

JAMES CAMERON LECTURE.

LIBERTY - THE FIRST CASUALTY IN THE WAR ON TERRORISM.

It is a great honour to be invited to give this lecture in memory of James Cameron. In preparing this lecture I reflected upon the vital role of the journalist in a democracy: the responsibility of keeping citizens informed with honesty and integrity, the importance of shining light on the follies of the times. Cameron was one of journalism's truly great men, standing for the highest journalistic ethics, as well as brilliance as a writer. The fact that we are here remembering him twenty years after his death speaks to his pre-eminence. I am proud to honour his memory. I just wish he were here now.

It is always claimed that the first casualty in war is truth. Certainly in the run up to the war in Iraq, truth was indeed a victim, even before the bombardment began. A war of choice was sold as a war of necessity and many untruths were told to bolster that deception. However, I am not here to talk about the war in Iraq. I want to talk about that more amorphous war – the war on terrorism. When George Bush declared war on terrorism in September 11 2001 he was not displaying his usual waywardness with the English language. The word 'war' was chosen with care. War offers opportunities not otherwise available to Prime Ministers and Presidents. The climate becomes more favourable for repressive legislation which

would never be countenanced during peacetime. Our own history is littered with examples.

This war's first casualty has been liberty and the climate of fear and anxiety engendered around it allow encroachments far beyond the rounding up of those suspected of involvement in conspiracies to cause explosions or other subversive activity.

The argument I want to make tonight is that the erosion of liberty was already in hand before 9/11 and that the crimes perpetrated on that day allowed for an acceleration of a process that was already underway here in the UK. I would also argue that the erosion of legal principles is made possible by the concurrent hollowing out of our democracy, with an over powerful Executive dominating the House of Commons, passing into law populist policies which are developed by a small coterie after listening to focus groups.

Over the last nine years I have been involved in depressing and wretched disagreements with government over their retreat from civil liberties. On one of the occasions when I was called to book by a whip for voting against the government, he said to me that my concerns were completely out of touch with the voter for whom it was 'just law'. Not anything serious like health or education or the economy. This was a way for government to meet the concerns of the public about crime. I left the meeting with my heart as heavy as a stone.

The law matters. It is not just a set of rules. Which is not to say I am uncritical of aspects of the legal system. I believe it needs to be constantly fine tuned to ensure that justice is done. I have no mercy for lawyers whose only interest is in huge reward or judges who are remote from the lives of ordinary people. I have spent my life in the law doing battle for people who have little voice in the system, taking on vested interests, carving a space for women, gays and minority ethnic communities. What I thought we had learned is that the rule of law is as fundamental to a civilised society as democracy. Law and democracy are “the twin pillars” of our constitutional architecture and our only hope for the world is that it should be built on law, human rights and consent.

This willingness of Tony Blair to abandon legal principle was evident in his decision to spurn international law when he embarked on the Iraq war, justified subsequently as necessary to remove a thoroughly wicked man.

In November 2004 Sir Stephen Wall, a former policy advisor at 10 Downing street commented publicly: “We allowed our judgements of the dire consequences of inaction to override our judgements of the even more dire consequences of departing from the rule of law.”

Why more dire? The problem with bending the rules to your will is that a precedent is set for future acts where we may not all agree which leader is a bad man or which regimes are ripe for changing.

The willingness to jettison principle has also been the weakness at the heart of domestic policy on law and order, asylum and immigration. It is manifest in the erosion of civil liberties and the games played with human rights. And it is much more serious than most people realise because power is being incrementally transferred to the state with our endorsement because we are so close to the canvas we cannot see the whole picture. In this lecture I want us to step back and look at what is happening.

Law is not just an instrument; it is also a fabric, whose careful weft and weave protects us all.

