A Bill of Rights for a new South Africa?

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The writer of this article was fairly recently a Fullbright Professor of Law at the University of Natal (Durban). During the course of his visit to South Africa, he developed certain ideas on a bill of rights for this country. The Professor is a distinguished American academic with an excellent reputation in Constitutional Law and Tele-Communications Law, and the ideas expounded by him in this article are not only interesting but also of great practical significance particularly in view of the Professor’s experience with a bill of rights in the USA and of the SA Law Commission’s report on Group and Human Rights published recently. Of special importance to us are his views on a constitutional court for South Africa. (See also the first editorial in this issue).

An implicit premise, which I see no reason to doubt, of the current political discussion is that the adoption of a new constitution will be a necessary step in fashioning a non-racial democratic South Africa. Should such a constitution contain a Bill of Rights? If so, should the rights there enumerated include such “second and third generation rights” as rights to housing, a minimum income, or adequate medical care as well as such “first generation rights” as freedom of speech and freedom from racial or religious discrimination? Whatever the Bill of Rights might include, how should the courts who are expected to interpret and apply its terms be staffed and structured?

Ultimately, of course, those questions must be answered by the people of South Africa, based upon their own experiences, cultures and aspirations. But experiences with the United States constitution’s Bill of Rights, adopted 200 years ago, may shed some light on the questions one must ask in addressing these issues. Therefore, this essay is intended as a guide to the kinds of discussions that are likely to emerge, not as a prescription for the resolution of specific issues.

Why have a Bill of Rights?

Currently, it appears that America’s greatest export is judicially protected individual rights and liberties. If the United States could charge a fee for copies of its Bill of Rights, its balance of payments deficit would disappear overnight. In the special case of South Africa, the American Bill of Rights is not subject to the sanctions law and so is freely available to anyone in South Africa who wants it.

Why should anyone want it? For many, I suppose this seems an easy question. Employing language in the Bill of Rights, the United States Supreme Court has decreed unlawful all state-enforced racial segregation, substantially eradicated gender distinctions from American law books, guaranteed all defendants in all criminal cases the right to effective representation, decreed the abolition
of mal-apportioned legislatures and prevented the President from halting publication of volumes of data – compiled by his own Defense Department – that cast substantial doubt on the legitimacy of American involvement in the war in Vietnam. These decisions (and many more too numerous to recount) might be said to embody many of the most precious cornerstones of a modern, liberal democracy. They have been applauded and emulated throughout much of the world.

But if the desirability of a Bill of Rights is to be measured by the number of inspiring judgments issued by the US Supreme Court, then one needs to take account of the darker side of its ledger as well. In previous eras, that Court has also employed the language of the Constitution to rule that Afro-Americans, whether slaves or not, could never be made citizens of the states by the national government, that legislatures lacked the power to limit the working hours of bakers, that most of the major, initial legislative acts of Franklin Roosevelt’s New Deal were unconstitutional, and that the right to freedom of speech did not extend to people who argued that conscription for military service was unconstitutional and immoral. In more recent times, the Court has opined that distinctions between those who were and were not pregnant was not gender discrimination, that a state may inflict capital punishment notwithstanding overwhelming evidence that, in America, this punishment is largely meted out in fact to blacks who kill whites and that the police may obtain search warrants based on unverified tips from anonymous informants.

It is not a phenomenon unique to American culture that the act of putting on a black robe does not render the judge politically sterile. Nevertheless, the claim (or hope) for a Bill of Rights – unless it is to operate simply as an exhortation to the conscience of legislators – is that it will enable a more neutral and detached body to prevent the citizens from doing harm to themselves. The case for a Bill of Rights, then, rests on certain theoretical propositions: (1) that we can identify and describe with reasonable precision certain enduring values that should never (or only rarely and for exceptional reasons) be neglected in a democratic society, no matter how urgently momentary passions or isolated prejudice might suggest otherwise and (2) that a politically independent judiciary is particularly well suited to provide a sober second look at the actions of the legislative or executive branches, as measured against these more enduring values.

