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Disappointing SupCo Is Here

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Introductory Note by FB

The article below is a further addition to my writings on the Supreme Court. Others are included within the Topic on my website titled 'United Kingdom Supreme Court'.[1a] The article below was introduced by the Editor Dr Venkat Iyer in the following words:

> 'The opening of the United Kingdom's new Supreme Court marked a watershed in the history of this ancient nation. While the event was greeted with enthusiastic approval by those who are, broadly speaking, sympathetic to the reform agenda of the New Labour government which took office in 1997, it has also elicited, in almost equal measure, sceptical reactions from many who see it as either an expensive gimmick or a triumph of form over substance. The move even drew veiled criticism from within the ranks of the judiciary, with Lord Neuberger (who turned down a place on the new court) expressing fears that there was now a real risk of a clash between the court and the executive. He is also reported to have ventured the view that the Supreme Court had been created "as a result of what appears to have been a last-minute decision over a glass of whisky."
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> However that may be, we believe that the subject is important enough to merit discussion. We are therefore privileged to carry an article by Francis Bennion, a longstanding commentator on matters affecting the judiciary and an acute observer of the legal scene in Britain. Bennion raises a number of interesting points, and concludes that those holding high hopes for the court are likely to be disappointed.'[1b]

In the following the footnotes marked with a number and a letter were added after publication.

Introductory

In 1994 I wrote a review of the New Zealand Law Commission's proposals for changing the format of legislation and gave it the title 'If It's Not Broke Don't Fix It'.[1] If I hadn't used that title before I would have given it to the present article. The Appellate Committee of the House of Lords was not broken, so why did Prime Minister Blair think he had to fix it? In fact he didn't just fix the Appellate Committee, he abolished it - replacing it by a body of twelve judges he styled the Supreme Court of the United Kingdom. A finicky person (which of course I am not) would complain that this new title showed Mr Blair's lack of learning. There are many different sorts of court. For all anyone knows, this may be a new name for the Wimbledon Centre Court.

Mr Blair's more erudite predecessors (he is himself, let's remember, a barrister) called the body set up in 1873 to replace the separate law courts of Chancery, Queen's Bench, Common Pleas, Exchequer and Admiralty by the more precise term the Supreme Court of Judicature.

[1a] The Topic can be found at www.francisbennion.com/topic/supco.htm.
[1b] 18 Com L (Dec 2009), p. 5.
[1] [1994] Stat. L. R. 164, www.francisbennion.com/1994/004.htm.

(Hobbes, by the way, defined judicature as 'nothing else but an interpretation of the Laws'[2]). Why was 'judicature' not added here?[3] Probably because, in these renegade times, it is not plain enough for the plain English brigade. Indeed the times are such that we may find the style shortened still further in popular use, say to SupCo. This would be by analogy with LegCo, which in the dear dead days of the British Empire was often used to describe a colony's Legislative Council.

The difference between a statesman and a jobbing politician is that the former respects the wisdom of the ages, whereas the latter often despises it. So it proved with Prime Minister Blair when in an idle moment he resolved to sweep into the ashcan the ancient office of Lord Chancellor together with the said Appellate Committee. I have written before of his failure to abolish the Lord Chancellor[4], who under heavy disguise is still with us in the person of former student union agitator Mr Jack Straw MP. The Appellate Committee was not so fortunate, and on 1 October 2009 gave way to the newly-created Supreme Court. A further grievance lawyers have with Tony Blair is that up to now this term has always been taken to refer to the august US institution, which thanks to him it no longer does.

Doing law differently

One of the Blairite architects of these constitutional changes, Lord Falconer of Thoroton, published a brief explanatory paper titled 'Doing Law Differently' (April 2006). He was at the time both Lord Chancellor and Secretary of State for Constitutional Affairs (a post that endured only for a few months before being abolished by Mr Blair). In this paper he said, in diction that would have surprised his august predecessors:

> 'The law needs to be done; but the way we do law needs to change. We need to do law, but we need to do law differently.

