

A Declaration or Bill of Rights

Most modern constitutions have a Declaration or Bill of Rights setting out fundamental rights and freedoms that are specially protected by the constitution. Declarations of Rights have a long history. English-speaking people regard their first as the Magna Carta of 1215, while the French look to the Declaration of the Rights of Man and of the Citizen, which was adopted at the beginning of the French Revolution in 1789. The practice of including a statement on rights in constitutions became prevalent after the UN General Assembly adopted the Universal Declaration of Human Rights in 1948. The first constitution in this country to have a declaration of rights was the short-lived 1961 Constitution, and thereafter all our subsequent constitutions have contained one.

Why have a Declaration or Bill of Rights?

The purpose of a Declaration or Bill of Rights is to protect the rights of citizens and ordinary people living in the country. Although generally these rights must not be overridden by the government, some have to be qualified. Rights cannot always be absolute – they may have to be limited to allow the government to govern effectively in the interests of all its citizens, and some have to be balanced with the rights of others. But it is important that any limitations on the rights that are protected by a Declaration or Bill of Rights should be spelt out. Hence a Declaration or Bill of Rights also has to set out clearly, unambiguously, specifically and not in general terms the ways in which a government may legitimately limit the rights of its citizens and how they are to be balanced with the rights of others.

Should a Declaration or Bill of Rights be Enforceable?

If people are to be protected against oppression or undue interference by governments, the rights contained in a Declaration or Bill of Rights must be enforceable. They are usually enforced through court challenges to laws which violate them. For example, media practitioners have successfully challenged some of the provisions of AIPPA. Sometimes, however, the challenge may be directed at an executive action rather than a law – e.g. the conduct of the police in prohibiting a meeting. And sometimes the challenge can be directed at people other than the Government or its agents: for example if an employer breaches an employee's constitutional right to fair treatment, then the right can be invoked against the employer. Whatever the precise way in which a Declaration or Bill of Rights can be enforced, it must be enforceable. If a Declaration or Bill of Rights is "non-justiciable" [that is, if courts cannot strike down laws and actions that contravene it] then it would serve no purpose whatsoever.

What Rights Should be Protected by a Declaration of Rights?

General considerations

Originally, only civil and political rights and freedoms — for example, the right to a fair trial and freedom of expression and association — were protected by constitutional declarations of rights. Social, economic and cultural rights such as the right to education and the right to work, were not usually so protected, though some constitutions have included them in a statement of principles to guide government

policy. The South African Constitution protects some social and economic rights because it was felt that the rights to housing, health care, food and water, for example, were crucially important to most people in an economically unequal society such as South Africa's. The same considerations would apply to Zimbabwe: indeed, one of the questions COPAC asked in its outreach programme was what social, economic and cultural rights should be included in the new constitution.

Incorporation of International Instruments?

A constitutional Declaration or Bill of Rights should cover at least the main rights and freedoms that are recognised internationally; indeed, it has been suggested that it should cover all of them, perhaps through a provision saying something like: "Laws of the legislature must not violate any rights recognised by international conventions to which Zimbabwe is a party." Such a provision would have two drawbacks, however:

- International instruments are usually broadly and loosely drafted, whereas rights that are protected by a constitution must be defined clearly and unambiguously so that the government and its subjects know what they can and cannot do.
- A provision along the lines suggested above would allow a government to remove the constitutional protection from any right simply by renouncing or withdrawing from the treaty which embodied the right.

Should it be possible to amend the Declaration of Rights?

Peoples' ideas of what rights are important vary over time. The French Declaration of the Rights of Man and of the Citizen, for example, was silent on the rights of women — a serious omission by present-day standards. And Magna Carta, in addition to protecting subjects against arbitrary punishment and the expropriation of their property without compensation — rights which are still regarded as fundamental in most countries — also protected men against arrest on the accusation of a woman, a right which could hardly be claimed nowadays. The fact that attitudes towards fundamental rights may change is important for two reasons:

- Only rights that are truly fundamental should be included in a constitutional declaration of rights.
- A Declaration of Rights is not only for the present, but also for future generations.
- Although a constitutional declaration of rights should not be easily amendable [because if it is governments may be tempted to limit or abolish rights that have become politically inconvenient] it should not be completely unamendable. Like the rest of the constitution, a declaration of rights may need to be altered from time to time.

Specific Rights

What follows is a brief [and by no means complete] selection of specific rights that should be protected by our new constitution, and some of the problems associated with them:

Right to life

This right is so fundamental that it obviously must be included, but in defining its extent two questions arise:

- Should the right cover unborn foetuses [i.e. should abortion be permissible]?
- Should the death penalty be allowed?

It should be noted that even if the constitution allows abortion and the imposition of the death penalty, they may be restricted or prohibited by the ordinary law.

Right to liberty

This right protects people against arbitrary arrest and detention, but should it extend to protection against imprisonment for failure to pay a civil debt? Civil imprisonment is prohibited by article 11 of the International Covenant on Civil and Political Rights, to which Zimbabwe is a party.

Protection against inhuman or degrading punishment or treatment

This protection obviously should be included in a Declaration of Rights, but does it imply prohibition of capital punishment? The South African Constitutional Court said it did, but our Government amended the current constitution to say it didn't, thereby preventing the Supreme Court from tackling the death penalty issue.

Protection against discrimination

Again this should be included, but how far should it go? Our current constitution has been amended over the years to extend the grounds on which discrimination is prohibited to cover sex, gender, marital status and physical disability. Should it be extended further, to include sexual orientation? This is controversial in present-day Zimbabwe, but it should be remembered that the International Covenant on Civil and Political Rights requires parties [of which Zimbabwe is one] to give equal protection under the law to everyone without any discrimination whatever.

