Из периодики прошлого

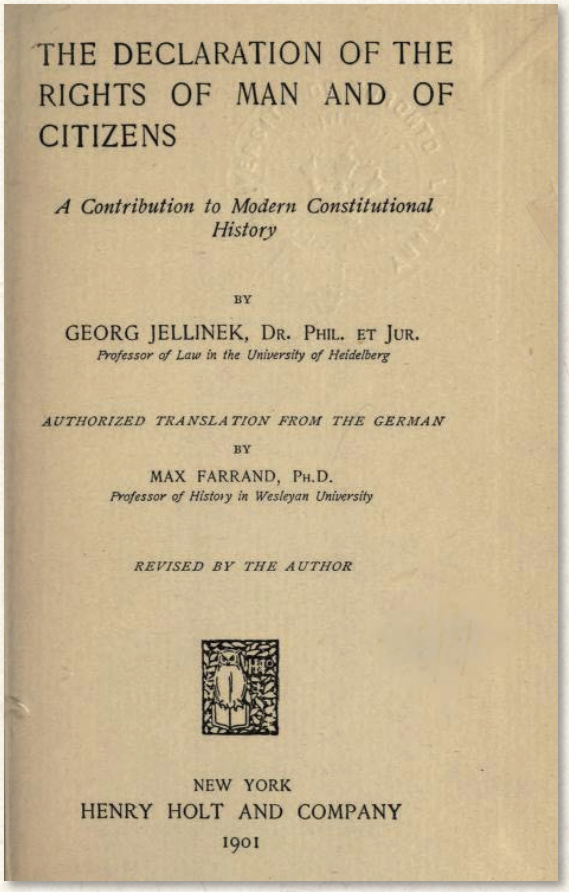
Georg Jellinek (1851—1911)

Georg Jellinek is known for his essay 'The Declaration of the Rights of Man and the Citizen' (1895), which argues for a universal theory of rights.

Here is an extract from his book 'The Declaration of the Rights of Man and the Citizen. A Contribution to Modern Constitutional History', Chapter VI — 'The Contrast Between the American and English Declaration of Rights', authorized translation from the German by Max Farrand, PHd in Wesleyan University, New York, 1901.

Georg Jellinek

The Declaration of the Rights of Man and the Citizen (1895), Essay[1]



THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS

A Contribution to Modern Constitutional History

BY

GEORG JELLINEK, DR. PHIL. ET JUR.
Professor of Law in the University of Heidelberg

AUTHORIZED TRANSLATION FROM THE GERMAN

BY

MAX FARRAND, PH.D.
Professor of History in Wesleyan University

REVISED BY THE AUTHOR

NEW YORK
HENRY HOLT AND COMPANY
1901

[1] Материал из открытого источника Internet Archive (archieve.org).

CHAPTER VI.

THE CONTRAST BETWEEN THE AMERICAN AND ENGLISH DECLARATIONS OF RIGHTS.

THE comparison of the American and French declarations shows at once that the setting forth of principles abstract, and therefore ambiguous, is common to both, as is also the pathos with which they are recited. The French have not only adopted the American ideas, but even the form they received on the other side of the ocean. But in contrast to the diffuseness of the Americans the French are distinguished by a brevity characteristic of their language. Articles 4–6 of the Declaration have the most specific French additions in the superfluous and meaningless definitions of liberty[1]

[1] It harks back finally to the old definition of Florentinus L. 4 D. 1, 5: "Libertas est naturalis facultas eius, quod cuique facere libet, nisi si quid vi aut jure prohibetur."

and law. Further, in Articles 4, 6 and 13 of the French text special stress is laid upon equality before the law, while to the Americans, because of their social conditions and democratic institutions, this seemed self-evident and so by them is only brought out incidentally. In the French articles the influence of the *Contrat Social* will have been recognized; but yet it brought out nothing essentially new, or unknown to the American stipulations.

