DECLARATIONS OF RIGHTS AND THEIR BEARING ON CRIMINAL SCIENCE

By ERNEST BARKER, Litt.D., Honorary Fellow of Peterhouse, Cambridge

In our English theory there is no distinction between constitutional law and other law. All our enacted law is one body, with all its parts equally made, and equally alterable, by parliament. Englishmen have therefore no fundamental rights, declared in the constitution or in connection with the constitution, which are superior to the ordinary law-making body, and the organs connected with it, and which must be respected by that body and those organs. On our theory the King in Parliament, which is the ordinary law-making body, can do everything, and undo everything; and no rights stand against that body. That is our theory; but it has not really been our practice. In practice we have solemnly declared, at various periods of our history, solemn rights which must be solemnly respected. We did so in the Magna Carta of 1215: we did so in 1628 in the Petition of Right: we did so in 1689, in the Bill of Rights. True we left the King in Parliament still formally supreme, even over these rights. But that supremacy was formal rather than real; and the King in Parliament acted *de facto* on a convention, or understanding, that these rights were to be respected.

I venture to think that this is the origin of declarations of rights the world over—the declarations which were inserted in written constitutions, or issued in connection with written constitutions, when such constitutions began to come into vogue in 1776 and afterwards; the declarations which thus came to be regarded as part of the constitution, and as possessing the particular validity of the constitution, in the days when the constitution and its law began to be distinguished from, and exalted above, all other law. As I see the matter, the North American Colonies, revolting from England in 1776, took over from England the idea of fundamental rights, to be used against England, and proceeded to give that idea a new character by associating it with the idea of the constitution and the particular validity of the constitution. Virginia and Pennsylvania did this in 1776, and were thus the inaugurators, so far as I know, of a new phase of legal thought. Virginia issued a declaration of rights on June 12, 1776, seventeen days before it proclaimed a constitution on June 29. Here the declaration of rights was

prior to and separate from the constitution. Pennsylvania proclaimed a constitution on September 28, 1776, which contained a declaration of the rights of the inhabitants as its first part, and a plan or frame of government as its second part. Here the declaration of rights is part of, and immersed in, the constitution. France, during the French Revolution, imitated both Virginia and Pennsylvania. First she issued a declaration of the rights of men and citizens on August 27, 1789, a declaration prior to and separate from any other act; then, when she voted a constitution on September 8, 1791, she prefixed the declaration to it as its preface, or preamble, and as an integral part of its contents. Under the joint influence of the American Colonies and France, the idea of a declaration of rights, as connected with the written constitution, has generally spread. The Federal Constitution of the United States, which in its original form of 1787 did not contain any declaration, added one subsequently in the first ten amendments made in the year 1791. Rights are declared in the Swedish constitution of 1809 and the Norwegian of 1814: they appear in the Belgian Constitution of 1831, the Danish of 1849 and the Swiss of 1874; and they have appeared in large dimensions in the new constitutions formed since the end of the War of 1914–18. I may particularly cite the Weimar constitution of 1919, with its Part II devoted to a declaration of rights—along with duties: the Austrian and Czechoslovak constitutions of 1920: the Polish constitution of 1921: the Portuguese constitution of 1933: the Russian constitution, with its important chapter 10, of 1936; and the Irish constitution of 1937. The form of the declarations differs. Sometimes it is contained in scattered articles of the constitution: sometimes it appears in a whole chapter containing a series of connected articles: sometimes, as in the Weimar constitution (which in this respect is like the Pennsylvania constitution of 1776), it forms a whole half of the constitution.

What is the value of these declarations? Before we try to answer that question, let us make a preliminary observation —or rather two. First, we must distinguish, according to French jurists such as Esmein, between the declaration of rights and the guarantee of rights. A declaration, *per se*, is only a sublime enunciation of first principles: a guarantee is much more. It is the proclamation of the first principle *as law*, and not only as law, but *as a superior or higher law*—so superior, and so much higher, that it binds and limits the makers and enforcers of ordinary law. I am not clear myself that this distinction between declaration and guarantee comes to much. Already,

from 1776 onwards, every declaration was meant to be also a guarantee: for instance, the Pennsylvania constitution of 1776, after declaring rights in Chapter I, contains an article (§ 46), in Chapter II on the Frame of Government, to the effect that the declaration of rights "is hereby declared to be a part of the constitution, and ought never to be violated on any pretence". The real question is not one of the difference between declaration and guarantee: it is a graver question. That leads me to my second observation, which I put in the form of a question: What is the sanction which secures the observance of rights declared or guaranteed in, or in connection with, a Constitution? Is it merely a convention or understanding resident in public opinion, and therefore and thereby in the legislature and government which represent such opinion, that the rights ought to be observed? If that is all, then the rights, whether said to be declared or said to be guaranteed, are, after all, only first principles, and not real law; and the most we can say for them is that the fact of their declaration or guarantee in, or in connection with, a constitution ensures a particularly solemn enunciation of such principles, particularly likely to impress public opinion, and therefore particularly likely to become a general convention or understanding. Or, alternatively, is there a real legal sanction, enforced by a real legal court, which has the power of disallowing laws and acts contrary to the rights declared or guaranteed? In that case the rights will be part of real law, because they can be vindicated by a real law-court. This second way was already attempted by Pennsylvania in 1776, when it instituted, by § 47 of Chapter II of its Constitution, a Council of Censors, with power to enquire whether the legislature had observed the constitution (including the declaration of rights), and with authority to pass public censures, to order impeachments, and to recommend to the legislature the repeal of unconstitutional laws. This is the germ of what we may call a constitutional court. Such a court, as is well known, was subsequently developed, in the shape of the Supreme Court, in the Federal Constitution of the U.S.A. Europe, more tender to the rights of lgeislatures, did not welcome this germ; and European States, though they declared or guaranteed rights in constitutions, for a long time erected no court to provide a legal sanction for those rights. Austria and Czechoslovakia, under their constitutions of 1920, were the first, so far as I know, to introduce such a court. The best modern example of which I know is now Ireland, under its constitution of 1937. Here the jurisdiction not only of the Supreme Court, but also of the

