

Annual meeting of the International Association of Judges
Marrakech, October 2018

UK response to the First Study Commission Questionnaire on

"The Threats to the Independence of the Judiciary and the Quality of Justice:
workload, resources and budgets"

Question 1

Please provide at least one example, which can be used as a case study, of an occasion in your jurisdiction where a judge, the judiciary or the courts have been unfairly criticised by:

- a) A politician or politicians;**
- b) The mainstream media;**
- c) Social media.**

Please attach the actual examples to your response.

- (a) The Brexit case (as mentioned in the preamble) is the prime example when mainstream politicians (as well as certain elements of the media) went public with criticisms of the three judges who dealt with the case in the first instance (the Lord Chief Justice, the Master of the rolls and Sales LJ).
- (b) Again, the Brexit case with the notorious "*Enemies of the People*" headline in The Daily Mail alongside pictures of the three judges.
- (c) Probably the Brexit case again but, more generally and not specifically, judges' sentencing decisions are not infrequently criticised in social media and judges are blamed for merely applying the law.

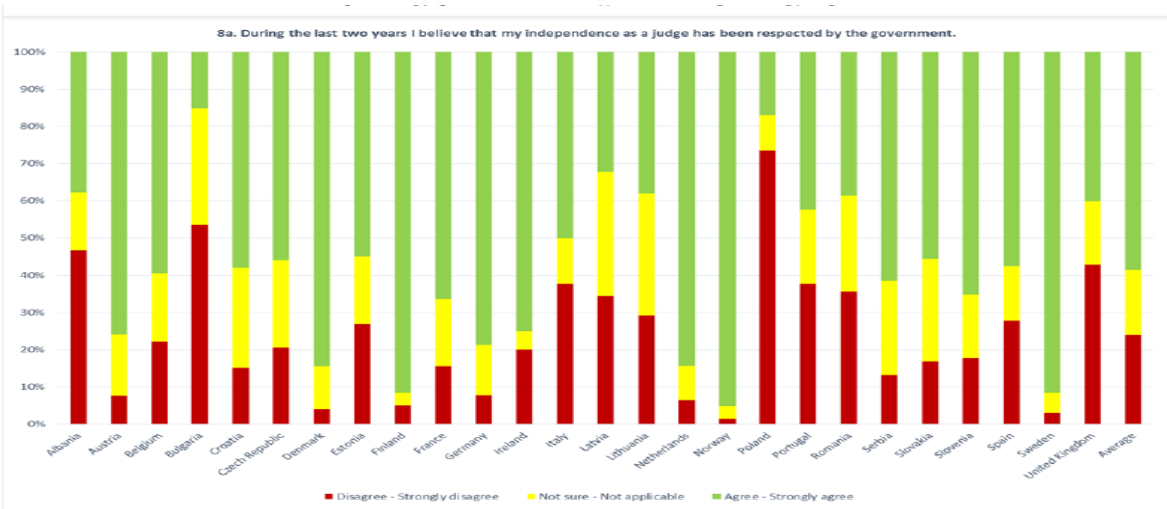
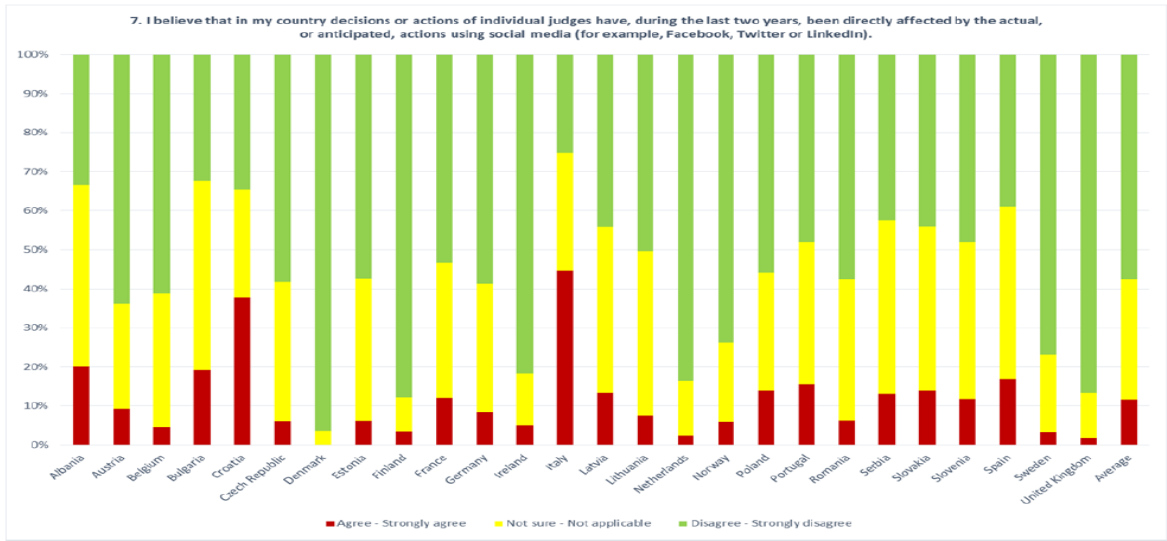
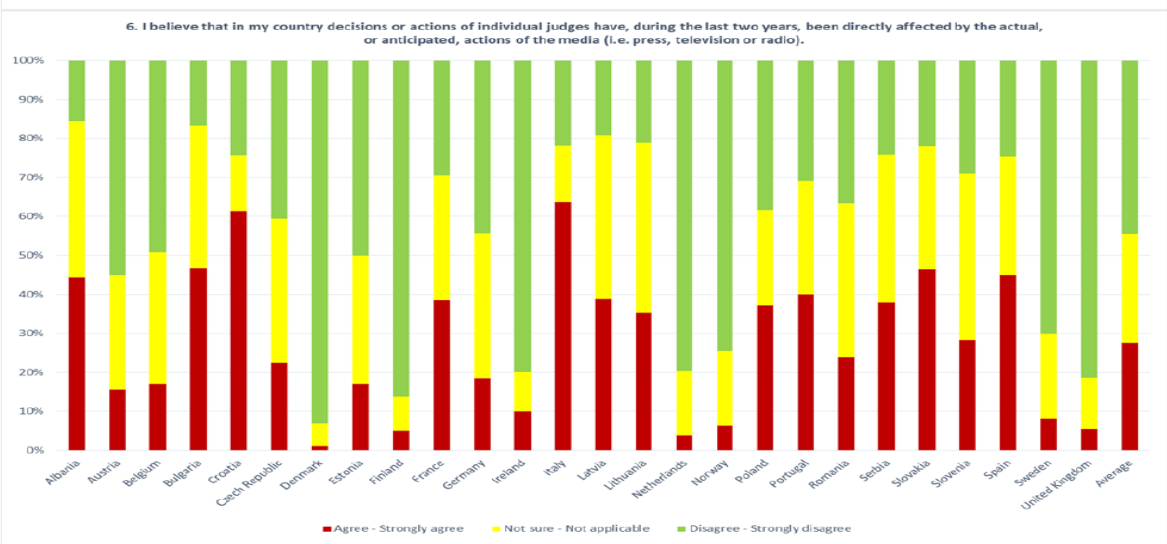
Question 2

