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## Centennial Lecture to the Nassau County Bar Association

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# ARTICLES

## CENTENNIAL LECTURE TO THE NASSAU COUNTY BAR ASSOCIATION

LORD MAKAY OF CLASHFERN<sup>1</sup>

I count it a great honour to have been invited by the Nassau County Bar Association to give this lecture as an important part of the Centennial celebrations. My subject involves a comparison between the judicial control of politics in the United States and the United Kingdom. This is a wide and important subject and it is appropriate that I should attempt to sketch the framework involved and that we should have a considerable time for questions and discussion after I conclude.

I begin with the situation in the United Kingdom. The doc-

<sup>1</sup> Lord Makay of Clashfern served as Lord High Chancellor of the United Kingdom, the highest officer in Great Britain's judicial system, from 1987 to 1997. Lord Makay was the first member of the Scottish Bar to hold the position of Lord High Chancellor. As Lord High Chancellor he was simultaneously a member of the cabinet, speaker of the House of Lords, as well as the highest judicial officer. Lord Makay also had careers as a mathematician, tax lawyer, and Law Lord.

This is the text of the "Centennial Scholar Lecture" which Lord Makay delivered on October 15, 1998 at Domes, the home of the Nassau County Bar Association, commemorating NCBA's one-hundredth anniversary.

trine of the United Kingdom, which has governed this subject there, is the doctrine of parliamentary sovereignty. As you know the United Kingdom parliament consists of the House of Commons, whose members are elected so far by a system of first past the post for constituencies throughout the United Kingdom. The size of these constituencies is the subject of regular review by the Parliamentary Boundaries Commission with reports which are subject to deliberation and decision by parliament. The members are elected in a general election when all seats in the House are subject to election, or at a by-election where a vacancy has occurred by reason of death or for some other reason a member ceases to sit as a member of parliament.

The other House of Parliament is the House of Lords consisting of the hereditary peers, certain Bishops of the Church of England, the Lords of Appeal in Ordinary and life peers. The hereditary peers are those who, by reason of a grant, are entitled to sit in parliament, the grant descending to successors. At present the British Government have an election manifesto to deprive hereditary peers of their right to sit and vote in the House of Lords and other changes in that House are contemplated. I happen personally to be Chairman of a commission set up by the leader of the Conservative Party to consider options for the reform of the Second Chamber. The final element of parliament in the United Kingdom is the Monarch or Sovereign, Her Majesty Queen Elizabeth II. Acts of parliament generally are the result of a Bill approved in the same terms by both Houses of Parliament which then receives the Royal Assent. An act of parliament is the supreme law in the United Kingdom, and where it applies, must be given effect. This is the doctrine of the sovereignty of parliament. We shall see later some erosion of this principle in recent times but the principle is historic and well established.

The Queen's Printer's copy of an act of parliament determined the law and the court would not inquire into the manner in which it had been arrived at. Acts of parliament might be public general acts creating a general law for the whole of the United Kingdom, or acts with territorial limitations, such as for example an act applying to Scotland only but still of a public general character within that jurisdiction. In other classes of acts are private acts or personal acts, the former being acts which are

promoted by a corporation to confer special rights or powers otherwise to legislate in a special way for a particular enterprise and personal acts which made special laws for particular people. For example, in former times when divorce was much more difficult to obtain generally parties to a marriage sometimes petitioned parliament for an act dissolving their marriage. However, these acts of the legislature were law for the courts and the task of the court was to construe the act and apply it to the factual situation before the court.

A qualification in relation to this principle of the supremacy of parliament arose in connection with acts of the Scottish parliament before the union of the parliaments. It was possible for an act of the Scottish parliament to fall into desuetude which resulted in it no longer having the effect of law. This happened when the act was not enforced over a substantial period and practice had grown up inconsistent with it. The decision whether an act of parliament was in desuetude was a decision for the courts. However, this doctrine did not apply in the parliament of England, and since the union of the parliaments it has not been applied to the parliament of the United Kingdom.

