"We, the people of Cameroon,

Declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights;

Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:

1. all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
2. the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
3. freedom and security shall be guaranteed each individual, subject to respect for the rights of others and the higher interests of the State; …"

[6] Cliteur et al. (n 3) 91; *cf* S. Levinson, "Do Constitutions have a Point? Reflections on 'Parchment Barriers' and Preambles" (2001) 28(1) *Social Philosophy and Policy* 150.

Indirect effect the most usual approach

Given that making a preamble enforceable is so unusual, it is hard to see why this approach would be adopted. If any of the values that one wants to insert into a Preamble would also be useful as directly enforceable rights, they could be replicated in the main portion of the Bill. Moreover, values such as dignity, are not generally suitable as enforceable as rights.[7] The most usual approach would be to draft a preamble that was suitable for symbolic and aspirational purposes, but to expect that this will have indirect interpretive effect and colour the bill of rights. This is probably not necessary to state expressly; it would very likely to be done by any rights enforcer tasked with interpreting the bill.

Other functions of Preambles

Cliteur et al. note various sorts of "added value"[8] that preambles can provide, including noting the importance of duties or responsibilities, and the *difference* between rights and these concepts. Duties, they suggest, may be better suited to a preamble, where they will not have legal effect.[9] It is very rare to have duties included in bills of rights or constitutions, though there are some examples. It is somewhat more common to find them in preambles.

Difficulty in reducing values into more concrete rights

It should be borne in mind that it is difficult, at times, to translate values into concrete rights that can be applied and enforced. As several witnesses have stressed to you, granularity or specificity is ultimately crucial if rights are to be enforced in practice. Dignity, as I have mentioned before, is a notoriously contested concept. What is required to vindicate the value of dignity will very likely be the subject of dispute. Therefore, it is important to understand that any concrete instantiations of values that one wishes to protect should be separately protected in the main text of the bill, and one should be prepared for the interpretation of the preamble's values to take on some life of its own. One cannot control exactly how those tasked with reading and understanding these values will interpret them.

2. Incorporating international rights and instruments

The UK is a party to many international human rights treaties. Very few of these, other than the ECHR, have been given effect in domestic law.[10] They are largely not legally enforced, but rather supervised by international monitoring bodies. The most important of these are, in no particular order:

[7] C. O'Mahony, "There is no such thing as a right to dignity" (2012) 10(2) International Journal of Constitutional Law (ICON) 551.

[8] Cliteur et al. (n 3) 94.

[9] Cliteur et al. (n 3) 97.

[10] Scotland, for example, plans to incorporate the Convention on the Rights of the Child by way of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. This has passed through parliament, but has been referred to the Supreme Court by the Attorney General for Scotland.

- Universal Declaration of Human Rights;
- UN Convention on the Rights of the Child;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- European Social Charter;
- UN Convention on the Rights of Persons with Disabilities;
- UN Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

When framing a bill of rights, it is obvious that we would consider these obligations and see how they might be incorporated into the bill. It is difficult, however, to incorporate these instruments directly into the bill, for several reasons.

First, while there are some of the more specific conventions that are very rights based that would be appropriate to adopt in domestic law—CEDAW, the Convention on the Rights of the Child, or the Convention on the Rights of Persons with Disabilities—these would usually be better incorporated in dedicated domestic legislation that would provide for various additional legal and policy measures to help implement them. Others—such as the Universal Declaration and the Social Charter—would incorporate some obligations that would be quite out of character with rights in a common law system such as that of Northern Ireland, and it would be hard to foresee how they would be enforced. They are perhaps best described as aspirations rather than legal rights.

Secondly, some instruments are duplicative of each other, or cover very similar subject matter; incorporating them all would leave these different protections clashing with one another, with no obvious way to say which should take priority or why. It would also make the bill of rights very long. Thirdly, if these instruments were being included, care would have to be taken to omit parts that would not make sense in the context of a domestic bill of rights.

As a result, it would be preferable, in my view, to identify gaps where rights protected in these instruments and are not adequately defended in UK law and incorporate these elements into the bill of rights. You could, in this process, easily change that which needs to be changed to work them into the domestic legal order and the approach and priorities of the bill of rights.[11]

3. Universalism and pluralism in bills of rights

[11] An example of this would be the text of Article 42A of the Irish Constitution on Children's Rights, which adapted many of the values and principles in the UN Convention but worked them into the scheme of the Irish Constitution's protection on rights and adapted them accordingly.

One thing that came through clearly in the engagement with stakeholders was the importance of various identities, traditions, and diversities in Northern Ireland, and the need to offer additional protection for vulnerable groups. Notably, they identified the need to protect additional rights related to disability, age, religion/belief, cultural background, and ethnicity.

This lays bare of the contradictions at the heart of rights discourse: that we use the language of both individualism and universalism, but many fundamental entitlements are liked to groups, community, and group identity rather than being either individual or universal.[12] One way to address this is to avoid group-based entitlements, and formulate all rights individualistically, but this may not sum up adequately the nature of the of entitlements if we are truly concerned not only with individuals but with groups.

On the other end of the spectrum, one could list out particular groups that merit particular protection, but this may present difficulties. The categories it draws may, over time, become less relevant. New categories may become apparent as deserving of protection. Unlike, say, equality legislation, which can be more readily amended, it will be rare that a bill of rights is subject to change; it is supposed to be written for the long run, and not lightly altered. More problematically still, the expression of protection for certain groups could be interpreted as *excluding* those not listed, preventing the protection of other groups by implication.[13]

Therefore, it might be more desirable to protect broader categories—say, a protection for those who are vulnerable in society[14]—or to protect rights that apply with particular force to these categories that we are concerned about. This would allow the application of these ideas to be developed in practice, and they would therefore be easier to augment or change if, in time, our needs prove to be different than what we anticipated.

[12] See J. Raz, "Rights and Politics" (1995-1996) 71 Indiana Law Journal 27.

[13] There is a maxim of interpretation in law that *expressio unius excludio alterius*—expressing one thing excludes the other.

[14] For example, there is a (judge made) approach in Canada that rights cases are treated differently if the protection of "vulnerable groups" is in question. See R. Colker, "Section 1, Contextuality and the Anti-Disadvantage Principle", 42 U Toronto LJ 77 at 84; *R v Keegsta* [1990] 3 S.C.R. 697; 1990 CanLII 24 (SCC).