

The Law Society response to the UN Special Rapporteur on the Independence of Judges and Lawyers call for input:

Thematic report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy.

January 2024

Introduction

1. The Law Society of England and Wales is responding to this call for evidence in its representative capacity as the independent professional body for 200,000 solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. The perspective of solicitors in England and Wales will be the focus of our response, although some answers will be relevant to both solicitors and barristers and indeed across the UK jurisdictions. We have also offered responses to some questions relating to judges, as far as our expertise allows.

Response to questions

Judges

Have judges played an active role in safeguarding democracy and upholding fundamental democratic rights in your country?

3. The UK has a long and proud tradition of respect for the rule of law, including the role and independence of judges. While the UK does not have a strict separation of powers, the judiciary nevertheless provides an important check on the power of the executive and Parliament, and judges routinely play an active role in safeguarding democracy and upholding fundamental democratic rights. In particular, the system of judicial review provides a means through which individuals and legal entities can challenge decisions and actions of public bodies, assert their rights and receive a remedy.

4. Two landmark cases decided by the Supreme Court in recent years demonstrate the role of the judiciary in safeguarding democracy. The first, known as *Miller I*¹, challenged the UK Government's decision to trigger withdrawal from the European Union without reference to Parliament. In its decision the Supreme Court held that an Act of Parliament was required to trigger withdrawal, therefore upholding the democratic role of Parliament over changes which would have far-reaching constitutional implications.
5. The second, known as *Miller II* or *Miller/Cherry*², concerned the prorogation of Parliament for what would have been the longest period in modern times of over a month. The Supreme Court held unanimously that this was unlawful as it interfered with the constitutional principles of parliamentary sovereignty and parliamentary accountability.
6. While cases raising substantial constitutional issues such as these are rare, they demonstrate that the judiciary, alongside its routine role of upholding individual rights, plays a vital and active role in upholding and protecting democratic traditions in the UK on a wider scale, including the role of Parliament.
7. However, the justice system in the UK has been under increasing pressure for years due to under resourcing. This has resulted in rising backlogs of cases, poor court infrastructure and buildings and shortages of judges.³

Is there a specific role played by the judiciary in democratic elections?

8. In the UK, elections are overseen by the independent Electoral Commission.⁴
9. Traditionally, the calling of elections was a prerogative power of the Monarch acting on the request of the Prime Minister. This was given a statutory basis by the Fixed-Term Parliaments Act 2011 (FTPA).⁵ However, the FTPA was repealed by the Dissolution and Calling of Parliament Act 2022 (DCPA), which maintains the five-year maximum for a parliamentary term but seeks to revive the prerogative power. It also includes an 'ouster clause' which excludes the courts' jurisdiction over questions of the dissolution of parliament. In practice, the courts have never intervened in such matters (the case of *Miller II* concerning prorogation, rather than dissolution).
10. It is generally accepted in the UK that the calling of elections is a power reserved for the Monarch and Prime Minister. However, there are debates about what the limits of this power are or should be, whether the courts retain some role in determining

¹ R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5

² R (on the application of Miller) v The Prime Minister [2019] UKSC 41

³ Law Society, 'System failure likely with justice spending cut' (press release), 17 November 2022. Available at: <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/system-failure-likely-with-justice-spending-cut>

⁴ <https://www.electoralcommission.org.uk/>

⁵ For further information, see: Richard Kelly, 'Fixed-term Parliaments Act 2011' (Briefing Paper No. 6111, House of Commons Library, 26 November 2021). Available at: <https://commonslibrary.parliament.uk/research-briefings/sn06111/>

these limits notwithstanding the DCPA, and whether Parliament should have an element of control.⁶

Are judges facing any obstacles, risks, or challenges in your country when fulfilling this role?