That a judiciary will not always perform this task well is not so problematic as the chance that it will act perversely. If the judges do not vigorously protect these rights, that only means that the outcomes of the democratic processes remain intact. For example, a failure to overturn a conviction for seditious utterances as a violation of a right to freedom of speech does not upset the political balance that produced the sedition law. But if the judges employ the bill of rights to enforce their own political agenda on society, then the risk of autocracy supplanting democracy is real. This occurred in the United States, for example, when the Supreme Court employed the requirement that government afford people “due process of law” to invalidate laws establishing minimum wages and maximum hours for workers.

It may be helpful to note that a bill of rights, enforced by an independent judiciary, can also help promote democracy and democratic institutions by overseeing the behaviour of local or isolated bureaucracies, such as local police departments or housing agencies. In a formal sense, what these bureaucracies do is “democratic”, since they are ultimately accountable to the people’s elected representatives. But, in reality, they often acquire a power to make their own rules in proceedings not highly visible to the public. So, the decision to seek to gain a confession from one accused by prolonged interrogation or to build a public housing project far away from vital municipal services may often be best reviewed by the judiciary rather than by the national legislature or executive likely to be preoccupied with more far-reaching issues.

What belongs in a Bill of Rights?

For the reasons just given, I believe, the debate over a Bill of Rights for a new South African constitution should focus only in part on the question of what sorts of values should constrain the choices of democratically chosen representatives. The constitutional dialogue must also consider whether judges can enforce those constraints and whether judges are likely to employ them for unintended purposes, as well as whether other governmental institutions are likely to be effective in securing these rights against isolated abuses.

For a simple illustration, suppose the suggestion were made that a Bill of Rights should contain a provision forbidding “discriminatory legislation”. Proponents of such a provision would argue, sensibly, that even in a democracy law makers need to be constrained by the duty to treat everyone even-handedly. Otherwise, politics – which is supposed to be concerned with public, not private, interests – can simply degenerate into a spoils system in which those who win elections enrich themselves at the expense of those who lose.

Taxes, for example, might be levied that fall disproportionately on those with less political power. Worse, history shows that politics may often be conducted on class, racial or religious lines. Where this occurs, legislation aimed at subjugating or segregating low income people or racial or religious minorities may result.

For these reasons, it might be argued, the principle that there should be no “discriminatory legislation” is an enduring value fit for inclusion in a Bill of Rights. The absence of “discriminatory legislation” is one hallmark of a well-functioning democracy but, perversely, unchecked one-person, one-vote processes may produce “discriminatory legislation”. It would be beneficial to save the citizenry from doing this to themselves.

Perhaps unfortunately, the matter is not so simple. Opponents could forcefully argue that a ban on “discriminatory legislation” would be quite difficult for judges to enforce fairly and consistently and could present substantial opportunities for abuse. Like it or not, we must realise that all laws discriminate. Is a tax on cigarettes “discriminatory legislation” because it takes money from smokers but not pipe smokers? Judges would need some way of choosing between distinctions that make sense and those that do not. In the previous example, how are judges to know any better than the elected representatives of the people whether a rational basis exists for determining to raise certain revenues from cigarette smokers but not pipe smokers.
Further, because all laws "discriminate", judges could employ the constitutional provision to accomplish what it was designed to prevent. A law establishing that all people shall have equal access to all public beaches discriminates, among other ways, in favour of people who prefer racially integrated public facilities and against those whose tastes are for racial separation. A judiciary bent on returning South Africa to its former ways could declare such "discrimination" unconstitutional (or hold it illegal if it did not provide for some segregated beaches for those who preferred them).

In the simple example I have provided, the flaw is not in the design but in its execution. The solution is not to condemn the notion that protection against discrimination should be enshrined in a Bill of Rights but, rather, to define that protection more carefully. For example, the document might forbid only overt discrimination where it is achieved by employing particularly suspect criteria (such as race, religion or gender) to distinguish between people subject to and exempt from laws. Then, the constitution would permit taxing cigarettes, but not taxing only cigarettes sold to women.