The task of the courts, as I say, in relation to an act of parliament was to construe the act and apply it to the factual situation before the court. The acts of the United Kingdom parliament have normally been expressed, particularly in more recent times, with a considerable degree of precision, parliament attempting to lay down the law with sufficient clarity to enable the court to reach a clear conclusion on the result of its application in any case, but human language being what it is, and the English language in particular being what it is, there is always the possibility of ambiguity. Much of the work of the courts in relation to acts of parliament over the years has been deciding whether an ambiguity in the language exists and if so which of the possible meanings is the right meaning in the context to give the act and then to apply that meaning to the factual situation.

However, if the court decided that the act of parliament had a particular meaning, it would be open to parliament itself, if it disagreed with that view, to amend the act of parliament and from the time that amendment took effect, the meaning which parliament put in the amending statute would prevail. This was sometimes referred to as parliament over-ruling the court, but in

strict theory I suppose it is more accurate to say that parliament, having seen the decision of the court, decided to amend the law thereafter so that the court's decision no longer applied to a factual situation the same as that which was the subject of the earlier decision.

One of my particular interests when I was in practice was taxation law and it was often said that if the taxpayer succeeded in establishing in court his interpretation of a tax law with the result that he escaped taxation, it was almost inevitable that in a very early session of parliament thereafter the law would be changed to catch a similar transaction so the taxpayer's success might be short-lived, but perhaps for him that was sufficient.

So far I have been dealing with acts of parliament which may be conveniently referred to as primary legislation. These acts often contain a power of a minister of the Crown or some other authority to make regulations which have the force of law, and if a regulation is made in accordance with statutory powers by the authority authorized to do so that provision does have the effect of law in accordance with its terms. However, in this situation it is possible to challenge the regulations as not being a proper exercise of the power given to the minister. The grounds of challenge can be that, for example, the power granted to the minister does not extend to regulating the activities that his regulations have sought to embrace, or that the provisions he has made are not in accordance with the general purpose of the act, or have been produced without observance of the procedures which the act has required to be implemented before a regulation becomes effective. The most common example of this is where the act provides for consultation with particular interests before regulations are made. If regulations are then made without this consultation having been properly undertaken the regulation may be subject to being declared ineffective.

In recent years there has been a large increase in the growth of regulation-making powers. Lord Chief Justice Hewitt had protested vigorously against this development referring to it as "the new desperatism." Since his time there has been a very considerable growth in the occasions on which the courts have set aside subordinate legislation for reasons I have indicated. This could be regarded as a judicial control of politicians but as will be appreciated the legislature could always overcome a court

decision by making a new act of parliament, under which the former regulation would be effective so that even judicial review, extended as it is, did not give the judges ultimate control over the legislature, or indeed over subordinate legislation, in the sense that the legislature could always, by subsequent primary legislation, give effect to the regulation overturned providing it with the force of primary law if it so desired. This then is the traditional doctrine of the supremacy of parliament and it would be fair to say that so long as it prevailed there was no ultimate judicial control of politicians.

I should also mention at this stage that by the Bill of Rights, what politicians said in parliament could not be called into question in any court of law and even where remarks made in parliament were grossly damaging to an individual's reputation he had no redress for that in law. So in a sense the absence of judicial control of politicians not only applied to acts of parliament but also to their actions in parliament.

When the United Kingdom becomes party to a treaty which requires a change in the law of the United Kingdom, the government before the treaty comes into effect will have an obligation to have legislation enacted by parliament enabling the treaty to be fully effective in the United Kingdom, but there is no scope in these arrangements for judicial intervention ordinarily. However, after the Second World War the nations of Europe, having experienced the dreadful night in which human rights were abused by totalitarian regimes, decided that a new arrangement should be made for the protection of human rights. The Council of Europe and its accompanying declaration of human rights and fundamental freedoms was the response to this period of European history. The purpose was to create a mechanism by which Europe as a whole would become alerted to breaches of human rights in any of the countries who were members of the Council. The mechanism was an innovation. The arrangements included a commission which considered whether a complaint that human rights had been abused in a particular country was admissible. The commission then determined whether the complaint was justified, and whether the matter could be referred to the council of ministers in order that the problem might be amicably resolved. With the country whose conduct was in question being of course by its minister being a

party to these discussions. But there was also constituted a court, The European Court of Human Rights, to which a case could be brought, either by reference from the commission because it was important, or by way of challenge to the decision of the commission. The signatories to the convention obliged themselves as a treaty obligation to give effect to the judgments of the court. The judges of the court were appointed from the member states, usually the judge for a particular state being a member of the legal profession of that state with a considerable degree of standing in it.