It is not just history which tells us why civil liberties matter. My clients taught me. Individual pain is the clearest point of entry into understanding why civil liberties matter. The protections that have been hewn into the legal processes are there by dint of hard struggle and scalding lessons. Miscarriages of justice are not new – mothers wrongly accused of killing babies, political outsiders falsely convicted of terrorism. History is strewn with horror stories which have a strange symmetry and we were supposed to have learned from past ignominy - lives stolen by the hangman, transportations and long years of wrongful punishments. – We should have learned that carefully constructed legal precepts and evidential rules were built into the system to prevent injustice. We all have a stake in securing justice because there is nothing like the rage of those who have

been wronged. Secure, well-tempered societies – at ease with themselves – know that just law is fundamental. It is within the protections provided by civil liberties and human rights that we find the moral component of the law. We have to ask why it is being stripped away. Why was it happening even before 9/11.

Labour governments have always had to prove that they are as financially astute as Conservatives, that they can run the military and are not afraid of war. And when it comes to law and order, they really have to show their mettle, not so much taking no prisoners as taking lots of prisoners. It is easy to see Home Office policy over the last nine years as merely Labour's desire to show that we are not the party of social workers, with bleeding hearts and no spine. If New Labour wants to position itself as the national party, continuing to reach into the former Conservative heartlands while keeping its traditional vote, it has to engage effectively with public concerns about crime. Labour's traditional voters, just like Tories, also worry about crime and with more reason; the level of burglary, criminal damage and assault is higher in working class estates than anywhere else. The public do worry greatly about crime and about the police failure to catch criminals – even if their concerns do not reflect the reality that overall there is less crime now than there was 10 years ago. The Met's annual figures show that crime in London is at its lowest for 5 years. Homicides are down by twenty since last year (to 175–

including the 7/7 bombings.) Sexual offences are also down. Seventy six % of crime goes unsolved (probably an underestimate because many people do not even bother to report theft of wallets, break-ins to cars) yet rather than examine how the police might be better trained to investigate crime the government gives us a display of activity: reducing trial by jury, putting convictions in front of juries to raise the chance of conviction, doing away with the hearsay principle. The conviction rate for serious crime is in fact very high. 73%

People are perfectly capable of hearing a more nuanced debate about crime and terrorism and the reasons for retaining high standards within the system. However, the great fear of governments is always that they may hand their political opponents a trump card if they are not seen to be relentless.

In the early days of New Labour I too used to think that, as with the economy, the government was simply anxious to show that it could play hardball. So when I was pessimistic, I thought the tough talk on criminal justice was just a display of “my truncheon is bigger than yours” machismo by the boys. But rather than seeing the government stance as a symptom of wayward testosterone, I now think something more complex is taking place.

Globalisation has profound ripple effects. Citizens within a disturbingly uncertain world do seek areas of certainty. People are easily

alarmed by the idea that barbarians are at every gate, including their own, in the form of terrorists, asylum seekers and criminals. People are afraid about what the future holds. As a result they are prepared to sacrifice a significant level of freedom and privacy in exchange for greater security. The temptation is for governments to read expressions of public fear and the willingness of citizens to make sacrifices as giving them a carte blanche to rewrite underlying principles of law. Instead of “making the political weather”, reassuring the public and devising policies which provide protection while respecting fundamental principles, governments increasingly see citizens as consumers, to be listened to through the marketing device of focus groups and to whom policy should be tailored. So when members of the public say “too many toerags get away with it”, even if the perception is wrong the government seeks to respond to it. Government-as product-supplier means pursuing market share, redesigning the brand and purveying policy on a ‘what works’ basis rather than on principle. But there are some areas of our lives including the justice system which are not susceptible to market forces, where to rely on economic drivers or majoritarian, populist desires creates distortions, injustice and outcomes which take no account of the common good. Justice is not a commodity.

New Labour’s warm embrace of the market and its endeavour to thin out the role of the state in the delivery of public services and welfare,

calls upon it to chart new waters. Unfortunately, when Labour politicians do that they often slide into right of centre positions rather than progressive ones, despite all the talk of a progressive consensus. In New Labour's post-state vision, criminal justice can look like another aspect of state provision that is ripe for rebalancing, giving more power to the consumer, who is identified as the victim. The problem with that analysis is that the accused and detainees are also consumers of the criminal justice system; the system is in fact a social good belonging to all of us.

