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Cymdeithas y Cyfreithwyr
The Law Society

Elfyn Llwyd MP

The Scales of Justice:

The Modern Challenge

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ELFYN LLWYD

Member of Parliament for Meirionnydd Nant Conwy

Elfyn Llwyd was born in Betws y Coed in 1951 and was educated at Sir Thomas Jones School Amlwch, Llanrwst Grammar School and Ysgol Dyffryn Conwy.

He graduated with honours at the University College of Wales, Aberystwyth and then went on to study at the College of Law in Chester.

He qualified as a solicitor in 1977, and in 1978 he was made a partner at Guthrie Jones & Jones, Bala and Dolgellau. In 1990 he was President of the Gwynedd Law Society. He was called to the Bar in 1997 and is a member of 1 Stanley Place Chambers, Chester.

He has been Member of Parliament for Meirionnydd Nant Conwy since 1992, and Plaid Cymru's Parliamentary Leader since 1998. He is a member of a Parliamentary Standards and Privileges Committee and Vice Chair of the Cross Party PCS Union Group and the Courts and Justice Unions.

He enjoys fishing, rugby and pigeon breeding in his spare time. He was invested to the white robe by the Gorsedd of the National Eisteddfod in 1998.

"THE SCALES OF JUSTICE: THE CONTEMPORARY CHALLENGE"

It was a great privilege for me to be invited to deliver this speech today, commemorating one of the great figures of the Welsh nation. I sincerely hope that I will be worthy of this honour.

After graduating in law at the University College of Wales, Aberystwyth, I had the opportunity to complete my articles with the famous firm William George and Son (Lloyd George & George) and I soon realised that this was no ordinary firm. Within a few days, I came across a box of papers that included the famous Llanfrothen case where it was established, by means of an eventual ruling in the House of Lords, that an individual had the right to be buried in a Church graveyard regardless of his or her religion. Needless to say, this is an important case, not only in Welsh history, but also in British history. The solicitor who conducted all the detailed background work for this case was the late Dr W R P George's father, Dr William George, and his brother, Mr Lloyd George was the advocate; Mr Lloyd George the solicitor and the politician.
Little did I think at that time, at twenty two years old, that I would also turn in the circles of the law and politics - but of course, without reaching anywhere near the dizzy heights of the Wizard of Dwyfor.

It's good to recall the connection between the late Dr W R P George and the National Eisteddfod. The poet-lawyer followed in his father's footsteps - Dr William George, another poet-lawyer - to take on the post of Honorary Solicitor to the National Eisteddfod. It is also good to note that Dr W R P George's son, Philip George, is himself today Honorary Solicitor to the National Eisteddfod. What commendable service this family has given.

I also recall an occasion that led to the formation of the Gwynedd Law Society. Dr George had recently won the crown at the National Eisteddfod in Carmarthen, and to celebrate his success a number of eminent lawyers gathered to organise a dinner, amongst them the late Harry Evans Jones and Trefor Morgan. The dinner was extremely successful and through the hard work of Trefor and others, the Society was established. I had the privilege of being Secretary and later President of that same Society.

On one occasion, I recall travelling to London with the President at the time, Mr Huw Elwyn Jones, Bangor, to see the Lord Chancellor - Lord MacKay. We went there to discuss our fierce opposition to some changes to the law regarding the transfer of land, and we were scheduled to be with him for three quarters of an hour, but the meeting went on for an hour and a half and he changed his mind!

Things don't change that easily usually, believe me.
A noteworthy fact is that Dr W R P George was very supportive of the Society from the outset, despite being so busy.
I never came across anyone, - neither solicitor nor barrister - who had a better knowledge of the contents of "The White Book" and I learnt a great deal from him, and from Mr R T Price as well. Mr R T Price specialised in family law and advocacy in the Magistrates' Court and in Crown Court. I am heavily indebted to both of them.

In fact, it was Mr Robert T Price who enlightened me that I could always look busy by carrying a file of papers under my arm. I understand that it was in the air force, whilst doing his National Service, that he learnt that.
I have chosen as my subject today the balance between rights and the freedom of the individual and security and the interests of the state.
The greatest icon in law is probably the scales, and the scales are very apparent

today when considering this subject.