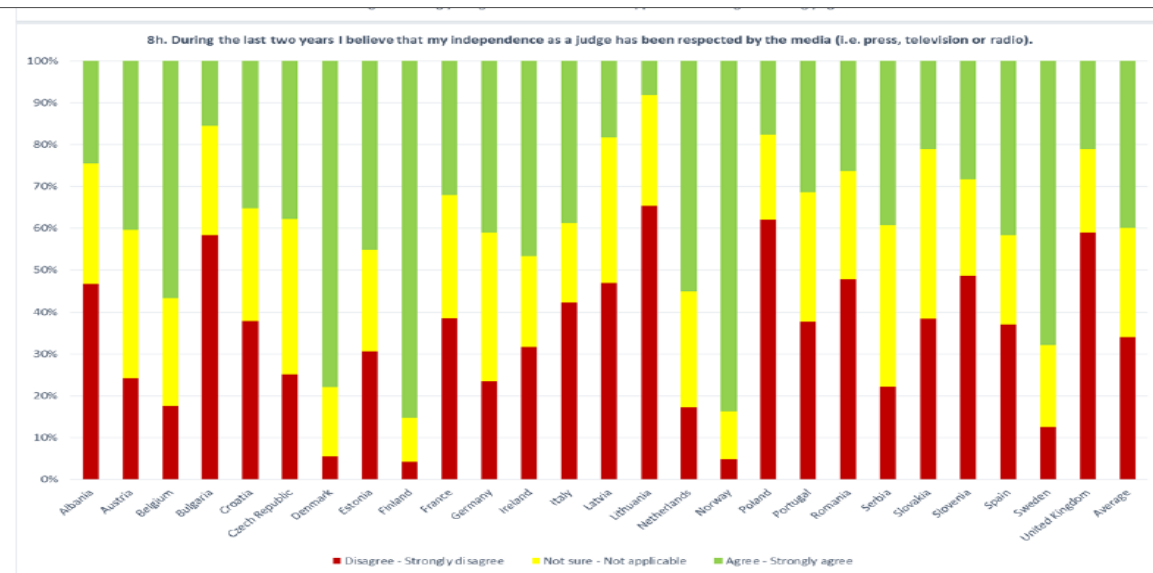
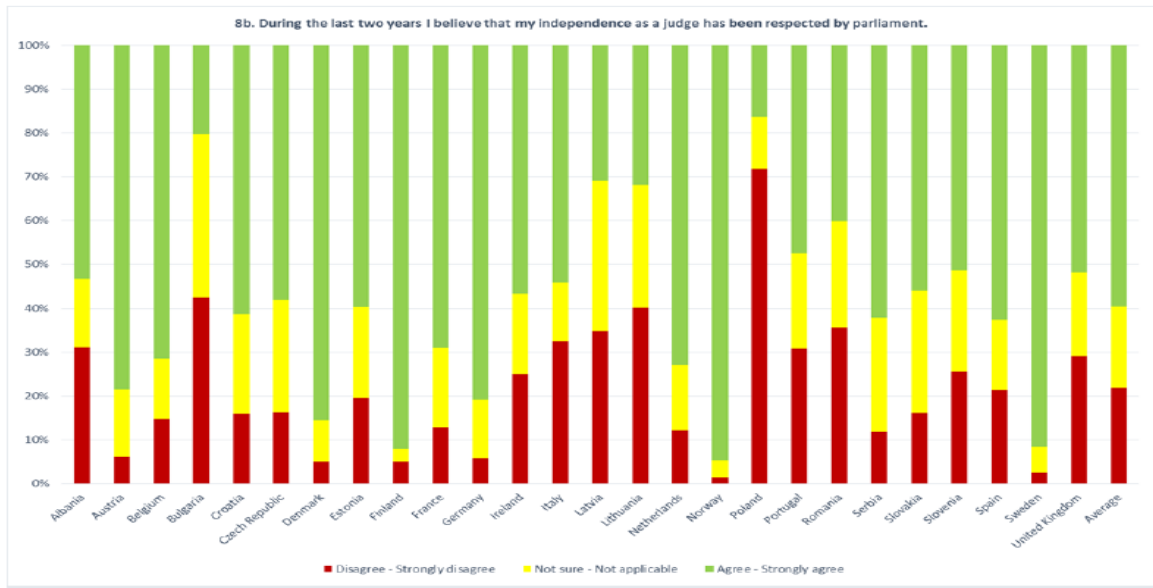
What effect, if any, have those criticisms had:

