

Bill of Rights Application

The aim of this paper is to explore the issue of application (to whom does a Bill of Rights apply), and any recent developments in other jurisdictions.

The countries examined are Canada, the US, South Africa, Ireland and New Zealand, explaining how the respective Bills are applied and whether they have **horizontal or vertical** effect, that is the application to the State (Vertical) and the individual (horizontal).

All of these nations tend to share a number of distinctive features within their bills of rights - they are generally presented as a set of broad statements of fundamental rights, often within a codified constitution which sets out the institutional framework designed to protect rights. These broad objectives are usually open to judicial interpretation due to the need for flexibility of meaning of each provision.

A further shared feature is that these countries include a statement resembling a Preamble which goes to the underlying meaning of a document. This type of information can influence the interpretation and application of a bill of rights.

The table below sets out the scope of the Bill of Rights for each named country in terms of obligations on state and individual. It also highlights the emphasis each gives to international law.

Canada

Canada's constitution is the supreme law of Canada and as such all law must be consistent with its provisions.

The Canadian Charter has application in relation to:

- (i) Government laws and actions including the laws and actions of federal, provincial, and municipal governments and public school boards
- (ii) Common law

The courts interpret and enforce the Canadian Charter with the Supreme Court of Canada being the ultimate authority. This is a variant of judicially entrenched approaches adopted by jurisdictions such as the US. It allows the legislature to override the application of a right to particular legislation in specified circumstances.

The Canadian Charter does not have direct application to private activity. However, the Canadian Supreme Court is acknowledged to have adopted indirect horizontal effect as its general position on the scope of the 1982 Charter of Fundamental Rights and Freedoms. It draws a distinction between constitutional "rights" and constitutional "values," whilst adhering to the vertical position requiring governmental action before constitutional rights are triggered, but permits them to have some horizontal application to private individuals.

This is not crystal clear – how values and rights are applied Vertically (ie to government) as distinct from individuals (horizontal) - ie just how the horizontal applies here.

United States

The first ten articles of the American Constitution are considered to be a Bill of Rights. The US bill of rights is subject to a stronger form of judicial entrenchment, as these judicial powers are derived from the federal constitution which is superior in legal status to Acts of Congress.

The American Constitution itself is regarded as 'sovereign' and has never been revised although it has been amended 26 times

In considering the horizontal and vertical application of the US bill of rights, it can be observed that despite private actors not being bound directly by constitutional rights, this does not mean that such rights do not govern their legal relations with one another.

For instance, one individual's rights can limit what another person can do, therefore whilst accepting that such rights impose constitutional duties only on governmental structures, it can have a horizontal effect in certain circumstances.

South Africa

The Constitution is the supreme law of South Africa and any law or act inconsistent with its provisions has no force or effect (unless otherwise provided expressly or by necessary implication in the Constitution) The Constitution binds all legislative, executive and judicial organs of state at all levels of government.

It also has a clear horizontal and vertical application.

It is clearly binding on the government with Section 8 stating that it binds the executive, the judiciary and all organs of state. It goes even further to oblige private individuals and bodies (such as clubs, companies and private schools) to observe such rights. It recognises that some private bodies, for instance, large companies, can have great power and that citizens should be afforded protection when necessary. (that is important – but it has not worked in practice why?)

Ireland

The Irish Supreme Court has interpreted certain of the rights provisions in its Constitution to have horizontal effect which directly bind private individuals and not only the state. The mechanism for this has been the court's development of the constitutional tort action, (which lies for breaches of constitutional rights by private individuals. Justice Walsh said in the 1973 case of *Meskeil v. Coras Iompair Eireann*:

“If a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right.”

The Irish Supreme Court has interpreted provisions of the Irish Constitution to impose a positive obligation on all state actors, including the courts, to protect and enforce the rights of individuals.

This judgment by Walsh has been applied in Ireland in the several cases (most notably) in Justice Kelly judgment re 'uncontrollable' kids, whose rights were continuously declared by repeated High court judgments to have been infringed by practice of the state, of placing them in prisons, without due

process. (No proven criminal offence) because proper facilities for the care had not been provided by the state.

Kelly enjoined three ministers responsible for failure to provide suitable (which vindicated their constitutional rights) places for the care, but Supreme Court threw out his High Court injunction on grounds that it contravened the separation of powers (of Executive and judiciary). – as a judge he had no basis to injunct ministers.

Furthermore the protection, afforded by the Constitution, of rights has been rendered ineffective through conflicts between rights declared within the constitution – thus the right to private property has been widely considered to render ineffective, for example Rights declared in Art 45, 2.iii

“that the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment”

(and other succeeding articles under Art. 45.).

New Zealand

The New Zealand Bill of Rights Act 1990 (the Act) affirms a range of civil and political rights.

It is not supreme law and can be amended in the same way as an ordinary act. It applies to the relationship between the individual and the state, allowing an individual to invoke the Act for breaches committed by one of the three branches of government – executive, legislative and judiciary. The Act therefore applies to these three branches of Government, as well as to any person performing a public function, power or duty conferred by law. This can include legislation, policies, practices and service delivery.

