Protecting the judiciary

If we value the rule of law, we must not take our judges for granted, says Khawar Qureshi QC

IN BRIEF

- The Constitutional Reform Act 2005 removed the Lord Chancellor from the centuries-old role of head of the judiciary.
- The judiciary have since been subjected to increased attacksfrom politicians and the media, yet are prevented from answering back.

One of the most radical and unexpected changes to the position of the judiciary took place on 12 June 2003, when the Labour Government abruptly announced the abolition of the centuries old role of the Lord Chancellor who had hitherto been described as 'the lightning rod between the executive and the judiciary'. Lord Irvine was removed from the post of Lord Chancellor, and replaced by Lord Falconer who immediately encountered heavy criticism and resistance for the lack of consultation with the judiciary, and the somewhat hasty approach that was being adopted.

The late Lord Bingham, in his article in the *Law Quarterly Review* [2006] 211 at p 220, observed that: 'Whether as widely believed, robust insistence by Lord Irvine on judicial independence and respect for fundamental legal principle gave rise to tensions which contributed to his precipitate and unsought departure, cannot be known until the records are opened. If so, it is not a happy omen'.

While the title of Lord Chancellor has ultimately been retained, the office holder is no longer the head of the judiciary, nor have the past four office holders been qualified lawyers. Any individual 'qualified by experience' which 'the Prime Minister considers relevant' can hold the office (s 2, Constitutional Reform Act 2005 (CRA 2005)).

Section 1 of CRA 2005 states that the Lord Chancellor's existing role in relation to the principle of the rule of law is not adversely affected by the Act. Section 3 of CRA 2005 seeks to provide a 'guarantee of continued judicial independence' which the Lord Chancellor must uphold.

In a previous article written in 2006 for *NLJ*, I expressed concern that these fine words left many questions unanswered, and that the trend for statute to displace centuries old tested conventions and relationships built upon trust was potentially problematic (see 'Changing an age-old relationship' Pt 1, 156 *NLJ* 7244, p 1458 & Pt 2, 156 *NLJ* 7245, p 1586). By way of example, what exactly was

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encapsulated within 'the existing principle of the rule of law'? How would the post CRA denuded Lord Chancellor defend the judiciary? What (if any) legally enforceable duties were created by CRA 2005?

Unhappily, it did not take long for the fears of commentators to be confirmed, namely that the trimmed down Lord Chancellor was either unable or unwilling to be robust in the face of an assault upon the judiciary. In the face of 'the first big test' the House of Lords Constitution Committee berated Lord Falconer for failing to protect the judiciary in 2006 when the then Home Secretary John Reid verbally attacked a judge for his criminal sentencing. The Committee observed that judges were being seen as 'fair game' despite the fact that they cannot and should not publicly defend themselves in such situations.

What became clear from this incident was that, absent comment from the Lord Chief Justice, retired judges, some politicians, the Bar Council/Law Society and those who cared about the integrity of our legal system, the judiciary could not rely upon the post-CRA 2005 Lord Chancellor to defend them either swiftly or robustly.

Nevertheless, in a lecture delivered on 11 March 2015 Lord Falconer asserted that the role of Lord Chancellor to protect the rule of law within the executive had not diminished. He added further that 'the role requires a profound understanding of the rule of law, as one of the twin foundations of our constitution, along with democracy; an appreciation of the need to stand up for judicial independence within government; an ability to build a strong, communicative relationship with the judiciary'.

Since CRA 2005 came into force, we have increasingly seen the somewhat unedifying need for senior retired judges and lawyers to fill the void left by silence on the part of successive Lord Chancellors to respond to attacks upon the judiciary.

There have been a few examples of individuals within government who have been prepared to stand up robustly and fearlessly to defend the judiciary and the rule of law, most notably Dominic Grieve QC MP, the former Attorney General.

However, the recent utterly disgraceful attacks upon our judiciary in the context of the Art 50 Brexit cases, which were not confined to the tabloid press, have revealed a clear fault line with regard to the seemingly hollow words of ss 1-3 of CRA 2005, and the lamentable inaction/attitude/approach of successive Lord Chancellors (almost all non-lawyers).

For better or worse, the general public increasingly derives its 'mood music' from mass media, more so electronic media, notably twitter. Minimal, if any reflection, often maximum vitriol is the substance of such material. In an era where mis-information/fake news and smear campaigns using the media are increasingly common place, it is even more important for our judiciary to be protected from such attacks.

First and foremost, it is incumbent upon politicians to remember and accept that the guardians of the rule of law are the judges. While they may disagree with some decisions, they must either exhaust avenues of appeal or respect and obey them. Politicians must show by example that they do indeed respect the judiciary, and that they will defend judges.

The creation and fostering of an environment within which it was considered acceptable for judges at the end of 2016 to be identified by photos and described as 'Enemies of the People' is the responsibility of the media. However, much blame lies with the politicians for creating a 'moral context' within which respect and restraint has given way to vilification and ridicule.

Concluding observations

At a time when many High Court judicial positions remain vacant and some of our best judges are contemplating leaving the bench before retirement age, it would be a foolish, reckless and short-sighted executive which considered a weakened judiciary to be a positive development. Our judges and courts are respected throughout the world and those of us who believe in the rule of law and integrity of our system must not take it for granted. It remains to be seen whether the new Lord Chancellor will succeed where most of his predecessors have failed. **NLJ**

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