THE STATE OF CIVIL LIBERTIES IN ENGLAND TODAY

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THROUGHOUT the thirty and more years I have been a university teacher my main concern has been with the relationship between the citizen and the State, and especially with the Englishman's civil liberties. It had always been surprising to me that nobody had ever written a book trying to state just what freedoms our law actually gave us, with the result that in 1963 I had a Penguin published, Freedom, the Individual and the Law, which did just that. Now four editions (and well over 100,000 copies sold) later seems a good moment to see how matters stand today. All the time I have been writing editions of that book I have had two objects in view: telling the citizen what his rights are, and showing what is wrong with the law and how Parliament should set about putting things right. I can look back on the last fifteen years with some satisfaction, in that many of the grievances I have aired over the years have been put right. At the same time there is still a great deal that is wrong with our Civil Rights. If any M.P.s are in the audience or if they read this lecture in its published form, I hope that they will take heed of this point. It is very disappointing how poor has been the contribution by way of Private Members' Bills of M.P.s towards rectifying many of the injustices.

One has to tread very cautiously in this field where so many committed and diverse views are expressed. On the one hand it may be the Tory advocates of Law and Order, values which seem so unshakably sound that they think it almost treasonable to query them. It may be the insistent activity of the National Council for Civil Liberties; nobody can doubt that they have done great work for the underprivileged, but one has to be chary of accepting that right is always on the side of the underdog, the

1 A lecture delivered in the John Rylands University Library on Wednesday, 15th February 1978.
foreigner, the accused, the demonstrator and the active trade unionist; Authority is not always in the wrong. There are other formidable propagandists: for instance, Freedom of the Press is not a banner under which every conceivable activity of news-gatherers can be justifiably paraded without supervision by the Law. In short, in every area of civil liberties there is a balancing act to be performed, competing interests to be reconciled by the law in as just a fashion as possible. No doubt I, too, have my own prejudices, perhaps even more than I am aware of, but at least the task I set myself this evening is the lawyer’s one of achieving justice between the Authority and the Individual by assessing the force of the conflicting interests at stake, and proffering the most acceptable legal solution.

I regard relations between the police and us as citizens as one of the most critical and important of all. We have much to be proud of, and thankful for. We do not live in a Police State. That means the police do not make their own rules, we are not afraid of men in uniform breaking into our homes in the middle of the night, leaving behind our families and friends helpless, with no means of knowing our whereabouts, and if they do, no means of doing anything about it. I have the highest regard for the police, and there is no other country’s police I know that I would willingly exchange for ours. And yet I have been saying for twenty years and still say tonight that this is an area where the legal dispositions are quite unsatisfactory. What is the problem? We all want criminals to be detected, caught, given a fair trial and, if convicted by their fellow citizens, duly punished. At the same time we do not want innocent people to be hounded, and we expect officials to show a proper respect for personal freedom and for the privacy of a man’s home.

On paper we have a set of laws which appear to recognize to the fullest extent these individual liberties. We have detailed laws of arrest fashioned by Parliament and the courts which state when the police can arrest, what they must tell us when they do so, how soon they must bring an arrested person before the courts and so on. Our laws also specify the circumstances—and quite restricted they are—in which a policeman can enter premises and search without first obtaining a warrant. And is not the writ of
habeas corpus one of our most cherished protections down through the centuries? Whenever anybody is kept in custody do we not know that habeas corpus will be issued from the courts requiring the gaoler, whoever he may be, to justify before a judge the legality of his detaining in custody, and that unless he can adduce lawful authority, the judge will set free the person so restrained?