This arrangement produced for the United Kingdom a new type of judicial control of politicians in that if the court decided that a law in the United Kingdom was inconsistent with the declaration of human rights and fundamental freedoms, parliament was obliged to change that law so that the United Kingdom law might be brought into conformity with the convention. However, until parliament did so the former law would remain effective in the United Kingdom although this might produce subsequent cases of violation to go before the commission and possibly the court in Strasbourg.

Further, the court in Strasbourg has always held that in many of the provisions of the convention there was a degree of discretion accorded to the member states. In other words, the member states would only be in breach of the convention if what they did overstepped the boundary in the particular area in question which observance of human rights required. This, referred to as the margin of appreciation, meant that in many aspects of the convention there was a discretion in the member states of how they might conform with the convention and therefore, when the court decided that there had been a contravention of the convention, parliament might well have an option, depending upon the subject matter, on how it should be implemented.

I give one illustration of a case in which I personally was concerned and which was heard in the court in Strasbourg on the day when the members of the American Court of Human Rights first came as such members to visit the court in Strasbourg. This was a case about the use of corporal punishment in Scottish schools. It had been traditional in Scotland for children who had misbehaved to be punished by the teacher by the use of a tawse which was a leather strap administered on the misbehaving

child's hands. Two parents whose children had misbehaved objected to this practice on the ground that they had a religious or philosophical belief that such action towards a child was wrong. The court upheld the view that administering corporal punishment to a child of a parent who held the view that it was wrong was a breach of that parent's right to have their religious and philosophical views respected in the education of their children. This provided the possibility to the United Kingdom parliament that when a child went to school the parent could have an option to state to the school whether or not they wished their child to be subject to corporal punishment. If they did not wish their child to be subject to corporal punishment the school would respect that. Originally, the government proposed to meet the Strasbourg decision in this particular way but it became apparent that the difficulties of a fair system of discipline in a class would be subject to very severe strain if children in the same class could be subject to such differing sanctions for misbehaviour. Accordingly, parliament ultimately decided that the way to conform with the decision was to abolish corporal punishment in state schools altogether.

This illustrates the point that although the Strasbourg judges in a sense exercised a control over the activities of the United Kingdom parliament, still very considerable options could be left to the parliament in implementing the parliaments' obligations. And I suppose it would be right to say that ultimately parliament could, if it wished, ensure that the government denounce the treaty and thus remove the obligation on parliament to conform with the decisions of the court in Strasbourg which resulted from it. Thus, in a sense the legislature remained ultimately in control, although as a practical matter I do not think it at all likely that such a course would ever be contemplated. So for practical purposes the Strasbourg control is likely to remain. I should mention that the system of commission and court to which I referred as operating in Strasbourg was found with the growth of work to be ineffective, and these arrangements have now been altered to make a full-time court the authority for determining complaints of breach of the convention.

When the United Kingdom joined the European Common Market the United Kingdom came under obligation to secure that European law laid down under the treaties by the legisla-

tive processes specified in the treaties, was binding on the United Kingdom. Decisions on the application of these laws were committed under the treaties to the European Court of Justice in Luxembourg. The treaties were given the force of law in the United Kingdom by the European Communities Act of 1972, and subsequent amendments of the treaties have been given effect by subsequent acts. The 1972 Act provided that the laws enacted under the treaties should be law in the United Kingdom and that any law which was inconsistent with these laws, whether passed before or after the 1972 Act, should be ineffective insofar as it was inconsistent with the European law. A Provision is made under the treaties for the courts of the member states to ascertain the judgment of the European Court of Justice on any question of European law that arises in a case before the courts of the member state. The final court of appeal in any such case is required to submit the question to the Luxembourg court, if it has not previously been done in the case (since the lower courts considering the matter having a discretion to do so.) It follows from these arrangements that the court in Luxembourg has the right to decide that the provisions of a particular act of the parliament of the United Kingdom are inconsistent with the European law. When this comes to the appropriate court in the United Kingdom, it follows that that court will be bound to give effect to the judgment of the court in Luxembourg and set aside as ineffective an act of the parliament of the United Kingdom. As a corollary, the law of the United Kingdom must provide the necessary facilities to give any remedy to a litigant which the European law provides for that litigant in respect of a breach of his rights under that law.