11. Judges are thankfully largely free to fulfil their constitutional role without risk. However, there have been notable instances where judges have suffered personal attacks from the media and politicians, which the Law Society has detailed in a previous submission to the Special Rapporteur in 2021.⁷
12. While extreme instances are rare, these have not been isolated incidents and rhetoric accusing judges of undue 'judicial activism' and political motivations has continued. A report from the All-Party Parliamentary Group (APPG) on Democracy and the Constitution⁸ found that the behaviour of the executive towards the judiciary has infringed on their independence. This behaviour has included:

*"... making public statements which misrepresent judicial decisions, launching ad-hominem attacks on judges who decide against them, responding to adverse decisions with threats to "reform" the judiciary (including to bring it under political control), and conflating "decisions with political consequences" with "political decisions", thereby giving the misleading impression that judges are stepping outside their constitutional bounds."*⁹
13. The APPG considered how this pattern of behaviour has affected the judiciary. While it noted high levels of concern amongst the judiciary, it was not able to reach a conclusive decision on whether this has influenced judicial rulings by creating hesitancy to find against the government.
14. The UK has in recent years seen several of the reform proposals referred to by the APPG. These have focused on key means for holding the executive to account and were triggered, in part, by allegations that the judiciary has overstepped into

⁶ For further information, see: Meg Russell, Gavin Phillipson and Petra Schleiter, 'The Dissolution and Calling of Parliament Bill: why the House of Commons should retain control over dissolution' (8 September 2021). Available at: <https://constitution-unit.com/2021/09/08/the-dissolution-and-calling-of-parliament-bill-why-the-house-of-commons-should-retain-control-over-dissolution/>
Richard Kelly, 'Dissolution and Calling of Parliament Act 2022: Progress through Parliament' (Briefing Paper No.9308, House of Commons Library, 28 March 2022). Available at:

<https://commonslibrary.parliament.uk/research-briefings/cbp-9308/>
⁷ Available at: Available at: <https://www.ohchr.org/sites/default/files/2022-04/replies-questionnaire-law-society-england-wales.docx>

⁸ All-Party Parliamentary Group on Democracy and the Constitution, 'An Independent Judiciary - Challenges since 2016: An Inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary' (2022). Available at: <https://www.icdr.co.uk/judicial-independence-inquiry>

⁹ All-Party Parliamentary Group on Democracy and the Constitution, 'An Independent Judiciary - Challenges since 2016: An Inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary. (Executive Summary)' (2022), para.5. Available at: <https://www.icdr.co.uk/judicial-independence-inquiry>

political competencies. The Independent Review of Administrative Law¹⁰ (IRAL), which examined the use of judicial review, and the Independent Human Rights Act Review¹¹ (IHRAR) both found no evidence of judicial overreach. However, in both instances, the UK Government proceeded to pursue reforms which went further than the independent panels' recommendations.

15. Successive pieces of legislation have demonstrated a concerning and escalating trend towards reducing the judiciary's role in providing legal oversight of executive action and upholding fundamental rights. This includes:

- **Judicial Review and Courts Act 2022**¹² - this legislation followed the IRAL. It introduced two new judicial remedies, suspended and prospective-only quashing orders, and ousted the ability of the High Court to judicially review permission decisions of the Upper Tribunal. While the Law Society was pleased that the Government listened to our concerns and removed a statutory presumption in favour of the new remedies from the final Act, we remain concerned about the impact of reducing the consequences of unlawful action for the executive through prospective-only orders.¹³
- **Nationality and Borders Act 2022**¹⁴ - although largely replaced by the Illegal Migration Act (see below), this would have introduced a two-tier asylum system, meaning those who arrive in the UK via irregular means would receive less protection and support. This Act also removed stages of asylum appeal and introduced various evidentiary and procedural measures which disproportionately disadvantage claimants.
- **Bill of Rights Bill**¹⁵ - this Bill followed the IHRAR and sought to repeal and replace the Human Rights Act. It was eventually dropped by the Government in July 2023. However, its measures were a cause of great concern and would have substantially limited the ability of the courts to uphold fundamental human rights by introducing obstacles to accessing the courts, restricting the interpretive powers of judges, excluding positive elements of rights and prohibiting certain types of claims.
- **Illegal Migration Act 2023**¹⁶ - this largely replaced the Nationality and Borders Act and prevents any asylum seeker who arrives in the UK through unofficial routes from making an asylum or human rights claim, or from accessing modern slavery protections. Instead, it places a duty on the Secretary of State to remove