The result that has been won is not without significance for the student of history in passing judgment upon the effects of the French Declaration. The American states have developed with their bills of rights into orderly commonwealths in which there has never been any complaint that these propositions brought consequences disintegrating to the state. The disorders which arose in France after the Declaration of the Rights of Man cannot therefore have been brought about by its formulas alone. Much rather do they show what dangers may lie in the too hasty adoption of foreign institutions. That is, the Americans in 1776 went on building upon foundations that were with them long-standing. The French, on the

other hand, tore up all the foundations of their state's structure. What was in the one case a factor in the process of consolidation served in the other as a cause of further disturbance. This was even recognized at the time by sharp-sighted men, such as Lally-Tollendal [2] and, above all, Mirabeau.[3]

But from the consideration of the American bills of rights there arises a new problem for the historian of law: How did Americans come to make legislative declarations of this sort?

To the superficial observer the answer seems simple. The very name points to English sources. The Bill of Rights of 1689, the Habeas Corpus Act of 1679, the Petition of Right of 1628, and finally the *Magna Charta libertatum* appear to be unquestionably the predecessors of the Virginia bill of rights.

Assuredly the remembrance of these celebrated English enactments, which the Americans regarded as an inherent part of the law of their land, had a substantial share in the declarations of rights after 1776. Many stipulations from Magna Charta and the English

[2] *Arch. parl.* VIII, p. 222.
[3] *Ibid.*, pp. 438 and 453.

Bill of Rights were directly embodied by the Americans in their lists.

And yet a deep cleft separates the American declarations from the English enactments that have been mentioned. The historian of the American Revolution says of the Virginia declaration that it protested against all tyranny in the name of the eternal laws of man's being: "The English petition of right in 1688 was historic and retrospective; the Virginia declaration came directly out of the heart of nature and announced governing principles for all peoples in all future times." [4]

The English laws that establish the rights of subjects are collectively and individually confirmations, arising out of special conditions, or interpretations of existing law. Even Magna Charta contains no new right, as Sir Edward Coke, the great authority on English law, perceived as early as the beginning of the seventeenth century.[5] The English statutes are far removed from any purpose to recognize general rights of man, and they have neither the power nor the in-

[4] Bancroft, VII, p. 243.
[5] *Cf.* Blackstone, *Commentaries on the Laws of England*, I, 1, p. 127. (Edited by Kerr, London, 1887, I, p. 115.)

tention to restrict the legislative agents or to establish principles for future legislation. According to English law Parliament is omnipotent and all statutes enacted or confirmed by it are of equal value.

The American declarations, on the other hand, contain precepts which stand higher than the ordinary lawmaker. In the Union, as well as in the individual states, there are separate organs for ordinary and for constitutional legislation, and the judge watches over the observance of the constitutional limitations by the ordinary legislative power. If in his judgment a law infringes on the fundamental rights, he must forbid its enforcement. The declarations of rights even at the present day are interpreted by the Americans as practical protections of the minority.[6] This distinguishes them from the "guaranteed rights" of the European states.

[6] Upon this point, *cf.* Cooley, *Constitutional Limitations*, 6th edition, Boston, 1890, Chap. VII. Even if the stipulation contained in the bills of rights that one can be deprived of his property only "by the law of the land" should not be embodied in the constitution by a state, a law transgressing it would be void by virtue of the fundamental limitations upon the competence of the legislatures. *Loc. cit.*, p. 208.

The American declarations are not laws of a higher kind in name only, they are the creations of a higher lawmaker. In Europe, it is true, the constitutions place formal difficulties in the way of changing their specifications, but almost everywhere it is the lawmaker himself who decides upon the change. Even in the Swiss Confederacy judicial control over the observance of these forms is nowhere to be found, although there, as in the United States, the constitutional laws proceed from other organs than those of the ordinary statutes.

The American bills of rights do not attempt merely to set forth certain principles for the state's organization, but they seek above all to draw the boundary line between state and individual. According to them the individual is not the possessor of rights through the state, but by his own nature he has inalienable and indefeasible rights. The English laws know nothing of this. They do not wish to recognize an eternal, natural right, but one inherited from their fathers, "the old, undoubted rights of the English people."

The English conception of the rights of the subject is very clear upon this point.