You may say: what then can there possibly be to complain about? First take the case of someone walking along the pavement at night carrying a bag. The police patrol car draws up and he is told to open it so that the police may search the contents. Surely the law will be clear about that, you would think. Not so. It varies from town to town. Even within the area of one police authority, the police will have the power to search in some districts, but not in others. In Manchester itself, the citizen who wants to know how he stands would find the answer in the Manchester Waterworks Improvement Act 1869, which would tell him that here the police did have the power to search his bag. But the snags do not end there. The police have an understandable and commendable desire to do their job efficiently: catch criminals. One of the best ways is to take suspects to the police station and subject them to prolonged questioning. No doubt more criminals are brought to book by their own confessions than by the methods of Maigret or Poirot. But the law does not allow policemen to detain for questioning, and to keep suspects in police stations for days on end while they help the police with their inquiries. Yet I know from having been concerned for the last seven years with Granada’s “This Is Your Right” programme and seeing the regular flow of viewers’ written-in queries that this kind of thing occurs frequently in Granadaland, and no doubt throughout the rest of the country. The police say, and they are right, that if the citizen voluntarily accompanies them to the police station, and chooses to stay in the police station and answer their questions even though he has not been charged with any offence, they are acting within the law. What happens of course is that the citizen does not know his rights; he believes that the police have the law on their side, and he is left in ignorance. Suppose his friends learn that he is
inside the police station and knowledgeably obtain a writ of habeas corpus. Hey Presto! immediate release, you say. No. A few weeks ago a Mr. Jones was taken to Brixton police station, and four days later was still there although not charged with any offence. His barrister sought his release on habeas corpus from the Lord Chief Justice himself. Lord Widgery refused to set him free, and said the most he was willing to do was to adjourn it to another day. An earlier case of a Mr. Milhench in Wolverhampton also showed that this is now how the judges treat habeas corpus applications; they do not immediately release those wrongfully detained by the police; so that they give the police more time to get an incriminating statement from the suspect.

And what protection has the citizen while being questioned in the police station? You would surely expect me to give you a clear answer based on firm law. I cannot. What we have are the Judges' Rules, which are not law, but guides to policemen. In the U.S.A. if a policeman breaks the rules in securing a confession the jury is not allowed to be told of the confession. Not so in Britain; a judge is free to admit the damning evidence even though the police acted illegally in obtaining it. Take the Maxwell Confait case last December: there was such public disquiet over the treatment of three youths originally convicted of murder, manslaughter and arson, that Sir Harry Fisher, a former High Court judge, was asked to investigate. He duly found that the police had ignored the Judges' Rules while eliciting confessions from the youths. The Rules speak of the obligation of the police to inform those detained of their right to summon a solicitor; they were not told. And what of this so-called right? Because the Rules are not law, no legal consequences ensue when a person is refused his solicitor.

I have been protesting about this state of affairs for twenty years or more, and this is one of the instances where my exposure of defects in the protection of our liberties has produced no improvement. Some points seem to me self-evident. If the police have insufficient powers to carry out their job, they should not be driven to the expedient of requiring citizens to submit to their requests in the hope, usually realized, that the citizen will
be unaware that they have not got the powers. It is the task of Parliament, and nobody else, to frame precisely a code which defines the legal powers of the police. Some of the changes needed are as obvious to me now as they have been for years. For example, interviews in police stations should be tape-recorded. The right of access to one's solicitor on such occasions should be a legal right. What we want above all is a clear statement of police powers; no longer should they have to rely on deception to accomplish their tasks. Instead of photographing accused by subterfuge, promising persons release from a weekend in prison only if they make a statement, searching without a warrant by leading householders to believe they have a right of entry, stopping cars "to make routine inquiries" and making sure the driver breathes (with or without alcohol) in their face, and having citizens accompany them to the station to help with their inquiries, let the police convince the Home Office that they should be given by law for the first time these powers and let Parliament then decide which of them to put into statutes. What we cannot endure—for it is fair neither to police nor public—is the citizen not knowing what his rights and duties are, and the conscientious police believing that they can do their job only by keeping the citizen in that state of ignorance. And once we have given the police the powers to which they are entitled, let us deter them from exceeding them by providing that illegally obtained evidence is not admissible at the trial.

I turn next to the heart of the Law and Order debate in which the police are also of course closely involved. We believe—and it is surely our strength—in people being able freely to express their views, however odd or off-beat, and to try and persuade us that they are right. At the same time we cannot tolerate disturbances of the public peace. Our basic stance is that you can say what you like provided that you do not fall foul of some specific law. And there is a pretty heavy battery of laws available for police use. Time does not permit a detailed inventory: trespass, obstructing the police in the execution of their duty, conspiracy, unlawful assembly, disturbing the peace, binding over when conduct causes reasonable apprehension of a breach of the peace, and above all the Public Order Act setting up new
offences such as uttering threatening, abusive or insulting words. These various offences are calculated to strike a fair balance between freedom of expression and the need for public order, and in my view have been utilized with wise discretion by the police in the political arena. In general the offences I have been listing deal after the event with matters of public disorder. The much more difficult question is how far does the law head off trouble before it happens? Here we focus on the conflict between the National Front and left-wing groups. It seems to me right, for instance, that the Lambeth magistrate did bind over for engaging in conduct likely to cause a breach of the peace those who in anticipation of a lawful National Front march at Lewisham last year were preparing banners saying “Smash the National Front”. On the other hand, I am less happy about the ruling of the Lord Chief Justice that if a National Front spokesman addresses his meeting in a manner which would not lead to a breach of the peace by a reasonable audience, nonetheless he is guilty of using offensive words under the Public Order Act if it is likely to lead to the left-wing hooligans in his audience breaking up his meeting. Should the speaker have to take his audience as he finds them, however unreasonable they be, or is he entitled then to expect the police to carry out their duty of arresting the hooligans?