This then is a very direct and strong judicial control of the legislature of the United Kingdom, lying first in the hands of the Court of Justice in Luxembourg, but by virtue of that authority and the obligation of the United Kingdom courts to follow it lying also in the hands of the judiciary of the United Kingdom. This novel consequence in the United Kingdom is, I think, evidenced by the reaction of many when the first instance of its occurrence became generally known.

Reviewing these developments, I think it can now be said that there has been a considerable increase in judicial control of politics in the United Kingdom in recent years. The supremacy of

parliament in practical terms has been considerably eroded. From the purely theoretical point of view I think it can still be said that all of these controls by the judiciary of parliament to which I have referred are to continue only so long as parliament does not enact a provision to the contrary. It would theoretically be possible, as I said, for parliament to enact legislation requiring denunciation of the treaties under which these controls originate, but as a practical matter I think we can take it that these innovations are with us to stay. But theoretical possibility is still important from the point of view of the theory under which this control takes place.

May I now turn to the United States? Here the historical position is very different. The supreme law of the United States, and I speak of course subject to correction by all of you here who are more familiar with it than I, is not the law laid down by the legislature but the constitution of the United States.

The courts of the United States, and in particular the Supreme Court of the United States, have the responsibility of construing acts of the legislature and applying the meaning they believe to be the true meaning to the facts of the case before them. Just as in the United Kingdom, if the legislature concluded on considering the decision that it was not in accordance with their wishes it would be open to the legislature to alter the legislation, and once amended legislation has been enacted it would be the law notwithstanding the courts' decision to the contrary on the earlier legislation. In this respect, the courts of the United States stand in relation to the legislature in the same position as did the courts traditionally in the United Kingdom.

However, where the court is dealing with the application of the constitution to the circumstances before it, the courts construction of the constitution will be definitive and supreme unless and until the constitution has been altered and that is a very different matter from changing state or federal legislation.

I need not remind you that the constitution of the United States, and its several amendments, is couched in language of considerable generality, much more general than acts of the legislature, either here or in the United Kingdom, normally are. Generally speaking, the language was also used some considerable time ago. This means that the process of interpretation is a much less restricted activity in relation to the constitution than

it would be in relation to the language of at least most, if not all, acts of parliament.

This appears to me to lead inevitably to the conclusion that the judicial control of politicians in the United States is much greater than in the United Kingdom. The powers which United Kingdom judges have, to which I have referred, are certainly included in the powers of the judiciary within the United States.

I think there is no area in which the judges of the United Kingdom have a greater control over politicians acting as legislators or as discharging ministerial functions than the judges have in the United States.

In the present session of the parliament an act has been passed to alter the arrangements for dealing with human rights, and the convention to which I have referred has been made part of the law of the United Kingdom. However, the position is that the judges are not given authority under that act to set aside the whole or any part of an act of the United Kingdom parliament. Rather, they have the authority to make a declaration that an act or part thereof is inconsistent with the human rights act and parliament has then a mechanism for speedy resolution of the matter. Although in theory parliament could differ from the judges, I anticipate that it is expected that this would not occur.

There are of course in the United States controls over politicians which are wider than their legislative activities because the most powerful politicians in the United States are not themselves members of the legislature. So far as I understand the only member of the Federal Executive who is a member of the legislature is the vice-president by virtue of his presidency of the Senate.

It would I think be appropriate at this stage to comment on the appointment of judges and the differences on the two sides of the Atlantic regarding the judicial control of politics to which I have referred. I will restrict myself to the judges of the highest courts but the principles apply generally.