High Court, extends to questions of the validity of any law having regard to the provisions of the constitution (§ 34); and the provisions of the constitution include rules for the trial of offences (§ 38) and a statement of fundamental personal rights (§ 40). Ireland has thus no special constitutional court, but vests the ordinary courts with what may be called a constitutional jurisdiction, and in that sense treats them as being constitutional as well as ordinary courts.

In the light of these observations we may reach two conclusions. First, a declaration or guarantee of rights may have an actual *value*, even apart from legal sanction provided by courts, if it is backed by a general convention or understanding, resident in public opinion and its representatives, in favour of its observance. Secondly, such a declaration will have legal *validity*, if it is backed by a special court, or by a special authority vested in the ordinary courts, to enforce its observance on the legislature and the government generally. I do not pronounce on the question whether it is wise to attempt to secure legal validity. I will only say that in my own country, with its traditions of the sovereignty of parliament, it would be unwise to make such an attempt. But I would add that even in my country a declaration of rights, supplementing the old declarations of 1215, 1628 and 1689, might have an actual value—provided that it were passed by parliament, possibly in the form of a preamble to some great Act. For instance, an Act for the amendment of some large portion of our criminal law might contain a preamble declaring some fundamental principles of such law. The preamble of the Statute of Westminster of 1931, which contains some remarkable general propositions, may be cited as some sort of analogy for such a procedure. Alternatively rights might be declared in a schedule annexed to a general act amending a part or parts of criminal law. Such rights, it is true, would not be special constitutional rights. No such thing is possible with us. But they would be specially declared rights.

Declarations of rights, in constitutional documents ranging from Magna Carta in 1215 to the Constitution of Ireland in 1937, have always included some references to rights in the sphere of criminal law and procedure. Here I come, at last, to my particular theme—declarations of rights in their bearing on criminal law and procedure. It would be an interesting enquiry to trace the development of these references, and show the process of affiliation which connects later declarations with

earlier. I am Englishman enough to believe that the first seed of everything is Magna Carta of 1215, and particularly its great clause 39—"that no freeman be arrested or imprisoned . . . save by the lawful judgment of his peers or by the law of the land". That seed germinated in the Bill of Rights of 1689; and here I may particularly cite the clause of that Bill that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted". Our English Bill of Rights was the parent of Amendments 1 to 10 of the American constitution, introduced in 1791: indeed, those amendments are called by American historians "the federal Bill of Rights". The American amendments repeat declarations in our Bill of Rights (for instance the one I have just quoted, which is repeated *verbatim*): they also amplify them, in the light of the experiences of the American Revolution. These American amendments passed into Europe; you can trace their influence, for example, unless I am mistaken, in the Belgian constitution of 1831. That is how something which originated in England came to influence Europe—not directly, but through America.

I must end by making a confession. I see value in declarations of rights, and I should like rights in the sphere of criminal law and procedure to be declared, no less than rights in other spheres. But declarations will necessarily be always in general and even vague terms. They cannot, by their nature, "condescend upon particulars". Now an Englishman, by *his* nature, is always "condescending upon particulars". He is not interested in general theories; he is interested in the particular problem, the actual job, and in the sensible way of solving the problem and getting the job done. We English have produced the great apostle of codification—that curious, but also curiously typical, Englishman, called Jeremy Bentham. But we have never codified our law. We English, I am bold enough to think, started the idea of declaration of rights; but we have done little to develop the idea. What have we done—particularly in the sphere of criminal law and procdure? Well, we have had judges, and these judges have worked out legal processes, and they have deposited them in things which, as I understand, are called writs. In my ignorance I almost worship the writs which the judges of the English common law have invented—and also have practised, day in and day out, in their courts. I worship the writ of *Habeas Corpus*, which has, I fancy, a respectable antiquity of some seven centuries. I have also a great veneration for some other writs of the same general type as *Habeas Corpus*—the writs called *mandamus* and *certiorari*

and *prohibition*, which can all, like *Habeas Corpus*, be used to ensure the doing of proper justice in the sphere of criminal law. And on the whole I put my faith not in declarations of rights (though I see their point), but in the writs and the general procedure and the general judgments of the lawyers. I put my faith, too, in the solid sense and practical experience of the Home Office and the Prison Commissioners. I am therefore inclined to think that declarations serve best as sounding-boards, or good megaphones, for the truths worked out by judges and administrators who do the job in particular cases. What I mean is that they bring home to the general conscience, by a general enunciation, something that has been worked out in actual life before. The concrete law and administration precedes and produces the general declaration, which then works back on the concrete law. A circle describes itself. So I would say of declaration of rights what one of our poets once said of the code of Roman Law.

> Justinian's Pandects only make precise
> What simply sparkled in men's eyes before,
> Twitched on their brow, or quivered on their lip,
> Waited the speech they called but would not come.

I have just quoted Robert Browning. Let me end with a remark of my own, which is perhaps a rash *obiter dictum*. Give me a sound judge, with good writs he can use and a good procedure; and give me, at his command, a decent policeman and then I will not bother about declarations. Or rather, I shall, in that case, and on those conditions, be glad to have them, because then they will not be mere words, but will have sober reality at their back.