The rhetoric about rebalancing the system has been the common strand in government policy with the criminal process disingenuously described as a contest between the citizen-victim and the criminal. The reality of the powerplay is disguised because what is actually taking place is the rebalancing of power towards the state. However, in a culture where we are all increasingly encouraged to think of ourselves as victims or potential victims of criminals or terrorists, we easily forget that the state is capable of victimising us far more effectively than any criminal.

The mistake government ministers so often make is that once in office they think they are 'the state' and, since they are all nice folk, any expressions of concern about "thin ends of wedges" are dismissed as intemperate. The modern myth is that the contemporary state is benign; dictatorial methods are now deemed unsustainable in Western democracies because of our submission to international standards and our

general commitment to human rights; we should therefore be prepared to revisit legal principles created when democracies were more fragile. If ministers are reminded of the importance of legislating with one eye to their wing mirrors for what might come into office hereafter, they poo-poo such fears of authoritarianism as liberal delusions. (We saw it with the Prime Minister's response to Henry Porter in last Sunday's Observer.) Civil libertarian objections are seen as frequently outmoded and the product of a different political reality.

There are also other trends afoot. And our masters sadly have an eye for the trendy.

Debates about "new legal regimes" have been gaining momentum amongst neo-conservatives in the United States over a number of years and have been swilling around in our own establishment circles since the eighties. The Diplock courts in Northern Ireland fuelled a disdain for juries amongst a number of leading judges and other conservative thinkers. Our own experiences of terrorism in Ireland meant that the unthinkable was being discussed long before Labour every came to power. Authoritarians in America and here want to revisit the legal norms which have been at the heart of the common law . They believe that the criminal standard of proof is too high, that an accused should be required in many circumstances to prove his or her innocence, that juries are inefficient, uneconomic and at times irrational. The conviction rate

should be the measure of success, even if there is some collateral damage in the form of wrongful convictions. Pre-emptive detention like pre-emptive military strikes should also be possible where there is risk of offending. In many of these areas of possible change, the United States is inhibited domestically by its constitution – which was why Guantanamo was created - but the United Kingdom knows no such restraint. Former Conservative ministers say that these ideas would regularly emerge when the Irish Troubles were rife but were rejected as un-sellable to British people. What has changed since then is the global context. Globalisation has generated feelings of vulnerability in the face of uncontrollable forces and this anxiety has in turn been crowned by the fear-inducing rhetoric about international terrorism.

What was also different in the eighties was that no American government would have been on side in removing the due process rights of the Irish, whereas in the ‘war on terrorism’ the United States is showing the way. The Irish were fortunate at the time in having a powerful American lobby, not a support enjoyed by Arabs and Muslims in Britain today.

The removal of civil liberties by governments is not new. The public are always sold the erosion on the basis that the new restrictions are designed to convict the guilty and that decent citizens have nothing to fear. The arguments of all governments who remove rights is that they are

doing so for good reason, in the interests of the people and to counter disruptive elements in society. And, we, the citizens, can easily feel the current move is all about the ‘other’ – terrorists, paedophiles, anti-social yobs, Muslims, young blacks, the mentally ill. We always think it is other people’s liberty that is being traded, which somehow makes it all right. We do not realise that liberty is not divisible in this way.

It is important to recognise that anti-terror laws cannot be vacuum packed; they seep into the policing culture and create new paradigms of state power. In a lecture during a visit to India in 2004, the Home Secretary suggested that governments may have to consider whether the burden of proof might have to be lowered from ‘beyond reasonable doubt’ to the civil test of the ‘balance of probabilities’ in terrorist trials. But only two days later the Prime Minister was asked about this statement and not only did he agree that such a change should be considered he went further, suggesting that the lower standard might also apply to other serious crime. This idea has mulched down into the compost of policy making and only last weekend we had the threat of summary justice in the form of hyped up ASBOS to harry and hound serious criminals where the evidence would be insufficient for trial. What is introduced today for terrorism almost invariably enters general usage shortly thereafter. The right to silence was first emasculated in terrorism cases in Northern

Ireland in 1988 but the erosion of the right was extended into all domestic law in the UK in 1994.