For the House of Lords the appointments are made by Her Majesty The Queen on the recommendation of the Lord Chancellor. Where judges from Scotland are concerned, the Lord Chancellor would consult the Secretary of State for Scotland. The selection would be made from judges who have already served in the High Court and Court of Appeal. In recent years,

the appointments to the House of Lords have invariably been made from the Court of Appeal, so far as judges from England, Wales and Northern Ireland are concerned. In Scotland there is no separate Court of Appeal and the same distinction does not apply. In selecting those to be appointed to the House of Lords the Lord Chancellor will consult with the existing Lords of Appeal in Ordinary and usually also the Lord Chief Justice and the Master of the Rolls. The search will be for judges who have distinguished themselves in their previous judicial career. The qualities looked for are judgment and openness of mind to listen to argument and to cite the cases, having regard to the arguments, with due respect to the development of the law. Speaking generally, a judge is promoted for his skill and judgment in applying the law successfully to the case before him, success being measured by the cogency of his judgment. It would not be normal to trawl all the writings of the judge, and many distinguished judges have not written a great deal outside the records of their judgment, to discern the judge's opinions on matters of public controversy, such as abortion, or politics, private as distinct from public education and the like. There is no process at present in which parliament can intervene before an appointment is concluded. In a recent paper on options for reform of the second chamber in our parliament, a commission of which I am chairman, has put forward the possibility that a reformed second chamber might review proposals for appointment made by the executive including those for judges, but there is no such mechanism existent at present and there is no present proposal from government to introduce one. The leader of the opposition remarked during the passage of the human rights bill the thought if judges were to have a wide ranging role in determining matters of human rights under the European convention, with its rather general language, then such a procedure might be appropriate.

This leads me to the situation here. As I said earlier, where the judge's task is to construe language of a more general character than is usually found in statutes of the United Kingdom parliament,<sup>4</sup> there may well be scope for the application of general opinions and approach held by the judges prior to being called upon to decide a particular case. In this country, as you know, nominations for the Supreme Court are made by the

President and politics may enter into his nomination, I suppose. The Judiciary Committee of the American Bar Association reports upon candidates for the judiciary, describing them as not qualified, as qualified or as well qualified. I assume that the criteria used for this purpose by that committee, and I have had the advantage of knowing some of the members of it over the years, are those of professional eminence. Once nominated the judge is subjected to a process of examination by the judicial committee of the Senate and here the judge's previous opinions on matters of possible public controversy may well be examined in considerable detail as well as the quality of his judgments, if he has been a judge, although of course, in this country it is not uncommon for an academic to be nominated who may not have had previous judicial experience.

This, I think, could be characterized by saying that the judges in this country may be appointed for their opinions whereas judges in our country are appointed for their capacity to form well reasoned opinions from a position of a reasonably open mind in the light of the arguments presented to them. This is, of course, a generalization intended to highlight the distinction which I am endeavoring to make, although I do not pretend that it is exhaustive.

A mechanism which has been prominent in the recent history of the United States is that of independent counsel under the federal act which provides for the appointment of such an officer. We do not have in our system anything of a statutory nature resembling your statute for independent counsel. So far as I understand your legislation, it is not so much concerned with the control of political decisions but rather with the investigation of allegations of certain types of criminal proceedings by persons who are subject to the provisions of the act. In our country a person against whom a prosecutor was making a serious allegation would be suspended from office or would be expected to resign depending upon the circumstance. For example, an allegation against a judge would mean that once it was made he would be suspended from office until the matter was determined in criminal proceedings and if he was a minister of the Crown he would be invited to resign so that the investigation might proceed uninhibited by his holding of office.

Fundamentally, the distinction between your country and ours

in the matter of judicial control of politics is the difference between politics controlled by written constitution and politics not so controlled. The recent developments, however, to which I have referred in the United Kingdom point to an intermediate stage in which certain aspects of politics may, to some degree, be subject to judicial control because that aspect of the legislative function has been made subject to a law, or laws laid down otherwise than by the legislature. To this extent in recent years our system has become more like yours.

Are we therefore making progress?