The Bill of Rights Act is not supreme law and cannot be used to override, or implicitly repeal or revoke, other legislation. In contrast to other countries, the act states that the courts have no authority to declare any statute invalid or refuse to apply any statute on the grounds that it is inconsistent with the rights and freedoms protected in the act. However, it is recognised that the Act should be interpreted broadly in order to give comprehensive protection to individual fundamental rights. Moreover section 6 of the Act requires legislation to be interpreted and applied in a manner consistent with the Bill of Rights Act where possible.

All new legislation is examined to see if it is consistent with the rights and freedoms affirmed by the Bill of Rights Act. If there are any inconsistencies, then the government is required to provide a justification for the limits placed on these rights. The Attorney-General must report any inconsistencies with the Bill of Rights Act to Parliament when the legislation is introduced.

Furthermore, all submissions for Cabinet Committees, prepared by government departments on policy and legislation are required to include a statement of the proposal's compliance or non-compliance with both the Bill of Rights Act and the Human Rights Act.

Potential points for consideration

1. It appears that there is an interpretative element to each bill of rights which influences its scope of application horizontally and vertically. (Often the law. (example Ireland above) The development of interpretations and reliance as in Ireland on a developed 'case law' obviates the obligation on state to change the constitution (B of R.s) only by referendum of the people.
2. Often, there is scope for judicial interpretation of the Bill and it should be considered when developing a Bill for here and whether the existing court structures would perform this function or if there should be a new Constitutional Court.
3. There is a need a Constitutional Court – Supreme Court, if body of existing law (English Law) is to be made consistent with a NI Bill of Rights)
4. A further important consideration in the context of the above is the development of private law to run alongside and complement a bill of rights.
5. While there is at least an indirect horizontal application to many of the international Bills, it should be considered how feasible this will be for some of the rights – particularly socio-economic rights. For instance, if a Bill of Rights is too far-reaching, does it make it impossible to enforce? Could we introduce 'progressive realisation' requiring the State to meet its requirements over a period of time? What happens when the state does not conform to obligations set by Supreme court? (See point 7 below) .
6. Whether or not the B of Rs is 'too far reaching'-meaning guarantees wider socio-econ. rights protection- this does not impact on the issue, which remains – how to sanction a government which refuses to institute effective policies to vindicate socio-econ. Rights.
7. It is not a question of how many rights, but a fundamental question of how, within a BORs, to impose and apply effective sanctions- enforcement. 'Progressive realization' allows the executive to maintain oversight of budgetary demands within the democratic context while allowing the judiciary to monitor effectively the progress to limit rights violations. For example, the court may set time frames and ask for evidence of budgetary allocation to ensure that rights are "being progressively realized" within the set time frame.
8. The importance of getting the application right is highlighted by the recent 'YL' case when the House of Lords ruled that the Human Rights Act does not apply to private care homes in England and Wales, which were operating on behalf of the local authority. It is unlikely that this would have occurred with in the South African application provisions with in their BORs.
9. The decision came in the case of an 84 -year-old woman with Alzheimer's, known only as Mrs YL. Her lawyers argued that her threatened eviction from a (council funded) private home would violate her right to family life. Her appeal was rejected by a 3 -2 majority.
10. This is a telling example of why a bill of rights should strike the appropriate balance of binding the relevant bodies and individuals.
11. However, it must do so without inadvertently negating its aim, or creating contradiction through the inclusion of a multitude of specific entitlements. It's not the 'inclusion of specific entitlements' which 'creates contradiction'.. example – case above Ireland note. It is precisely through creating specific entitlements (judicial and specific Socio econ. Rights) that a B of R.s that will enable the BOR to become a "living instrument" .
12. 'Multiplicity of inclusion of specific entitlements' is not the problem. The problem is defining the 'bodies' which are to be bound by BOR.s. One suggestion could be that any public body performing a duty, obligation or power should be bound by the BORs.
13. The purpose of B of R.s is to protect the individual/s (primarily) from state and other powerful interests as well as addressing historical imbalances (companies etc. See S. Africa above) .
14. 'Horizontal applicability' is not about individual vs. individual, in fighting, inter alia, about their respective rights under the constitution. (law of Tort and such like) but about the protection (of equality) of the people within a state's jurisdiction, where institutions through

'democratically' elected power (money, discriminatory ethos corruption etc.) deny vindication of fundamental rights.

15. So applicability comes down to the question of defining what institutions deny rights, and what sanctions to impose - to make them stop. – to make a BOR effective in practice.
16. Clearly individuals and groups (through class actions) must have access to some judicial redress. Allowing the BOR to be applicable to a broad range of persons does not necessarily mean that the courts will be inundated with applications. As was clear from last week's talk, the myth surrounding the application of the HRA was ill-founded and the courts were and are well placed to decide on appropriate applications.
17. One of the most important questions is: Can we apply the BOR to a wider audience than the HRA currently applies to?