Now we have the new control orders which place considerable restrictions on liberty of citizens on the basis of reasonable suspicion. No proof in the traditional sense is necessary. House arrest can be ordered on the balance of probability and without trial. But this lowering of the standard of proof is part of corrosive process cutting across the system and it is not confined to terrorism. The control order is in fact the cousin of ASBO – the anti social behaviour order, which allows an order to be made to exclude someone from an area, create curfews, prevent association and so on. Again it can be made on hearsay evidence, on the civil burden of proof, and breach is a criminal offence leading to imprisonment. Everyone greeted the asbo as a great innovation without blinking but it was the beginning of an alarming shift whereby the civil and criminal law are merged with very worrying consequences. As a footnote I should explain that we in the women's movement invented this conjunction for domestic violence cases and our creativity was hijacked by the government for broader purposes which may prove malign. It is called the law of unintended consequences!

Other fundamental shifts are taking place in our justice system with barely a whimper. On 18 June 2002 the Prime Minister claimed that the “biggest miscarriage of justice in today's system is when the guilty walk

away unpunished.” In that statement he sought to overturn centuries of legal principle and the approach to justice that every mature democracy in the world respects, whereby the conviction of an innocent man is deemed the greatest miscarriage of justice. But his soundbite was a trail for the legal reforms he wants to see enacted. For the Prime Minister, everything is negotiable, even legal principle and the law should simply be put to the service of a desired outcome. People often ask me why a lawyer like Prime Minister and other lawyers in the government can be so cavalier about legal principles and it goes back to the business of your experience. Perhaps commercial and employment lawyers do not have the searing experience of the frontline, sitting with asylum seekers who have been forced to leave everything they love, who can barely give voice to some of their experiences. Sitting with a woman blamed for killing the baby she has just lost. I don’t know. What was clear from his diatribe in last Sunday’s Observer was that he has forgotten any law he learned and does not know what law his government has made. On virtually every single issue he was factually wrong, and most shockingly claimed that the courts could under our Human Rights Act strike down legislation. Which is plain wrong. He threw away the notion that people hardly had their DNA taken for dropping litter. Mr. Prime Minister, they can have it taken for doing nothing. If arrested and then released with no charge their DNA is on record.

The world is going through a period of dynamic change, presenting entirely new problems to nations and to the international community. Societies are now more complex and mixed than they were in the twentieth century; people are better educated, more demanding and more conscious of their rights. The position of women has changed radically. Attitudes to homosexuality, marriage and illegitimacy have all altered. The rigid divisions between classes have broken down. The police and security agencies now have an incredible array of technology at their disposal, which makes questions of privacy now more pressing. Law has a central role to play in this new landscape and legal systems have to adapt. I am not advocating a conservatism which would stultify any process of modernisation but reform has to take place against a backdrop of principle, mindful of how the state in a less benign political environment might behave. The current election campaign and the rise of the BNP shows very clearly how a changing world and hostility to the stranger could easily foment serious social divisions. At some time in the future a party could come into government with a really authoritarian agenda. What then for the safeguards that have been abandoned? I identified strongly with the comment of Studs Terkel the great American progressive social commentator, who was challenged in a recent interview about refusing to shift his ground despite the new threat to

America. He said that on some things he was proudly conservative. “Yes, I want to conserve civil liberties. I want to conserve our environment for future generations too. There are areas of our lives where what exists should not be destroyed.”

Unfortunately 10 Downing Street has been a history free zone. When Tony Blair entered it in 1997 he was quoted as chirping “New, new, new. Everything new.” And the idiocy of this mantra has been reiterated in the mouths of other ministers, who dismiss any argument about the ancient roots of our legal system as being good reason for relying on long established principles.

