Bill of Rights

by
Richard Munday

On the day the government announced its handgun ban proposals, newspapers reported that a carriage full of passengers on a London commuter train had been held up by armed robbers, one wielding a pistol. It underscored the limited relevance of measures directed against licensed gun owners (the Home Office has identified two crimes a year in which legally held pistols are used, whilst the police estimate that some 2,500 *illegal* guns enter the country every week).[1] It underlined further the old wisdom of the Scottish **MP** Andrew Fletcher, who observed three centuries ago that "he that is armed, is always master of the purse of him that is unarmed".[2]

That is an unfashionable wisdom today. The Home Office advised Lord Cullen that "as a matter of policy" UK law did not permit the citizen any weapon for his defence.[3] Apparently, the Home Office had forgotten the Bill of Rights.

The Bill of Rights of 1689, which is still in force as statute law and remains our central constitutional document,[4] guarantees only two rights of the individual, and one of these − the ultimate surety, according to Blackstone, of the subject's other liberties − is the right to arms. It was not arms for target shooting that the Bill of Rights guaranteed, but arms for the citizen's personal *defence.*

Perhaps the Home Office forgot the Bill of Rights because the arms clause appears at first sight to be hedged about qualification. It declares: "That the Subjects that are Protestants, may have Arms for their Defence suitable to their Condition, and as allowed by Law". Upon investigation, however, the three apparent caveats prove insubstantial. The right of *Protestants* to arms was affirmed because it was they who had been disarmed "contrary to the Law" after the Restoration: but the right to defensive weapons was not restricted to them, as was made clear by another Act of the same year recalling the same right for Catholics.[5] The wording *suitable to their condition* reflected the Bill of Rights' appeal to ancient usage (for the Bill did not seek to create rights, but to reaffirm immemorial principles of common law): the context was that of the assizes of arms which served as a sort of martial mediaeval income tax, indexing the weaponry the state could levy from the subject. Constitutional commentary and case law would later confirm that this condition could not be construed to exclude "people in the ordinary class of life" (Rex v. Dewhurst, 1820). The third apparent caveat in the clause, permitting arms *as are allowed by Law,* was perhaps no constraint at all: in affirming the heritage of common law, the Bill of Rights reiterated a refrain of complaints against misdeeds "contrary to Law" or "against the Law", and "according to Law" should arguably be seen in the same linguistic context. If it was a caveat at all, it was a circumstantial one relating to the laws against poaching and bearing arms *in terrorem populi,* to terrorise the public.[6] Again, case law upheld the Bill of Rights provision in both these contexts. In the eighteenth century, for instance, we find repeatedly that the possession of a dog can be held *prima facie* as evidence of intent to poach, whereas a gun could be possessed under like circumstances legitimately for self defence;[7] and even an Irishman carrying a loaded revolver in the street in 1914 was ruled not to be committing an offence *in terrorem populi*.[8]

When Britain introduced her first Firearms Act in 1920, the Bill of Rights provision was respected: the normal "good reason" for the issue of a licence for a pistol was self defence. This remained the case following the Firearms Act 1937; a change of policy was only indicated when the Home Secretary stated in October 1946 that he would "not regard the plea that a revolver is wanted for protection of an applicant's person or property as necessarily justifying the issue of a firearm certificate".[9] Perhaps because applicants were advised that other "good reasons" were open to them, this shift of policy went unchallenged. But if the right to weapons for

defence fell in abeyance, it was not thereby extinguished: In 1913 it had been ruled in *Bowles v. Bank of England* that "the Bill of Rights still remains unrepealed, and practice of custom, however prolonged, or however acquiesced in on the part of the subject can not be relied on by the Crown as justifying any infringement of its provisions".

It might be argued that the first attempt to introduce firearms legislation that really intrenches upon the Bill of Rights does not specifically refer to pistols, it could be contended that at least until 1946 their selection as weapons of defence was regarded as natural, and that where arms are carried for that purpose today (eg. police on protection duties, or individuals specially authorised to carry personal protection weapons) pistols still remain the norm. Moreover if pistols are prohibited, it might be asked what weapons the subject is now permitted under the Bill of Rights to posses for his defence. According to the Home Office's advice to Lord Cullen, "as a matter of policy" the subject is allowed none. Does this policy mean that public servants are being incited to break the law by denying the subject his statutory rights?