Recent controversy has centred round the powers contained in the Public Order Act to ban processions. Where a chief officer of police reasonably apprehends that a procession may cause serious public disorder he asks the local authority where the proposed procession is to be held to prohibit clashes of processions for a period up to three months, and such an order is effective when the Home Secretary confirms it. In London it is an order of the Commissioner of the Metropolitan Police which needs confirmation by the Home Secretary. It is the police who alone decide whether the risk of serious public disorder is great enough for them to initiate the banning measures. So last year the Commissioner took no such action for the Lewisham National Front march, whereas Mr. Anderton in Manchester asked Tameside council to order a ban on a National Front march in Hyde, which ban was confirmed by the
Home Secretary. The division of function between police and Home Secretary seems sensible, for it means that no politician can ban of his own initiative and it makes the chief constable the sole judge of public disorder and yet at the same time enables the Home Secretary to ensure that a procession is not banned ostensibly for reasons of public order, but in fact by way of political discrimination. Chief constables and Home Secretaries have used these powers sparingly and fairly.

So far I seem to be more or less satisfied with the law in this area, and yet you will say a lot of people are very critical. Why? I think much of it arises from what happened in 1965. Many, including myself, who were active in fashioning for the first time in the United Kingdom legislation to control racial discrimination, viewed with disquiet one innovation of the Race Relations Act 1965. Under pressure from its own Left Wing and from Jews, the Labour government added a clause to the Bill which made it a crime for a person to distribute threatening, abusive or insulting matter, or to use in any public place or at any public meeting threatening, abusive, or insulting words, if the matter or words were likely to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins, or citizenship. By a 1976 amendment it is no longer necessary to prove that the accused intended to stir up hatred. Notice that this offence has nothing to do with disturbance of the public order; it makes racialism a crime, and so runs counter to much of the philosophy underlying our laws relating to racial discrimination which stress the need for conciliation and regard the injunction and compensation as the ultimate remedy. This new offence has been extensively relied on in prosecuting Fascists. The fervid political opponents of the National Front are now seeking to muddy the waters in precisely the way one could foresee. Racialism is an offence, the National Front is racist, therefore ban National Front marches and meetings, runs the argument. But banning marches rests on threat to public order, the Race Relations Act offence has nothing to do with public order. The present Home Secretary has been recently severely criticized in the media for the sharp distinction which he draws between public order and incitement.
to racial hatred as such. The extent to which we use the sanctions of criminal law in the war against racial discrimination is a separate issue. What we must not do is to allow the political party in office to deny freedom of expression to their opponents even though they are not threatening public order.

You will expect me to comment on the matter of Old Bailey judge, Judge McKinnon. Of course his summing up to the jury was misguided and might have had some bearing on Mr. Read’s acquittal. Equally reprehensible was the left-wing clamour for forthwith sacking the judge. Of course those of us who had examined in the 1960s the problems of race and the law were not surprised that left-wing elements would exploit unsuccessful criminal prosecutions in this way. The cause of legal control of discrimination is only harmed by Parliament’s imposing criminal sanctions which give others the opportunity to whip up frenzy among those who are easy victims of crude propaganda.