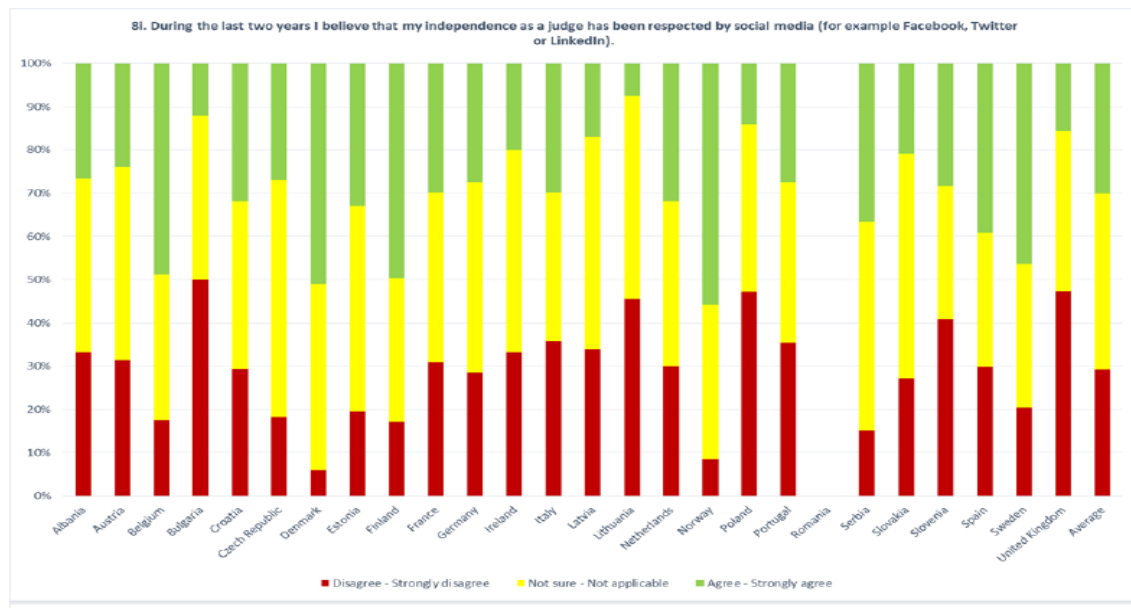
- a) On the independence of the judiciary;**
- b) On the separation of powers;**
- c) On public confidence in the judiciary.**