About six years ago, a new term was coined - "The war against terrorism" - and to those of us who are accustomed to using words in our occupations, that particular phrase struck a discordant note. How, you may ask, could one state go to war against nothing more than a concept ?

In my opinion, this phrase was born out of true fear rather than out of any intention created in cold blood.

But its continued use is questionable to say the least. At the end of May this year, Amnesty International published a report entitled *"2007: The State of the World's Human Rights"* In this Report, Amnesty's General Secretary, Irene Khan, says that the fear of immigrants, the fear of crime, and terrorism are used by states to suppress basic human rights.

She goes on to say that giving one group of people security at the expense of other people's rights is bound to fail, and that many anti-terrorist measures and laws have failed because they don't give this enough consideration, and that they have, and I quote directly *"done little to reduce the threat of violence..... and much to damage human rights and the rule of law".*

I believe that these words are, unfortunately, a reflection of what has been happening in the British Isles for some years now. Although the Government has decided that Ministers will no longer use the term *"the war against terrorism"* the need remains to ensure that we continue to feel under threat.

We must remember that each and every one of us has a right to freedom, and yet the Government is prepared to weaken it, a task which is far easier against

the background of terrorist and violent threats. Every one of us knows that the Government's policies - whoever that Government is - tend to be created in the tabloid press, and that it is very difficult to have a meaningful discussion on penal policy, without sinking deeply into the quagmire of superficial politics.

My argument is that these shackles also exist in the area of the security of the country or the state, and one of the most obvious elements is creating the fear I have already mentioned.

However, it's true to say that the war in Iraq has made life in Britain more dangerous, but the response of the Government, in the opinion of many people across the political spectrum, isn't going to alleviate this threat - rather, perhaps, it may intensify the problem.

Today's problems cannot be addressed effectively by eroding civil liberties. There is enough talk about the balance between the freedom of the individual and the security of society. Of course, this is important and it should be central to our debate. But many people today believe that the scales have fallen too heavily on the side of the interests of the state - at the expense of guaranteed rights that we have been recognising for a century and more - rights and freedom that meant we stood out as an example of a civilized system that provided for the interests of the individual alongside the interests of society or the state. That used to be the situation at any rate.

We saw that keeping individuals under lock and key without going to Court had been inflammatory action in Ireland, and had led to an intensification of the problems there in the 70s and 80s. Negating rights that were guaranteed and then increasing the number who turned to violence. It appears that the Government doesn't learn the lessons of history - and that failure could be very expensive .

We recall the jury-free Diplock Courts in Ireland, and now there is another attempt at starting the process of eroding the right to trial by jury.

Whilst touching on the need to safeguard our system of trials by jury, I would like to take this opportunity to call once again for a change in the law to ensure trials through the medium of Welsh before Welsh speaking juries.

During the discussions on the Language Bill in 1993, I proposed an amendment to this effect and it was lost by only one vote. It's quite amazing that we are still waiting for this change. Mr Justice Roderick Evans called for this in his powerful lecture at the Eisteddfod last year (The Annual Lecture of the Law Society 2006). His demand was echoed by Lord Justice Thomas in another important speech in Cardiff in January of this year. (Legal Wales : "Some reflections on our future tasks" 19.01.07). In his speech, Lord Justice Thomas expresses his concern that the Crown Courts have not emulated the Civil Courts and Magistrates' Courts where full cases through the medium of Welsh take place easily and free of obstacles. He also referred to what he calls a "mantra" that Welsh speaking juries cut across the principle of choosing a jury at random.

Recently, I discussed this matter with another High Court Judge who maintained that there were significant administrative problems in bringing Welsh juries into existence. I have not encountered any counter arguments or examples that outweigh this view.

This matter still throws a shadow over all the good work this circuit's judges have accomplished in the area of bilingualism over the last decade. We must move on this matter.

And that's exactly what my friend Hywel Williams, M.P., has done.
He has prepared a simple Bill to right this wrong. Let us hope, in the light of the "new inclusive politics" in Cardiff that we will see this coming to fruition before long.

To those of us in the House of Commons who are concerned about trials by jury, it is difficult to get Parliament to understand that this opposition is not simply about reserving some small privilege for us as lawyers and barristers. Juries are a fair reflection of society and far more often than not they do the right thing, and justice is served.