What then is wrong with the present law? I would resist the resolution passed at last year’s National Labour Party Conference that legislation be passed authorizing the Home Secretary to ban marches and meetings of the National Front and other parties on political grounds. Just think of that in the run up to a general election. The right of freedom of expression within the law must be jealously guarded, however much we as individuals may detest the political views of the National Front. I believe marches are a less necessary form of communicating a viewpoint than public meetings and would support some changes. There should be a new statutory obligation on all holding marches to give advance warning to the police of intention to hold marches or processions. The Left protests that it would be an intolerable interference with freedom if when they were organizing a counter march the police could require the names and addresses of their organizers: I disagree. At present either all processions or none must be banned. This seems absurd. Tameside had to ban Boy Scouts and the Salvation Army once it resolved to ban the National Front. I see no reason why specific marches on specific days should not be banned on grounds of public disorder. I am not convinced that there is any need to juxtapose, as
happens at present, the local authority between the decisions of the chief constable and the Home Secretary. In any event it seems odd that, as with Tameside, the designated local authority should not be the police authority, which was the Greater Manchester Police Authority. Nor perhaps are Greater Manchester’s ratepayers enthusiastic about paying for the extra police needed to supervise the public political meetings which Tameside or Bolton at its discretion decides to allow to be held in its premises.

The theme of law and order spills over on to the industrial front, as Grunwick demonstrated only too clearly. The left-wing view, illustrated by comments of officials of the National Council for Civil Liberties, is that the police and criminal law should not be involved with industrial disputes. The failure of the police to enforce the law against striking miners outside the Saltney works a few years ago shows the police predicament. I find the issues clear cut. Trade union demonstrators are subject to the same criminal penalties for disturbing the peace as anybody else. The thesis that the ordinary criminal law does not and should not apply to industrial action is unacceptable. Of course it would be as foolish to impose extra criminal liabilities especially on strikers and their supporters as it is to do so with respect to race relations. That must not be confused with the campaign, in the aftermath of Gouriet v. The Union of Post Office Workers to exempt trade unionists (and nobody else) from the law that makes it a crime to interfere with the forwarding of mail. With regard to picketing, Parliament owes it to both police and public to clarify the law by making up its mind what is to be the purpose of picketing. If it is to be only to attempt by imparting information peaceably to persuade those crossing a picket line not to do so, then it is perfectly straightforward to pass a law restricting the maximum number of pickets to that regarded as adequate for that purpose, and to allow an authorized member of a picket so to persuade for a specified short period even the occupants of vehicles. If on the other hand the lawful object of a picket is to be by threat of force and violence even against innocent third parties in such numbers as the demonstrators can muster to see that the objects of strikers are achieved, Parliament
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must say so in clear terms so that the police know that statute has created this exception to the general ambit of the criminal law for the benefit of trade unionists. I suspect that politicians will continue to fudge this issue.

I turn now to an entirely separate aspect of civil liberties: the role of the media and first broadcasting. One item under this head is related to what I have been saying about the National Front. You will recall that the Labour Party devoted a recent party political broadcast to an attack on a rival party, the National Front, and that the broadcasting authorities refused to allow the National Front a right of reply. This incident is one of many which have caused me to complain over the years how unsatisfactory these arrangements about party political broadcasts are. They are based on agreement between the B.B.C., I.B.A. and the Labour, Conservative and Liberal parties, each of which is represented on the Committee on Party Political Broadcasting. This committee decides the amount of time for the broadcasts and the allocation between parties. These arrangements have no legal force and are indeed kept secret and not made available to the general public. The Annan Royal Commission on Broadcasting was satisfied with these arrangements; I never have been. I do not see why the three main parties should make cosy secret arrangements just to suit themselves. I believe that party political broadcasting should be regulated by law, not by arrangements behind closed doors. Given the present arrangements, no criticism can be made of either the Labour Party or the B.B.C. The rules by which the B.B.C. and I.B.A. work in their own current affairs programmes would of course have prevented such a broadcast; its producers would not be allowed to do as the Labour Party did—that is, record interviews with members of the public and falsely conceal from them that those would be used in a party political broadcast. But there are no such constraints on the political parties under the secret agreement. Similarly the agreement denies any right of reply to other parties not parties to the agreement who are attacked, so that the B.B.C. properly denied the National Front a reply.