- (a) Perversely, although it is difficult to give any proof of this, I think it likely that attacks such as those identified make judges all the more determined to be independent.
- (b) Interestingly, after the Brexit criticisms, there seemed to be something of a backlash in that respected politicians and commentators began making the point that the judges were only doing their job and were independent as judges.
- (c) The same observation applies.

Although it is not easy to give proof, it is instructive to consider the results of the ENCJ survey carried out among judges in various countries (including the UK) in late 2016/early 2017. Relevant parts are these:







Question 3

- a) What steps, if any, were taken to deal with the criticism?
b) How effective were those steps?

- (a) As regards the Brexit case, retired judges spoke out in defence of the judges concerned. So, too, did the Bar Council. The judges themselves said nothing until many months later when the soon to be retired Lord Chief Justice, Lord Thomas, one of the judges who had been criticised, spoke out in March 2017 before the Constitution Committee of the House of Lords, saying, in effect, that the criticism was not fair not because it was mere criticism but because it was more than that. Criticism is acceptable and to be expected to a degree but abuse is not acceptable. Lord Thomas said this in a speech to the ENCJ General Assembly in Paris on 8 June 2017 when referring to what he had told the Constitution Committee:

“... I was asked in March 2017 by the Constitution Committee of the House of Lords in our Parliament about what had happened in November 2016. I answered by making it very clear that there is a difference between criticism, which is perfectly proper and necessary, and abuse, which undermines justice itself and which, as such, is unacceptable. I also made clear my view that the Lord Chancellor ought to have acted to stand up for judges and the judiciary. There was no option but to speak and to take a stand for the independence of the judiciary, even if necessarily delayed. It was my duty to do so. It is absolutely central that we stand up and be resilient in fighting for justice itself. If we say nothing, then this undermines the rule of law.”

- (b) They were effective since I believe that there was an appreciation that there had been an overstepping of the mark in relation to the Brexit case. By way of further observation, the Lord Chancellor at the time that the judges in the Brexit case came in for the attacks to which they were subject herself was criticised for not speaking up on behalf of the judges. She subsequently was replaced as Lord Chancellor.

Question 4

What is regarded as the boundary between legitimate and unfair criticism?

See above: when the criticism becomes abusive. As Lord Thomas put it in a speech to the ENCJ General Assembly in Paris on 8 June 2017:

“Whenever a controversial case comes before a court, the result will disappoint one party and is likely to be the subject of criticism. That is part of the ordinary workings of a judicial system. What seems to have occurred, certainly over the past year, has been abuse of the judiciary in democratic states and undue severe pressure placed on the judiciary in such states. ...”

Question 5

What approaches have been adopted in your jurisdiction to improve the accuracy of reporting of court decisions and fair treatment of judges and the justice system?