When one looks through the Bill of Rights carefully, one finds but slight mention there of individual rights. That laws should not be suspended, that there should be no dispensation from them, that special courts should not be erected, that cruel punishments should not be inflicted, that jurors ought to be duly impanelled and returned, that taxes should not be levied without a law, nor a standing army kept without consent of Parliament, that parliamentary elections should be free, and Parliament be held frequently, —all these are not rights of the individual, but duties of the government. Of the thirteen articles of the Bill of Rights only two contain stipulations that are expressed in the form of rights of the subject,[7] while one refers to freedom of speech in Parliament. When nevertheless all the stipulations of the Bill of Rights are therein designated as rights and liberties of the English people,[8] it is

[7] The right to address petitions to the king (5), and the right of Protestant subjects to carry arms for their own defense suitable to their condition (7).

[8] "And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties."

through the belief that restriction of the crown is at the same time right of the people.

This view grew directly out of the mediæval conception of the Teutonic state. While the ancient state appears at the beginning of its history as πόλις or *civitas*, as an undivided community of citizens, the monarchical Teutonic state is from the beginning dualistic in form,—prince and people form no integral unity, but stand opposed to each other as independent factors. And so the state in the conception of the time is substantially a relation of contract between the two. The Roman and Canonical theory of law under the influence of ancient traditions even as early as the eleventh century attempts to unite the two elements in that, upon the basis of a contract, it either makes the people part with their rights to the prince, and accordingly makes the government the state, or it considers the prince simply as the authorized agent of the people and so makes the latter and the state identical. The prevailing opinion in public law, however, especially since the rise of the state of estates, sees in the state a double condition of contract between prince and people. The laws form the content of this compact. They

established, therefore, for the prince a right of demanding lawful obedience, and for the people of demanding adherence to the limitations placed by the laws. The people accordingly have a right to the fulfilment of the law by the prince. Thus all laws create personal rights of the people, and the term people is thought of in a confused way as referring to the individuals as well as to the whole—*singuli et universi*.[9] From this point of view it is a right of the people that Parliament should be frequently summoned, that the judge should inflict no cruel punishments, and however else the declarations of the English charters may read.

This conception of law as two-sided, establishing rights for both elements of the state, runs through all the earlier English history. The right which is conferred by law passes from generation to generation, it becomes hereditary and therefore acquirable by birth

[9] The old English charters put forward as possessors of the "*jura et libertates*" now the "*homines in regno nostro*", now the *regnum* itself. The Petition of Right speaks of the "rights and liberties" of the subjects, but they are also characterized as "the laws and free customs of this realm".

as one of the people. Under Henry VI. it is declared of the law: "La ley est le plus haute inheritance que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roy et nul inheritance sera."[10] And in the Petition of Right Parliament makes the appeal that the subjects have inherited their freedom through the laws.[11] The laws, as the Act of Settlement expresses it, are the "birthright of the people".[12]

And so we find only ancient "rights and liberties" mentioned in the English laws of

[10] Year Books XIX, Gneist, *Englische Verfassungsgeschichte*, p. 450.

[11] "By which the statutes before-mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom." Gardiner, *The Constitutional Documents of the Puritan Revolution*, 1889, pp. 1, 2.

[12] "And whereas the laws of England are the birthright of the people thereof." Act of Settlement IV, Stubbs, *Select Charters*, 7th ed., 1890, p. 531. Birthright = right by birth, the rights, privileges or possessions to which one is entitled by birth; inheritance, patrimony (specifically used of the special rights of the first-born). Murray, *A New English Dictionary on Historical Principles, s. h. v.*

the seventeenth century. Parliament is always demanding simply the confirmation of the "laws and statutes of this realm", that is, the strengthening of the existing relations between king and people. Of the creation of new rights there is not a word in all these documents. Consequently there is no reference whatever to the important fundamental rights of religious liberty, of assembling, of liberty of the press, or of free movement. And down to the present day the theory of English law does not recognize rights of this kind, but considers these lines of individual liberty as protected by the general principle of law, that any restraint of the person can only come about through legal authorization.[13] According to the present English idea the rights of liberty rest simply upon the supremacy of the law,—they are law, not personal rights.[14] The theory,