Faced with embarrassment, the government might rely on the doctrine that no parliament may be bound by its predecessors, and seek if necessary to repeal the provisions of the Bill of Rights. But in so doing they must attack the principle of the Bill: for the Bill of Rights claimed not to promulgate anything new, but rather to reaffirm the "true antient and indubitable rights and liberties of the people of this Kingdom" that should be upheld "in all times to come". Against this the government must set the view of parliamentary sovereignty expressed most eloquently by Dicey a century ago, that would allow them to "make or unmake any law whatever".[10] Dicey denied that "constitutional" laws were special,[11] though interestingly his illustration of this looked at the Acts of Union rather than the Bill of Rights,[12] and since he wrote, we have seen parliament once again accept the notion of higher law. The doctrine of parliamentary supremacy has, indeed, had a chequered history. Sixty years before the Bill of Rights, the doctrine was affirmed (not without political motivation) by Sir Edward Coke, who declared that the power of parliament "cannot be confirmed", and recorded the failures of the attempts of earlier parliaments to bind their successors.[13] This did not deter parliament in 1689 from enacting the Bill of Rights, any more than the doctrine enunciated by Dicey prevented parliament binding its successors under Section 2 of the European Communities Act 1972.[14] Perhaps, in the unlikely event that the European Union survives for the next three hundred years and its rulings do not in the meantime conflict with UK law, a future constitutional lawyer will once again assert the absolute supremacy of parliament, because it has not been tested. The situation might then be analogous with the Bill of Rights now: for though the Bill has been revised in matters of procedure, the thirteen essential principles of the Declaration of Rights that were supposed to be upheld "for all time to come" still stand.

The absolute sovereignty of parliament was perhaps always something of a legal fiction: constructive as a fiction, but potentially destructive, even of its own ultimate purpose, as a reality. Blackstone allowed in theory that parliament could act with omnipotence even to the ruin of the country, and recalled Montesquieu's prediction that even as Rome and Sparta and Carthage had lost their liberty and perished, so in time would England at the hands of her legislature; but in reality he did not think this would come to pass.[15] He believed that there were natural rights upon which government could not legitimately encroach.[16] Dicey, too, allowed in theory that parliament could do anything that was not "naturally impossible", but in practice saw that it was constrained by political realities.[17] He was less sanguine, perhaps, than was Blackstone about those constraints: and he looked to the introduction of the referendum as an external check on the exercise of arbitrary power by parliament.[18] In the seventy years since Dicey's death the concerns he expressed have grown. In 1950 Craik−Henderson reflected on how the changing composition of the House of Commons with the emergence of the paid career politician had established really a Cabinet rule, in a "servile but supreme parliament".[19] The dangers were no longer theoretical: parliament, whose central purpose had been to check arbitrary government, could now be its tool.[20]

The question whether parliament can now override the Bill of Rights, is at once the question whether it is proper for it to do so. The Bill of Rights set out the claims of parliament as part of the constitutional

framework of legitimate rule, in ignoring which it declared that Restoration governments had acted unlawfully. The twin pillars of that framework were the old principle of government by common counsel, in which our notion of parliamentary sovereignty is founded; and the ancient yardstick of custom, in which our notion of precedent, and therewith of the rule of law, is rooted. These enduring constitutional precepts were not merely the whim of 1689.