Two basic points, that cannot be overlooked in constitutional debate, remain: First, the decision to embed a principle or value in a Bill of Rights means, if it is to have real force, that some body independent of strictly democratic institutions will be able to delay or veto the people's will. In that sense, a Bill of Rights is anti-democratic. Second, assuming the judiciary is the enforcement body, these rights should be limited to provisions that judges can enforce and that are not easily twisted to achieve perverse ends. This goal is not easy to achieve.

What about second and third generation rights?

Application of the principles just described is quite likely to lead to the conclusion that, if a Bill of Rights is to be adopted, it should include certain basic tenets of modern liberal democracy. These include prohibitions on legislative or executive actions that destroy or dilute the right to vote, to speak freely, to be arrested only for violations of established laws, to be imprisoned only after conviction by a court employing fair procedures and to be afforded equal opportunity for advancement and self-development without regard to one's race, colour, creed, national origin or gender. These are often referred to as "first generation rights" because they appear in bills of rights included in the world's early efforts at establishing written constitutions. One might also call them "process rights", because they seek to assure that the processes of government are democratic and that peaceful avenues for change are available, but do not dictate the substantive outcomes produced by these democratic institutions or require that they be altered periodically.

An important issue confronting any country contemplating creation of a Bill of Rights today is whether to include "second and third generation rights", provisions often found in twentieth century constitutions that seek to guarantee that government will meet or provide certain social welfare standards. Examples include rights to adequate medical care, decent shelter, or establishment of a universal, minimum income. They order government to produce certain substantive outcomes.

Although the rights documents of many countries include such provisions, attempts to persuade the United States Supreme Court to read them into the more elastic phrases of the American constitution have been uniformly rebuffed, usually with a fair measure of hostility. The Court's reluctance stems from the view that judges lack the competence to question legislative decisions in the area of economics and social welfare. That view is grounded in part on the belief that such matters necessarily must be part of the political bargaining process; minimum income policy must be informed by matters as complex as the contribution of fiscal policies to inflation and as diverse as the costs of food, housing, clothing, and medical care.

This hands off approach also stems from a keen awareness that, during the first third of this century, when the American Supreme Court was more venturesome in this area, it produced a series of rulings invalidating protective labour legislation that are now seen as thinly veiled attempts to impose a rigid, doctrinaire philosophy of laissez faire capitalism on a society whose economic ills were barely comprehended by the wealthy professional class from which Supreme Court justices were drawn.

Finally, fully aware that constitutional adjudication is an anti-majoritarian venture, the Justices consciously wish to limit their own authority and believe their powers are most legitimate when confined to the task of asking simply whether people, in cases brought before the court, have been charged under unjust laws. On this view, it is one thing to impose judicial authority to refuse to convict someone charged with making an inflammatory speech that should be shielded by the right to freedom of expression, but quite another to act as a free wheeling inquisitor into all policies and programs that effectively determine the true income levels of various classes of citizens.

Proponents of including economic and social rights in a Bill of Rights advance three principal points. First, they claim that first generation (or process rights) mean little without simultaneous enjoyment of second generation (or substantive economic) rights and vice versa. As phrased by some, they want neither freedom without bread nor bread without freedom.

Second, proponents of recognizing second as well as first generation rights assert that the risks of unwarrantably extending judicial power are no greater in one case than another. True, judges heedless of the inherent limits of their authority and expertise might employ a phrase requiring maintenance of a minimum income to decree that every government budget must be perfectly balanced lest deficit spending should induce inflation that erodes the protection of minimum income laws. But the same judges might just as easily enforce their conception of appropriate budget policy by decreeing that unbalanced budgets yield inflation that disproportionately reduces the real income of the lower economic classes which include all the members of certain fringe religious sects and so violate the (first generation) right to be free of religious discrimination. For judges determined to impose their policy preferences on society, any bill of rights provision may serve equally well as a convenient excuse.

