The Bill of Rights 1689

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This Note sets out the historical background to the Bill of Rights 1688-89 and examines how its provisions have altered in the intervening centuries. Its role as part of the uncodified constitution of the United Kingdom is also discussed.

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1 Introduction

The 1689 Bill of Rights does not constitute what is generally understood as a modern "bill of rights", if by that term one means a document which defines and guarantees the basic human rights of individual citizens. Nor is it, on its own, the equivalent of a written constitution, although it can be viewed as a watershed in the development of the British constitution and especially with regard to the role of parliament. It is one of the four great historic documents which regulate the relations between the Crown and the people, the others being: the Magna Carta (as confirmed by Edward I, 1297), the Petition of Right (1627) and the Act of Settlement (1700). To this list of fundamental constitutional documents should be added the recent *Human Rights Act 1998*.

The Bill of Rights was an historic statute that emerged from the "Glorious Revolution" of 1688-89, which culminated in the exile of King James II and the accession to the throne of William of Orange and Mary. Its intentions were: to depose James II for misgovernment; to determine the succession to the Throne; to curb future arbitrary behaviour of the monarch; and to guarantee parliament's powers *vis a vis* the Crown, thereby establishing a constitutional monarchy.

2 The 'Glorious' Revolution

In 1685, following the death of Charles II, James II (of England, VII of Scotland) acceded to the throne. James II was a Roman Catholic and during his short reign, in a period in which there was widespread fear of Catholicism, he set about trying to repeal the penal laws against Catholics. This, and his requests for more money for the maintenance of his standing army, brought him into conflict with Parliament, culminating in James proroguing Parliament on 20 November 1685.

For the next two years James II pursued the appointment of Roman Catholics to various public offices amid growing unease. He also attempted to secure a Roman Catholic House of Commons. On 5 April 1687 he published a Declaration of Indulgence, which suspended all the religious penal laws and included the sentiment - "We cannot but heartily wish, as it will easily be believed, that all the people of our Dominions, were members of the Catholic Church …". The heavy-handed use of the Royal Prerogative without parliamentary approval fuelled the growing fear among the majority of his subjects. This was brought to a head with the re-issue of the Declaration of Indulgence the following year accompanied by an instruction to Anglican clergy that it be read out to their congregations. This led to the petition from the "Seven Bishops" requesting that the order be withdrawn on the grounds that the declaration was illegal. While the bishops awaited trial in the Tower of London, a son was born to the Queen, thereby seemingly securing the Roman Catholic succession. At this point, a group of noblemen wrote to Prince William of Orange, Protestant son-in-law of James, inviting him to intervene. William landed in November 1688 and James, seeing the effect on his own standing army, was allowed to escape to France.

After the flight of James II, all those who had been members of the Parliaments of Charles II, together with the Court of Aldermen and members of the Common Council of the City of London, assembled on 26 December 1688 in the presence of Prince William. The assembly requested of William that he take charge of the administration of government and that he

summon a Convention Parliament[1], which met on 21 January 1688 (or 1689[2]), was therefore irregularly convened. The Commons resolved -

> "That King James II having endeavoured to subvert the constitution of the kingdom by breaking the original contract between the King and people and by the advice of Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the throne is thereby vacant."[3]

On 12 February a declaration was drawn up affirming the rights and liberties of the people and conferring the crown upon William and Mary, then Mary's children, and failing any heirs Princess Anne and her heirs; and failing also that, William's heirs. Once the declaration had been accepted by William and Mary, it was published as a proclamation. The declaration was subsequently enacted with some additions in the form of the Bill of Rights 1688, and the Acts of the Convention Parliament were subsequently ratified and confirmed by the Crown and Parliament Recognition Act 1689 which also acknowledged the King and Queen. In this way the Bill of Rights was confirmed by a Parliament summoned in a constitutional manner and thereby acquired the force of a legal statute and appears as such on the statute book.

This note confines consideration to the position of the Bill of Rights in England and Wales. The Bill was passed before the Act of Union with Scotland, and Scotland has its own corresponding legislation – the Claim of Right Act 1689. As regards Northern Ireland, there are doubts on whether, or to what extent, the Bill applies there. Geoffrey Lock, in an article on the significance and application of the Bill of Rights, looks briefly at its relevance in Scotland and Northern Ireland.[4]

3 The provisions of the Bill of Rights

The Bill of Rights incorporated the Declaration of Rights and consisted of:

- a declaration by the Commons and the Lords commencing with a list of the misdeeds of James II
- 13 "articles" defining the limitations of the Crown and confirming the rights of Parliament and the individual
- a lengthy passage confirming the accession of William and Mary to the Throne and providing for the succession on their decease
- a short section on *non-obstante* dispensations[5]

There is some difference of opinion as to how revolutionary the events of 1688-89 actually were and several commentators make the point that the provisions of the Bill of Rights did not represent new laws, but rather stated existing rights. Thompson wrote that, apart from determining the succession, the Bill of Rights did "little more than set forth certain points of existing laws and simply secured to Englishmen the rights of which they were already

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1 Commons Journal 26 December 1688

2 a note on dates following the change of calendar from the old style (Julian calendar) to the new style appears in *Halsbury's Laws of England* Vol 8(2) Constitutional law and human rights, 4th ed reissue, para 35, note 3