Unfashionable though it might now be, the arms provision of the Bill of Rights was also no passing foible. The common law right it expressed was, indeed, as old as English history itself.[21] It was enumerated by Blackstone as the final safeguard of the subject's other rights, for "in vain would these rights be declared, ascertained, and protested by the dead letter of the laws, if the constitution provided no other method to ensure their actual enjoyment".[22] In recourse "to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self−preservation and defence".[23] A hundred years later, Dicey's contemporary James Paterson would still remark that "in all countries where personal freedom is valued, however much each individual may rely on legal redress, the right of each to carry arms − and these the best and the sharpest − for his own protection in case of extremity, is a right of nature indelible and irrepressible..."[24] It was not merely a theoretical right. In a material rather than a cineamagraphic sense, British society was much more a "gun culture" in the early years of this century than it is today. Conan Doyle's Dr Watson dropping his revolver into his pocket before walking the London streets indeed illustrated what was then a commonplace. The "Tottenham Outrage" of 1909 presents a telling vignette of the reality of that time:[25] pursuing the perpetrators of an attempted wages robbery across north London, the police borrowed four pistols from passers−by; other armed citizens fulfilled what Dicey still recognised as legal obligation of the subject to halt felons by joining in the chase themselves.[26] Today we might be shocked by such a thought; Londoners then were apparently more shocked by the idea of an armed robbery. In the years before the First World War, when anyone could purchase a pistol, total firearms crime in the metropolis ran at less than fortieth of that today.[27]

Come forward to 1946, when the Home Office decided that self−defence would no longer necessarily be a "good reason" for a pistol licence, and we find that armed robbery, the most significant index of serious armed crime, totaled 25 incidents in London. Today we have that number every two weeks.[28] Over the past thirty years, as enforcement policies have steadily reduced the number of legal firearms in circulation, firearms crime has risen lockstep. In 1979 Professor Harding at Oxford warned that further gun controls might prove "counter−productive",[29] and criminologists in a number of countries have since then argued that reducing the levels of legitimate firearms ownership might actually promote crime.[30]

Perhaps, if the House of Lords pauses to remember the Bill of Rights during the deliberation on the current Firearms Bill, its members might address those unfashionable considerations. They might note that even today in Britain, Home Office figures (not shown to Lord Cullen) indicate that in constabulary areas where legal firearms ownership is higher, armed crime is lower: and that this is still true if one factors out differences between town and country and looks at the proportion of offences committed with guns.[31] They might remember too the wisdom of that father of penal reform, Cesare Beccaria, who wrote centuries ago.

> "False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for ills, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty − so dear to men, so dear to the

enlightened legislator − and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconvenience and advantages of a universal decree."[32]

Footnotes:

1. "The Use of Licensed Firearms in Homicide − England & Wales", Home Office RSD evidence to the Dunblane enquiry, reprinted in Munday & Stevenson, *Guns & Violence* (Piedmont 1996) pp.321−326 & commentary pp.341−363: Frank Cook MP, speech in Hyde Park 1.12.1996 col. 1155.

2. Andrew Fletcher, *Political Works*, 1749, p.7.

3. "Comments on the Research Note in the Government Evidence (Annex G)", Home Office RSD evidence to the Dunblane enquiry, reprinted in Munday & Stevenson, *op. cit.*, p.210.

4. "The Bill of Rights is perhaps the nearest approach to a constitutional code which we possess". Sir William Anson, *The Law and Custom of the Constitution,* (5th Edn., Oxford 1922).

5. W&M Sess. 1, C. XV 1688, *An Act for the better securing the Government by disarming Papists and reputed Papists*.

6. Statute of Northampton 1328.

7. *Cf. Rex v. Filer,* 1722; *Bluet v. Needs*, 1736; *Rex v. Gardner*, 1739; *Malloch v. Eastly,* 1744; *Wingfield v. Stratford*, 1752; *Rex v. Thompson*, 1787.

8. *Rex v. Smith*, 1914; *cf. Rex v. Dewhurst,* 1820, & *Rex v. Meade*, 1903.

9. C. Greenwood, *Firearms Control* (London 1972). p.72.

10. A. V. Dicey, *Introduction to the Study of the Law of the Constitution,* (8th Edn., London 1931) p.xviii.

11. *Ibid.*, p.84.

12. *Ibid.*, pp.62−63.

13. Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (1628; this edn. London 1747) p.36. p.43.