Both I.B.A. and B.B.C. are to be congratulated on the way they have stood up to government pressure, especially over
programmes on Ulster. It seems to me important that the public should be confident that current affairs programmes will present a balanced impartial survey, even though it does not suit a harassed government, and this is what the broadcasting authorities have done. M.P.s would be better employed authorizing the televising and broadcasting of parliamentary proceedings instead of persistently thwarting the will of the people in this matter. They are also subject to increasingly frequent attempts from outside to stop broadcasts which those outsiders think injurious to them. They have not been intimidated by threats of court proceedings and more often than not have successfully defended High Court proceedings for injunctions to stop broadcasts. The press makes great play of cases where the internal controls of broadcasting result in programmes being cancelled or cut. My detailed investigations of these show that these criticisms are not on the whole well-founded; that the authority has been doing merely what Parliament has commanded it to do, by, above all, maintaining due impartiality. I am less happy that the B.B.C. follows the example of the Press Council by refusing to entertain a complaint unless the complainant agrees in writing in advance to relinquishing any legal action arising out of the programme which he might have. It is disappointing that in its Report last month the B.B.C. Programmes Complaints Commission did not support this change.

Freedom of the Press. That is an impressive slogan and the newspapers are for ever reminding us of it. The industry has set up the Press Council to deal with complaints and under pressure from the public and the Royal Commission on the Press has been constrained gradually and grudgingly to make it a less biased and feeble organ. It still remains true that it has no teeth, editors cock a snook at it and continue to intrude into people's lives, practise cheque-book journalism and sometimes fail to correct statements whose falsity the Council has exposed. All very reprehensible, but it is difficult to see how the Council could be given greater powers. To give a private body powers of fining or suspension or awarding compensation seems impracticable. It must remain the function of the ordinary law
of the land to determine and enforce the appropriate limits on press freedom. The critical question is whether the existing law does adequately protect the citizen against interference by the press. Every time we must simultaneously assess the importance to us all of the press being free to report what they know.

The press will seek to convince you that the law of defamation unfairly hinders them in their work. I disagree. The defences of truth and fair comment are wide, and the whole trend of defamation law in recent years has been to make success for the defamed person more difficult and his litigation more expensive. And contrary to the impression of many, after allowance is made for inflation the scale of damage awards is markedly lower than before the second World War. Far more alarming to the press is the very recent upsurge of criminal libel, sparked off by James Goldsmith's prosecution of Private Eye. Currently, the most important one is against two Yorkshire Television reporters, arising out of Johnny Go Home and brought by Roger Cleaves upon his leaving prison after being the central figure in that programme. Until recently criminal libel has been no serious threat to the press. Now it is. And why serious? Because truth is no defence unless the press also proves that the publication was for the public benefit. It used to be thought that there was no criminal libel unless there was a risk to the peace; it is now clear that the prosecution do not have to prove any threat to the public peace. The crime is more rigorous than most other crimes; mistake or want of intention is no defence. I can think of no good reason why this crime should exist in respect of libels by the press. The rest of the law, and especially the right to claim damages for defamation, is all that is required.

It seems to me wrong that if broadcasting authorities or the press do a first-class piece of investigative journalism on a public scandal, and even prove the truth of 90 per cent of what they say and have reasonable grounds for believing the truth of the rest they are still criminals.

The victims of media criticism increasingly seek to prevent publication altogether by obtaining an injunction. Here the courts continue to show a healthy reluctance to act as censors. So, in the last few months, Sir Harold Wilson failed to stop either
on grounds of defamation or breach of confidence publication of Roth's biography. Tate and Lyle could not prevent on grounds of injurious falsehood *This Week*‘s programme about labour conditions in South Africa, James Slater could not, on grounds of breach of contract, stop *The Sunday Times* journalist Charles Raw from publishing his version of the workings of the Slater Walker empire even though it showed Slater in a light less flattering than his own contemporaneously published version.

It is obviously of the first importance that every accused should have a *fair* trial. Important though freedom of the press is, a "freedom" which deprived prisoners of a fair trial could not be countenanced. In the United States, the press is free to assist in detection of crime, to interview witnesses and suspects and report their observations, to comment on trials as they proceed, and to give opinions on the guilt of suspects. We should be proud of the fact that none of these things can happen in England: the law of contempt stands in the way.