Freedom of expression

According to the French Declaration of the Rights of Man and of the Citizen, this freedom is one of the most precious of all human rights. It includes freedom of the press and media, though press and media freedom are often dealt with separately. So important is this freedom to democracy that it should be subjected to minimal restriction, but some modern declarations of rights [for example, the one in the South African Constitution] expressly state that it does not cover "hate speech". If this freedom were given proper respect in Zimbabwe, crimes such as undermining public confidence in the Police Force or ridiculing the President — if they existed at all — would be difficult to prosecute successfully.

Freedom of movement and residence

This is an important right, particularly in the light of Zimbabwe's history of racial segregation. The South African Constitution adds a right to a passport to this right, and the same should be done in our new constitution since a passport is essential for the lawful exercise of the right to freedom of movement.

Access to information and right to administrative justice

These are relatively new rights, intended to promote governmental transparency and fairness. In a country such as Zimbabwe, whose political processes have always been cloaked in secrecy and where government action has often been arbitrary, it is vital to have these rights enshrined in the Constitution.

Political rights

These rights encompass the right to join and form political parties and to contest and vote in elections. These rights are generally confined to citizens, though this does not mean that non-citizens should be prohibited from all political activity. A difficult problem, in the case of Zimbabwe, is how to allow members of the Diaspora to enjoy these rights — to which, it should be noted, they are currently entitled.

Property rights

The right to hold and own property, and protection against arbitrary deprivation of one's property, are enshrined in the Universal Declaration of Human Rights and in most constitutions. Rightly so, because there is a clear link between strongly entrenched property rights and economic development. Nevertheless property rights cannot be absolute because private property may have to be taken for public purposes (for example, building roads), and a country's constitution must take this into account, usually by requiring any such taking to be procedurally fair and to be accompanied by adequate compensation.

Our new constitution must tackle three additional problems:

- What to do about the commercial farmers whose land was seized in the previous government's resettlement programme? The farmers have not yet been compensated for their losses.
- What to do about people who are not using farmland productively? Should the law allow them to be dispossessed? More generally, to what extent should the law control the ways in which people use and dispose of their own property?
- How can the sometimes antagonistic rights of miners and farmers be reconciled?

Rights of women and children

Women and children should be given special protection in a new constitution, because they are particularly vulnerable. It is not enough, for example, merely to state that discrimination against women is prohibited: they need to be encouraged to take their equal place in society.

Social, economic and cultural rights

Some of these rights should be included in the Declaration of Rights in the new constitution, because of the economic gulf between the élite [who don't need special protection] and the vast majority [who do]. The rights which are essential to the maintenance of a reasonable standard of living are:

- the right to basic health care;
- the right to fair and safe working conditions, including the right to join a trade union and the right to take industrial action;
- the right to free education, at least to primary level, because an educated workforce is the key to economic growth;
- the right to adequate food and clean water. No government of a properly-functioning modern State can allow its people to starve or to suffer from inadequate or polluted water supplies.
- The right to housing and shelter.

It must be made clear in the Declaration of Rights that the government is responsible for assuring these rights.

Even if the fulfilment of these rights is dependent on the government having adequate resources – the rights are not meaningless because the government is obliged to make resources available if it possible to do so. If a government wastes its resources providing luxury vehicles and housing for ministers and other officials it would be open to aggrieved citizens to sue the government and demand a responsible allocation of resources.

Limitations on Fundamental Rights

The Declaration of Rights in our present Constitution proceeds by setting out each right, then a long list of exceptions where the right is either limited or is declared to be inapplicable. This has been criticised on the ground that the Constitution gives rights with one hand and then takes them away with the other. The approach adopted by the South African constitution avoids this criticism: it has a general clause allowing the rights to be limited so long as the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.

Should all the rights be subject to limitation? The draft constitution produced by the Law Society lists certain rights that cannot be limited, namely the right to life, the right not to be tortured or enslaved and the right to equality. A provision along these lines would not be necessary if there is a general limitation clause similar to the one in the South African constitution, because a law which allowed slavery, for example, could not be regarded as justifiable in an open and democratic society.

Democracy and a Declaration of Rights

Although a declaration of rights is a feature of most modern democratic constitutions, in one sense it is undemocratic in that it restricts the power of a democratically-elected government to pass laws overriding those rights and usually gives unelected judges the power to invalidate democratically-enacted laws which contravene the declaration of rights.

The point is not a valid one, however. Democracy consists of more than the holding of free and fair elections, and encompasses such concepts as tolerance and respect for the rights of others. A government which rides roughshod over the fundamental rights of its people is not democratic, even if it was elected by a majority of the people.

The point does, however, illustrate one important factor that must be borne in mind when drafting a declaration of rights. The declaration must be comprehensive enough to protect the fundamental rights of individuals, but it must not be so restrictive that it inhibits the power of a democratically-elected government to govern the country properly. If it is unduly restrictive, the government may seek ways to amend it or, failing that, may try to circumvent it by unconstitutional means.

Final Observation

We must guard against putting a meaningless declaration of rights into our new constitution. A well-crafted declaration of rights can make even the most despotic régime look warm-hearted and caring. The Rhodesian Constitution of 1969, for example, had a declaration of rights similar to the one in our present Constitution, but it was non-justiciable [that is, courts could not strike down laws that contravened it, and the government was free to enact whatever repressive laws it chose]. Also, without a government that respects its people and observes the rule of law, and without an independent and impartial judiciary, a declaration of rights, however fine sounding, is worse than useless.