It is difficult to see the Government's logic here. Only about 2% of criminal cases are committed to Crown Court. That's about ten long fraud cases per year. Is this justification for starting to undo the knot of justice? Because once that knot has been undone it will very soon disappear.

Over the last ten years thousands of crimes have been created. I recall asking the Prime Minister a year or two ago if he would be willing to place an *aide memoir* in the Library of the House of Commons in order to remind us how many crimes we have created every week. It could be laughable if the situation weren't so serious.

You can commit a crime today by holding a peaceful protest in Central London if you don't have permission to do so. People who have protested completely quietly and peacefully have been arrested for causing a disturbance and breach of the peace. An attempt was made to silence Brian Haw's anti-war protest outside Parliament by direct legislation.
I was a member of the Standing Committee for the Civil Contingencies Act, and that is a painful and dangerous Act. Under that Act, Government Ministers, including Whips, are given the right to act on an emergency. The definition

of an emergency is a matter for the Minister. The powers are terrifying. The Government could demolish your house and your home without any right of compensation if that was recommended by the word of the Government Whip. There is a right to bring in the army to act immediately if we had a problem such as the fuel protests again.

In December 2003, Amnesty International published a report that was very critical of the Government's policy of keeping people who are not British in custody without trial - calling the system a *"British Guantanamo Bay"*. In the report they remind us that the Home Secretary is not prepared to abstain totally from reliance on information that has been gained through torture.

Where on earth are we going? The report was supported by numerous figures from the religious world, and eminent figures from the legal world who declare that imprisonment without trial goes against the principles of justice, equal treatment and also the rules of law - and pleas were made to the Government to bring these people to Court or to release them.

These individuals have the right to appeal to the Special Court - Special Immigration Appeals Commission – *S.I.A.C.* – and they have the right to be represented by one of only twelve barristers. BUT - these barristers have no right to speak to the individuals to hear their opinion on the evidence against them. It is no wonder therefore that many lawyers have resigned from this panel. Ian MacDonald Q.C. resigned, and in his words *"being some kind of fig leaf of respectability and legitimacy to a process which I found odious"*.

As Professor Conor Gearty, from Matrix Chambers by the way, said ten years ago now, *"the rule book shouldn't be thrown away because of an attempt to retaliate for the atrocity of terrorist activities, as these rules have evolved through the three all important*

principles of equality, fairness and the dignity of the individual".

These are the most important principles that should be adhered to, and it's odd to think that the same Government who brought the Human Rights Bill into existence has turned its back on these principles only four or five years later.

Of course, keeping a person in custody without trial contravenes Article 5 of the European Convention and Article 9 of the International Covenant on Civil and Political Rights. The Government argues that Article 5 is not relevant and that it is being discounted - but it may not be discounted except in a war or in a situation where a crisis is threatening the life of the country, and even then, only insofar as that can be justified.

One of the Judges in the House of Lords, Lord Steyn, stated in a recent case that was dealing with this - *"so that people can be locked up without trial when there is no evidence on which they could be prosecuted is not in present circumstances justified".*

For centuries, the accused person has been presumed innocent - this aspect of the system in England and Wales has been a particular source of pride, but since the Terrorism Bill of 2000 there has been a presumption of guilt. It is implicit on the accused that he now proves beyond all reasonable doubt that he is not guilty - the complete opposite to what the proof had been for centuries, namely that it is for the Crown to prove and not for the accused to do so.

Moreover, if there is merely suspicion that an individual is linked to terrorism, his citizenship can be revoked - and under the 2003 Criminal Justice Act the police have the right to keep a person in custody for questioning for two weeks.

The "right to silence" has almost disappeared - a concept that was supported by

Labour when in opposition. And the Government has extended this to children under fourteen years old; in other words, if a child is unwilling to answer a question the Courts have the right to presume guilt. It is interesting to see that the individuals within the Labour Party who used to oppose such measures are now responsible for bringing them to the Statute Book.

But the "right to silence" had been weakened in Northern Ireland in 1988.
It was an important right based on the fact that the State had to prove an offence and not vice versa, and that is, of course, at the heart of our justice system.
Through the 1994 Criminal Justice and Public Order Act this right has gone - and it is a high price to pay for silence since the Courts can now presume the worst in light of that silence.