He also said, as part of his description of the new dispensation:

> 'Until very recently the regulatory framework has allowed lawyers effectively to determine their own standards and to regulate their own operations.'

This was a snide reference to what was until very recently looked on (though evidently not by Lord Falconer) as one of England's glories, its system of independent professions. In a former capacity (as chief executive of the Royal Institution of Chartered Surveyors) I wrote what turned out to be the last book to be published in England on this noble system, now swept away.[5]

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In 'Doing Law Differently' Lord Falconer described the rationale of our new Supreme Court:

> 'Clarification of our constitutional arrangements is also being extended to the separation of the courts from the legislature and the executive. The final court of appeal, the body that makes the most difficult and controversial decisions, is currently the Appellate Committee of the House of Lords. To make the final court of appeal more visible with a clear division between the judges and Parliament, the jurisdiction

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[2] Thomas Hobbes, *Government and Society* (1651), xv 17.

[3] According to the Northern Ireland Court Service website, the Ulster equivalent was renamed the Court of Judicature of Northern Ireland '[a]s a consequence of the establishment of the new Supreme Court of the United Kingdom'.

[4] 'Requiem for the Lord Chancellor', 12 *The Commonwealth Lawyer* (August 2003), p. 31, www.francisbennion.com/2003/003.htm. See also my Times letter to like effect: *The Times*, 14 June 2003 (lead letter), www.francisbennion.com/2003/019.htm. Stanley Brodie QC wrote of this: 'Francis Bennion is entirely correct in saying that the centuries-old office of Lord Chancellor is of inestimable constitutional value' (*The Times*, 23 June 2003 (lead letter)). For the displaced Lord Chancellor's views on his summary removal see www.parliament.uk/documents/upload/ConstLordIrvineofLairg.pdf.

[5] *Professional Ethics: the Consultant Professions and their Code* (Charles Knight, 1969). The text can be downloaded free at www.francisbennion.com/1969/001.htm.

> of the Appellate Committee will be transferred to a new Supreme Court for the United Kingdom.[5a] This will be located separately from the Houses of Parliament. Our preferred location is the Middlesex Guildhall on Parliament Square, subject to planning permission being granted.'

Planning permission was indeed granted, and SupCo is now functioning in its new quarters.[5a] The existing Lords of Appeal in Ordinary have been transmogrified into mere Justices (except Lord Neuberger of Abbotsbury, who sensibly refused). It would have been logical for the head of these to be called the Lord Chief Justice (LCJ) but to the confusion of foreigners that title continues to be reserved to the factual head of a less senior court, the Court of Appeal. That is the practical aspect, for the Court of Appeal is where the LCJ usually sits. However, nominally the LCJ is head of the entire judiciary of England and Wales, a role previously held by the Lord Chancellor. The head of SupCo is styled the President[6]. The new arrangements represent a huge increase in complexity, so far as concerns the position of our senior judges. I can only refer readers to the relevant website.[7]

One might have expected Lord Falconer to justify the new arrangements by describing just how bad the old ones were. He does not do that, because he cannot. Honesty compels him to admit they were not bad; quite the opposite. Here is what he does say about them:

> 'Britain's justice system is one of our country's greatest strengths. The legal and judicial system in the United Kingdom plays a major part in our social and economic well-being. We have an independent judiciary of the highest probity and quality. Across the world, there is recognition that a decision from an English court will have the hallmarks of both judicial excellence and judicial integrity.'[8]

So this really is a case of 'if it ain't broke don't fix it'. Or as the Labour Lord Chancellor Lord Irvine of Lairg himself said in 2003:

> '. . . [w]e have a very, very high quality system which rests on customs, conventions and conditions that are special to us. You should only interfere with them if you are absolutely sure that you can produce a better product as a result.'[9]

Lord Falconer admits that the ancient British constitution flowered in an admirable, enviable way yet he helped to uproot it on purely doctrinaire grounds. What is more, most of the judges shamefully colluded in letting this happen. No one can be 'absolutely sure' of the outcome.