This extraordinary shift to the right, in the belief that it wins elections, is reshaping our lives irredeemably. The relationship between the citizen and the state is being resettled. Politicians speak regretfully about the public distrust of politicians but there is a mutuality in political engagement. The government distrust of citizens is manifest in the erosion of juries, in the introduction of ID cards, in the duty to inform on others, in the willingness to hand citizens over to other states without examination of evidence. One of the most precious aspects of British life has been the freedom we enjoy, the respect for liberty. But in return for short term gains we are unpicking the mortar which holds together our social architecture.

I am a firm believer in the common law. Before anyone ever spoke about human rights, the common law essentially embodied everything that is contained within the universal declaration of human rights. Because it is built on case law and we believe in judicial discretion, (unfortunately that belief is not shared by certain government ministers) it has flexibility to meet the justice of given situations and is capable of evolving. – The common law breathes. Its extraordinary adaptability has made it one of the great tools of vibrant trading nations. Markets have always thrived better under common law systems. Another great strength of the common law system is the jury, bringing the values of the community into the courtroom, deciding on the facts in cases and also protecting the judiciary from corruption where corruption is most likely to rear its head. The common law is built on a moral wisdom grounded in the experience of ages, acknowledging that governments can abuse power and when a person is on trial the burden of proof must be on the state and no one's liberty should be removed without evidence of the highest standard. By removing trial by jury and seeking to detain people on civil "ASBO" orders as a pre-emptive strike, by introducing ID cards, the government is creating new paradigms of state power. Being required to produce your papers to show who you are is a public manifestation of who is in control. What we seem to have forgotten is that the state is there courtesy of us and we are not here courtesy the state.

We have always operated from certain preferred truths in Britain. The preferred truth that an accused person is innocent; the preferred truth that a person who is here actually belongs here. The state has to prove otherwise. We the people have the assumption on our side. All that is disappearing and it will qualitatively change our lives.

A retreat from the Rule of Law, human rights and civil liberties is short-sighted. Yet such a retreat is precisely what is taking place. A quiet and relentless war is being waged. One individual encroachment on freedom can seem inconsequential or even justifiable if the reasons given are sufficiently seductive, but taken as a whole a pattern begins to emerge which should leave none of us feeling sanguine. The catalogue of inroads into our liberty is shocking. The list is too familiar to repeat.

One of the reasons for these changes is undoubtedly globalisation as I have said. The huge shifts taking place in our world create an impetus to create hybrid systems of law. Cherry-picking of other systems has been a favourite occupation of this government. If they do something in Sweden or France and it seems to work then why not try it here. The latest wheeze is the Scottish not-proven verdict which even the Scots don't like. Justice depends on very careful checks and balances and it is easy to introduce legal transplants which do not work because our immune system is not

attuned to the new initiative. Law is cultural and works best when it is grown in our own rich soil.

Why have we allowed these things to happen?

One of the reasons why it is now so hard to engage popular support for the protection of civil liberties is that we are also losing our historic memory about the need for such safeguards.

Collective memory about abuse of power, from the Tolpuddle martyrs, the early trade unionists of 1836, to the use of the suspected persons laws against black people in the 60s and 70s, fired a belief that civil liberties were vital. Knowledge of this experience gave us the power to say “no” and the ability to give reasons for the rejection: if we do not understand past struggle we are much more likely to be taken in by new fangled dogma. In order to renew or reform effectively, you need to understand the old. If tomorrow’s headline, the next poll or the next vote is all that matters, discernment drops away. We should have learned from history that in the long run abuses by the state are far more dangerous to liberty and democracy than individual criminal conduct, dangerous and disturbing as that is.

Just law matters. It is what makes the centre hold, the mortar that fills the gaps between nations, between people and communities, creating a social bond without which the quality of our lives would be greatly undermined. If we interfere with the principles which underpin law, fritter

them away, pick them out of the crannies of our political and social architecture, restoration will be impossible. Following the law in the face of terrorism is not a sign of weakness but of strength. The US Supreme Court Justice, Louis Brandeis, got it right 75 years ago:

“Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, (and is dismissive of the law) it breeds contempt for the law; it invites every man to become a law unto himself.”