¹⁰ For the Independent Review of Administrative Law's final report, see:

<https://assets.publishing.service.gov.uk/media/6053383dd3bf7f0454647fc4/IRAL-report.pdf>

¹¹ For the Independent Human Rights Act Review's final report, see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

¹² For more on the Law Society's views, see: <https://www.lawsociety.org.uk/topics/human-rights/judicial-review-reform>

¹³ *Ibid.*

¹⁴ For more on the Law Society's views, see:

<https://www.lawsociety.org.uk/topics/immigration/nationality-and-borders-act>

¹⁵ For more on the Law Society's views, see: <https://www.lawsociety.org.uk/topics/human-rights/human-rights-act-reforms>

¹⁶ For more on the Law Society's views, see:

<https://www.lawsociety.org.uk/topics/immigration/illegal-migration-act>

the individual from the UK. As asylum or human rights claims are inadmissible, with very limited exceptions, it is therefore not possible to appeal to the courts. The Act also: greatly expands powers of detention, while removing the ability of the courts to review the use of these powers; and prevents the awarding of interim remedies, instead only permitting 'suspensive claims' on narrower grounds. The Act was accompanied by a ministerial statement accepting that the Government cannot guarantee its measures are compatible with the European Convention of Human Rights (ECHR).

- **Safety of Rwanda (Asylum and Immigration) Bill**¹⁷ - this Bill is currently being debated by Parliament. It seeks to domestically implement a partnership with Rwanda through which asylum seekers in the UK will be removed to Rwanda, where they can make an asylum claim. The Bill seeks to overturn a recent factual finding of the UK Supreme Court¹⁸ (in a challenge to an earlier version of the same policy) that Rwanda is not a safe country to send asylum seekers to due to the risk of onward refoulement. It deems in law that Rwanda is to be considered 'safe' overall and prevents entirely the courts from hearing legal challenges on this point, including whether there would be a risk of refoulement. The Law Society is extremely concerned about the precedent this sets and the constitutional implications for the balance of powers within the UK.¹⁹ The Bill also contains a ministerial statement that the government cannot guarantee its compatibility with the ECHR.

16. Criticism of judicial 'interference' in policy matters has also extended to strong criticisms of the role of international courts. Rhetoric against international courts, in particular the European Court of Human Rights (ECtHR), has also been increasing and has recently resulted in threats from the UK Government to leave the ECHR entirely should the ECtHR intervene in its current asylum policy with Rwanda.²⁰ This has been accompanied by defensive legislative measures, ostensibly intended to 'shield' the UK Government from international law, such as providing a power for Ministers to disregard interim measures of the ECtHR.²¹

17. The Law Society has repeatedly expressed profound concerns about the trend towards disrespect for, sidelining of and undermining of the judiciary, both domestic and international²². The UK has a long and proud tradition of championing the rule of law, yet we are concerned that more recent developments undermine this reputation.

¹⁷ For more on the Law Society's views, see:

<https://www.lawsociety.org.uk/topics/immigration/rwanda-asylum-partnership>

¹⁸ R (on the application of AAA and others) v Secretary of State for the Home Department [2023] UKSC 42

¹⁹ For more on the Law Society's views, see:

<https://www.lawsociety.org.uk/topics/immigration/rwanda-asylum-partnership>

²⁰ See, for example: <https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023>

²¹ Illegal Migration Act 2023, section 55, and Safety of Rwanda (Immigration and Asylum) Bill, clause 5.

²² See, for example: The Law Society, 'Alarm bells rung at UN over UK rights record' (press release), 31 March 2022. Available at: <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/alarm-bells-rung-at-un-over-uk-rights-record>

18. The Law Society also has some concerns about recently announced Government plans to overturn the convictions²³ of all victims of the Post Office Horizon scandal.²⁴ While we welcome the move, we are clear that intervening in the court process is an exceptional step and this should not set a precedent.²⁵

What are the approaches taken to protect judges in this role?