The British press accept the force of the points that I have just summarized, but they protest, and, I believe, with justification, that the courts, in their zeal to preserve their own jurisdiction free from all forms of interference, have recently made the law of contempt unnecessarily stringent. They also complain, with equal justification, that the law lacks precision. Once a man has been charged, the press should not be allowed to comment on the case, but recent decisions go further and hold that even if an arrest is merely imminent—and they do not tell us what "imminent" means—it is contempt to comment. It is unfair to the press to leave them not knowing how free they are to report before proceedings are brought; contempt should begin only after a charge has been made. It should be equally clear that in civil cases the press is free to comment until a case has been set down for trial. Now only too often the very moment a newspaper publishes the first part of a superb piece of investigative journalism its victim issues a writ of libel against the proprietor. By issuing this "gagging" writ the plaintiff has only one object: to stop any more revelations against him. It is unfair to the press that as the law stands they cannot be absolutely sure that they can ignore the gagging writ
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It used to be thought that an article was not contemptuous unless it created a serious risk of interference with the course of justice. When the House of Lords stopped *The Sunday Times* from publishing the results of its investigations of Distillers' conduct in the thalidomide affair, it held that although the article would have affected neither court nor witnesses, no prejudgement at all of issues in pending proceedings was permitted. They did so because they were determined to halt what they saw as a slide towards trial by newspaper or television. This prejudgement rule is unfair to the press; there should be no contempt unless serious risk of interference with a fair trial is created. A government report (the Phillimore Report) endorsed in 1974 the criticisms I have been making. *The Sunday Times* has been campaigning strongly for the government to implement it, but the government does nothing. Meanwhile *The Sunday Times* has been demonstrating by examples from various parts of the country how judges in 1977 have been failing to apply the present law with any consistency or predictability or reliability. The law in Scotland has for years been seen to be even more draconian, as London Week End Television found to their surprise and to their cost (£61,000 in fines) last month.

The other outstanding problems about the press are whether the law should step in to do what the Press Council fails to do: prevent the press intruding in private lives unreasonably, and enforcing a right of reply when the press reports inaccurately. So far press pressure has prevented any effective intrusion of law in these matters.

Some regard the law of obscenity as a threat to freedom of expression. I am not one of them. Of course, when I first became interested in this subject the law was in an absurdly restrictive state. Matters are very different now, thanks both to Parliament and the courts. The turning point was the acquittal of D. H. Lawrence's *Lady Chatterley's Lover*. What the law now seeks to do is to leave unhindered the publication of serious bona fide literature but to control the flagrant commercial exploitation of hard-core pornography. I believe that this
approach commands wide public support, just as I believe that the majority of Manchester's citizens support its chief constable in the big effort which his force makes to contain this pornographic trade. Most of the criticisms I would make are technical and raise matters which no doubt the Departmental Committee now investigating the matter will find difficult to resolve. Particularly baffling is the formulation of a clear definition which separates the criminally obscene from the permissible in such a way as to provide clear guide lines for publishers and booksellers, and equally for the courts, whether jury or magistrates, who have to decide these issues. I do not object to the police having wide powers of seizure—I understand the Greater Manchester police seizures average about 15,000 copies a month. I do think that these powers are in some ways unfair to the owner of seized materials. The police should not be free to keep raided materials for months on end without having instituted proceedings and without being liable to compensate the deprived owner. And this is what happens now. A related question which is highlighted by the dismissal of Mr. Parr, Lancashire's chief constable, is the effect of giving police chiefs discretion whether to prosecute known criminals; one of the complaints of booksellers is that what they can sell with impunity in City A is seized in City Z.

In early editions of my Penguin book I exposed the comic and ridiculous laws of theatre censorship, and, as I predicted, no harm would be done by abolishing it. I may appear inconsistent in having recommended the abolition of theatre censorship by the 1968 Act and yet not also insisting on the abolition of censorship in the cinema. Why not, as with theatres, leave it to the law of obscenity, indecency etc. to deal after the event with any exhibitions of films which contravene the criminal law? I still believe that there is one significant difference between the two: the very much greater exposure of young children to the film. We owe it to them to protect them against the horrific, perhaps even more than against the outrageously lewd. No doubt if we were starting from scratch we would not devise a scheme where the cinema trade is so prominent in the censoring. Yet my own impression is that it works pretty well. I would merely question whether it is necessary to make censorship
ultimately a decision for local authorities, or whether much unnecessary expense would be saved by making the scheme national in scope.