Later Lord Falconer says:

> 'For many years . . . we have been behind other countries in ensuring the composition of the judiciary reflects the society in which we live. The judiciary is of the highest quality and our judges are undoubtedly of the highest calibre, but failure to sufficiently widen the pool from which appointments are made weakens the connection between the judges and those they judge.'[10]

A judge does not *represent* the persons on whom he or she sits in judgment. That is the job of the MP or local councillor. Like a medical practitioner, the judge is there to do a difficult job

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[5a] The devolution jurisdiction of the Judicial Committee of the Privy Council was also transferred to the Supreme Court: see Constitutional Reform Act 2005, s. 57 and Sch. 10

[5a] For a devastating criticism by Marcus Binney of the alterations to the historic Middlesex Guildhall building see www.francisbennion.com/pdfs/non-fb/2010/2010-001-nfb-supco-hq.pdf.

[6] Constitutional Reform Act 2005 s. 23(5).

[7] The website of the judges, magistrates and tribunal members in England and Wales, www.judiciary.gov.uk.

[8] 'Doing Law Differently', p. 1.

[9] Cited by Andrew Le Sueur in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds.), *The Judicial House of Lords* (OUP, 2009) at p. 65.

[10] 'Doing Law Differently', p. 4.

with the required expertness. As with the medical practitioner, the judge's race or sex is irrelevant. So much for 'diversity'.

How SupCo Judges are appointed

In what I am tempted to call the good old days the Lords of Appeal in Ordinary were appointed by what was known as the 'tap on the shoulder' system. A discreet clerk in the Lord Chancellor's Department gathered information about possible judges from work colleagues who watched them in practice day in and day out over lengthy periods. Strengths and weaknesses were noted and assessed. Finally, if all went well, there was a tap on the shoulder of a particular practitioner, and the invitation was issued on behalf of the Lord Chancellor. He would advise the Monarch accordingly. That was the time-honoured method that produced the old-time Law Lords about whom Lord Falconer is so enthusiastic.

The Blairites were unhappy about this process and determined to get rid of it. A press notice by the Commission for Judicial Appointments dated 1 July 2004 was headed 'Commission report calls for end to "tap on the shoulder" appointments for senior judges'. It reminded us that the Commission was established on 15 March 2001 as part of the Lord Chancellor's response to Sir Leonard Peach's independent scrutiny of the appointments processes of judges and Queen's Counsel in England and Wales. At the time of the press notice the Commission consisted of eight persons headed by a former

law professor in Northern Ireland. The others were a former director of British Telecom, a financial ombudsman, a professor of social policy, a director of the Royal Shakespeare Company, an NHS chief executive, the Vice-President of the European Economic and Social Committee, and the Human Resources Director for Marks and Spencer plc. The Commission was the forerunner of the Judicial Appointments Commission (JAC) established by the Constitutional Reform Act 2005, which also set up the Supreme Court.

On 17 May 2006 the JAC issued *Joint Diversity Strategy*, a paper from the Lord Chancellor, the LCJ and the JAC Chairman. It promised a more diverse judiciary of the highest calibre, with candidates appointed solely on merit, drawn from the widest possible range of available talent, 'and with increased understanding of the communities it serves'. To this end it would be ensured that 'the culture and working environment for judicial officeholders encourages and supports a diverse judiciary'.

Meanwhile the 2005 Act had laid down special provisions governing the appointment of SupCo judges.[11] These are sections 25-31 and Schedule 8. They run to 3,659 statutory words, compared to the nil statutory words needed for the 'tap on the shoulder' system. It is no wonder there are complaints that our legal system grows more and more complicated. I will attempt a brief description.

Section 25 says the SupCo candidate must be qualified by service in a legal capacity for a given period. The barrier seems much steeper for practitioners in England and Wales than for those from Scotland or Northern Ireland.