The Home Secretary gives him/herself the right to send an individual away from here on any suspicion that his/her presence does not correspond with Britain's best interests. This is abhorrent, but what makes things much worse is that this individual will be in danger if sent back to a country where he/she is in danger of being tortured and killed. All that in an attempt to deal with terrorism?

It is a truism to state that terrorism is a dreadful challenge to any Government - but it is just as true that it cannot be dealt with by turning one's back on the rights of the individual.

As the Government offends some factions within society, it is likely that these factions will feel that the treatment is unfair and therefore there is a real possibility that this would contribute further towards the number of potential terrorists. Unfairness leads to hatred - and hatred is at the root of terrorism almost every time.

One of the dangers on the horizon is the creation of a sort of second "sus" law which was so destructive in society when thousands of black people were taken in for questioning by the police without any real cause. I hope we won't see the same pattern developing again with the Arab section of our society being targeted. In fact, there is some evidence that this has already started in the big cities.

Another tendency that is a cause for concern to many of us is the fact that the Government has been so willing to bring numerous civil orders into the justice system in order to achieve a specific aim. As we know, civil proof is lower than criminal proof, but the consequences of orders are onerous and far-reaching.

I have no love for persistent criminals, who often live by their offences, ruining the lives of hundreds of people. Several attempts have been made to ensnare these criminals recently but there is a genuine danger that we will catch individuals who are less deserving of the orders in the net. Consider the most recent Bill, the 2007 Serious Crime Bill. The Prevention of Serious Crime Orders are intended to deal with the top criminals - but in fact they are not likely to succeed in this. It would be better to ensure that the evidence justifies taking the case to a criminal Court in the usual way. Liberty argues that this latest legal "short cut" is going to be unfair and ineffective (LIBERTY - notes for the Second Reading June 2007). And yet, there are similar powers in existence already and, if a person's movements and activities need to be restricted, that could be done very easily by setting down bail conditions before taking the case to trial. It appears that the Government want to achieve the result they crave by whatever means necessary.

In a recent report, the Parliamentary Joint Committee on Human Rights - i.e. a Joint Committee between the House of Commons and the House of Lords - stated "In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of

control which are outside of the criminal process and which avoid the application of criminal standards of due process.".
(Twelfth Report 2006-07, HL 91/HC 490).

This criticism also manifests another of the Government's constant tricks, namely the establishment of a consultative Committee, only to ignore its opinion completely when that Committee is presumptuous enough to disagree.

Hindering the processes of criminal law, therefore, is not the way to achieve this particular aim. Those processes have evolved over the centuries to ensure fairness for the individual and to ensure that justice is served. It has been deplorable to witness sustained and regular threats to this order over the last five or six years. We will all be worse off if this process moves on any further.

Discrediting Judges is not the way forward either. That tendency has caused amazement to many people, and one of the things that exists in every totalitarian country is a "tamed" judiciary, with Judges taking their directions from the Government.
We have much to be grateful for regarding the independence of our Judges.

Take, for example, the verdicts of Mr Justice Collins against giving the right to keep people in custody without allowing them an open and fair trial. How can keeping people in custody - preventing them having the right to attend the Courts and see the evidence against them - be consistent with the Rule of Law?
In another case, Mr Justice Sullivan used the words "misuse of power" in a case last year.
This was a case against the Home Secretary who refused to accept the arguments of Afghan asylum seekers not to be returned to the hands of the Taliban. He said, *"Here was a complete failure to comply with the relevant requirements of the rules of civil administration on every level, and a failure to comply with the duty and the public*

authority to co-operate and to disclose evidence fully".

Harsh words indeed - but in 2004 in another High Court judgement regarding a case from Belmarsh, comparisons were drawn with Stalin's Russia, and even with Germany under the Nazis.
It's no wonder that the politicians and the Judges are at each other's throats so often these days.

We must bear in mind that the nature and evolution of emergency powers in the laws of England and Wales have changed immensely during the Twentieth Century, as we know.
It began with the 1914 Defence of the Realm Act. This Act and others permitted regulations to be passed that lasted for specific periods only, for specific reasons and with far-reaching effect.
This is why they were time restricted in that way.
But over the last decade a new movement was seen. There was no time limit on the legislation - it was too broad and too loose, and also the legislation didn't need to be re-assessed and renewed by Parliament. We are therefore living in a period of "continuous crisis".