Finally, it may be plausibly argued that the appropriate judicial role with respect to second generation rights is remarkably similar to that for first generation rights. For example, a Bill...
of Rights provision might require the legislative and executive departments to make good faith, fully informed efforts to ensure that each citizen receives an adequate minimum income. The judge who is sensitive to and responsible about his or her task will realize that the adequacy of the average minimum income in South Africa would not be a fit subject for judicial determination in a democratic society. But she or he might well play a constructive role by inquiring whether prevailing legislation was, in fact, based on full review of all available information, truly intended to establish income maintenance and designed to make exceptions for the quite unusual individual case of the sort legislators might overlook or not foresee.

Indeed, such questions are quite similar to the kinds of inquiries judges make in, for example, freedom of speech cases. The judiciary in America does not inquire whether everyone has equal or adequate rights of freedom of speech. Obviously, the wealthy have more access to the media than the poor. Rather, they ask less far-reaching questions such as whether the legislature had a purpose to suppress unpopular speech in enacting the statute, whether sufficient evidence exists to show that a restriction on speech is necessary to protect a compelling governmental interest, or whether the government could achieve any permissible, non-censorial purposes by means that do not conflict with the individual’s right to self-expression.

In considering whether to include second or third generation (or economic and social) rights in a Bill of Rights, the principal question, of course, must be whether the society should commit itself and future generations to treating these rights as fundamental and inalienable. Thus, with respect to minimum income, for example, the first question must be whether some minimum income for every citizen should be an inalienable birthright in a new democratic South Africa. But one must ask as well whether the choice to establish the value in a Bill of Rights (rather than, say, in a non-binding admonition to the legislature) asks judges to do too much or threatens to give them undue powers. In a sense, the question comes down to this: are certain first generation freedoms — such as the rights to vote, speak freely and be rid of racial discrimination — necessary to make the bread palatable?

**How should courts be staffed and structured?**

By now it should be clear that creating a Bill of Rights that is to be an effective constraint on legislative, executive and administrative institutions requires granting real power to an independent, or at least semi-autonomous, judiciary. Therefore, an important question in thinking about whether to create what kind of Bill of Rights is what kind of judiciary to establish.

If a Bill of Rights is to exert a meaningful limiting force on daily political activity, then the judges who enforce it have to be insulated from those political pressures. But complete independence is probably unwise and certainly unattainable. A judiciary completely unrepresentative of the citizenry at large is going to do a poor job of articulating their overarching goals and enduring aspirations. And, unless the judges are to be selected by throwing darts at a telephone directory, they will have to be selected through a process that is, to at least some degree, controlled by ordinary politics. So, the goal one must seek is some balance between representatives in selection and protection from routine political control after that selection.

Many models are available that can produce such results. In the United States, at the national level judges are nominated by the President (who is elected separately from the Congress) but must be confirmed by a majority vote of the Senate (the least representative of the two houses of Congress). South Africans may recall the very substantial controversy in 1987 over President Reagan’s nomination to the Supreme Court of Judge Robert Bork. Considered by both his defenders and his detractors to be a strict conservative, Bork failed to gain Senate confirmation after a prolonged, intensely political, battle centred on the role the Supreme Court should play in matters such as freedom of speech, reproductive rights, and race relations law.

As the Bork controversy illustrates, nomination by a political leader, subject to a veto by yet another political body, tends to keep the court free from interference and independent. But party politics — including the need to obtain a party’s endorsement, to campaign and to raise funds — still dominate these processes.

A third type of model attempts to remove judicial selection from politics by employing some sort of independent body (often dominated by judges or lawyers) to select new judges. But, of course, this cannot extract politics from the process. It simply moves the political focus back to the choice of people to serve on the selection committee. To try to protect judges’ independence without granting them tenure into their senile years, one might establish a lengthy, fixed period of service without possibility of extension or renewal. However, of course, experience shows that some people suffer “hardening of the judicial arteries” at a very young age while others remain vigorous, productive and creative well after 80.