19. One of the ways in which judicial independence is protected in the UK is through the judicial appointments process. Prior to 2006, judicial appointments were made on the recommendation of the Lord Chancellor, who was a government minister. While this system did not in practice affect the independence of the judiciary (with the Lord Chancellor usually making appointments on the advice of the senior judiciary), concerns about its vulnerability to political interference led to the establishment of the Judicial Appointments Commission²⁶ under the Constitutional Reform Act 2005. This is an independent body that makes recommendations to the Lord Chancellor for judicial appointments; the Lord Chancellor's role is restricted to a limited power of veto. Candidates are appointed on merit following open competition and the Commission has a statutory duty to encourage diversity in applications.
20. Further measures to protect judicial independence were included in the Constitutional Reform Act, which codified in statute a specific duty of the Lord Chancellor to 'defend the independence of the judiciary'²⁷ by incorporating this wording into the oath taken upon a new Lord Chancellor's appointment.

Lawyers

Have lawyers played an active role in safeguarding democracy and upholding fundamental democratic rights in your country?

21. The legal professions play a vital role in upholding fundamental rights by enabling individuals and other legal entities to exercise these rights through the judicial system. They also frequently act in cases of wider democratic and constitutional significance, such as those referenced above, and before international courts.
22. The legal professions are proud to provide services either funded by legal aid or offered pro bono, which particularly aids those who are marginalised or disadvantaged and is vital to ensuring everyone has the ability to exercise their democratic rights. However, the legal aid sector has been under immense pressure

²³ Ministry of Justice, 'Government to quash wrongful Post Office convictions' (press release), 10 January 2024. Available at: <https://www.gov.uk/government/news/government-to-quash-wrongful-post-office-convictions>

²⁴ For further information, see: Kevin Peachey, Michael Race & Vishala Sri-Pathma, 'Post Office scandal explained: What the Horizon saga is all about', BBC, 23 January 2024. Available at: <https://www.bbc.co.uk/news/business-56718036>

²⁵ For more on the Law Society's views, see: <https://www.lawsociety.org.uk/topics/blogs/post-office-horizon-scandal-government-announces-legislation>

²⁶ <https://judicialappointments.gov.uk/>

²⁷ Constitutional Reform Act 2005, section 17.

for years due to under resourcing and is currently unsustainable.²⁸ This has resulted in legal aid deserts, leaving large areas without any legal aid providers.²⁹

Are lawyers facing any risks, obstacles, or challenges in your country when fulfilling this role?

23. Lawyers in the UK are largely free to carry out their duties without improper interference. However, there are occasions when they are subject to stigmatisation by legislators, government or press, and there has been an increased occurrence of this in recent years. We refer here to our previous submission to the Special Rapporteur from December 2021, which details some of these instances.³⁰
24. Since that submission, negative and inflammatory rhetoric regarding lawyers has continued to be used, focused in particular on lawyers practising in immigration and asylum law. This has been in the context of the passage of successive pieces of asylum legislation and policy, discussed above. The rhetoric used has included ascribing political motives and accusations that lawyers are frustrating the will of government and parliament, acting against the national interest or exploiting and abusing the law. Terms such as “lefty lawyers”, “activist lawyers”, and even “anti-British” have been used with concerning frequency, including by senior government ministers and even Prime Ministers.³¹
25. This rhetoric has been accompanied by the establishment of the Government’s Professional Enablers Taskforce. While this was established in early 2023, the Ministry of Justice and Home Office called attention to the taskforce in a press release and social media post on 8 August 2023, describing its purpose as to “build cases to prosecute rogue immigration lawyers”³² and “increase enforcement action against lawyers who help migrants exploit the immigration system.”³³ These government communications used further inflammatory language, describing immigration lawyers as “crooked”.
26. This followed reports in the media of a small number of immigration advisers allegedly encouraging false claims. The Law Society recognises that action should be taken where there is evidence of wrongdoing by legal professionals, but the

²⁸ For further information, see: <https://www.lawsociety.org.uk/topics/legal-aid>

²⁹ For further information, see: <https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/>

³⁰ Available at: <https://www.ohchr.org/sites/default/files/2022-04/replies-questionnaire-law-society-england-wales.docx>

³¹ For examples, see: <https://www.theguardian.com/politics/2023/aug/16/tory-party-criticisms-legal-professionals-timeline>