[13] *Cf.* the instructive work of Dicey, *Introduction to the Study of the Law of the Constitution*, 3d ed., 1889, pp. 171 *et seq.*

[14] "Sie sind objectives, nicht subjectives Recht." Dicey, pp. 184 *et seq.*, 193 *et seq.*, 223 *et seq.*, etc. Dicey treats the whole doctrine of the rights of liberty in the section "The Rule of Law." Individual liberty according to him is in

founded in Germany by Gerber, and defended by Laband and others, according to which the rights of liberty are nothing but duties of the government, sprang up in England, without any connection with the German teaching, from the existing conditions after the conception of the public rights of the individual as natural rights, which was based on Locke and Blackstone, had lost its power.

But with Locke even this conception stands in close connection with the old English ideas. When Locke considers property—in which are included life and liberty—as an original right of the individual existing previous to the state, and when he conceives of the state as a society founded to protect this right, which is thus transformed from a natural to a civil right, he by no means ascribes definite fundamental rights to the man living in the state, but rather places such positive restrictions upon the legislative power as follow from the purposes of the state.[15] When closely examined,

England simply the correlative of only permitting the restriction of the individual through laws.

[15] This is treated in the chapter "Of the Ex-

however, these restrictions are nothing else than the most important stipulations of the Bill of Rights, which was enacted the year before the *Two Treatises on Government* appeared.[16]

Blackstone was the first (1765) to found his doctrine of the absolute rights of persons upon the idea of the personal rights of the individual. Security, liberty, and property are the absolute rights of every Englishman, which from their character are nothing else than the natural liberty that remains to the individual after deducting the legal restraints demanded by the common interest.[17] Laws appear likewise as protectors of these rights, —the whole constitution of Parliament, the limitation of the royal prerogative, and along with these the protection of the law courts, the right of petition, and the right to carry arms are treated, exactly in the manner of

tent of the Legislative Power," *On Civil Government*, XI.

[16] *Cf. On Civil Government*, XI, § 142.

[17] Political liberty is no other than national liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. *Loc. cit.*, p. 125 (113).

the Bill of Rights, as rights of Englishmen, and indeed as subordinate rights to assist in guarding the three principal rights.[18] But in spite of his fundamental conception of a natural right, the individual with rights was for Blackstone not man simply, but the English subject.[19]

The American declarations of rights, on the other hand, begin with the statement that all men are born free and equal, and these declarations speak of rights that belong to "every individual", "all mankind" or "every member of society". They enumerate a much larger number of rights than the English declarations, and look upon these rights as innate and inalienable. Whence comes this conception in American law?

It is not from the English law. There is then nothing else from which to derive it than the conceptions of natural rights of that time. But there have been theories of natural rights ever since the time of the Greeks, and they never led to the formulation of fundamental rights. The theory of natural rights for a long time had no hesitation in setting forth the contradiction between nat-

[18] *Loc. cit.*, pp. 141 *et seq.* (127 *et seq.*).

[19] *Cf. loc. cit.*, pp. 127 (114), 144 (130).

ural law and positive law without demanding the realization of the former through the latter. A passage from Ulpian is drawn upon in the *Digests*, which declares all men to be equal according to the law of nature, but slavery to be an institution of the civil law.[20] The Romans, however, in spite of all mitigation of slave laws, never thought of such a thing as the abolition of slavery. The natural freedom of man was set forth by many writers during the eighteenth century as compatible with lawful servitude. Even Locke, for whom liberty forms the very essence of man, in his constitution for North Carolina sanctioned slavery and servitude.

Literature alone never produces anything, unless it finds in the historical and social conditions ground ready for its working. When one shows the literary origin of an idea, one has by no means therewith discovered the record of its practical significance. The history of political science to-day is entirely too much a history of the literature and too little a history of the institutions themselves. The number of new political

[20] L. 32 D. de R. J. Exactly so the kindred doctrines of the Stoics earlier in Greece had not the least legal success.

ideas is very small; the most, at least in embryo, were known to the ancient theories of the state. But the institutions are found in constant change and must be seized in their own peculiar historical forms.