In terms of formal reporting of judicial decisions, in other words reporting for use by lawyers, there is no problem: cases are reported widely and are on the internet virtually immediately. In terms of ensuring that the media report on judicial decisions in a fair manner, there are no formal steps but there are now some judges who have had media training and there are people within the Judicial Office whose job is to monitor what is being reported.

For example, the Scottish judiciary, with the support of the Scottish Courts and Tribunals Service has taken the view that while it may be unable to prevent the misreporting of judicial decisions and misrepresentation of other judicial activity, it is able to reduce such misreporting and misrepresentation and certainly to remove any excuse for it, by providing as much information to the press and to the public as is possible. Examples of how this is done include the following:

- The Scottish Courts and Tribunals Service has an open access public website with descriptions of the various courts and their procedures and their current business.
- In addition, the Judicial Office for Scotland has a public website which in straightforward language provides brief explanations of judicial roles and activities. Topics include “*a day in the life of a judge*”, judicial training and the concept of judicial independence.
- Important judgments (in practice all judgments of the higher courts) are published in full on the Scottish Courts and Tribunals Service on the day of issue. Senior judges have the option of having summaries of their judgments prepared for press release.
- In 2004 there was appointed a Head of Judicial Communications who was an experienced public relations practitioner. She was tasked with press liaison and made herself available for contact by journalists not only during working hours but into the evening. She was also available to advise judges involved in the more sensitive of cases.
- In more serious criminal cases judges have adopted the practice of preparing quite detailed sentencing statements explaining precisely upon what basis and for what reasons a particular sentence has been imposed. Judges will take the opportunity to revise these statements in the light of what is said in mitigation before delivering them in open court. A text will be available for distribution to the media (usually digitally) shortly after the statement has been delivered and in time to be used at the next radio and television news broadcast.

- Since 2011 judges have granted permission when an application has been made in appropriate circumstances for live social media streams commenting on the progress of hearings in particular cases.
- On occasion permission has been given for filming in court. Recent examples have been of judges delivering particularly significant criminal sentences. These have then been available for news broadcasting on the day the sentence was pronounced.

In England & Wales there is also a Judiciary website which does the same type of thing: <https://www.judiciary.uk/>. In addition, there is some (relatively) limited TV screening of hearings in the Court of Appeal and (continuous and live) screening of the Supreme Court (covering Scotland as well as England & Wales) (<https://www.supremecourt.uk/>).

More generally, there is an increasing realisation that the judiciary must do what it can to help the public understand the centrality of justice to democracy and to the wellbeing and prosperity of the state. As Lord Thomas pointed out in his ENCJ speech:

“There is, certainly in the UK, unfortunately, a general lack of understanding of the importance of justice and the rule of law which makes it easy for others to attack the judiciary. It is not always possible to promote this understanding through judgments. Informal discussions with leaders of the media and other groups can help to this end.”

Question 6

What have been the benefits of and any problems caused by those procedures?

See above. However, the problems include that it is rarely possible for there to be an immediate response to the abuse since the judges involved cannot be seen to engage when they likely still dealing with the case in relation to which they have been criticised and when it is, in any event, important that judges do not get embroiled in public spats. As, again, Lord Thomas put it when speaking to the ENCJ:

“When an individual judge or the judiciary is put under pressure or attack, then the response of the judiciary must be measured. It cannot be a response by the judge who is under attack. Nor can the judiciary gain anything by answering other than in a judicial tone. Abuse must never be met with abuse. But answer it must, even if it has to wait till the time is right. If no answer is made, then the slippery slope to the erosion of the influence of an independent judiciary may well begin.”

Question 7

What suggestions could you make for:

- a) improving the accuracy of reporting of court decisions; and
- b) the fair treatment of judges and the justice system
 - i) By politicians
 - ii) By the media;
 - iii) In social media?

See above, but also the judiciary should develop ways of working with the legislative and executive branches of the state in a way that does not compromise judicial independence, ensuring that there is a proper understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together.

In addition, children should be taught in schools what judges do and how they are independent.

The Presidency Committee also invites each national organization to provide details of any threat to judicial independence which has been experienced in your country or region in the past year.

See above.

Proposal for topic 2019

I would like to consider this with my colleagues and so will revert separately.

Mr Justice (Simon) Picken

Lord (Philip) Brodie

22 June 2018.