Section 26 says a recommendation for appointment by the Monarch may be made only by the Prime Minister. If there is a vacancy, or it appears to him that there will soon be a vacancy, the Lord Chancellor must convene a special selection commission. In the nifty new drafting style, s. 26(6) says briefly 'Schedule 8 is about selection commissions'. So let us turn to Schedule 8, which itself runs to over two thousand words or about the length of the present article.

A selection commission consists of the President and Deputy President of SepCo and one member of the JAC and its Scottish and Northern Ireland equivalents. At least one must be

[11] The Act uses the term 'judge' to cover Justices of the Supreme Court and the President and Deputy President (to whom the term 'Justice' does not apply).

non-legally qualified. There is a long list of persons who must be consulted by the commission. The Lord Chancellor, in relation to a person whose name is notified to him by the commission, can accept or reject the nomination or require the commission to reconsider, Further tortuous provisions attempt to deal with disagreements without giving the Lord Chancellor the sort of freedom of choice he had under the old system.

Lord Neuberger, the Law Lord who declined a seat on the new Supreme Court, expressed his misgivings as follows:

> 'The danger is that you muck around with a constitution like the British constitution at your peril because you do not know what the consequences of any change will be.'[12]

Undesirable consequences had been hinted at by Sir Thomas Legg, who at one time used to participate in the 'tap on the shoulder' routine: 'Appointing authorities are not entitled to take risks at the expense of their fellow-citizens, *and the room for experiment is very limited*.[13]

An early SupCo case

After the above was written the first cases decided by the new Supreme Court began to appear. I wrote an article for another journal about one of these[14], of which the first sentence ran:

> "Many had high hopes of the new Supreme Court, which started work on 1 October. I did not share this optimism, and regrettably have been proved right as respects the court's early decision in *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, which I will refer to as *L*."

The article went on to say that one hope that has not been realised is that the Justices of the new court would be given the level of supporting staff enjoyed by the Supreme Court in the United States. James Vallance White, a former Principal Clerk to the Judicial Office, records that the Law Lords cherished the ambition to have this type of assistance for a long time before at last being granted a mere four judicial assistants in 1999.[15] In this connection it is interesting to read the remarks of a Court of Appeal judicial assistant, Greg Fullelove, on the HM Courts Service website:

> "Nobody escapes drafting his or her fair share of 'bench memoranda' - notes for the judges which summarise and analyse the appeal before the Court. It is easy to forget that many appeals are prepared by litigants in person who have not had the benefit of legal advice. In some cases, the papers can be chaotic, the issues confused. It will be up to the assistant to impose order in the memorandum. Watching the best of the bar reasoning the cases of the day is, in itself, an education. However, many assistants agree that it

> is attendance at the pre- and post-court judges' meetings where the real insights come. Here you witness first hand the judges' reactions to the case as presented on the papers and then later their views on the oral argument."

A generous provision of first-class help for the Justices would inevitably lead to an improvement in the quality of their judgments. As I showed in the article, the judgments in *L* are seriously deficient. In some places they openly contradict each other. In my view (after sixty years in the law) the Supreme Court should strive to present a united view of the law

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[12] Reported by Joshua Rozenberg, *The Times Literary Supplement*, 2 September 2009.
[13] Sir Thomas Legg KCB, QC, 'Judges for the New Century' [2001] PL 62-67. Emphasis supplied.
[14] 'Enhanced Criminal Record Certificates: Some Knotty Questions', 173 CL&J (14 November 2009), 725-728, http://www.francisbennion.com/2009/035.htm.
[15] *The Judicial House of Lords* , eds. Louis Blom-Cooper, Brice Dickson and Gavin Drewry (OUP, 2009), p. 42.

governing a case in a single agreed judgment arrived at in meetings of the participating Justices. The Human Rights Act 1998 has given renewed force to the concept that the law should be certain. Dissent among Justices, or failure to produce a satisfactory judgment reconciling differences, impedes this worthy aim.[15a]

[15a] For an article by Richard Susskind on advanced information technology employed by SupCo see http://business.timesonline.co.uk/tol/business/law/article6854612.ece.