The response to terrorism has weighed heavily against our basic rights - those rights found in the Human Rights Act, where we have seen the erosion of:
Article 5 - the right to freedom, liberty and security;
Article 6 - the right to a fair trial;
Article 8 - the right to respect for private and family life;
Article 10 - the right to freedom of expression;
Article 11 - the right to freedom of assembly;
- the right to protection of property (Article 1 of the First Protocol)

This tension between emergency legislation and human rights has led to many cases in the Strasbourg Court.
There are genuine fears today that these powers are too wide ranging and that the issue of terrorism may have been raised to justify disposing of part of our historically intrinsic and important rights.
However, I perceive that Parliament and the Courts are uneasy about this tendency.
The House of Lords stated that placing individuals in custody without a trial contravenes the rights under the Convention on Human Rights - stating that even if there is a crisis then the steps have to be commensurate and without prejudice against individuals.

By now, the Right Honourable Gordon Brown has announced his intention to seek again the right to keep a person in custody for 90 days without charge. Many of us are concerned about this and cannot understand how other states are able to cope without going down this route. A period of 90 days is equivalent to six months in prison – without a charge at the end of it.
The Government will argue once more that this change is necessary - and that it is needed urgently. This brings us back to the concept of creating fear.

So far, despite all the Parliamentary debates on this subject, I have heard no logical justification to support this demand.
At the same time, I must also say that I haven't heard a good argument in favour of identification cards either. An attempt was made to bring "fear" into that debate as well. The plain truth is that ID cards would have no impact at all on terrorism, as was seen in the tragic disaster in Madrid where the people responsible held ID cards - each and every one of them.

In her excellent book entitled "Just Law", Baroness Helena Kennedy, Q. C. begins by explaining the title. It is not an obvious interpretation. She was preparing to make a strong speech against one of the measures I've been referring to when she was visited by the Government Whips in the House of Lords in an attempt to persuade her not to rebel against the Bill. One of them said to her - "Come on Helena, don't oppose the Bill *"it's just law"* - that is, it's just a law, rather than a just law. This suggests to me that the Whips of the House of Lords are just as uncaring as their fellows in the "Other Place".

If that is uncaring, then there is certainly one other change that is more deliberate and serious. Under the title of "modernisation" the debates in the House of Commons have been timed, that is, shortened every time, in order to make the work of the House easier for Members and families, so they say, the hours need to be changed, everything has to be timed and strictly limited. I was in the Chamber recently when discussing a Bill returning after a Report to Parliament. There were a number of amendments and there was a great deal of discussion on amendments during the period of the Standing Committee on the Bill. Only three hours were allocated to discuss all the amendments and the Bill reached its close with 80 amendments that we had not had a chance to debate.

This was despite the fact that the Government itself had tabled dozens of amendments - showing that there were weaknesses and that the Bill needed improving. That is what modernisation leads to - strengthening the Executive Body and weakening the Legislation.

The House of Commons has been seriously undermined and eroding the powers of the House is undemocratic and questions the credibility of Parliament. More importantly, it undermines the main purpose of Parliament, which is to scrutinise the Ministries and to change, alter and improve laws.
The situation is serious , and Gordon Brown says he wants to strengthen the House

of Commons - we'll see! In the meantime, not a single Member has more time with his or her family - not even the London Members. That's "modernisation" for you.

My own great concern is the quality of new laws and the way society is worse off as a result .

Two years ago, Richard Thomas, the Information Commissioner, said that we were sleepwalking into some surveillance society. He was referring to CCTV cameras, and he drew his comparison from George Orwell's "1984". But recently, Ian Redhead, Deputy Chief Constable of Hampshire, has said that Members of Parliament don't realise that there is a need for debate on this. "We are," he said, "sleepwalking through the lobbies of Parliament whilst Britain is slipping toward Authoritarian Rule".

This brings me back to the beginning of this speech, the relationship between the law and Parliament. I believe that it is our place as solicitors and politicians to bring up this debate frequently, and to make our voices heard in order to ensure that all of us within society wake up from this deep sleep before it is too late.