14. Dicey himself observed that "The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology, which treats the successful violation of a constitutional rule as a proof that the maxim is not in reality part of the constitution" (*Ibid*., p.437)

15. William Blackstone, *Commentaries on the Laws of England* (Oxford 1765) Book 1 pp.156−157.

16. The provisions of the Bill of Rights and the other principle constitutional documents reflected "that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience", *ibid.*, Book 1, p.125. *Cf.* p.70: "And it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that followed the innovation", & p.226: "James had broken the *original contract* between king and people", the terms of which were then declared after the Revolution.

17. Dicey, *op. cit.*, pp.69−79.

18. "It is probable, if not certain, that anyone, who realised the extent to which parliamentary government itself is losing credit from its too close connection with the increasing power of the party machine, will hold with myself that the referendum judiciously used may... revive that faith in parliamentary government which has been the glory of English constitutional history" *Ibid.*, p.c.

19. "A politician is almost a term of abuse in many countries, but fifty years ago in this country Members were universally believed to be men of principle and of sufficient independence to oppose any measures, from whatever source, that might adversely affect our constitution or parliamentary system", J. J. Craik−Henderson, "The Dangers of a Supreme Parliament", in Lord Campion *et al.*, *Parliament: A Survey* (London 1952) p.94.

20. It is ironical, but perhaps unsurprising, that recent years have seen calls for a new Bill of Rights: *cf.*, *e.g.*, A. Lester, *A British Bill of Rights* (2nd edn., Institute for Public Policy Research 1996).

21. *Cf.* S. Halbrook, *That Every Man be Armed: The Evolution of a Constitutional Right* (Albuquerque 1984) pp.3743.

22. Blackstone, *op. cit.*, Book 1, p.136.

23. *Ibid.*, p.140.

24. James Pateson, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person* (London 1877), p.441.

25. R.W. Gould & M.J. Waldren, *London's Armed Police* (London 1986) pp.61−68.

26. Dicey, *op. cit.*, pp.493−495, citing Foster; "Where a felony is committed and the felon flyeth from justice, or a dangerous wound is given, it is the duty of every man to muse his best endeavours for preventing an escape. And if in the pursuit the flying party is killed, whereby he cannot otherwise be overtaken, this will be deemed justifyable homicide. For the pursuit was not barely warrantable; it is what the law requireth, and will punish the willful neglect of".

27. Statistics compiled 1911−1913 by the Commisioner of Police of the Metropolis indicated an average of 75 incidents a year in which a firearm was used or possessed (Greenwood, *op. cit.*, p.36); 1992−1994 the Metropolitan Police recorded an average of 3,084 firearms offences (Home Office RSD).

28. Munday & Stevenson, *op. cit.*, p.244.

29. *Ibid.* p.116.

30. *Cf,* e.g., Proffesor Csaszar (University of Vienna): "Experience shows that tightening the gun laws affects only the law abiding. Their progressive disarmament can ultimately even promote crime, as the probability of armed defence against aggression diminishes" (*Ossterreichishe Richterzeitung* 9/1994, p.180); Dr. Dobler (University of Freiburg); "The lesson that a reduction in the number of firearms available does not necessarily mean a reduction in the case of gun crimes is also clearly applicable to Germany. It is indeed conceivable that raising the level of firearms ownership would have a depressive effect on crimes of violence and against property" (E. Dobler, *Schufwaffen und Schufwaffenkriminalitat in der Bundesrepublic Deutschland,* Frieburg I. Br. 1994, p.207); and discussion in Munday & Stevenson, *op. cit.*, pp.236−245.

31. Peter Jackson *et. al.*, "Was the Dunblane Enquiry Misled?"
(Also available as http://dvc.org.uk/dunblane/crimstat.zip.)

32. Cesare Beccaria, *Dei e Delitti e delle Pene* (1764; English trans by H. Pauolucci, *On Crimes and Punishments*, 1963) pp.87−88.

See also, "There's Only One Way To Protect Ourselves − And Here's The Proof" by Richard Munday.

Posted: 1997