3 Commons Journal 28 January 1688 (or 1689)

4 Geoffrey Lock, "The 1688 Bill of Rights", *Political Studies* XXXVII (4), Dec 1989, p 541

5 "notwithstanding" – Crown licences to do something *non obstante* any law to the contrary. See *Jowitt's dictionary of English Law*, 2nd ed, 1977, vol 2, p 12446

posessed"[6]. Geoffrey Lock, in an article on the significance of the Bill of Rights, states that the articles of the Bill of Rights were, in effect, a programme for future legislation. "It was never intended that the Articles should stand on their own as substantive law but rather that Parliament should return to these topics, elaborate on the summary texts and work them up into full-scale statutes"[7]. This view is based on an entry in the Commons Journal:

And towards the making a more firm and perfect Settlement of the said Religion, Laws and Liberties; and for Remedy of several Defect and Inconveniences; it is proposed and advised by the said Commons, that there be provision, by new Laws, made in such manner and with such Limitations as, by the wisdom and Justice of Parliament, shall be considered and ordained in the Particulars, and to the Purposes, following …[8]

Whatever the intention at the time, some of the main articles are still regarded as of considerable relevance today, particularly those affecting parliament which required that:

- Parliament should be frequently summoned and that there should be free elections (articles 13 and 8);
- Members and Peers should be able to speak and act freely in Parliament (article 9);
- No armies should be raised in peacetime and no taxes levied, without the authority of parliament (articles 4 and 6);
- Laws should not be dispensed with or suspended without the consent of parliament (articles 1 and 2).

One further article is also considered as having modern significance:

- That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (article 10)

4 The Constitutional Status of the Bill of Rights

Because there is no single document comprising the rules of constitutional practice in the United Kingdom, it is sometimes said that the UK has an "unwritten" constitution. In fact, in the UK the fundamental rules of constitutional practice are enshrined in many individual documents: in various acts of parliament, in the common law, in judicial decisions, in parliamentary law and customs and in constitutional conventions. It is therefore more correct to say that the constitution is "uncodified", rather than "unwritten". One implication of the absence of a single codified constitutional document is that there are no unambiguously constitutional "higher" laws. With a written constitution it is generally easier to distinguish constitutional laws from the rest of the law, while in the UK there is no strict distinction. However, there are certain laws which are generally regarded as being "core" constitutional laws that deserve and receive particular respect and special consideration, and the 1689 Bill of Rights falls into this category. For example, the courts would generally be unwilling to accept that the provisions of such legislation have been overridden by later statutes except in very clear language.

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6 Mark Thompson *Constitutional History of England* 1938
7 Geoffrey Lock, *op cit*, p 541
8 Commons Journal 7 February 1688[1689]

The Bill of Rights contains an interesting sentence apparently attempting to entrench its provisions and make them immune from subsequent amendment or repeal:

> All which their Majestyes are contented and pleased shall be declared enacted and established by authoritie of this present parliament and shall stand remaine and be the law of this realme forever

Consequently it is sometimes mistakenly believed that the Bill of Rights cannot be amended. This is not the case. It is a fundamental principle of British constitutional law that no parliament can bind its successors and that any statute can be repealed; this doctrine was already established by the late 17th century. The principle of parliamentary sovereignty means that the UK Parliament can enact any law whatsoever on any subject whatsoever, (although there are now considerations of compatibility with European Union law, and it is arguable that the *European Communities Act of 1972* is "semi-entrenched". For as long as the UK remains a member of European Union that Act cannot be repealed.) Furthermore, changes in rules of UK constitutional law can be effected by ordinary legislation, (unlike the situation, for example, in the United States of America, where changes can only be made by a complicated process of constitutional amendment).

The statement in the Bill of Rights that it shall remain the law forever cannot, then, be taken at face value. Lock expresses the view that the sentence was included "to add solemnity and weight".[9] Although the greater part of the historic Bill of Rights remains on the statute book unchanged, a few sections have, in fact, been repealed or amended, as set out in *Halsbury's Laws*[10], eg –

- the declaration against transubstantiation, by the *Juries Act 1825*
- the declaration on accession to the throne, by the *Accession Declaration Act 1910*
- various other sections by the Statute Law Revision Acts of 1888, 1948, 1950

It is also worth noting that the line of succession laid out in the Bill of Rights was, in fact, altered just over a decade later by the Act of Settlement 1700.

The Bill of Rights is still in operation today, as recent debate on parliamentary privilege for example, has demonstrated. Article 9 protects Members' rights of free speech in Parliament.[11] However, many of the Bill's original articles, while never formally repealed, are generally regarded as having been superseded by subsequent legislation. Laws may be obsolete but still unrepealed. For example, the article covering the right of protestant subjects to bear arms is generally considered to fall into this category, although there have been attempts to challenge this from time to time (most recently during the passage of the Firearms (Amendment) Bill of 1996-97.[12]) The Bill of Rights was essentially a political settlement concerned with resolving the particular political issues of the day. The relevance of some of its provisions to the political life of today is questionable. It is generally thought that, in relation to the provisions in the Bill of Rights on the bearing of arms, for example, and to other unrepealed articles, the courts would have difficulty in trying to apply some the

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9 Geoffrey Lock, *op cit*, p 555

10 *Halsbury's Laws of England*, Vol 8(2): Constitutional Law and Human Rights, 4th ed reissue, para 1, footnote 13

11 See Library Standard Note Parliamentary Privilege and individual Members, and Report of the Joint Committee on Parliamentary Privilege, HC 214 1998-99

12 See Library Research Paper 96/102 *Controls on Firearms: The Firearms (Amendment) Bill*, 8.11.96

provisions to modern conditions, particularly given the brief and often imprecise wording used in the Bill.

The text of the Bill of Rights as it now stands, bearing in mind the points above, is set out in *Halsbury's Statutes.*[13].

[13] *Halsbury's Statutes*, 4th ed, 1995 reissue, Vol 10: Constitutional Law, pp 32-38