The conclusions that emerge from these considerations are, I think, really quite simple. Certainly, one feature of a well-functioning bill of rights system is a judiciary that is both reasonably representative of the people whose rights are to be protected and reasonably independent of ordinary political pressures. Neither of these goals can be attained completely; indeed, at some level they virtually contradict each other. But a variety of ways exist to achieve a fair measure of both representativeness and independence. The key issues to be resolved are at what stage in the
selection process political considerations should play a role, what institutions should control that process and how far the nation should go in promising, in advance, not to meddle with the judges once they are selected.

A distinct issue that arises in a country contemplating the creation of a new constitution is what should become of the judges and courts established under the previous constitution. That all depends, of course, on the magnitude of the changes to be brought about by the new constitution and the reasons for it. Judges and their courts are part of the institutions of government and, in no instance in the history of the world has their own legitimacy transcended that of the government that endowed them. At the same time, to the extent that individual judges or judicial institutions have performed or been structured in a manner that comports with the philosophy of the new constitution, one assumes that their retention makes sense.

No matter what procedures or institutions are developed, no judiciary can, by itself, make a meaningful bill of rights come alive for a nation. The populace has to believe in the values it reflects and the purposes of setting those values apart. Conditions are ripe for successful, independent protection of individual rights and liberties when, after hearing a fiery political oration with which they vehemently disagree, most people shrug and say, “Well, that’s her opinion and she’s entitled to it, but she’ll not get my vote.” Absent those conditions, it is not apparent that elaborate drafting of definitions of “rights” or the erection of formal bulwarks to “judicial independence” has much chance of making a real difference.

What of the structure of the judiciary? In particular, if a constitution is meant to be independently enforceable by judges against the more political branches, does that suggest the wisdom of a separate constitutional court? Such a court, it may be argued, might more easily accumulate expertise in the interpretation and enforcement of the constitution. Moreover, it might be readily and easily accessible to people who assert that their fundamental rights have been infringed.

Perhaps this is merely a manifestation of my subconscious American chauvinism, but I nevertheless believe that the idea of a constitutional court is inconsistent with the notion of a bill of rights that protects and reinforces democratic institutions and values. The purpose of enacting a bill of rights onto a democratic constitution is to establish a superior law, so superior that it even controls the (democratic) acts of the people’s elected representatives. Judges enforce bills of rights because they are law, just as a statute of a previous judgment of a court is law. Every legal issue and every legal case, then, potentially contains an issue concerning the bill of rights and every judge in the land must be able to interpret and apply that document if it is to have its intended force.

Moreover, bill of rights issues do not usually arise in a vacuum or divorced from other legal issues. Often, the interpretation of a statute determines what constitutional issue arises. Often, the precise facts of a particular case must be found before one can decide whether the constitution applies to this instance. Therefore, no court can decide only constitutional issues, for those issues usually emerge from controversies to which other legal sources are relevant and where the underlying facts must first be established.

Thus, it seems to me, every court in the land must be a constitutional court and no court can artificially confine itself only to those legal issues that are constitutional issues. Of course, the highest court in the land, the court of last resort, will have the final say on the meaning of the constitution. In that sense, it might be called a constitutional court. But what sets this court apart is not that it entertains and resolves constitutional issues but, rather, that it is the highest court. In addition, certain constitutional controversies may arise where it is advisable to bypass the inferior courts and proceed directly to the highest court for an immediate, definitive resolution of the problem. Again, however, such a case is to be submitted to the highest court, not to a constitutional court.

Conclusions

Thinking about a Bill of Rights for a post-apartheid South Africa is an exhilarating experience. It asks South Africans to reflect on the fundamental, enduring values they wish to enshrine in their basic charter. The task, however, also calls for hard thinking about the judiciary – what kinds of tasks is it well-suited for, how far should its capacity for enlightened self-restraint be trusted, how should it be constituted? One cannot think of either the judiciary or the notion of independently enforceable civil rights and liberties separately. They are two sides of the same coin.

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