³² Ministry of Justice and Home Office, ‘Government to build cases to prosecute rogue immigration lawyers’ (press release), 8 August 2023. Available at: <https://www.gov.uk/government/news/government-to-build-cases-to-prosecute-rogue-immigration-lawyers#:~:text=News%20story-Government%20to%20build%20cases%20to%20prosecute%20rogue%20immigration%20lawyers%20dedicated%20taskforce%20and%20tougher%20sentences>

³³ X (formerly Twitter, 8 August 2023, <https://twitter.com/ukhomeoffice/status/1688909426051457024>

government, regulators and law enforcement agencies already have the powers they need to deal with misconduct.³⁴

27. The Law Society is further gravely concerned about the recent experience of Jacqueline McKenzie, Head of Immigration and Asylum at the law firm Leigh Day. In August 2023, the Conservative Campaign Headquarters shared misinformation about her with the national media. The document focused on Ms McKenzie's links to the Labour Party and described her as a "lefty lawyer blocking Rwanda deportations."³⁵ Ms McKenzie has subsequently found herself targeted by the press and has stated publicly that she has had to review her security.³⁶

28. This is a particularly alarming incident and a concerning intensification of action by the UK government to undermine lawyers working on immigration and asylum issues. The Law Society is concerned that this incident and the repeated use of negative and inflammatory language by the government towards lawyers not only serves to undermine public confidence in our justice system, but to fuel a hostile climate for lawyers carrying out their professional duties in good faith.³⁷

Is there a specific role played by the Bar association in democratic elections?

29. The Law Society does not play a specific role in democratic elections, and we stringently follow the rules on impartiality for non-political organisations around election periods. However, in our representative capacity, we seek to ensure that the interests of solicitors, the justice system at large and the rule of law are protected and promoted in the election manifestos of political parties.

Are there any policies or institutional arrangements in place to limit the role of lawyers or the bar association in safeguarding democracy?

30. There are no specific policies or institutional arrangements intended to limit the role of lawyers or the bar association in safeguarding democracy. However, we have been concerned about the impact of policies such as under-resourcing of the justice system and the Professional Enablers Taskforce mentioned above in creating a challenging environment for lawyers carrying out their duties and for ensuring access to justice.

³⁴ Law Society, Professional Enablers Taskforce should not detract from unworkable Illegal Migration Act, 14 August 2023. Available at: <https://www.lawsociety.org.uk/topics/immigration/professional-enablers-taskforce-should-not-detract-from-unworkable-illegal-migration-act>

³⁵ Rajeev Syal, 'Target of Tory "lefty lawyer" dossier forced to review security after email', The Guardian, 8 August 2023. Available at: <https://www.theguardian.com/politics/2023/aug/08/target-of-tory-lefty-lawyer-dossier-forced-to-review-security-after-email>

³⁶ Jacqueline McKenzie, The Guardian, 'I'm an immigration lawyer, and now the target of a Braverman smear campaign. It will backfire', 8 August 2023. Available at: <https://www.theguardian.com/commentisfree/2023/aug/08/immigration-lawyer-braverman-smear-campaign-rightwing-press-deported-to-rwanda>

³⁷ Law Society, 'It's our priority to defend the profession against attacks from those in power', 21 August 2023. Available at: <https://www.lawsociety.org.uk/topics/immigration/its-our-priority-to-defend-the-profession-against-attacks-from-those-in-power>

What are the approaches taken to protect lawyers in this role?

31. In the UK, the legal professions are regulated by independent bodies. In England and Wales, solicitors are regulated by the Solicitors Regulation Authority (SRA),³⁸ which is in turn overseen by the Legal Services Board (LSB).³⁹ There is a separate Legal Ombudsman scheme operated by the Office for Legal Complaints (OLC),⁴⁰ which handles complaints about legal service providers. Each of these bodies was established by the Legal Services Act 2007 but operate independently of government.

³⁸ <https://www.sra.org.uk/>

³⁹ <https://legalservicesboard.org.uk/>

⁴⁰ <https://www.legalombudsman.org.uk/>