Since 1966 the United Kingdom has been a party to the European Convention of Human Rights and recognized the jurisdiction of the European Court of Human Rights. In effect a citizen who complains that the government has denied him a right guaranteed him by the Convention can seek a ruling to that effect from the European court, regardless of whether he would have had a right according to English law. It is really quite remarkable how little use of this facility Englishmen have so far made. In my view the legal profession must take some of the blame. Untrained in European law, they have simply been unaware of the potential relief available. Perhaps the most striking success achieved there has been that of The Sunday Times. You will recall that I criticized the House of Lords' ruling that to publish their article about Distillers would be contempt. The European Commission held in 1977 that the British government violated rights to free speech when it sought to prevent publication of the draft article. It was in the public interest that the information contained in it about Distillers' production of thalidomide should be published. In other cases the court has found, what I and others have asserted for some time, that when Parliament passed the Prison Rules it enacted laws which treated prisoners unfairly. The British government has compensated some of these victims and amended the Prison Rules to the minimum extent necessary to accord with the European rulings. We all expected that the European court would find that the government's methods of interrogating prisoners in Northern Ireland were illegal, notwithstanding the subtle attempts by some British public figures called in for earlier investigations to whitewash those responsible. One outstanding decision awaited is that on the birching in the Isle of Man under a court sentence; the reaction of the Isle of Man to this proceeding has been to abolish the right of its citizens to complain to the European Commission.

This increasing familiarization with European documents proclaiming human rights has triggered off a demand for
something similar in Britain. Our jurisprudential approach has always been as follows. A citizen is free to do as he likes unless some particular law prevents him. We have looked to Parliament and the courts to frame such rules as are necessary to restrict freedom, and left it to Parliament to change the rules at will whenever they have been found wanting. And the government is certainly active in sponsoring legislation in the field of civil liberties; there would be an average of at least one Act of Parliament a year affecting the law of civil liberties.

Should we then have a Bill of Rights? When we find gaps in the protection of a citizen's freedom, is a new statute the remedy or do we need to enshrine his rights in a formal constitutional document? Many who advocate a Bill of Rights (including Mrs. Shirley Williams and others responsible for a Labour Party discussion pamphlet in 1976) would favour enacting the European Convention of Human Rights. Its characteristic is that it spells out in general terms freedom of expression, freedom of the person, freedom of assembly, freedom of religion, and so on, duly qualified by epithets like "unreasonable", "arbitrary", or "necessary in the public interest". But what legal consequences are you to attach? If it is to be a mere declaration of principles its impact will be insignificant. If you say that this is now the law enforceable in the courts, the courts have to decide these issues of "unreasonable", "arbitrary" and the like. For that reason jurists like Lord Gardiner oppose a Bill of Rights; they say that the judges would have an impossible task, so inherently uncertain is the limit of such qualifications. Others regard the European Convention as an inadequate statement of basic human rights; some Tories say that they know why Labour supports the Convention—it fails to deal with basic rights like the right not to join a trade union, the right to send one's child to a school of one's choice, and freedom of property from expropriation and high taxation. Labour replies that unless the moderate European Convention is relied upon there will be interminable haggling over the text from which only the lowest common denominator will emerge, and conflict with our European obligations will be the result. Others criticize the European Convention because they believe every
right should be in such terms that the courts can fully protect and enforce it.

Even if the problem of a Bill of Rights’ contents should be solved, there would remain the even tougher problem of its legal effect. Is the Bill alone to repeal by implication every existing statute and decided case inconsistent with it? Nobody would know how many of these details were still the law until the judges had interpreted the Bill of Rights in the light of them. Or you may say the purpose of the Bill of Rights is to affect future legislation; you would "entrench" the Bill so that none of it could be automatically repealed by later Act of Parliament. But how far would you "entrench" it? A mere convention of the constitution would not be enough. The American solution would be to say every statute in conflict with the Bill is to that extent void, and the courts alone would decide the matter. This would be a revolutionary change in the British constitution, giving tremendous powers to the judiciary which it has never been conditioned to exercise. They would be brought into the political arena, and called on to decide the legality of social and economic legislative schemes of the government of the day. The public, the politicians and the judges are not prepared for such radical changes. A lesser "entrenchment" would be to make it more difficult for Parliament to change the Bill by subsequent Act; at present Parliament can repeal any Act, and in so far as an existing Act is inconsistent with a later one, the earlier Act is automatically impliedly repealed.

Obviously, discussion of civil liberties will continue. Instances will occur of defects in our laws. We must be vigilant to expose them and zealous in the quest for their solution. I am optimistic. I look back on the last few decades and see in how many ways our liberties are better secured. I see no reason why we should not in the future make even stronger the protection which our system of justice affords to our civil liberties.